H.R. 3822, TO STRENGTHEN THE SYSTEM OF CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES OF THE UNITED STATES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LEGISLATION

OF THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

FEBRUARY 24 AND MARCH 10, 1988

U.S. GOVERNMENT PRINTING OFFICE

85-813 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

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Dena —
Larry would like you
to file this with the
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Debbie

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H.R. 3822, TO STRENGTHEN THE SYSTEM OF CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES OF THE UNITED STATES

WEDNESDAY, FEBRUARY 24, 1988

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LEGISLATION,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:00 a.m., in room 2203, Rayburn House Office Building, Hon. Matthew F. McHugh (Chairman of the Subcommittee) presiding.

Present: Representatives McHugh, Stokes, Livingston, Shuster, Richardson, Glickman, Hyde and McEwen.

Staff present: Thomas K. Latimer, Staff Director; Michael J. O'Neil, Chief Counsel; Thomas R. Smeeton, Associate Counsel; Bernard Raimo, Jr., and Stephen D. Nelson, Counsel; Jeanne M. McNally, Clerk; Karen W. Schindler; Angel R. Torres; and Merritt R. Clark.

Chairman MCHUGH. The Committee will please come to order.

Today the Subcommittee continues its hearings on legislative proposals designed to improve congressional oversight of covert operations. These hearings were initiated last April following disclosure that the Reagan administration had covertly sold arms to Iran, and that profits from the sale of those arms had been diverted to finance the operations of the Nicaraguan contras.

While that disclosure raised many questions that have been addressed elsewhere, our hearings have focused primarily on whether this secret operation was consistent with current law governing covert activities and what changes may be needed to avoid similar mistakes in the future.

The responsibility for formulating U.S. foreign policy is shared by the Executive and Legislative Branches of our government, and generally policy decisions are debated openly. However, in exceptional circumstances the security interests of the United States require that foreign policy be formulated and conducted in secret; in those cases, special procedures apply.

Currently, the law provides that the Intelligence Committees of Congress must be kept "fully and currently informed of all intelligence activities . . . including any significant anticipated intelligence activity." This provision establishes a general requirement that the Intelligence Committees must be given prior notice of any covert operation. However, the law allows two exceptions to this general rule.

First, "if the President determines it is essential . . . to meet extraordinary circumstances affecting vital interests of the United States," he may restrict prior notice to the House and Senate leadership and to the Chairmen and Ranking Minority Members of the two Intelligence Committees, the so-called "Gang of Eight."

Second, the law also recognizes that in certain undefined cases the President may withhold prior notice entirely, but in such cases he is required to "fully inform the Intelligence Committees in a timely fashion."

In the case of the arms transfer to Iran, the President signed his finding authorizing the transfers in January, 1986, well after the operation had begun. The President never provided notice of this operation. Indeed, it was not until November of 1986, a full 10-plus months after the President signed his finding, that anyone in Congress learned of the operation, and then only because it was disclosed in a foreign publication.

No one who testified before this Subcommittee last year argued that Congress had received timely notice of the sale of arms to Iran. However, in a letter and legal memorandum submitted to this Subcommittee and made a part of the record, the Justice Department took the position that notice "in a timely fashion" means whatever the President in his sole discretion says it means. As the Iran arms case clearly demonstrates, if the Justice Department's position is allowed to stand, it could effectively deny the Intelligence Committees pertinent information about significant policy decisions for very long periods of time.

To many of us in Congress, the administration's position is inconsistent with the clear intent of existing law and would preclude the Intelligence Committees from meeting their responsibility to exercise meaningful oversight.

Moreover, the requirement for timely notice and consultation is designed not simply to protect prerogatives of Congress, but to give the President the benefit of independent counsel on important policy decisions. If the President had told the Intelligence Committees that he contemplated selling arms to Iran, strong objections would surely have been expressed. Members on both sides of the aisle have so stated in these hearings. While their objections would have been advisory only, they might have helped the President avoid embarking on a policy that was flawed in both its conception and implementation. And that, in short, is what the oversight process is all about: helping to ensure that covert actions advance rather than damage the national security interests of the United States.

The purpose of our hearing today is not to condemn past mistakes but to determine whether the oversight process can be strengthened so that we avoid similar mistakes in the future. The specific focus of our hearing is H.R. 3822, which represents a refinement of legislation introduced last February. It incorporates many of the recommendations of the select committees that investigated the Iran-contra affair.

This bill requires that the Intelligence Committees, or the so-called "Gang of Eight," be given prior notice of covert actions. In rare cases, where "time is of the essence" and the President determines it is important to the national security interests of the

United States, the President may initiate a covert operation without giving prior notice, but in such cases he would be required to notify the Committees within 48 hours.

H.R. 3822 would also do the following.

It would require that a Presidential finding initiating a covert action be in writing, that it specify each agency, department or entity authorized to fund or participate in the activity, and that it state whether non-governmental third parties will participate in the action.

It would permit an oral finding when immediate action is necessary but require that a contemporaneous record be made and that the finding be committed to writing within 48 hours.

It would prohibit retroactive findings and prohibit findings from authorizing an action that violates any law of the United States.

It would define covert operation to include requests made by the U.S. Government to other countries or private citizens to conduct a special activity on behalf of the United States.

And it would prohibit the expenditure of funds on covert actions until a finding has been made.

A similar bill was reported favorably by the Senate Intelligence Committee on January 27th of this year by a vote of 13 to 2.

Currently, this Committee is engaged in discussions with representatives of the Intelligence Community, the Department of Justice, and the National Security Council to perfect the bill. I trust that we can continue to work together on these issues, and I very much appreciate the suggestions and advice the Intelligence Community has already provided.

