Central Intelligence Agency

Washington, D.C. 20505

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The Honorable Lee H. Hamilton
Chairman
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request of 21 May 1985 for the views of this Agency and the Intelligence Community concerning H.R. 2419, the Intelligence Authorization Act for Fiscal Year 1986. Pursuant to your request, we have circulated the bill and the Committee's accompanying report within the Agency and to other Intelligence Community agencies. Of particular concern to the Community, after reviewing the bill, are sections 104, 105, 401 and 402. We believe that these provisions either unnecessarily limit Intelligence Community activities (sections 104 and 105), rigidify existing reporting practices by permanently codifying these arrangements in the National Security Act of 1947 (section 401), or require a potentially duplicative report in an unrealistically short time frame (section 402). Our comments concerning the provisions of the bill are set forth below in more detail.

Our first comment concerns section 104 and the parenthetical language contained in that section limiting the Director of Central Intelligence's (DCI) authority to exceed authorized personnel ceilings. This section provides that the DCI may authorize civilian personnel in excess of authorized personnel ceilings except that this increase may not "for any element (or offices, agencies or subelements thereof) of the Intelligence Community exceed two per centum of the number of personnel authorized" for such element. Given the need for the DCI to have flexibility to adjust personnel temporarily to respond to various emergencies, we are opposed to the inclusion of this parenthetical language and the additional limitations it places on the ability to effectively shift and transfer personnel within an agency to meet the changing circumstances and needs confronting the Intelligence Community. We would prefer that the language of the "except" clause not contain the present parenthetical qualification, but instead state, as have

the equivalent provisions in previous authorization acts, as follows: "Except that such number may not, for any element of the Intelligence Community, exceed two per centum of the number of civilian personnel authorized...for such element". All prior authorization acts containing this two per centum ceiling have used the term "element" without modification. This term is universally understood to mean program element of the NFIP. This should continue to be the case in the absence of any problems identified in the use or implementation of this authority.

With respect to section 105, we object to this provision which contains a prohibition on providing material assistance to the Nicaraguan democratic resistance for FY-86. This section would prohibit the provision of funds, goods, equipment, civilian or military supplies, or any other materiel to the Nicaraguan democratic resistance during FY-86. This section would permit, however, the provision of intelligence information and advice to the Nicaraguan democratic resistance. We object to this provision because we believe it unduly limits the President's ability to deal effectively with the security interests of the United States in Central America, and restricts the flexibility required by the President to fully pursue United States policy objectives in this area. Moreover, there is an inconsistency between this provision and the House's own recently expressed judgment as to the agencies which can be involved in administering this assistance to the Nicaraguan democratic resistance. As you know, the House in the 1985 Supplemental Appropriations Bill approved the provision of $27 million in humanitarian aid to the Nicaraguan resistance which includes the provision of food, medicine, clothing and other humanitarian aid for these purposes. This bill, H.R. 2577, permits this aid to be administered by any agency except the Central Intelligence Agency (CIA) or the Department of Defense (DOD). H.R. 2419, on the other hand, would prohibit any agency or entity involved in intelligence activities from providing material assistance to the Nicaraguan resistance. We believe that section 105 and its broader limitations on the furnishing of material assistance to the Nicaraguan resistance should be deleted from the bill.

Section 401(a) of the bill provides that funds available to an intelligence agency may be obligated or expended for an intelligence activity only if those funds are specifically authorized or if certain other criteria are met. The Agency opposes permanent codification of this provision in the National Security Act of 1947. In view of the Committee's expressed intent to simply codify previous language contained in earlier authorization bills wherein funds made available by the Congress through the authorization and appropriation process have been strictly controlled as to use, we see no particular virtue in converting the annual authorization language into a more basic statute.

We believe this provision is best omitted because it is too limiting and is better suited for inclusion in annual authorization acts. As the Committee's report notes, similar provisions have been included in the annual Intelligence Authorization Act for the past several years and have been a matter addressed by mutually agreeable procedures prior to that time. Evidence of the value of keeping this provision in the authorization bill is shown in the number of times this particular language has been amended since its first appearance in 1981. Inclusion of such provisions in the annual authorization process or by agreement between the Committee and this Agency allows for inevitable fine tuning and modification in this area without the need to amend the National Security Act each time a change of procedures is contemplated.

