Florida Law Review

Volume 36 | Issue 4 Article 6

September 1984

Silencing the Name Droppers: The Intelligence Identities Protection Act of 1982

Robert W. Bivins

SILENCING THE NAME DROPPERS: THE INTELLIGENCE IDENTITIES PROTECTION ACT OF 1982

I. INTRODUCTION

A strong tension between the guarantee of free speech[1] and the legitimate need for secrecy in matters of national security has traditionally marked American jurisprudence.[2] Recently, this tension has clearly created conflict in the cloak and dagger world of international espionage. Over the past decade, the number of Americans exposed as covert agents has increased at a dramatic rate.[3] This increase, in large part, results from deliberate efforts of Americans determined to hamper the effectiveness of the Central Intelligence Agency as an in-

1. This guarantee is embodied in the first amendment. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The first ten amendments to the Constitution compose "the bill of rights" which was passed by Congress on Sept. 25, 1789 and ratified on Dec. 15, 1791. U.S. CONST. amend. I-X.

2. *See* Haig v. Agee, 453 U.S. 280 (1981) (revocation of passport for revealing identities of CIA agents is constitutional); Snepp v. United States, 444 U.S. 507 (1980) (holding CIA employee breached fiduciary duty by publishing book without government clearance); New York Times Co. v. United States, 403 U.S. 713 (1971) (constitutionality of prohibiting prior restraint of Pentagon papers publication); Dennis v. United States, 341 U.S. 494 (1951) (upholding conviction of Communist party leaders on grounds that they posed clear and present danger); Near v. Minnesota, 283 U.S. 697 (1931) (in dicta, suggesting for the first time a national security exception to free speech); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (prohibition of publication of hydrogen bomb data), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

3. Since 1975, over 3,000 alleged CIA agents have been publicly identified. S. REP. No. 201, 97th Cong., 2d Sess. 7-8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 151-52.

ternational mechanism.[4] These exposures have not only undermined the efficiency of the United States intelligence establishment, but have also amplified the threat of physical violence to foreign operatives.[5] Congress reacted to these exposures by enacting, with both Presidential and bipartisan approval, the Intelligence Identities Protection Act of 1982 [the Act].[6]

The government hoped that the new law would work to derail the cannonballing threat of strategic disaster which the continuing exposures were generating.[7] In constructing a law which would satisfy national security needs, however, Congress had to operate within first amendment constraints. Although both the executive and legislative branches have concluded that the Act successfully accommodates both the requirements of the first amendment and the demands of national security,[8] that belief is not universal[9] and several commentators have criticized the statute and seriously questioned its constitutionality.[10]

The judiciary, however, has yet to pass final judgment on the Act.[11] In making this judgment, the courts will have two lines of inquiry open to them. Each requires the government to offer a justification for overriding first amendment protections. The first focuses on the state's showing of a compelling interest, while the second requires a showing that the affected speech creates a clear and present danger to the public.

This note will begin with a brief look at the history and reasoning

---

4. *Id.*

5. *See* 444 U.S. at 512; *infra* notes 19-28 and accompanying text. *See also* S. REP. No. 201, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 152.

6. Pub. L. No. 97-200, 96 Stat. 122 (1982), *amending* The National Security Act of 1947 (to be codified at 50 U.S.C. §§ 421-426). Both the Reagan and Carter Administrations supported the enactment of this statute and it passed both the Democratic controlled House and the Republican controlled Senate. It had over 40 co-sponsors from both sides of the aisle in the Senate alone. *See* S. REP. No. 201, 97th Cong., 2d Sess. 5-6, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 149-50.

7. S. REP. No. 201, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 152.

8. S. REP. No. 201, 97th Cong., 2d Sess. 14-15, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 158-59.

9. *See* S. REP. No. 201, 97th Cong., 2d Sess. 5, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 149 (the threat of a lengthy filibuster by opponents in the Senate kept the bill from reaching the floor during the second session of the 96th Congress).

10. *See, e.g.*, Note, *The Intelligence Identities Protection Act of 1982: An Assessment of the Constitutionality of Section 601(c)*, 49 BROOKLYN L. REV. 479 (1983) [hereinafter cited as *Identities Protection Act: Constitutionality of Section 601(c)*]; Note, *The Constitutionality of the Intelligence Identities Protection Act*, 83 COLUM. L. REV. 727 (1983) [hereinafter cited as *Constitutionality of the Identities Protection Act*].

11. Challenge of the Act appears imminent. In reaction to the Act, Philip Agee, editor of *Counter-spy* magazine, announced that he was suspending his routine of exposing CIA operatives until the statute was tested in the courts. N.Y. Times, Mar. 13, 1982, § A, at 11, col. 1.

behind the Act. Next, the relevant first amendment tenets will be discussed. These tenets will then be applied to the Act in an effort to determine its constitutional status. Finally, the Act will be inspected for any fatal overbreadth infirmities. The note concludes that, under either the compelling interest or the present danger test, the Act constitutes a permissible speech restriction.

II. BACKGROUND TO THE ACT

A. Historical Perspective

Congress enacted the National Security Act of 1947[12] to create a "comprehensive program for the future security of the United States."[13] The Act itself seemed largely a reaction to both the lessons learned during World War II concerning America's peacetime preparedness and the perceived threats from abroad which had lingered long after the dust had settled over Germany and Japan. Among the more significant creations of that Act were the National Security Council,[14] a unified Department of Defense,[15] and the Central Intelligence Agency (CIA).[16] By the late 1970's, however, repeated dramatic media exposures of covert CIA operations led to the formation of dissident groups at home and abroad dedicated to the abolition of the Agency.[17] Subsequently, the wholesale exposure of CIA operatives began.[18]

In 1975, the editors of *CounterSpy* magazine identified Richard Welch, the CIA's station chief in Athens, as an American intelligence agent.[19] Less than a month after publication of this information,

12. 50 U.S.C. §§ 401-403 (1976).
13. *Id.* § 401.
14. *Id.* § 402.
15. *Id.* §§ 401, 410.
16. *Id.* § 403.
17. Public criticism of the CIA rose dramatically as evidence became available concerning the organization's involvement in various questionable activities ranging from Watergate to a coup in Chile. *See, e.g.*, 127 CONG. REC. H6504 (daily ed. Sept. 23, 1981) (statement of Rep. Weiss suggesting link between Cuban participants in Watergate burglary and the CIA). *See also* S. REP. No. 201, 97th Cong., 2d Sess. 7, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 151.
18. For instance, *The Covert Action Information Bulletin*, published six times per year and operating out of Washington, D.C., has over 6,000 subscribers and features exposés on alleged CIA covert operations abroad as well as lists naming "suspected" CIA agents. Taubman, *Gadfly Exposes C.I.A.'s Covert Activities and Agents*, N.Y. Times, July 10, 1980, § A, at 12, col. 1.
19. *See* N.Y. Times, Dec. 24, 1975, § A, at 10, col. 4; Halperin, *CIA News Management*, Washington Post, Jan. 23, 1977, § C, at 2, col. 3. *See also* S. REP. No. 201, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 152.

Welch was murdered in front of his Athens home.[20] While *Counter-Spy*'s editor, Philip Agee, emphatically denied any responsibility for the murder, both the White House and the CIA insisted the publication indirectly caused Welch's death.[21]

In 1980, the editor of the *Covert Action Information Bulletin*, Louis Wolf, called a news conference in which he revealed the identities of fifteen alleged CIA agents working out of the U.S. embassy in Kingston, Jamaica.[22] Wolfe revealed not only names, but also addresses, telephone numbers, and the color and license plate numbers of automobiles.[23] Less than forty-eight hours after the news conference, the home of one of the named officials was sprayed with machine gun fire.[24] Several nights later an unsuccessful attack was launched upon the home of another of the officials named at the conference.[25] As a result of these attacks, the State Department had no choice but to remove all the targeted officials and their families from Jamaica.[26]

In 1981, the pro-Sandinista newspaper *Nuevo Diario* identified thirteen alleged CIA agents assigned to the U.S. embassy in Managua, Nicaragua.[27] A number of them received death threats and were attacked in their homes. As in Jamaica, several families had to be evacuated from the country. United States officials in Managua maintained that the publication of these names was linked with a visit by Philip Agee to Nicaragua.[28]

These "namings of names" were hardly isolated incidents. Exposures occurred around the globe[29] with increasing regularity from

---

20. *See* N.Y. Times, *supra* note 19, at 1, col. 2; Halperin, *supra* note 19, at 2. col. 3.

21. S. REP. No. 201, 97th Cong., 2d Sess. 7, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 151-52.

22. N.Y. Times, July 5, 1980, § A, at 1, col. 5; Note, *Open Secrets: Protecting the Identity of the CIA's Intelligence Gatherers in a First Amendment Society*, 32 HASTINGS L.J. 1723, 1724 n.8 (1981) (restating an address by Stansfield Turner, Director of the CIA, to the San Francisco Press Club on Aug. 11, 1980).

23. S. REP. No. 201, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 152.

24. *Id. See also* N.Y. Times, July 5, 1980, § A, at 1, col. 5.