In prior hearings the administration representatives have been strongly opposed to any change in existing law. Of course, they have every right to do so, but I would hope that we can arrive at a constructive accommodation.

As I said earlier, our purpose here is not to replow the ground of the select committees that investigated the Iran-contra episode. Yet, it would be a mistake to ignore their findings and recommendations.

In their final report, a bipartisan majority found as follows:

> The common ingredients of the Iran and contra policies were secrecy, deception, and disdain for the law. A small group of senior officials believed that they alone knew what was right. They viewed knowledge of their actions by others in the Government as a threat to their objectives. They told neither the Secretary of State, the Congress nor the American people of their actions. When exposure was threatened, they destroyed official documents and lied to Cabinet officials, to the public, and to elected representatives in Congress. They testified that they even withheld key facts from the President.

The report then concluded as follows:

> Congress cannot legislate good judgment, honesty, or fidelity to law. But there are some changes in law, particularly relating to oversight of covert operations, that would make our processes function better in the future.

Many of those recommendations are contained in H.R. 3822. The question we now face is whether we are content to let the recommendations of the select committees gather dust, or whether we are going to enact the kinds of changes they recommended. We have a distinguished group of witnesses to help us address that question today, and I look forward to their testimony.

Before calling upon our first distinguished witness, however, I would like to recognize the Chairman of our full Committee, the Hon. Louis Stokes from Ohio.

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

I join this morning with Chairman McHugh in welcoming today's witnesses as we continue hearings on intelligence oversight legislation. Each of them brings a distinct and useful perspective based on many years of experience to the important issues with which the Committees must deal.

The prior notice provision of this bill and of the Senate bill S. 1721 has caused a great deal of controversy, but as has been pointed out, there are other important provisions. None of them are cast in concrete, and we have and we will work with the administration to accommodate as best we can traditional intelligence interests and to correct drafting mistakes or omissions.

I think I speak for all of us when I state that we are not seeking confrontation or endeavoring to criticize the administration for the sake of criticism or partisan advantage. Some of us—I think most of us—see a problem and are trying to correct it. There is no ulterior motive.

Part of the problem is the apparent ambiguity of the current statute. In this regard, I would note that in 1980, during the Carter administration, a majority of the Intelligence Committee preferred a more clear and concise version of the prior notice provision than was enacted. At that time, however, the Committee deferred to a Democratic Senate and a Democratic President and compromised on the vague language of the timely notice provision.

The arguments made at that time in the Committee were that, considering the fate of the Nixon administration, no President would ever in the future withhold notice of a covert action from the Congress. The Committee was also told it was better to proceed on the basis of an expectation of trust, rather than pursuant to a strict statute.

Well, the Intelligence Committee, of which I was not then a Member, and the House of which I was a Member, were persuaded. And now I am here today, and, as Yogi Berra said, "It's deja vu all over again." We are told that the law should not be changed because of an aberration like Iran-contra and that it is better to avoid strict reporting requirements that offend the Executive Branch.

Mr. Chairman, I appreciate the fine work that you have done on these hearings and on the bills we have introduced. I would also like to publicly commend Senators Boren and Cohen for the leadership they provided on these issues.

As you know, in January S. 1721, a bill substantially the same as H.R. 3822, was reported favorably by the Senate Intelligence Committee by a vote of 13 to 2. While we may not be able to match these numbers, I think we should try. In any case, we hope to report an equally worthy bill very shortly.

As I noted when Mr. McHugh and I testified on S. 1721 before the Senate Intelligence Committee,

> Although S. 1721 would revise the structure of the Intelligence Oversight Act, its substantive changes in law are few. Indeed, they are more in the nature of refinements of a statute now seven years old than they are structural changes in congressional oversight. They are, nonetheless, essential revisions.

Congress established its Intelligence Committees to act as surrogates for the House and the Senate in reviewing covert actions. Since those operations, in effect, are secret foreign policy initiatives, prior notice—prior consultation—takes the place that extensive debate plays with respect to other foreign policy decisions. Congress plays an important constitutional role in U.S. foreign policy debate. It cannot perform that role at all with respect to covert action if it is denied, through its surrogate committees, the most basic knowledge of such covert actions.

I thank you very much, Mr. Chairman, for yielding to me.

Chairman McHUGH. Thank you very much, Mr. Chairman, and thank you for your leadership on this issue.

It is my pleasure now to introduce our Ranking Republican Member for any opening remarks he would like to make, Mr. Livingston of Louisiana.

Mr. LIVINGSTON. Thank you, Mr. Chairman.

I appreciate the opportunity to make a statement. I will not make a formal statement at this time, although I would like to make some comments. I would like to reserve the right to submit a formal statement for the record later on.

I would like to say that in my view, the laws on the books with respect to intelligence activities are indeed sufficient to provide adequate congressional oversight of intelligence activities, and in fact they have permitted us to provide a great deal of oversight over the facts at hand, the facts which prompted this hearing and the bill that is before us.

Iran was an extraordinary situation. It was extraordinary for the administration. It was extraordinary for the country. But the fact remains that Congress has looked extensively at the facts of that entire episode, and those who have stepped beyond the bounds of propriety have been dealt with and perhaps have paid dearly for whatever mistakes they have made. I happen to think that all of the people involved in that episode were well-intentioned and had nothing but the best interests of the country at heart. But be that as it may, they have paid dearly, primarily because Congress has acted and acted severely.