A review of the intelligence authorization act process in recent years clearly demonstrates the utility of this process in providing needed flexibility and required change in the reporting practices expected by the Committee in this area. Since the 1981 Intelligence Authorization Act, a provision has been included in the annual authorization bill which states that no funds may be appropriated or otherwise made available through transfer or reprogramming unless specifically authorized or unless by notification. While the notification required under this provision was expected to be made at least 15 days prior to completion of the funding transaction, the Committee has recognized that circumstances may require later notification. Beginning with the 1984 Intelligence Authorization Act, the Committee expanded this provision to require that the transfer of funds from one account to another which would trigger the notification requirement, must be for a higher priority program or must be based on unforeseen requirements. This amended provision additionally required that in no event could funds be spent for intelligence programs which had been denied by Congress. Further, the report language accompanying this provision for the last several years has made clear that in circumstances in which prior notice of an activity would be required by this section, but not required by the Intelligence Oversight Act (section 501 of the National Security Act) that the notification provided to the Committee should be determined by the principles of comity and mutual understanding as set forth in the legislative history accompanying the 1980 Intelligence Oversight Act. As the above discussion indicates, the authorization process has proven to be a workable arrangement in which the Committee's need for prompt notification concerning the use of reprogramming or transfer authority has been provided while allowing a certain needed flexibility. We believe the working relationship and longstanding practice that have developed between the Committee and the Agency concerning these notification procedures and the available annual intelligence authorization process make permanent codification of these provisions in the National Security Act of 1947 unnecessary and undesirable.

The Agency is equally concerned about section 401(b) of the bill which addresses the covert transfer of defense articles or services exceeding $1 million in value. We believe that the present reporting requirements contained in section 501 of the National Security Act are adequate and satisfy the objective of keeping the Committee fully and currently informed of significant covert arms transfers. This is particularly true in light of present reporting which covers a considerably wider range of military equipment, and the nearly completed efforts between the Agency and the Committee to establish formal covert action reporting procedures which specifically address the reporting of covert arms transfers well beyond the type contemplated by this provision. In light of this effort to work out mutually agreeable procedures of greater significance, we do not perceive any need to codify in a statute what should be a flexible and workable agreement.

On this same matter, we believe it is particularly inappropriate to include portions of the yet-to-be-agreed-upon procedures in the classified annex and to state the Committee's expectation that the type of activities described in these procedures will require prior notice to the Committee. While we hope shortly to reach final agreement on these procedures, the Agency and the Committee have yet to reach a full understanding as to the exact meaning and scope of the language now contained in the classified annex and as to what kinds of activities would require prior notice under these procedures. Given this uncertainty as to what is required to be reported under these procedures, the potential for the type of misunderstanding which these procedures are intended to avoid is greatly increased by including the procedures in the classified annex and expressing the expectation that the Agency is to report pursuant to them. We would recommend against the adoption of these procedures by the Conference Committee when they consider the classified annex pending a final resolution, which we believe is imminent, between the Agency and the Committee concerning the procedures. We will, of course, continue to keep the Committee informed of any matter of significance or of Committee interest.

More importantly, we believe that this type of detailed, statutorily-mandated reporting on covert arms transfers will unnecessarily limit the flexibility required by the President in responding to and taking advantage of rapidly changing international events. Given recent terrorist episodes such as the highjacking of Flight 847, the need for this country to be able to fully cooperate with other nations and their security services is particularly evident and should not be hampered by unnecessary reporting obligations which do not further congressional oversight, but do inhibit the community's ability to respond to unique opportunities, unforeseen circumstances, or crisis situations. This is a time during which the Community and the Committee should be searching for ways to

better respond to terrorist and other external threats. Our joint efforts in improving intelligence capabilities in this area require that all options in responding to these situations be available for use without the need to invoke additional unnecessary reporting requirements, and we are aware of no problems under the current reporting scheme that these statutory requirements would solve. On the contrary, the proposal, which better suits formal overt foreign assistance transactions, saddles the Executive Branch with additional and unnecessary burdens.