25. S. REP. No. 201, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 152.

26. *Id.* Replacement of uncovered personnel is both difficult and expensive. *Id.* at 153.

27. 128 Cong. Rec. S1168 (daily ed. Feb. 25, 1982) (statement of Senator Goldwater).

28. *Id.*

29. In 1982, six Americans were expelled from Mozambique on charges of espionage. The expulsion followed visits to Mozambique by agents of the Cuban Intelligence Service and the editors of the *Covert Action Information Bulletin*. S. REP. No. 201, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 152. In addition, in 1981, two American officials of the American Institute for Free Labor Development were assassinated in El Salvador following an extensive discussion of the organization as a CIA front by Philip Agee in his book, INSIDE THE COMPANY: CIA DIARY. *See* N.Y. Times, Jan. 15, 1981, § A, at 10, col. 4-5.

1975 to 1982. Two of the better known perpetrators, Agee and Wolf, claimed to have personally exposed a total of over 3,000 covert operatives during the 1970's.[30] Prior to this rash of exposures, Agee made his objectives clear. He announced that his "campaign" was to have two major goals. The first goal was to force CIA officers and agents out of the countries where they were operating by exposing their CIA links. The second was to have the CIA altogether abolished.[31]

Because such disclosures were unforeseen by the drafters of the National Security Act, the legislation contained no provision capable of coping with the strategic disaster the CIA faced. The only legislation even arguably applicable was the decades-old group of laws known as the "espionage statutes"[32] and a miscellaneous statute covering theft of government property.[33] Both, however, were believed largely inapplicable to the publication of identities.[34] Recognizing both the lack of recourse under existing law and the rapidly mounting damage to America's intelligence network, Congress began debating proposed amendments to the National Security Act of 1947 in 1979.[35] From 1979 to 1980, various bills and amendments were raised, considered, and subsequently dropped.[36] In 1981, however, legislative discussion of the bills was revived and resulted in passage of the Intelligence Protection Act of 1982.[37]

---

30. In addition to being editor of *CounterSpy* magazine, Philip Agee is also contributing editor of the *Covert Action Information Bulletin*. *See supra* note 18. Agee claims to have revealed over 1,000 CIA agents over the years. Likewise, Wolf, editor of the *Covert Action Information Bulletin*, claims to have publicly identified over 2,000 agents. S. REP. No. 201, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 151-52.

31. Haig v. Agee, 453 U.S. 280, 283 n.2 (1981). *See also Identities Protection Act: Constitutionality of Section 601(c), supra* note 10, at 480 n.2.

32. 18 U.S.C. §§ 793-798 (1982).

33. 18 U.S.C. § 641 (1982).

34. *See* Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973). *See also* S. REP. No. 201, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 152; United States v. Truong Dinh Hung, 629 F.2d 908, 924 (4th Cir. 1980) (concerning application of 18 U.S.C. § 641 to classfied national defense information), *cert. denied*, 454 U.S. 1144 (1982).

35. *See, e.g.*, H.R. 5615, 96th Cong., 1st Sess. (1979); S.2216, 96th Cong., 2d Sess. (1980); S.2284, 96th Cong., 2d Sess. (1980). *See also* Note, *"Naming Names": Unauthorized Disclosure of Intelligence Agent's Identities*, 33 STAN. L. REV. 693 (1981).

36. The 1982 Act is largely similar and directly descended from a family of bills introduced during the 96th Congress. *See supra* note 35. *See also* N.Y. Times, Apr. 8, 1981, § A, at 14, col. 1. For a history and evaluation of the meaning of these bills see Edgar & Schmidt, *supra* note 34.

37. The House began reconsideration of the protection measures on September 23, 1981 and the Senate followed suit on March 18, 1982. The final bill was passed by the House on June 3, 1982 and by the Senate on March 10, 1982. 1982 U.S. CODE CONG. & AD. NEWS 145, 152.

B. The Act and Its Reasoning

The Act sets out three classifications of substantive offenses,[38] each based upon the perpetrator's access to classified information and the nature of the disclosure.[39] The severity of the criminal penalties varies directly with the nexus between the intelligence agency and the perpetrator.[40] Sections 601(a) and (b) address disclosures of information, either directly or indirectly revealing a covert agent's identity, made by present or former U.S. government employees to unauthorized persons.[41]

While critics have attacked the Act as a whole, there has been little argument as to the validity of the first two sections.[42] This acceptance is premised on judicial recognition that the employment relationship creates a fiduciary duty on the part of an employee not to betray his or her employer's confidences.[43] The standard CIA practice of requiring employees exposed to sensitive classified material to sign

---

38. The Act's substantive provisions, contained in § 601 (to be codified at 50 U.S.C. § 421) are as follows:

> (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both. (b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $25,000 or imprisoned not more than five years, or both. (c) Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

Id.

39. *Id.*

40. *Id.*

41. *Id.* § 421(a), (b). The term "covert agent" embraces not only "secret agent" per se, but all United States intelligence officers, informants and sources as well. *See* § 606 of the Act (to be codified at 50 U.S.C. § 426).

42. *See, e.g., supra* note 10.

43. *See, e.g.*, Snepp v. United States, 444 U.S. 507, 507-08 (1980); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir.), *cert. denied,* 421 U.S. 992 (1975); United States v. Marchetti, 446 F.2d 1309, 1318 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972). *See also* Note, *Constitutionality of the Identities Protection Act, supra* note 10, at 732.

secrecy oaths reinforces this concept of a fiduciary duty.[44] The courts have upheld the validity of these agreements in several instances.

In *United States v. Marchetti*,[45] for example, a former employee of the Central Intelligence Agency planned to publish a book recounting his experiences while an intelligence agent.[46] Upon joining the Agency in 1955, he had signed a secrecy agreement in which he promised "not to divulge in any way any classified information, intelligence, or knowledge, except in the performances of his duties, unless specifically authorized . . . by the Director or his authorized representative."[47] Marchetti signed a second such oath upon his resignation in 1969.[48]

In granting an injunction against Marchetti, the appellate court affirmed the validity of the secrecy agreement.[49] The court observed the first amendment limited the degree of secrecy which the government could impose, contractually or otherwise, on its employees.[50] The court noted, however, that the first amendment was not intended to act as a bludgeon with which to shatter the remainder of the Constitution.[51]

The CIA's gathering of intelligence is within the President's constitutionally designated responsibility to safeguard the nation's security.[52] While citizens have the right to speak out and criticize the government, the government has the duty to strive for internal secrecy when disclosure could damage national interests.[53] Secrecy agreements, the *Marchetti* court held, are reasonable means for the CIA to protect its intelligence network. Thus, while an individual accepting employment with the Agency does not surrender his first amendment rights, the government can constitutionally prevent the disclosure of classified information.

The Fourth Circuit's holding was not unique.[54] Following *Marchetti*, other courts reinforced the principle that government em-

---

44. *See supra* note 43.

45. 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

46. *Id.* at 1313. Previously, Marchetti had written a novel dealing with a fictional agency known as the "National Intelligence Agency," as well as several magazine articles critical of the CIA which recounted some of his experiences while with that agency. *Id.*

47. *Id.* at 1312.

48. *Id.* Before resigning, Marchetti had served as Executive Assistant to the Deputy Director. *Id.*

49. *Id.* at 1318.

50. *Id.* at 1313.

51. *Id.* at 1314.

52. *Id.* at 1315.

53. *Id.*

54. *See, e.g.*, Snepp v. United States, 444 U.S. 507, 507-08 (1980); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Marchetti*, 466 F.2d at 1318.

ployees were subject to more restrictions on their first amendment rights than were citizens in the private sector.[55] By executing secrecy oaths in consideration for government employment, CIA employees effectively renounced any right to disclose classified information.[56]

In *Snepp v. United States*,[57] the nation's highest court acknowledged Agency secrecy oaths as valid contracts.[58] In *Snepp*, however, the information which the defendant was seeking to expose was unclassified.[59] Nevertheless, the Court held that because Snepp had agreed not to divulge any information whatsoever without prepublication clearance from the Agency, he was prohibited from writing books disclosing the unclassified data.[60] Thus the *Snepp* Court upheld a limited prior restraint, via pre-screening procedures, of even unclassified information.[61]

The fiduciary relationship upon which the *Marchetti* and *Snepp* decisions were based[62] is equally applicable to government employees when no secrecy agreement exists. As long as the employee learns the identity of the agent through authorized access to classified information, an implied fiduciary duty to safeguard that information clearly exists. The breach of faith in this context is little different in principle from employee treachery in the private sector companies wronged by employees who misappropriate their secret formulas or customer lists often prevail in trade secret protection suits.[63]

---

55. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980).

56. 466 F.2d at 1316.

57. 444 U.S. 507 (1980).

58. *Id.* at 509.

59. *Id.* at 510. *See also* 466 F.2d at 1318; Alfred A. Knopf, Inc. v. Kolby, 509 F.2d 1362, 1370 (4th Cir.) (where only classified information was restricted), *cert. denied*, 421 U.S. 992 (1975).