I think that it would be a great mistake for us to use the facts of the Iran-contra episode to jump in and pass, willy-nilly, legislation to avoid a recurrence of similar activities. There is an old saying in the courtroom that "bad facts make bad law," and I think the same can be said with respect to legislation and our activities here in Congress. We have an unusual situation with Iran-contra, but we have laws on the books which deal with oversight. They have been appropriate in the past and they will be in the future. If anybody abuses those laws, they will, as has been done in the past, be dealt with severely.

But the bill before us is bad law, and it should not under any circumstances, in my opinion, be passed. There are various examples of its deficiencies. Those have been testified to in two previous hearings by the vast majority of witnesses that have appeared before this committee. The most glaring example of problems presented by this bill occur in the requirements for prior notice by the President to consult with Congress in advance of any covert activities or to provide them notice, at the very latest, after only a 48-

hour leeway, to consult with at least the "Gang of Eight," if you will, the leaders of Congress and of the Intelligence Committees.

The vast majority of the witnesses have testified against that 48-hour provision. They have said it is unwarranted, and it is a dangerous intrusion into the powers of the Chief Executive of the United States.

The Minority report of the Iran Committees—you quoted from the Majority Report, Mr. Chairman, I would like to quote from the Minority Report—which talks about that. Nearly all of the Minority Members of the Iran-contra hearings concluded and said they are convinced, that this approach would be unconstitutional. Equally important, we think it is not needed. The Members who think they need new legislation underestimate the political leverage they now have to ensure that a President will not abuse his inherent power.

That is not the only evidence we have that this could be a bad bill and a bad provision. Previously at one of these hearings, Mr. Ray Cline, former Assistant to the Director of the CIA, said, in his view, that "new amendments regarding the 48-hour notice provision prescribed an unwarranted rigidity with respect to timely notification. They are also counterproductive in the micromanagerial congressional intrusion into the Executive authority of the President to conduct sensitive national security operations. . . . [M]y belief, based on running clandestine and covert operations, is that there would be a chilling effect from such close supervision by the Congress."

And Admiral Stansfield Turner, former Director of the CIA under President Carter, said, "I would have found it very difficult to look such an individual in the eyes"—speaking about people who were jeopardized while undertaking foreign operations, such as the rescue of the people who took refuge in the Canadian Embassy during the Iran hostage situation, and were hiding from the Iranians in Iran—"I would have found it very difficult to look such an individual in the eye and tell him or her that I was going to discuss this life-threatening mission with half a dozen people in the CIA who did not absolutely have to know, who were not involved in supporting this activity," implying of course that if we consulted the Members of Congress, the hazard to those people under life-threatening situations would be all the greater.

So we have various people, most of the witnesses who have appeared before us, who have said that this is a very dangerous provision and that the bill, if passed, would tie the hands of the Chief Executive and would virtually halt all critical and reasonable intelligence and defense activities through unnecessary congressional interference and micromanagement. It would destroy the remarkable gains the United States has made in world relations and unnecessarily jeopardize our security on the world front, and leave our citizens around the globe open to a vastly increased threat of terrorism and mayhem.

So, Mr. Chairman, for this reason and for others which I think will be elaborated on by Judge Webster, a number of which are critical to performance of the duties of the CIA to protect our security and to conduct intelligence activities, I think this is a bad bill.

I would urge this Committee drop it right away and just to forget it ever existed.

Thank you.

Chairman McHUGH. Thank you, Mr. Livingston.

We are very pleased this morning to have as our first witness the distinguished Director of Central Intelligence, the Hon. William H. Webster. Director Webster has been in his present position since May of last year, and prior to that he served as Director of the FBI, as Judge for the United States Court of Appeals for the Eighth Circuit, and as a U.S. Attorney for the Eastern District of Missouri.

Judge Webster, we appreciate your indulgence in listening carefully to our opening remarks, and we are delighted you are with us this morning. Please proceed.

TESTIMONY OF HON. WILLIAM H. WEBSTER, DIRECTOR OF CENTRAL INTELLIGENCE, ACCOMPANIED BY RUSSELL BRUEMMER, GENERAL COUNSEL; DAVID PEARLINE, OFFICE OF CONGRESSIONAL AFFAIRS; JOHN HELGERSON, DIRECTOR, OFFICE OF CONGRESSIONAL AFFAIRS; AND GEORGE JAMESON, OFFICE OF GENERAL COUNSEL

Judge WEBSTER. Thank you, Mr. Chairman.

I am pleased to be here today to share some of my thoughts on H.R. 3822, the Intelligence Oversight Act of 1987. The views expressed in this statement also reflect the position of the administration, with respect to the issues my statement addresses. Other administration witnesses have discussed, or will do so, the significant constitutional problems that this bill raises as well as the impact it may have on the activities and programs of other agencies.

I will also draw your attention to the administration's position as conveyed to the Congress in the President's legislative message last month that a bill which fails to preserve the flexibility and authority the President needs to conduct intelligence activities effectively will not be acceptable to the President.

The bill being considered by the Committee today is similar in many respects to a bill reported out of the Senate Intelligence Committee last month. During its consideration of that bill, the Senate Intelligence Committee invited me to provide my views. I testified at that time on two issues: whether legislation was necessary, and what practical impact the Senate bill would have on the Intelligence Community. I intend to address both points in my testimony today on the House bill.

As you are probably now aware, in my remarks before the Senate Intelligence Committee I questioned the need for this type of legislation. Although the Senate Intelligence Committee subsequently decided to recommend approval of the legislation, I still strongly doubt that this legislation is a necessary response to the concerns Members of Congress have expressed about the oversight of special activities.

As you know, the President recognized last spring that there was room for improvement in the way the two branches were meeting their responsibilities, and he took concrete, substantial steps to es-

tablish improved procedures to ensure that Congress is given the opportunity to play its appropriate oversight role.