For example, we have some difficulty with the manner in which the valuation of this equipment is to be undertaken according to the Committee's report. The Committee would require that the valuation of equipment be based on original acquisition cost. However, with respect to foreign weapons acquired at no cost to the Agency, there would be no acquisition cost although there likely would be a replacement cost. Because the Committee requires that equipment replacement cost be used as a valuation method, this would require prior notice of Agency equipment transfers in circumstances in which no technologically important item of equipment or significant transfer requiring prior notification occurs. This requirement for reporting of defense services also would appear to raise substantial problems for the Agency, given the breadth of the Agency's covert programs and the standard Agency accounting practices, because of the Committee's requirement that the computation of transportation and other expenses associated with any United States personnel providing the service be included in the valuation of such services. The Committee action by imposing these requirements and attempting to legislate conformity with FMS procedures and requirements, will mandate additional bureaucratic mechanisms unduly hampering an efficient, flexible and workable system.

Section 401(b) also provides that arms transfers are not to be considered significant if the transfer is being made to another federal agency so long as there is no subsequent retransfer of the defense article or service outside the United States. This suggests that, in a joint operation in which the Defense Department is providing military equipment to the Agency, where the Agency intends to transfer the articles or service to a foreign recipient pursuant to an authorized covert action program, the Defense Department must report to the Intelligence Committees before the equipment can even be transferred to the CIA. We do not believe this is a necessary requirement, since the Agency can acquire the equipment from the Department of Defense pursuant to applicable authority and should assume responsibility for reporting to Congress prior to any transfer abroad. Finally, we would take exception with the statement contained on page 9 of the Committee's report which notes that "if such transfers are made covertly or clandestinely they are in effect covert action. As such, they must be

reported under the Intelligence Oversight Act." This characterization of transfers of military equipment by the CIA is not accurate in all instances. There are instances where transfers of military equipment are made clandestinely, but unrelated to any covert action program; rather they are undertaken as part of a foreign intelligence exchange.

In summary, we believe Section 401's reporting requirements remove certain needed flexibility in the oversight process by codifying unnecessarily existing workable arrangements. As the Committee itself noted, in commenting on the oversight process during its consideration of the Intelligence Oversight Act of 1980:

> True conflicts of policy between the executive and legislative branches are best disposed of by the traditional means of continued interplay, not reliance on statutory provisions which, it ought to be recognized, cannot and should not seek to resolve all future issues of congressional oversight.
>
> Such disputes should be left in the only arena which can effectively solve them, political give and take. It is there that resolve and consensus rule. In intelligence in particular, no other solutions are practical.

H.R. Rep. 96-1153, Part 1, 96th Cong., 2d Sess. 13 (1980).

As to section 402, while this proposal for a counter-intelligence vulnerability survey of confidential United States Government activities abroad has some merit, the proposed language contained in this section lacks specificity, and is clearly more suitable for report language than for inclusion as part of the bill itself. The scope of the inquiry requires further definition, both in terms of the United States activities to be covered and in terms of the security and counterintelligence disciplines to be addressed in this report.

Additionally, the Secretary of State has had an advisory panel, headed by Admiral Bobby Inman, conducting a review of overseas security for the past year. The advisory panel's report has just recently been issued. It would be advisable to closely review the results of that effort to see if it is responsive to what you are seeking. The task, as proposed, represents an extremely large undertaking. There are some twenty countries which are considered to have a hostile environment, plus another twenty-one with Communist intelligence service ties. To conduct a vulnerability survey of that proportion would not be feasible within the time allocated, and would require the suspension of other priority

security services in order to service this one which, as noted, may be duplicative of Admiral Inman's effort. I suggest we await careful consideration and review of Admiral Inman's report. Following this review, we can then determine what, if any, follow-up action is required, how it is to be done, and, since such a survey would impact on the interest of a number of agencies, who should be tasked to carry it out.

We appreciate the opportunity to comment on the Committee's bill. We believe that our comments and input would have been more helpful had they been requested and an opportunity provided for such input while the bill was still being considered by the Committee. While none of the provisions contained in the Administration's proposed bill were included in H.R. 2419, I believe that these proposals have considerable merit and hope that the Committee will reconsider and take appropriate action with respect to these initiatives at some future date.

Sincerely,

/s/ William J. Casey

William J. Casey
Director of Central Intelligence

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