60. *Snepp*, 444 U.S. at 510-11.

61. *Id.*

62. A recurring theme in the House and Senate debates over the Intelligence Act was while imperfect security was not to be considered by defendants as a trigger injecting the information into the public domain, the Executive Branch had the primary responsibility of "keeping the lid on" sensitive data. *See* Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, § 603, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 122 (to be codified at 50 U.S.C. § 423). *See also* S. REP. No. 201, 97th Cong., 2d Sess. 23-24, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 167-68. This was to be accomplished not by unilaterally relying on the Intelligence Act, but rather by internally tightening security procedures within the Agency. *See* S. REP. No. 201, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 154. The fiduciary relationship found to exist in the *Marchetti* and *Snepp* cases is based upon the trust the government necessarily extends to the personnel within the bureaucracy. *Marchetti*, 466 F.2d at 1317; *Snepp*, 444 U.S. at 510-11. A government cannot function without at least a number of key personnel having access to sensitive information. Moreover, few types of government employment involve a higher degree of trust than CIA employment. *Snepp*, 444 U.S. at 511.

63. The RESTATEMENT (SECOND) OF AGENCY § 396 (1958) states that after the termination of the agency relationship, the former agent has a duty not to disclose customer lists or other

Because there is no fiduciary relationship between the government and nonemployees, critics have been less willing to accept the constitutionality of section 601(c).[64] Despite the lack of fiduciary duty, however, Congress realized that unless the Act covered government outsiders it would be largely ineffective.[65] So unlike its sister sections, section 601(c) is aimed at exposures by persons not privy to classified information via legitimate, authorized access.[66] Congress, however, incorporated two additional criteria into into section 601(c).[67] These criteria were not seen as necessary to insure the constitutionality of section 601(a) or (b). Before a conviction can stand under section 601(c), the government must prove: (1) the disclosure was made in the course of a pattern of activities intended to identify and expose covert agents;[68] and, (2) the defendant engaged in the exposures with reason to believe that his actions would impair or impede U.S. foreign intelligence activities.[69] Congress included the two additional elements as a safety valve, both in order to remain within the confines of constitutionality and to ensure that the Act did not lead to undue regulation of the news media.[70] With these restrictions in mind, the constitutionality of section 601(c) should now be considered.

---

confidential information to third persons when the confidential information was given to him for the principal's use and disclosure would injure the principal's interests.

64. *See, e.g.*, Note, *Constitutionality of the Identities Protection Act, supra* note 10, at 754; Note, *Identities Protection Act: Constitutionality of Section 601(c), supra* note 10, at 515.

65. While Philip Agee, as a former employee of the CIA could be reached under § 601(a) or (b), Louis Wolf, who was never employed by the Agency, would be free to continue with his "wanton disclosures." *See generally* S. REP. No. 201, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 151-52 (focus on punishment of "leaks" disclosing identity of undercover employees).

66. To be codified at 50 U.S.C. § 421(c). For the precise wording of this section see *supra* note 38.

67. *See supra* note 38.

68. The legislation defined the term "pattern of activities" as "a series of acts with a common purpose or objective." *See* § 606(10) of The Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 122 (to be codified at 50 U.S.C. § 426(10)). Disclosures must be part of a purposeful enterprise of revealing names in order to meet this element. *See* S. REP. No. 201, 97th Cong., 2d Sess. 20-21, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 164-65. While the defendant would have to be in the business of naming names, a pattern of activities does not necessarily mean a pattern of disclosures. First disclosures are punishable if some requisite pattern of activities precedes the disclosure and if the other elements are met. *See* H.R. REP. No. 221, 97th Cong., 2d Sess. 8-9, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 170, 173.

69. *Id. See also* S. REP. No. 201, 97th Cong., 2d Sess. 20, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 164; H.R. REP. No. 221, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 170, 172.

70. *See* S. REP. No. 201, 97th Cong., 2d Sess. 20-21, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 164-65.

III. First Amendment Considerations

Historically, courts have zealously guarded first amendment guarantees.[71] The first amendment generally denies government the power to restrict expression because of its message, ideas, subject matter, or content.[72] While the first amendment is a favored amendment, however, it does not afford absolute protection and must yield under certain conditions.[73] Speech may lose its protected status due to either the intent of the speaker or the context surrounding the statements.[74] In determining the line between protected and unprotected speech, one must, therefore, exactingly examine all the circumstances surrounding the utterances.[75]

---

71. Garvin v. Rosenau, 455 F.2d 233, 239 (6th Cir. 1972).

72. *See, e.g.*, Police Dept. of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (first amendment denies the government the power to restrict expression because of its message, ideas, or subject matter); Cox v. Louisiana, 379 U.S. 536, 556 n.14 (1965) (statute banning all street assemblies and parades with an exception for labor picketing exceeds mere traffic regulation and unconstitutionally restricts expression).

73. *See, e.g.*, Mazzella v. Philadelphia Newspapers, Inc., 479 F. Supp. 523, 526 (E.D.N.Y. 1979) (no absolute right of privilege protects newsmen).

Rarely has it been suggested that the first amendment bestows absolute amnesty for the acts of every unscrupulous individual who may claim its protection. United States v. Smith, 414 F.2d 630, 633 (5th Cir. 1969), *rev'd on other grounds*, Schacht v. United States, 398 U.S. 58 (1970). Commentators have reflected upon the true reach of the first amendment since the day it was first drafted. As one such commentator noted over 60 years ago: "Amid the uncomplicated conditions of frontier life it was entirely feasible to assure each individual a certain quantum of 'inalienable rights,' but [today] the pursuit of happiness has become a joint-stock enterprise in which the welfare of all is embarked." Corwin, *Freedom of Speech and Press Under the First Amendment: A Résumé*, 30 Yale L.J. 48, 55 (1920).

74. *See, e.g.*, United States v. Cerone, 452 F.2d 274, 286 (7th Cir. 1971) (computation of illegal gambling point spreads not protected by first amendment), *cert. denied*, 405 U.S. 964 (1972).

75. *See generally* Gish v. Board of Educ. of the Borough of Paramus, Bergen County, 145 N.J. Super. 96, 104, 366 A.2d 1337, 1341 (1976) (whether speech may be restricted depends on many factors), *cert. denied*, 434 U.S. 879 (1977); People v. Weeks, 197 Colo. 175, 591 P.2d 91 (1979) (right of free speech depends on content and context); State v. A Motion Picture Entitled "The Bet," 219 Kan. 64, 547 P.2d 760 (1976) (line between regulatable and non-regulatable is fine and calls for delicate use of sensitive tool); White v. State, 330 So. 2d 3 (Fla. 1976) (to determine line, one must examine all relevant circumstances); People v. Hinman, 86 Misc. 2d 685, 383 N.Y.S.2d 498 (N.Y. Crim. Ct. 1976) (content regulation generally considered a constitutional taboo); Widmar v. Vincent, 454 U.S. 263 (1981) (content regulation subject to exacting scrutiny). For cases illustrating that this scrutiny can vary from medium to medium and from context to context, see Wolston v. Readers Digest Ass'n, Inc., 429 F. Supp. 167 (D.D.C. 1977) (qualified privilege applies to authors and publishers of books as well as to the press), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd on other grounds*, 443 U.S. 157 (1979); Community Communications Co. v. City of Boulder, Colo., 660 F.2d 1370 (10th Cir. 1981) (cable TV requires a different standard but first amendment does apply), *cert. dismissed*, 456 U.S. 1001 (1982); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (radio and TV broadcasters using limited and valuable resources are subject to a different standard than the press); Young v. American Mini Theatres, Inc., 427 U.S. 50 (city's interest in planning and regulating the use of property for commercial purposes is adequate to support ordinance regulating adult theatre locations); Jaffe v. Alexis, 659 F.2d 1018 (9th Cir. 1981) (state has burden to justify

A. The Compelling Interest Test

First amendment analysis involves a balancing of competing interests. While first amendment rights have been held to comfortably override such considerations as public convenience or public opinion,[76] speech may be restricted when a compelling government interest is involved.[77] As the term "compelling" implies, the asserted interest must possess a weight and magnitude substantial enough to override the pro-first amendment presumption.

1. The Government's Interest

In balancing the conflicting demands of national security and free speech, the courts have tended to resolve the conflict in favor of the government.[78] In *Near v. Minnesota,*[79] the Supreme Court laid the foundation for the "national security exception" to the rule against prior restraint of speech.[80] In *Near,* the Court dealt with a publisher

---

discrimination between speakers in forums generally available to the public); Cable News Network, Inc. v. American Broadcasting Co., 518 F. Supp. 1238 (N.D. Ga. 1981) (whether speech is protected or not often depends on its context).

76. *See, e.g.,* New York Times Co. v. United States, 403 U.S 713, 714 (1971) (per curiam) (any governmental attempt to restrict expression by prior restraint is presumed to be unconstitutional and government carries burden of proof).