These new procedures in the form of a new National Security Decision Directive on Special Activities (NSDD 286), which this Committee has had for review in full and much of which was recently declassified, clarify the rules by which special activities are reviewed, approved, and reported to the Congress. In fact, many of the proposals contained in H.R. 3822 are already contained in NSDD 286. That is not surprising, because the procedures the President has installed were developed following close and prolonged consultation with Members and staffs of the Intelligence Committees.

While a Presidential directive is not the same as legislation, I am not persuaded that new legislation at this time is the best way to address the concerns that Members have with the congressional role regarding special activities. In my view, a legislative remedy should be employed only if it is clear that there is a basic deficiency in the oversight process. That is doubly the case when the legislative remedy proposed raises constitutional issues which threaten to divide the two branches in an area where effective work places a premium on cooperation.

The Iran-contra matter, while extremely serious, has not in my view demonstrated that the system of congressional oversight of the Intelligence Community established under current statutes is seriously flawed. Many of the problems exposed in connection with that unfortunate period were the rest of officials failing to follow existing procedures and rules.

As the Committee is aware, I have taken steps within the CIA to discipline those employees who failed to follow CIA procedures and meet the standards of conduct expected of CIA employees or who testified to Congress in a manner that was not candid or forthcoming. Those actions, taken in light of the requirements defined by current statute, in my view have adequately addressed the problems we found.

Similarly, to the extent that there were any procedural shortcomings demonstrated by the Iran-contra matter, they have already been addressed by the new Presidential directive within the present statutory framework.

I would like to emphasize that any legislation that is enacted must not adversely affect the Intelligence Community's ability to do its job.

In this connection, Mr. Chairman, the bill you introduced, and the bill reported out of the Senate Intelligence Committee, have sought to address constructively some of the important concerns I and other administration officials raised before the Senate Intelligence Committee when it considered its original bill. That bill, for example, recognizes the need to report on special activities and intelligence collection in a manner consistent with due regard for the protection of sensitive intelligence sources and methods.

I am also pleased that neither the House nor the Senate bills require that the finding specify the identity of foreign countries assisting the Agency in the conduct of special activities. The proviso on protection of sources and methods, and the ability to protect the identity of foreign countries assisting us, will go a long way in as-

suring friendly services and potential agents that source identifying information will not be widely disseminated and possibly compromised.

While the House bill addresses several concerns previously raised in my testimony before the Senate Intelligence Committee, there are four areas of the bill that are troublesome. The first area of difficulty involves the provision of the bill that requires notification of a special activity to Congress, without exception, within 48 hours after the signing of a finding.

Last summer you received the views of the Department of Justice about the constitutionality of such a provision, so I will not address that issue here. I have two concerns about this provision.

First, the fact that there is a sharp difference of interpretation between the view of the Department of Justice and the position embodied in this bill regarding this provision's constitutional validity will promote tension between the Executive and Legislative Branches for years to come. In the intelligence area such tension has the potential to disrupt the kind of cooperation and trust effective national policy requires.

Second, I believe that some allowance must be made for that rare case where a limited delay in congressional notification is critical to preserve the absolute security of an operation when, for example, lives are at stake.

Furthermore, it is worthwhile to note that any concerns about excessive delay in congressional notification of a special activity have already been addressed by NSDD 286. That directive requires the National Security Planning Group to reevaluate at least every 10 days a decision to delay congressional notification of a given finding. This will ensure that when a delay in notification is necessary, the reason for that decision will be continually reassessed so that the delay will be as short as possible. I repeat, however, that I can think of few circumstances that would ever necessitate such extraordinary steps.

My second area of concern is with the definition of "special activities." This term is used to describe covert action operations. There currently is no definition of the term "special activities" in the law. The bill creates a special activities definition, but singles out and applies to CIA a standard that is different from that applied to all other departments and agencies of the U.S. Government.

For CIA, the bill defines a special activity to cover any operation in a foreign country other than activities intended solely for obtaining necessary intelligence. This definition is the same as that set forth in the Hughes-Ryan Amendment (22 U.S. Code Section 2422), which provides the existing statutory framework for determining whether an activity of the CIA in a foreign country requires a finding.

By contrast, for all other departments and agencies, a special activity is described as any activity conducted in support of a national foreign policy objective abroad which is planned and executed so that the role of the U.S. Government is not apparent or acknowledged publicly, and functions in support of such activity, but does not include activities to collect necessary intelligence, or diplomatic activities carried out by the Department of State or persons other-

wise acting pursuant to the authority of the President. This definition is similar to that set forth in Section 3.4(h) of Executive Order 12333, issued by President Reagan on December 4, 1981.

I understand that in crafting these definitions of special activities in the bill, it was not your intention, Mr. Chairman, to change in any way the current standard by which CIA determines whether to obtain a finding to authorize a particular activity.

Unfortunately, Mr. Chairman, my general counsel, Russell Bruemmer, who is seated behind me, has advised me that this definition, if adopted, may cause confusion about the standard used to determine whether a finding is necessary to authorize an activity. We have also requested the Department of Justice to examine this issue, and they have reached a similar conclusion.

The proposed definition of special activities in the bill could alter current practice. The Executive Branch, as the Committee knows, has interpreted the Hughes-Ryan Amendment in a manner that we believe is consistent with its legislative intent.

The Hughes-Ryan Amendment, if given an overly restrictive interpretation, would require Presidential authorization for even the most minor or routine activities of the CIA overseas if they were not related solely to intelligence collection. In my judgment, that is not a proper interpretation and was never the intent of Congress in enacting Hughes-Ryan.

The legislative history to Hughes-Ryan and the Oversight Act of 1980 contemplate a finding for those activities that truly can be considered covert action operations. In this connection, the definition of special activities contained in the Executive Order gives meaning to the language and intent of the Hughes-Ryan Amendment in determining whether that law would require a finding to authorize a particular activity.

Enacting H.R. 3822 as drafted would make it extremely difficult to continue such an interpretation because the Executive Order definition would by terms of the statute not apply to CIA. The clear implication would be that Congress intends that the language of Hughes-Ryan be given a more restrictive interpretation.

This could be construed to mean the following types of activities, for which findings are not obtained today, would henceforth require specific Presidential authorization in every case no matter how minor the CIA role: counterintelligence activities; support given to the Department of State in the conduct of diplomatic activities (this would include, for example, having the Chief of Station present the U.S. Government position on a particular matter to the Foreign Minister because of his close relationship with the Foreign Minister, or arranging for secure transportation or a meeting site for an ambassador or a diplomatic official); minor support to the Department of Defense or Department of State in the evacuation of Americans from foreign countries; minor support provided to the DoD and other agencies through the purchase of equipment or the provision of services under the Economy Act.

If we are in agreement not to alter the current practice within CIA on whether to obtain a Presidential finding to govern a particular activity, I would urge the Committee to modify the definition of special activities contained in the bill.

One approach would be to repeal the Hughes-Ryan definition and use the Executive Order definition of special activities to cover every department or agency, including CIA. There are other possible ways to resolve our concern, and I have instructed my staff to work with the Committee to come up with mutually acceptable language. The key, again, I think we can agree, is formulating language that will maintain the status quo.

I must add as a final note, moreover, that the definition proposed in the bill today, as well as that in the Senate bill, are different from that which I addressed when I testified before the Senate Intelligence Committee. For that reason, I did not have the opportunity then to express these concerns at the time of my previous testimony.

My third area of specific concern is with Section 4 of the bill, which amends Section 502 of the National Security Act of 1947. Section 502(a) of the National Security Act limits the use of appropriated funds.

Currently, appropriated funds available to an intelligence agency may be spent only if, one, funding for the activity has been authorized by Congress; two, in the case of release from the reserve for contingencies, notice of the intent to release such funds is given to the Intelligence and Appropriations Committees; or, three, in the case of reprogrammings or transfers, the activity to be funded is a higher priority intelligence activity, the need for funds for such activity is based on unforeseen requirements, and notice is given to the Intelligence and Appropriations Committees of the intent to make funds available for the activity.

The bill would amend Section 502(a) of the National Security Act to restrict expenditure of all funds, and not just appropriated funds. I am concerned that this amendment would jeopardize our authority to conduct certain activities which Congress has supported in the past. Specifically, the amendment would restrict our ability to use income generated by proprietaries for certain expenses necessary to make the proprietary appear as a commercial entity. This would make it extremely difficult to operate our proprietaries in a secure manner.

The amendment would also eliminate the authority of several agencies in the Intelligence Community to make certain accommodation purchases for other countries.

Finally, the amendment would eliminate our authority to receive funds donated by other countries to finance special activities for which a finding has been obtained.

I should emphasize that I have no objection to keeping the Committee generally informed of our activities in these three areas. However, there has been no stated rationale for the need for this change, and in my view adoption of this provision would have a very serious and detrimental effect on our continuing ability to conduct special activities, liaison activities with foreign governments, and operations of proprietaries.

The fourth area of concern is with the provision of the bill amendment Section 503 of the National Security Act, which currently provides for the reporting to the Intelligence Committees of the transfer of defense articles or services in excess of $1 million by an intelligence agency. The section would be amended to require

the reporting of defense articles or services which are individually worth less than $1 million but which aggregate to a figure more than $1 million.

I do not believe it is necessary to change the current standard for reporting the transfer of defense articles and services. Furthermore, I note that the provision does not provide standards to determine when defense articles or services should be aggregated.

Accordingly, if this provision remains in the bill in its current form, I would urge the Committee to consider statutory language or legislative history that would provide clear guidance on how the Intelligence community should aggregate defense articles or services for purposes of reporting to the Intelligence Committees.

There also are several other provisions in the bill that, while not as worrisome as the ones I have touched on, would, as written, pose problems for the Intelligence Community. My staff has already had useful discussions with the Committee staff on these provisions.

In closing, Mr. Chairman, I would like to reemphasize to each of you my personal commitment to making the oversight process work. It has always been clear, and recent experience has again demonstrated, that the implementation of the foreign policy of our government, including special activities, can only be successful when the Executive and Legislative Branches of Government work together in an atmosphere of mutual respect and trust. This spirit of cooperation can only occur if the Intelligence Committees receive the appropriate information needed to review and make informed judgments on special activities, while at the same time ensuring that this information is protected from unauthorized disclosure.

The law should reflect not only the need for cooperation, but also the President's responsibility for the conduct and management of our intelligence and the importance to the Nation of ensuring that the President has the necessary flexibility and authority to employ our intelligence capability effectively.

As I have noted, the President has taken corrective steps to improve the oversight system through a Presidential directive. At CIA, I have approved a number of measures which will help to prevent a repetition of the shortcomings in the Agency's performance in the Iran-contra matter. In short, significant changes have been made. I would respectfully submit that they should be given a chance to work.

I am convinced that the current framework, and not new laws, represents the most appropriate and effective means to achieve our shared commitment to have Congress play an active, effective role in the oversight of United States intelligence activities.