77. *See* Haig v. Agee, 453 U.S. 280, 307 (1981) (no government interest is more compelling than national security); Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979) (both prior restraints and subsequent restraints require a compelling state interest to sustain validity); New York Times Co. v. United States, 403 U.S. 713, 715 (1971) (government failed to carry burden of proof showing overriding state interest); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (respondent failed to carry burden of justifying imposition of prior restraint of distribution of informational materials); Near v. Minnesota, 283 U.S. 697, 713 (1931) (statute was the essence of censorship and furthered no legitimate compelling interest); KQED v. Houchins, 546 F.2d 284, 286 (9th Cir. 1976) (can only restrict speech if furthering a substantial state interest and is the least drastic means to do so), *rev'd on other grounds,* 438 U.S. 1 (1978); Mitchell v. King, 537 F.2d 385, 391 (10th Cir. 1976) (it is fundamental that limitation of speech is permissible where needed to meet state's substantial interests); Forcade v. Knight, 416 F. Supp. 1025, 1035 (D.D.C. 1976), *aff'd in part,* Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977); Graham v. Florida Legislative Investigation Comm., 126 So. 2d 133, 135 (Fla. 1960) (compelling interest exception to free speech now well established).

78. The "national security exception" to the rule against speech restriction was first formulated in Near v. Minnesota, 283 U.S. 697, 716 (1931). Since that time, the doctrine has been invoked frequently by the government. *See, e.g.,* Haig v. Agee, 453 U.S. 280 (1981) (revocation of passport for revealing identity of covert agents); United States v. O'Brien, 391 U.S. 367, *reh'g denied,* 393 U.S. 900 (1968) (sustaining conviction for burning draft card in draft protest); Dennis v. United States, 341 U.S. 494 (1951) (upholding conviction of Communist Party leaders on basis they posed a clear and present danger); Schenck v. United States, 249 U.S. 47 (1919) (pamphlet opposing draft constituted clear and present danger to war effort). *But see* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (prohibiting prior restraint of Pentagon Papers); United States v. Robel, 389 U.S. 258 (1967) (invalidating blank prohibition of employment of communists in defense plants).

79. 283 U.S. 697 (1931).

80. *Id.* at 716. While *Near* dealt with prior restraints on speech, and the Intelligence Act

who had been convicted of publishing defamatory material in violation of a Minnesota law forbidding such publication.[81] Although *Near* struck down the statute in question, the Supreme Court made it clear that while prior restraints are generally unacceptable, exceptions involving such circumstances as national security, obscenity, privacy, and seditious activities might be tolerated.[82] The Court recognized that "in time of war no one would question but that the government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[83] Over the years, the national security exception to the rule against prior restraints has been unanimously embraced by American courts and today it is treated as a given.[84]

The Supreme Court in *Near* referred to the national security exception in time of war.[85] The Court made it clear that if a nation was at war, statements which might be made freely in peacetime could so hinder the nation's war effort that no court could reasonably regard them as protected by any constitutional provision.[86] The distinction between war and peace is much more blurred today, though, than in the 1930's. Neither of the polar extremes of total war or total peace has been present in the United States for at least several decades. Our nation is, on the other hand, in a kind of of perpetual state of emergency with regard to the Soviet Union. Actions taken by the

---

deals with subsequent restraints, the logic is the same. Both methods are disfavored due to the possible chilling effect on protected speech. The distinction is not generally dispositive because both require "the highest form of state interest" in order to be upheld. Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979). Even so, prior restraints tend to be even more strongly disfavored than subsequent restraints due to the theory that while the latter may chill first amendment rights, the former freezes them. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Accordingly, the analysis of both is the same, but subsequent restraints, as a practical matter, might well survive judicial scrutiny under circumstances in which a prior restraint might fail.

81. *Near*, 283 U.S. at 697.

82. *Id.* at 716.

83. *Id.* The analogy to the present discussion is persuasive. The wholesale exposures have interfered with the CIA's recruitment and retention of operatives. *See* Haig v. Agee, 453 U.S. 280, 308-09 (1981). Moreover, the listing of names and stations of CIA operatives is substantially similar to giving out the "location of troops."

84. *See* Knoll, *National Security: The Ultimate Threat to the First Amendment*, 66 MINN. L. REV. (1981). Knoll was the editor of *The Progressive*, the magazine enjoined from publication of hydrogen bomb data in United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). Even Knoll acknowledged that "Chief Justice Hughes exaggerated only slightly when he assumed in *Near* that 'no one would question' infringement of the first amendment to protect military secrets in time of war. Few would have questioned such censorship a half century ago, and I suspect even fewer would do so today." Knoll further admitted that the national security exception is treated as an "unwritten addendum to the first amendment," taken for granted in both legal and journalistic circles. Knoll, *supra* at 164.

85. *Near*, 283 U.S. at 716.

86. *Id.*

United States in response to the Soviet threat have spanned the gamut of the military, economic and political spectrums.[87]

Additionally, there has been a perpetual cascade of international upheavals and crises largely beyond the generic NATO-WARSAW PACT antagonism. Some of these crises have drawn U.S. ground forces into shooting wars on foreign soil, such as the multi-national invasion of Grenada and the stationing of peacekeeping forces in Lebanon.[88] Others have had a less direct, if not less dramatic, impact on American interests such as the civil uprisings in Angola, Iran, Afghanistan, and El Salvador as well as the threat to accessible supplies of vital raw materials caused by general political instability in the Middle East and Southern Africa.

In the 1971 decision of *New York Times Co. v. United States,*[89] the Supreme Court made clear that the existence of war did not free the government from all first amendment restrictions. The decision did, however, reaffirm the power of Congress to pass legislation designed to protect the nation's security. *New York Times* concerned Daniel Ellsberg's release to the press of a secret, governmentally-compiled, historical analysis of America's involvement in the Vietnam War.[90] When the two defendant newspapers began publishing the analysis, the Federal Government moved for an injunction. The government claimed the reports would reveal top secret information, and irreparably damage U.S. security interests.[91]

The Court, however, found little support for the government's contention that U.S. security interests would be harmed. First, the government had to acknowledge that while all the documents were classified as top secret, there had been a massive and indiscriminate

87. *See* Forkosch, *Speech and Press in National Emergencies,* 18 GONZ. L. REV. 1, 23-25 (1983). Some illustrative examples include: the resistance to communist adventurism in Korea and Vietnam; joint military operations with the Western allies in NATO; U.S. troops poised in West Germany, facing the Iron Curtain; the stationing of military personnel in approximately 117 countries worldwide; preparations for possible use of laser weapons in outer space; boycotts of pipeline equipment and grain destined for Soviet ports; and the breakoff of arms control negotiations. *Id.* at 24 n.56.

88. The multinational force, led by the United States, landed on the shores of the island nation of Grenada on Oct. 27, 1983 in order to prevent the leftist government from becoming a Cuban satellite. During the invasion, several hundred Cuban troops engaged American forces in the first direct battle between American and Cuban troops since the latter had become a sovereign nation. Mullin, *Why the Surprise Move in Grenada—and What Next?,* 95, no. 19, U.S. NEWS & WORLD REP. 31 (1983). In Lebanon, American Marines, originally sent to Beirut as part of a multinational peacekeeping force, came increasingly under hostile fire and suffered several hundred casualties before they were evacuated. *See Lebanon Pullout—The Spreading Impact,* 96, no. 7, U.S. NEWS & WORLD REP. 28 (1984).

89. 403 U.S. 713 (1971).

90. *See* Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers,* 15 U. MICH. J.L. REF. 497, 500 (1982).

91. *Id.* at 500-01.

over-classification of the material.[92] Second, the documents did not discuss matters occurring after 1968. With over two years having passed, most of the 7,000 pages were now "truly water over the dam."[93] In short, the government failed to show with any certainty that the public exposure of the text posed any grave or immediate danger to the ongoing war effort in Vietnam.[94] On the other hand, reasoned the Court, the publication of the historical information could greatly assist the ongoing public debate into the origins of American involvement in an increasingly unpopular war.[95]

The Supreme Court's three paragraph per curiam decision, which simply declared the government had failed to meet its burden of overcoming the presumption against prior restraints,[96] has been widely cited as a general condemnation of prior restraints on free speech.[97] The concurrences which accompanied the short per curiam opinion, however, indicate that such a general condemnation may exaggerate the true intent of the decision. The concurrences also offer insight into the judicial scrutiny potentially faced by the Intelligence Act.[98] The concurrence of Justice Stewart, for example, stressed the legitimacy of secrecy in matters of national security. "[I]t is elementary," the Justice wrote, "that the successful conduct of international diplomacy and the maintenance of an effective national defense requires both confidentiality and secrecy."[99] Stewart went on to explain

92. *Id.* at 503.
93. *Id.*
94. *Id.* at 504.
95. *Id.*
96. *New York Times Co.*, 403 U.S. at 714.
97. *See, e.g.*, United States v. Progressive, Inc., 467 F. Supp. 990, 994 (W.D. Wis.) (distinguishing *New York Times Co.*), *appeal dismissed*, 619 F.2d 819 (7th Cir. 1979). *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (musical production prohibited prior to performance due to anticipation the show would violate the law) (citing to White, J., concurring).
98. The *New York Times* decision was a 6-3 split, with Justices Black, Douglas, Stewart, Brennan, White and Marshall voting with the majority and Justices Burger, Harlan and Blackmun dissenting. Justices Black and Douglas have long been acknowledged as first amendment absolutionists. The absolutist view of free speech is that "at no time, in any place, for any reason, under any circumstances, can the government impose any restriction or limitation on speech or press." *See* Forkosch, *supra* note 87, at 8. Under such a view, a person could falsely shout fire in a crowded theatre, or publish troop movements in time of war. *Id. See also* Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962); Kalven, *Upon Reading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428 (1967). The absolutist viewpoint, however, has never held sway with a majority of the Supreme Court. Accordingly, the first amendment has never been construed as preventing the Chief Executive from carrying out his obligation of protecting the United States. *See supra* notes 77-84 and accompanying text.
99. *New York Times Co.*, 403 U.S. 713, 728 (Stewart, J., concurring). Justice Stewart went on to say that "[O]ther nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured their confidences will be kept. And within our own executive

that, while he believed the primary duty to ensure secrecy rested with the Executive through the promulgation and enforcement of executive regulations,[100] Congress and the courts had a role to play as well. Justice Stewart acknowledged that legislation protecting national security and government secrecy was well within the government's power.[101]

Other concurrences also supported the validity of congressional legislation designed to protect national security. Justice White stressed the need for legislation based on independent congressional investigations and findings.[102] Justice Marshall's concurrence also focused primarily on the lack of congressional action in the area. Justice Marshall believed it inconsistent with the concept of separation of powers for the Court to use its power to prevent behavior Congress had declined to prohibit.[103] The Intelligence Act and its voluminous legislative history make it clear Congress has definitively addressed these concerns, and spoken in the area of covert identity protection.

Although the *New York Times* decision, at first glance, might seem to allow the release of sensitive information, the decision, taken as a whole, suggests that the Intelligence Act was a valid exercise of congressional power. First, the concurrences and the dissents indicate that the Act is likely to be scrutinized by a receptive court.[104] Second, the threat to national security which the Intelligence Act addresses is unlike the threat discussed in *New York Times* and is of a magnitude likely to establish a compelling interest.

Recent cases have arguably recognized the compelling nature of this threat. In *Haig v. Agee*,[105] the U.S. government reacted to Philip Agee's campaign against the CIA by revoking Agee's passport in order to curtail his disclosure activities abroad.[106] Secretary of State Haig based the action on a regulation authorizing such revocation

---

departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self evident." *Id.*

100. *Id.* at 729-30.

101. *Id.* at 730.

102. *Id.* at 732 (White, J., concurring).

103. *Id.* at 742 (Marshall, J., concurring).

104. *See supra* notes 99-103 and accompanying text. In addition to the opinions themselves, the counsel for the New York Times admitted, during oral arguments, that if American lives were at stake the government could have clearly prevented publication. 71 P. KURLAND & G. CASPER, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 187, 236 (1975) (oral argument of Alexander M. Bickel, Esq., on behalf of petitioner, New York Times). Secondly, he admitted, if national security and lives were at stake, Congress had the power to pass statutes making the reckless speech illegal. *Id.* at 239-41.

105. 453 U.S. 280 (1981).

106. *Id.* at 286.

where the Secretary determined that a U.S. citizen's activities abroad were causing, or were likely to cause, serious damage to U.S. foreign policy or national security.[107] Agee filed suit claiming the statute violated his first amendment right to criticize government policies. In upholding the revocation, however, the Court stated bluntly that "[w]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."[108]

The Court's recognition of the importance of protecting covert operatives seems reasonable in the present international context. Despite criticism of many of the CIA's past activities, every President since Franklin D. Roosevelt has believed the Agency was essential to the security of the United States and its allies.[109] As Admiral Turner, former Director of the CIA, testified to the Court in *Snepp,* however, intelligence sources working with the CIA have become increasingly nervous as exposures have soared.[110] Nearly every foreign intelligence service having contact with the CIA has undertaken reviews of those relationships. Some of the more immediate results of the continuing disclosures include reductions in contacts, hesitance to engage in joint operations, and a marked reduction in exchange of information.[111] These results are quite understandable. Many of our most valuable sources of intelligence live in societies which, if contacts with the West were revealed, would impose harsh penalties.[112] These sources understandably demand an unqualified assurance their cooperative relationship with the U.S. will remain private.[113]

One point the 1979 attack on the American embassy in Tehran, Iran, should have dramatically driven home is that foreign service, be it for either intelligence gathering or purely diplomatic purposes, can be extremely hazardous. Indeed, Philip Agee's activities took on special significance during the hostage crisis which followed the seizure

---

107. *Id.* Citing to previous congressional actions, the Court stated: "History eloquently attests that grave problems of national security and foreign policy are by no means limited to time of formally declared war." *Id.* at 303. Agee's operation was nothing less than a private counter-intelligence agency. Agee used his prior contacts from his days with the CIA in order to elicit information. He also recruited collaborators from foreign countries, training them in clandestine techniques, in order to expose CIA "covers." *Id.* at 284. Agee readily admitted they were likely to seriously injure national security. *Id.* at 287.

108. *Id.* at 309-10 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963)).

109. *See Snepp,* 444 U.S. at 512 n.7.

110. *Id.* at 512.

111. *See* 128 CONG. REC. S1169 (daily ed. Feb. 25, 1982) (statement of Senator Goldwater). *See also* S. REP. No. 201, 97th Cong., 2d Sess. 20, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 153.

112. *See* 128 CONG. REC. S1169 (daily ed. Feb. 25, 1982) (statement of Senator Goldwater).

113. *Id.*

of the American embassy in Iran on November 4, 1979.[114] The captors, with the official blessing of the Iranian government, held over fifty American citizens, many of whom were diplomats and some of whom were alleged to be CIA agents. Government affidavits show Agee made contact with the captors, urged them to demand certain CIA documents, and offered to travel to Iran to analyze the documents.[115] A government affidavit also described an earlier report of Agee being invited to travel to Iran in order to participate in a "Revolutionary Tribunal" to pass judgment on the hostages.[116]

Moreover, Philip Agee has reportedly relied on rosters of U.S. diplomatic personnel to discover his "spies."[117] One can only speculate on the number of innocent diplomats included on the rolls of "suspected CIA agents" printed in *CounterSpy* magazine or the *Covert Action Information Bulletin.* By contrast, one need only look at historical precedent to appreciate the grave danger in which these individuals and their families were placed.[118]

2. The Interest in Free Speech

In *Haig,* the court clearly found the government's interest compelling. The *New York Times* decision offers abundant evidence of continued judicial support for a national security exception. The case should also serve, however, as a reminder that under certain circumstances the public's interest in free speech and a free press will outweigh the government's concern with security.

While the press has long been considered a type of representative or agent of the public,[119] the right of journalistic access to information concerning government activities is qualified. The press enjoys only those same rights of access to information as does the public at large.[120] While the press is generally free to report what it sees and hears within the public domain, the press has no inherent right of

---

114. *See* Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980).

115. N.Y. Times, Dec. 24, 1979, § A, at 6, col. 5.

116. *See* Haig v. Agee, 453 U.S. 280, 286 n.8 (1981).

117. Frank & Eisen, *Balancing National Security and Free Speech,* 14 N.Y.U. J. INT'L L. & POL. 339, 354 (1982). Agee has reportedly relied on published, unclassified rosters of diplomatic personnel such as the State Department's *Biographical Register,* which was publicly available until 1974. *See* Simpson v. Vance, 648 F.2d 10, 11 (D.C. Cir. 1980). *See also* 128 CONG. REC. S2292 (daily ed. Mar. 17, 1982) (statement of Sen. Moynihan) (government provides only "nominal cover . . . for American intelligence operatives").

118. *See supra* notes 19-30 and accompanying text.

119. *See, e.g.,* Cable News Network, Inc. v. American Broadcasting Co., 518 F. Supp. 1238, 1244 (N.D. Ga. 1981) (first amendment rights held by both the public at large and the press, with the press acting as a representative or agent of the public).

120. United States v. Cianfrani, 573 F.2d 835, 861 (3d Cir. 1978), *overruled on other grounds,* 457 U.S. 596 (1982).

access to information not available to the public.[121] This necessarily generates disputes as to exactly when information enters the public domain.[122]

Several cases have held that where truthful information has been placed in the public domain by either open trial or public record, the press cannot be prohibited from publishing it.[123] This situation is, however, easily distinguishable from the case of covert agent identities. The government continuously takes affirmative actions to keep these identities out of any public record.[124]

Admittedly, many of the identities are learned through prior security leaks, and consequently the information disseminated by the likes of Agee and Wolf may have already fallen into foreign hands. Nevertheless, one need not inescapably conclude that the government has no legitimate interest in preventing their further communication.[125] While foreign operatives may often be aware of classified information, it cannot be assumed this is always the case. While most nations in today's world do have some established system for intelligence gathering,[126] it seems rather safe to assume most governments

---

121. *Id.* at 861. *See also* Medico v. Time, Inc., 509 F. Supp. 268, 279 (E.D. Pa. 1980), *aff'd*, 643 F.2d 134 (3d Cir.) (press' right to publish information is separable from a right to gather information), *cert. denied*, 454 U.S. 836 (1981).