Mr. Chairman, that now concludes my statement. I would be more than pleased to respond to your questions.

Chairman McHUGH. Thank you very much, Judge Webster.

The Committee will proceed with questions, as usual, under the five-minute rule.

I do appreciate the fact that you are here today and, more importantly, your personal commitment to making the oversight process work. As you said in your testimony, if more than policy implementation is going to be effective, we have to have a spirit of cooperation and trust between the two branches. And one of your state-

ments was particularly relevant: This spirit of cooperation can only occur if the Intelligence Committees receive the proper information needed to review and make informed judgments on special activities, while at the same time ensuring that this information is protected from unauthorized disclosure.

I think we all agree with that. The problem is that in the Iran-contra affair, this clearly did not happen. I realize that some Members would dismiss that episode as an aberration, and I hope it is. Nonetheless, it is a real-life case; it happened. And the facts are well known.

The substance is that the President signed a finding authorizing sale of arms to Iran in January, 1986, and never provided notice to the Congress until after the sales were disclosed by a foreign publication, more than 10 months later.

The law as presently written provides that in most cases there will be prior notice, and I am sure you would agree there was no prior notice to the Intelligence Committees or the "Gang of Eight." It then says that essentially in the President's discretion, he may withhold prior notice but must given timely notice to the Intelligence Committees. I will ask you if you think that was timely notice.

In any event, the Justice Department, has said that whether or not it was good policy, it was legal and that the President was within his authority not to provide prior notice and not to provide indeed any notice to the Intelligence Committees or the leadership for more than 10 months after the authorization was signed. For me at least, that poses the major problem.

You have indicated that the President has signed an Executive Order which in essence says that the President voluntarily, at his own discretion, will not do this again. He will in most cases at least provide much more timely notice than that. But that can be withdrawn any time this or another President chooses, and it is something solely within his discretion. From a congressional perspective, where we have certain responsibilities for oversight, this is very problematic.

I would like to get your reaction to that observation, and comment, if you will, on whether or not you believe this was timely notice, and if not, can you give us any better definition of what timely notice would be? We have said in our bill a period of 48 hours. That admittedly is an artificial period. There is no sacrosanct quality to that time. But certainly 10 months is unacceptable to at least a majority of us on this Subcommittee.

And so, therefore, I would appreciate your observation first as to whether or not the President's actions in the Iran arms sales case were consistent with current law. Was it timely notice, and if not, what is your conception of timely notice?

Judge WEBSTER. Mr. Chairman, I won't presume to give the legal opinions. They have been conveyed to you by other means. My own sense is that in that situation, 10 months was not timely. Timely does not have a definition unless you choose to give it one, but I believe timely means as soon as can reasonably be done, given the factual circumstances.

I would like to make clear in answering your question that the CIA can for all circumstances I foresee provide that notice within

48 hours if it comes through us, or make certain that it is made available to the Committee provided that the requisite Committee Members designated to receive that have not put themselves out of the reach of secure communication, given that it is not a mechanical process. It can be done in very short order, and most of the findings are now being delivered well within that 48-hour period.

Historically, it is my understanding that ever since these laws were in place there have been only three occasions when Congress was not given very timely notice of findings, all of which ironically involved Iran. My understanding is that those were the Canadian situation to which reference was made, the planning for the rescue attempt, and more recently, the Iran-contra issue.

My concern with the necessity for putting 48 hours into a statute has to do with a tension that arises whenever you face this kind of confrontational issue. In the past, the Congress and the President have always been able to find some means to accommodate that tension and provide some minor looseness in the joints.

In this case, the President has asserted that he will voluntarily provide that notice within 48 hours except in the very rare circumstance that requires him to delay it. He has also publicly committed himself under the National Decision Directive to reassess that decision, cause it to be reassessed by the National Security Council Planning Group every 10 days. This is one of the approaches that I advocated early on, because it was the making of an initial decision not followed by any review of that decision that caused it to go up on the shelf.

The National Security Planning Group, which is normally chaired by the President and consists of the major Cabinet officers involved with national security—the Secretary of State, the Secretary of Defense, the Attorney General, Secretary of the Treasury, with the Chairman of the Joint Chiefs and Director of Central Intelligence participating as advisers—it would be very difficult in my view for this group to continue to review every 10 days a deferred finding and not quickly come to the conclusion that the extraordinary reasons had expired and to give you proper notice.

There are a few circumstances that I could think of where that potential for exception would be exercised by the President, and survive a 10-day review test again. Nevertheless, it is my view that we don't need to build that kind of tension and raise a constitutional issue if we have a system that works.

And given the very few times that the President has not provided the notice and his additional commitment now to do it within 48 hours or to review it every 10 days with his full National Security Council is a very important and significant public commitment from which I do not see how he could recede.

Chairman McHUGH. Thank you, Judge Webster.

STATEMENT OF THE

DIRECTOR OF CENTRAL INTELLIGENCE

BEFORE THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE

HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1988

MR. CHAIRMAN AND MEMBERS OF THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, I AM PLEASED TO BE HERE TODAY TO SHARE SOME OF MY THOUGHTS ON H.R. 3822, THE INTELLIGENCE OVERSIGHT ACT OF 1987. THE VIEWS EXPRESSED IN THIS STATEMENT ALSO REFLECT THE POSITION OF THE ADMINISTRATION WITH RESPECT TO THE ISSUES MY STATEMENT ADDRESSES. OTHER ADMINISTRATION WITNESSES HAVE DISCUSSED, OR WILL DO SO, THE SIGNIFICANT CONSTITUTIONAL PROBLEMS THIS BILL RAISES AS WELL AS THE IMPACT IT MAY HAVE ON THE ACTIVITIES AND PROGRAMS OF OTHER AGENCIES. I WOULD ALSO DRAW YOUR ATTENTION TO THE ADMINISTRATION'S POSITION, AS CONVEYED TO CONGRESS IN THE PRESIDENT'S LEGISLATIVE MESSAGE LAST MONTH, THAT A BILL WHICH FAILS TO PRESERVE THE FLEXIBILITY AND AUTHORITY THE PRESIDENT NEEDS TO CONDUCT INTELLIGENCE ACTIVITIES EFFECTIVELY WILL NOT BE ACCEPTABLE TO THE PRESIDENT.

THE BILL BEING CONSIDERED BY THE COMMITTEE TODAY IS SIMILAR IN MANY RESPECTS TO A BILL REPORTED OUT OF THE SENATE INTELLIGENCE COMMITTEE LAST MONTH. DURING ITS CONSIDERATION OF THAT BILL, THE SENATE INTELLIGENCE COMMITTEE INVITED ME TO PROVIDE MY VIEWS. I TESTIFIED AT THAT TIME ON TWO ISSUES: WHETHER LEGISLATION WAS NECESSARY; AND WHAT PRACTICAL IMPACT THE SENATE BILL WOULD HAVE ON THE INTELLIGENCE COMMUNITY. I INTEND TO ADDRESS BOTH POINTS IN MY TESTIMONY TODAY ON THE HOUSE BILL.

THE NEED FOR LEGISLATION

AS YOU ARE PROBABLY NOW AWARE, IN MY REMARKS BEFORE THE SENATE INTELLIGENCE COMMITTEE I QUESTIONED THE NEED FOR THIS TYPE OF LEGISLATION. ALTHOUGH THE SENATE INTELLIGENCE COMMITTEE SUBSEQUENTLY DECIDED TO RECOMMEND APPROVAL OF THE LEGISLATION, I STILL STRONGLY DOUBT THAT THIS LEGISLATION IS A NECESSARY RESPONSE TO THE CONCERNS MEMBERS OF CONGRESS HAVE EXPRESSED ABOUT THE OVERSIGHT OF SPECIAL ACTIVITIES. AS YOU KNOW, THE PRESIDENT RECOGNIZED LAST SPRING THAT THERE WAS ROOM FOR IMPROVEMENT IN THE WAY THE TWO BRANCHES WERE MEETING THEIR RESPONSIBILITIES, AND HE TOOK CONCRETE, SUBSTANTIAL STEPS TO ESTABLISH IMPROVED PROCEDURES TO ENSURE THAT CONGRESS IS GIVEN THE OPPORTUNITY TO PLAY ITS APPROPRIATE OVERSIGHT ROLE. THESE NEW PROCEDURES IN THE FORM OF A NEW NATIONAL SECURITY DECISION DIRECTIVE ON SPECIAL ACTIVITIES (NSDD 286), WHICH THIS COMMITTEE HAS HAD FOR REVIEW IN FULL AND MUCH OF WHICH WAS RECENTLY DECLASSIFIED, CLARIFY THE RULES BY WHICH SPECIAL ACTIVITIES ARE REVIEWED, APPROVED, AND REPORTED TO CONGRESS. IN FACT, MANY OF THE PROPOSALS CONTAINED IN H.R. 3822 ARE ALREADY CONTAINED IN NSDD 286. THAT IS NOT SURPRISING, BECAUSE THE PROCEDURES THE PRESIDENT HAS INSTALLED WERE DEVELOPED FOLLOWING CLOSE AND PROLONGED CONSULTATION WITH MEMBERS AND STAFFS OF THE INTELLIGENCE COMMITTEES.

WHILE A PRESIDENTIAL DIRECTIVE IS NOT THE SAME AS LEGISLATION, I AM NOT PERSUADED THAT NEW LEGISLATION AT THIS TIME IS THE BEST WAY TO ADDRESS THE CONCERNS THAT MEMBERS HAVE WITH THE CONGRESSIONAL ROLE REGARDING SPECIAL ACTIVITIES. IN MY VIEW, A LEGISLATIVE REMEDY SHOULD BE EMPLOYED ONLY IF IT IS CLEAR THAT THERE IS A BASIC DEFICIENCY IN THE OVERSIGHT PROCESS. THAT IS DOUBLY THE CASE WHEN THE LEGISLATIVE REMEDY PROPOSED RAISES CONSTITUTIONAL ISSUES WHICH THREATEN TO DIVIDE THE TWO BRANCHES IN AN AREA WHERE EFFECTIVE WORK PLACES A PREMIUM ON COOPERATION.

THE IRAN/CONTRA MATTER, WHILE EXTREMELY SERIOUS, HAS NOT IN MY VIEW DEMONSTRATED THAT THE SYSTEM OF CONGRESSIONAL OVERSIGHT OF THE INTELLIGENCE COMMUNITY ESTABLISHED UNDER CURRENT STATUTES IS SERIOUSLY FLAWED. MANY OF THE PROBLEMS EXPOSED IN CONNECTION WITH THAT UNFORTUNATE PERIOD WERE THE RESULT OF OFFICIALS FAILING TO FOLLOW EXISTING PROCEDURES AND RULES. AS THE COMMITTEE IS AWARE, I HAVE TAKEN STEPS WITHIN THE CIA TO DISCIPLINE THOSE EMPLOYEES WHO FAILED TO FOLLOW CIA PROCEDURES AND MEET THE STANDARDS OF CONDUCT EXPECTED OF CIA EMPLOYEES OR WHO TESTIFIED TO CONGRESS IN A MANNER THAT WAS NOT CANDID OR FORTHCOMING. THOSE ACTIONS, TAKEN IN LIGHT OF THE REQUIREMENTS DEFINED BY CURRENT STATUTE, IN MY VIEW HAVE ADEQUATELY

ADDRESSED THE PROBLEMS WE FOUND. SIMILARLY, TO THE EXTENT THAT THERE WERE ANY PROCEDURAL SHORTCOMINGS DEMONSTRATED BY THE IRAN/CONTRA MATTER, THEY HAVE ALREADY BEEN ADDRESSED BY THE NEW PRESIDENTIAL DIRECTIVE WITHIN THE PRESENT STATUTORY FRAMEWORK.