122. *See generally* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.) (defendant insisted that all data had been obtained from the public domain and Government claimed that even if the individual bits of data were in the public domain, the compiled reports were not), *appeal dismissed*, 619 F.2d 819 (7th Cir. 1979).

123. *See, e.g.*, Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103 (1979); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).

124. The entire point of classifying documents as part of a larger overall security procedure is to prevent any problem with claims of public information. The Freedom of Information Act does not apply to classified documents. Yet the realist must acknowledge there is no foolproof system of internal security. The CIA's experience with Mr. Agee, a former CIA employee, is probative on that point. Even Agee's written oath of secrecy did not prevent him from exposing secret government information at will upon resignation from the agency. The agreement Agee had signed was equivalent to the one upheld in Snepp v. United States, 444 U.S. 507, 508 (1980). Despite the finding in Agee v. Central Intelligence Agency, 500 F. Supp. 506, 509 (D.D.C. 1980), that the valid agreement had been flagrantly violated and despite the granting of an injunction against Agee, he continued to expose covert agent's abroad. *See supra* note 27-31 and accompanying text.

125. *But see* Note, *Constitutionality of the Indentities Protection Act*, *supra* note 10, at 747 (government would lose its interests in restraining further publication under such a scenario).

126. "Every major nation in the world has an intelligence service. . . . It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence." *Snepp*, 444 U.S. at 512 n.7. Moreover, it is not hard to fathom a situation in which American journalists with their numerous contacts within the federal bureaucracy are able to discover information by asking the right people. A "diplomat" from the Soviet Embassy, on the other hand, might not be extended the same confidences. For example, in United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), part of the data compiled was reportedly gathered simply by going to the Department of En-

do not have sufficient contacts to pick up every particle of data leaked from CIA files. Historical facts seem to support this stance. Not until Agee and Wolf made their exposures were the attacks launched upon U.S. personnel in Jamaica and Greece.[127] When dedicated persons compile such leaks into an easily accessible format, it is of very little comfort to say some governments may have already known.[128]

Government watchdogs frequently decry restrictions on speech such as the instant Act on the grounds they chill first amendment rights and discourage exposures of impropriety and illegality within government. The fear the CIA will use the statute as a ticket to run rampant and trample the first amendment rights of its opponents by threatening whistle blowers with prosecution is, however, exaggerated.[129] First of all, informed debate on national security and the CIA does not hinge on the disclosure of the names of individual agents at the lowest levels of the Agency's hierarchy.[130] The purpose of debate is to bring issues, such as the CIA's controversial actions abroad, to light and direct the public eye toward them. Knowing the names and license plate numbers of each individual agent will not further this end.[131] This is analogous to the present national debate on nuclear preparedness. While an informed electorate needs to know the nation's capability to engage in nuclear warfare, the electorate does not need to know the exact coordinates of each and every missile silo or the composition of nuclear warheads.[132]

Congress has directly addressed the concern that the Act will serve to discourage exposures of illegality and impropriety in America's covert operations. In drafting the Act, Congress unequivocally stated that the Act was not intended as a shield against the

---

ergy and talking to unsuspecting officials.

127. *See supra* notes 19-26 and accompanying text.

128. In addition to his magazine *Counter Spy*, which named suspected CIA agents as a regular feature, Agee also published several books. *See* DIRTY WORK: THE CIA IN WESTERN EUROPE (P. Agee & L. Wolf eds. 1978); DIRTY WORK 2: THE CIA IN AFRICA (E. Ray, W. Schaap, K. Van Meter & L. Wolf eds. 1979).

129. *See, e.g.*, Note, *Constitutionality of the Identities Protection Act, supra* note 10, at 752-53; Note, *Identities Protection Act: Constitutionality of Section 601(c), supra* note 10, at 505-06.

130. *See, e.g.*, Note, *Constitutionality of the Identities Protection Act, supra* note 10, at 752-53; Note, *Identities Protection Act: Constitutionality of Section 601(c), supra* note 10, at 505-06.

131. *See* S. REP. No. 201, 97th Cong., 2d Sess. 16, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 160. *But see* Note, *Constitutionality of the Identities Protection Act, supra* note 10, at 752-53; Note, *Identities Protection Act: Constitutionality of Section 601(c), supra* note 10, at 505-06.

132. *See* United States v. Progressive, Inc., 467 F. Supp. 990, 994 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

exposure of improprieties.[133] Section 602 of the Act[134] incorporated this intent into the law by setting out several defenses to the Act which a defendant could raise in any prosecution. These defenses include the prior release of the identity by the government, the release of the information directly to Senate or House Intelligence Committees, or the disclosure only of one's own status as an agent.[135] The provision for allowing free disclosure to congressional oversight committees, members of which are authorized to receive classified information, insures that the vital first amendment policing technique of whistleblowing is not stiffled.[136]

Some critics of the Act have insisted labeling the identification of agents as unnecessary to an informed debate is an unacceptable position.[137] One fear of these critics is that the term "identify" as it is used in the Act is so broad as to trigger the Act whenever any debate on specific covert activities is attempted.[138] Although legitimate in theory, this position ignores the built-in safeguards of the Act. The identification requirement is only one of six elements which must be proven.[139] These additional elements assure that the Act's coverage is narrow enough to avoid a chilling affect on legitimate debate. Moreover, it is vital that the Act address itself to methods of identification other than the explicit publication of names. If names were the limit of its coverage, the Act could be easily circumvented.[140] One cannot realistically say that the publication of an agent's address or license number is any less effective an identification than a name or that it is any less likely to precipitate a threat of targeting. Clearly, the Act must at least cover the functional equivalent of names.

The competing factors involved in the Act clearly balance out in

---

133. *See* S. REP. No. 201, 97th Cong., 2d Sess. 23, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 167.

134. *See* Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, § 602, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 122-23 (to be codified at 50 U.S.C. § 422). Section 602 of the Act lays out defenses available under it and provides channels for the disclosure of improprieties. *Id.*

135. *Id.*

136. *Id.* § 602(2)(c).

137. *See* Note, *Constitutionality of the Identities Protection Act, supra* note 10, at 752-53; Note, *Identities Protection Act: Constitutionality of Section 601(c), supra* note 10, at 505-06.

138. *See* Note, *Constitutionality of the Identities Protection Act, supra* note 10, at 752-53; Note, *Identities Protection Act: Constitutionality of Section 601(c), supra* note 10, at 505-06.

139. *See* S. REP. No. 201, 97th Cong., 2d Sess. 20, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 164.

140. *See supra* notes 22-30 and accompanying text. Louis Wolf, in addition to names, revealed addresses, telephone numbers and license numbers and car descriptions of the alleged agents in Jamaica.

favor of its validity. Given the magnitude of the dangers involved and the questionable worth of the identities to any informed debate on U.S. covert activities abroad, the government should carry its burden of proof. Plainly, this law promotes a compelling state interest.

B. The Clear and Present Danger Test

The clear and present danger test examines the constitutional validity of statutes in a manner analogous to the compelling interest test. Both weigh conflicting dangers and balance the interests involved, thereby dealing with many of the same factors.[141] Nevertheless, although some courts tend to overlap the two concepts, the clear and present danger doctrine has developed separately.[142]

The most famous exposition of this doctrine was made by Justice Holmes in *Schneck v. United States*.[143] In his opinion, he pointed out that even "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[144] Holmes felt the relevant inquiry was whether the speech created a clear and present danger of substantive evils which Congress had the authority to prevent.[145] This "rule of reason" formed the foundation for a large body of subsequent case law.[146]

In *Whitney v. California*,[147] the Court refined the doctrine, requiring proof that reasonable grounds existed to believe a serious evil would imminently occur if the speech were not suppressed. Justices Brandeis and Holmes joined in a noted concurrence[148] in *Whitney* and made it clear that fear of serious injury alone was not sufficient

---

141. For example, the court in United States v. Progressive, Inc. 467 F. Supp. 990 (W.D. Wis. 1979) talked primarily in terms of balancing the interests in deciding whether to prohibit the publication of hydrogen bomb data. While this case could arguably fit under the compelling interest line of cases, it would seem the clear and present danger test was implicit in the court's line of reasoning. In the intelligence arena, a similar balancing would have to take place. *See* Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting) (according to Justice Black, clear and present danger was simply another technique for balancing competing interests).

142. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919). *But see* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970) (suggesting that clear and present danger should be rejected as a test for determining the validity of laws that punish speech).

143. 249 U.S. 47 (1919).

144. *Id.* at 52.

145. *Id.*

146. *See* United States v. Schneiderman, 102 F. Supp. 87, 95 (S.D. Cal. 1951); Schaefer v. United States, 251 U.S. 466, 482-83 (1920) (Brandeis, J., concurring). *See also supra* note 142.

147. 274 U.S. 357 (1927).

148. *Id.* at 372 (Brandeis & Holmes, J.J., concurring).

to justify suppression of free speech.[149] As the Justices noted, "[m]en feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."[150]

In *Brandenburg v. Ohio*,[151] the Supreme Court seemed to develop the clear and present danger doctrine into a two-prong test.[152] This seemingly black-letter test provided that a statute restricting advocacy would be upheld against constitutional attack only where such advocacy is (1) directed at inciting or producing imminent lawless action and (2) is likely to incite or produce such action.[153] Many experts have considered the *Brandenburg* two-prong test as an authoritative statement of the modern clear and present danger doctrine.[154] The *Brandenburg* formulation, however, includes a number of built-in obstacles hindering its application to the Intelligence Identities Protection Act.

As the history of murders and attempted murders following many of the exposures indicates, the identification of covert agents is arguably likely to produce lawless action. If so, such identifications may well satisfy the second prong of the *Brandenburg* test. The first prong of the test, however, presents more serious difficulties. Under the first prong, it must be shown that such disclosures were directed at inciting imminent lawless behavior. Evidence to support this contention is not easily obtainable. It might, however, be drawn from public statements such as Agee's announcement of his intent to drive U.S. agents out of their stations and destroy the CIA as an entity.[155] Alternatively, a present intent might be implied from the speaker's knowledge of such conduct provoking acts of violence in the past.[156]

Even if the disclosures are proven to be directed at inciting violence, additional problems exist in labeling the disclosures as "advocacy." Whether the *Brandenburg* test is even applicable in situations where speakers attempt to incite violence or illegal conduct by using language not literally calling for such actions is unclear.[157] It cannot

149. *Id.* at 376.

150. *Id.*

151. 395 U.S. 444 (1969) (per curiam).

152. *See* E. BARRET & W. COHEN, CONSTITUTIONAL LAW CASES AND MATERIAL 1123 n.a (1981).

153. *Brandenburg*, 395 U.S. at 447.

154. *See* E. BARRET & W. COHEN, *supra* note 152, at 1138, 1141-42.

155. Haig v. Agee, 453 U.S. 280, 283 n.2 (1981); *see also Identities Protection Act: Constitutionality of Section 601(c), supra* note 10, at 480 n.2.

156. *See supra* notes 19-30 and accompanying text. *See also* Reynolds v. United States, 98 U.S. 145 (1878) (every man presumed to intend the necessary and legitimate consequences of what he knowingly does).

157. *See Brandenburg*, 395 U.S. at 447. *See also* Note, *Identities Protection Act: Constitutionality of Section 601(c), supra* note 10, at 494.

be assumed listing names qualifies as "advocacy" under *Brandenburg*.[158] Likewise, even assuming naming names can qualify as advocacy, it remains unclear whether the advocacy is aimed at a sufficiently definite group to qualify under *Brandenburg*.[159] With each step in the analysis, *Brandenburg*'s applicability to the Act becomes increasingly tenuous.

The *Brandenburg* test, however, must be put into perspective. The *per curiam* decision's pronouncement of a two-prong test was dicta, and the test was never meant to be read as an exclusive formula for determining constitutionality.[160] As the Supreme Court stated eight years later in *Landmark Communication, Inc. v. Virginia*,[161] the mechanistic application of a technical test is questionable at best. The clear and present danger test was never intended to become a technical legal definition or to convey a rigid formula for adjudicating cases.[162] Rather, the clear and present danger test requires courts to make individual inquiries into the imminence and magnitude of the danger claimed in each case. The character of the evil and its likelihood is then balanced against first amendment rights and the possibility of any less restrictive measures serving the state's interests equally well.[163]

In *United States v. Progressive*,[164] the Court considered a situation analogous to the present one. The United States sought an injunction against the publishers of *The Progressive* to prevent the publication of allegedly classified data contained in an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It."[165] As much of the data on CIA agents has been, the data in *Progressive* had reportedly been pieced together primarily from scattered sources within the public domain.[166] The government argued such disclosures were, nevertheless, prohibited under the Atomic Energy Act.[167]

In evaluating the case before it, the Court engaged in a balancing analysis and examined a number of factors. While the article was not

158. *See Brandenburg*, 395 U.S. 444.

159. *See* Note, *Identities Protection Act: Constitutionality of Section 601(c)*, *supra* note 10, at 493-94.

160. *Id.* at 497.

161. 435 U.S. 829 (1978).

162. *Id.* at 842.

163. *Id.* at 843.

164. 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). *See* United States v. Josephson, 165 F.2d 82, 91 (2d Cir. 1948) (when speech clearly and presently presents an immediate danger to national security, protection of first amendment stops and Congress may legislate).

165. *Progressive*, 467 F. Supp. at 991.

166. *Id.* at 993.

167. *Id.* at 991. *See also* Atomic Energy Act of 1954, 42 U.S.C. §§ 274(b), 2280 (1982).

deemed to provide a "do-it-yourself guide to the hydrogen bomb," the piece could have conceivably provided sufficient data to certain foreign powers to accelerate their progress in developing nuclear weapons.[168] The *Progressive* Court found no satisfactory reason why the public needed to know technical details on the construction of a nuclear warhead in order to carry on an informed debate on nuclear proliferation.[169] The Court distinguished *New York Times* by pointing to the specific statute involved in *Progressive*.[170] The lack of such a clear legislative expression was a critical factor in *New York Times*.[171] Finally, the Court found the harm that could result from the publication of the article far outweighed any interests protected by the first amendment.

In referring to the disparity of risk involved, the *Progressive* Court analogized that "somehow it does not seem that the right to life and the right not to have soldiers quartered in your home can be of equal import in the grand scheme of things."[172] In the same sense, a weighing of the right of an individual to life, be he diplomat or CIA agent, against the interests of others in publishing classified information at will, information too diminimous to be useful in furthering meaningful public debate, leans heavily toward the prevention of disclosure. In light of the same considerations previously discussed in the context of a compelling interest analysis, the Act appears to sucessfully navigate the clear and present danger doctrine as well. The substantial harm to United States national security and the significant threat to life and limb of American operatives serving their country abroad clearly satisfy the requirements of magnitude and inevitability which permit governmental interference with free speech.[173]

C. Other Attacks on the Act

Even assuming the government carries its burden of proof, critics of the Act are quick to point out a statute will still fail to meet the requirements of the first amendment if either its intent standard is

168. 467 F. Supp. at 993.

169. *Id.* at 994. Moreover, the court observed that the defendant's position against nuclear proliferation would be harmed, not aided, by the publication of the article. *Id.*

170. Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1982).

171. 467 F. Supp. at 994. *See supra* notes 99-103 and accompanying text. Judge Warren further stated, that in his opinion, the test enunciated by two of the *New York Times* Justices, namely grave, direct, immediate, and irreparable harm to the United States, had been satisfied by the government in *Progressive*. 467 F. Supp. at 996.

172. *Id.* at 995.

173. *See supra* notes 147-50 and accompanying text.

defective or it is overbroad.[174] Commentators have charged that the Act suffers from both maladies.[175] The intent standard will be examined first.

Commentators have argued that section 601(c) does not require specific intent, and that the requirement of intentional disclosure is constitutionally insufficient.[176] As originally reported from the House Permanent Select Committee on Intelligence, the Act required disclosures under section 601(c) be made "in the course of an effort to identify and expose covert agents with an intent to impair or, impede the foreign intelligence activities of the United States by the fact of such exposures."[177] Prior to passage, however, the Act was amended and this specific intent standard was replaced with the reasonable belief standard which now exists.[178]

According to the House Conference Committee report, the amendment was intended, at least in part, to realign the elements of proof required at trial in order to safeguard journalists who do not "name names," but who otherwise engage in heated criticism of the CIA.[179] Fearing that the original language might be applicable to such journalists, the standard was changed from an intent to impede U.S. intelligence activities to an intent to identify covert agents.[180] Whether this realignment utterly obliterated the specific intent requirement of section 601(c) is unclear. Even assuming it does so, at least facially, the statute need not be deemed terminally defective.

In *Scales v. United States*,[181] the Supreme Court invoked the doctrine of constructive intent to save the membership clause of the Smith Act from constitutional attack. The Smith Act, inter alia,

---

174. Various criminal statutes have been constitutionally upheld and interpreted as not requiring the element of intent. *See, e.g.*, State v. Houghtaling, 181 So. 2d 636 (Fla. 1965) (upholding law prohibiting sale of unregistered securities); Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (1942) (upholding statutory rape law). These crimes were generally classified as crimes *mala prohibita*, and simply doing the act was considered punishable. An exception exists, however, where the statute would tend to chill the exercise of first amendment rights. In such a case, intent is generally required.

A regulation affecting first amendment rights is overbroad when it unnecessarily sweeps beyond activities constitutionally subject to regulation and invades the area of protected freedoms. NAACP v. Alabama, 377 U.S. 288, 307 (1964); International Soc'y for Krishna v. City of Houston, 482 F. Supp. 852, 863 (S.D. Tex. 1979), *rev'd on other grounds*, 689 F.2d 541 (5th Cir. 1982).

175. *See, e.g.*, Note, *Constitutionality of the Identities Protection Act*, *supra* note 10, at 750-53.

176. *Id.* at 752-53.

177. *See* H.R. REP. No. 221, 97th Cong., 2d Sess. 6-7, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 171.

178. *Id.*

179. *Id.*

180. *Id.*

181. 367 U.S. 203 (1961).

makes the acquisition or holding of a knowing membership in any organization advocating the violent overthrow of the United States government a felony.[182] The *Scales* Court held that while the clause did not expressly contain a specific intent standard, such a standard was to be fairly implied.[183] The constructive intent doctrine is as readily applicable to the Intelligence Act.[184] Yet even the saving doctrine of "constructive intent" may not be necessary. The intent standards of the Intelligence Act and certain sections of the espionage statutes are strikingly similar.[185] For example, section 793 of the espionage statutes, dealing with the gathering, transmitting, or losing of defense information, provides for convictions of persons who do certain listed acts "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of any foreign nation. . . ."[186] In 1941, this statute was upheld as a constitutional exercise of federal power.[187] Thus a court has available both a favorable judicial interpretation of similar legislation and the doctrine of constructive intent to uphold the Intelligence Act.

The Act may also face future challenges on grounds of overbreadth.[188] A statute is overbroad when it sweeps within its gamut not only legitimately restricted activity, but also activities protected by the first amendment.[189] Significantly, the Court's fear of a possible chilling effect on the exercise of legitimate constitutional rights is so strong that even a person whose actual conduct was validly proscribed in accordance with constitutional law can attack legislation. A defendant may argue that the Act is overbroad in scope by using hypothetical situations at the periphery of statutory meaning.[190] If the

182. 18 U.S.C. § 2385 (1982).

183. 367 U.S. at 221-22, 229-30.

184. *See* The Intelligence Protection Act of 1982, Pub. L. No. 97-200, § 601(c), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 122 (to be codified at 50 U.S.C. § 421(c)).

185. *Compare* 18 U.S.C. § 793(a) ("whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation. . . .") *with* The Intelligence Protection Act of 1982, Pub. L. No. 97-200, § 601(c), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 122 (to be codified at 50 U.S.C. § 421(c)).

186. 18 U.S.C. § 793(a) (1982).

187. *See* Gorin v. United States, 312 U.S. 19 (1941) (vagueness challenge defeated).

188. *See, e.g.*, Note, *Constitutionality of the Identities Protection Act, supra* note 10, at 752-53.

189. *See* Thornhill v. Alabama, 310 U.S. 88, 97 (1940); Mid-Atlantic Accessories Trade v. State of Maryland, 500 F. Supp. 834, 847 (D. Md. 1980); International Soc'y for Krishna v. City of Houston, 482 F. Supp. 852, 863 (S.D. 1979), *rev'd on other grounds*, 689 F.2d 541 (5th Cir. 1982).

190. *See* People v. Lerner, 90 Misc. 2d 513, 514, 394 N.Y.S.2d 514, 515 (N.Y. Sup. Ct.

court accepts the defendant's arguments, the statute will fail unless either it is the least drastic means available to address the problem, or the court can place a limiting construction upon the law.[191]

Critics argue that even if the declarations targeted by the Act can be constitutionally proscribed, the wording of the law lends itself to extension beyond that valid scope of control.[192] Even the broadest provision of the Act, however, specifies that six separate elements must be proven before conviction.[193] These elements act in concert to form a line of barriers against extensions beyond the narrow sights of the Act.

Even assuming, arguendo, that the Act were to be found facially overbroad, the analysis would not end there. As with the intent analysis, there are often saving constructions which may be applicable to otherwise overbroad statutes.[194] A cardinal principle of statutory construction is, when faced with two possible interpretations of the law, that the court has a plain duty to adopt a saving construction rather than one which would render the Act constitutionally null and void.[195] In *Broadrick v. Oklahoma,*[196] the Supreme Court reaffirmed

---

1977). *But see* Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (outside of first amendment setting, a defendant may not attack statute on the ground that it could conceivably be unconstitutionally applied in situations not before the court), *appeal dismissed,* 439 U.S. 809 (1978).

191. Collin v. Smith, 447 F. Supp. 676, 692 (N.D. Ill.), *aff'd,* 578 F.2d 1197 (7th Cir.), *cert. denied,* 439 U.S. 916 (1978).

192. *See, e.g.,* Note, *Constitutionality of the Identities Protection Act, supra* note 10, at 752-53.

193. *See, e.g.,* The Intelligence Protection Act of 1982, Pub. L. No. 97-200, § 601(c), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 122 (to be codified at 50 U.S.C. § 421(c)). In a successful prosecution under § 602(c), the government would have to prove:

> (1) an intentional disclosure of information identifying the covert agent;
> (2) the disclosure was made to an individual unauthorized to receive classified information;
> (3) the person making the disclosure knew the information did identify and disclose a covert agent;
> (4) the person disclosing knew the United States was taking affirmative measures to conceal the agent's affiliation;
> (5) the disclosure was made in the course of a pattern of activities intended to identify and expose covert agents;
> (6) the person had reason to believe such activities would impair or impede the foreign intelligence activities of the United States.

Id. See S. REP. No. 201, 97th Cong., 2d Sess. 20, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 164.

194. *See* Dowbrowski v. Pfister, 380 U.S. 479, 497 (1965); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 991 (D. Utah 1982).

195. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). *See also* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Kunz v. New York, 340 U.S. 290 (1951); Lovell v. Griffin, 303 U.S. 444 (1938); Labor Bd. v. Jones & Laughlin, 302 U.S. 1, 30 (1937).

196. 413 U.S. 601 (1973).

this principle and added, because the application of overbreadth is manifestly strong medicine, that overbreadth is to be utilized only as a last resort and only if it is substantial.[197] The determination of the substantiality of the overbreadth is to be made in light of the statute's plainly legitimate sweep.[198] Even partial invalidation, the Court continued, may be preferable to full invalidation if a limiting construction cannot be found.[199]

A saving construction or partial invalidation, however, should be unnecessary here. In drafting the Act, Congress expressly examined case law in search of guidance.[200] As a result, the Act was drawn as narrowly as possible. Its provisions were generalized only to the extent necessary to assure the Act's effectiveness.[201] Further limiting the provisions of section 601(c) would have allowed disclosers to easily circumvent the statute.[202] Given this conscious effort to narrow the scope of the Act, as well as the pressing concerns that made its protections necessary, the Act should survive any attacks for overbreadth. Moreover, even if the Act were found to suffer from overbreadth nearing the realm of substantiality, a limiting construction could no doubt be applied consistently with legislative intent.

V. CONCLUSION

The Intelligence Identities Protection Act of 1982 is by no means a universal panacea. The list of infirmities arguably present within its text is substantial,[203] and the Act will have to face the grilling scrutiny due any statutory restriction of free speech. In light of this, the intelligence agent in Paris or Managua may be sleeping no sounder. In evaluating the Act's constitutionality, however, the Court should acknowledge the pressing threat to national security with which the

197. *Id.* at 612-15.

198. *Id.* at 615.

199. *Id.* at 613.

200. *See* S. REP. No. 201, 97th Cong., 2d Sess. 15, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 145, 159 (referred to the *Broadrick* principles as having guided the committee in considering the Act's constitutionality).

201. *See supra* notes 21-30 and accompanying text.

202. *See supra* notes 21-30 and accompanying text.

203. In addition to the issues discussed herein, the Act suffers from several other imperfections. *See* Note, *Open Secrets: Protecting the Identity of the CIA's Intelligence Gatherers in a First Amendment Society*, 32 HASTINGS L.J. 1723 (1981). The Act fails to protect domestic intelligence sources. *Id.* at 1769. It does nothing to lessen the threat of "gray mail" when charges are brought by the government. *See* Note, *supra* note 35, at 703-04. By failing to protect persons erroneously listed, the statute implicitly acknowledges, upon the initiation of prosecution, the person named as accurately pegged. *Id.* Thereby, the Act solidifies the correctly named agent as a target by corroborating the exposure. *Id.* Moreover, it applies only after the identity is exposed, thus punishing the culprit, but only after he has opened the bottle and allowed the genie to escape. *Id.* at 704.

Act was intended to cope.

In order to adequately deal with the shadowy world of espionage and counter-espionage, the Act must necessarily contain some degree of generality. To expect otherwise would be beyond the realm of reasonableness. The appraising court should recognize this and grant the statute all the leeway the Constitution allows. Given either the compelling interest or the clear and present danger test, the government should meet its burden of proof and the Act should prevail in the balancing of interests. Correspondingly, it should also transcend any broadside attacks on the grounds of either constitutional overbreadth or a defective intent standard. If the Act is eventually upheld in the inevitable court challenge to come, then both our agents and our allies abroad may well sleep just a bit sounder after all.

ROBERT W. BIVINS