I WOULD LIKE TO EMPHASIZE THAT ANY LEGISLATION THAT IS ENACTED MUST NOT ADVERSELY AFFECT THE INTELLIGENCE COMMUNITY'S ABILITY TO DO ITS JOB. IN THIS CONNECTION, MR. CHAIRMAN, THE BILL YOU INTRODUCED, AND THE BILL REPORTED OUT OF THE SENATE INTELLIGENCE COMMITTEE, HAVE SOUGHT TO ADDRESS CONSTRUCTIVELY SOME OF THE IMPORTANT CONCERNS I AND OTHER ADMINISTRATION OFFICIALS RAISED BEFORE THE SENATE INTELLIGENCE COMMITTEE WHEN IT CONSIDERED ITS ORIGINAL BILL. THAT BILL, FOR EXAMPLE, RECOGNIZES THE NEED TO REPORT ON SPECIAL ACTIVITIES AND INTELLIGENCE COLLECTION IN A MANNER CONSISTENT WITH DUE REGARD FOR THE PROTECTION OF SENSITIVE INTELLIGENCE SOURCES AND METHODS. I AM ALSO PLEASED THAT NEITHER THE HOUSE NOR THE SENATE BILLS REQUIRE THAT THE FINDING SPECIFY THE IDENTITY OF FOREIGN COUNTRIES ASSISTING THE AGENCY IN THE CONDUCT OF SPECIAL ACTIVITIES. THE PROVISO ON PROTECTION OF SOURCES AND METHODS, AND THE ABILITY TO PROTECT THE IDENTITY OF FOREIGN COUNTRIES ASSISTING US WILL GO A LONG WAY IN ASSURING FRIENDLY SERVICES AND POTENTIAL AGENTS THAT SOURCE IDENTIFYING INFORMATION WILL NOT BE WIDELY DISSEMINATED AND POSSIBLY COMPROMISED.

PRIOR NOTICE OF SPECIAL ACTIVITIES

WHILE THE HOUSE BILL ADDRESSES SEVERAL CONCERNS PREVIOUSLY RAISED IN MY TESTIMONY BEFORE THE SENATE INTELLIGENCE COMMITTEE, THERE ARE FOUR AREAS OF THE BILL THAT ARE TROUBLESOME. THE FIRST AREA OF DIFFICULTY INVOLVES THE PROVISION OF THE BILL THAT REQUIRES NOTIFICATION OF A SPECIAL ACTIVITY TO CONGRESS, WITHOUT EXCEPTION, WITHIN 48 HOURS AFTER THE SIGNING OF A FINDING. LAST SUMMER YOU RECEIVED THE VIEWS OF THE DEPARTMENT OF JUSTICE ABOUT THE CONSTITUTIONALITY OF SUCH A PROVISION, SO I WILL NOT ADDRESS THAT ISSUE HERE. I HAVE TWO CONCERNS ABOUT THIS PROVISION. FIRST, THE FACT THAT THERE IS A SHARP DIFFERENCE OF INTERPRETATION BETWEEN THE VIEW OF THE DEPARTMENT OF JUSTICE AND THE POSITION EMBODIED IN THIS BILL REGARDING THIS PROVISION'S CONSTITUTIONAL VALIDITY WILL PROMOTE TENSION BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES FOR YEARS TO COME. IN THE INTELLIGENCE AREA SUCH TENSION HAS THE POTENTIAL TO DISRUPT THE KIND OF COOPERATION AND TRUST EFFECTIVE NATIONAL POLICY REQUIRES. SECOND, I BELIEVE THAT SOME ALLOWANCE MUST BE MADE FOR THAT RARE CASE WHERE A LIMITED DELAY IN CONGRESSIONAL NOTIFICATION IS CRITICAL TO PRESERVE THE ABSOLUTE SECURITY OF AN OPERATION WHEN, FOR EXAMPLE, LIVES ARE AT STAKE. FURTHERMORE, IT IS WORTHWHILE TO NOTE THAT ANY CONCERNS ABOUT EXCESSIVE DELAY IN CONGRESSIONAL NOTIFICATION OF

A SPECIAL ACTIVITY HAVE ALREADY BEEN ADDRESSED BY NSDD 286. THAT DIRECTIVE REQUIRES THE NATIONAL SECURITY PLANNING GROUP TO REEVALUATE AT LEAST EVERY 10 DAYS A DECISION TO DELAY CONGRESSIONAL NOTIFICATION OF A GIVEN FINDING. THIS WILL ENSURE THAT WHEN A DELAY IN NOTIFICATION IS NECESSARY, THE REASON FOR THAT DECISION WILL BE CONTINUALLY REASSESSED SO THAT THE DELAY WILL BE AS SHORT AS POSSIBLE. I REPEAT, HOWEVER, THAT I CAN THINK OF FEW CIRCUMSTANCES THAT WOULD EVER NECESSITATE SUCH EXTRAORDINARY STEPS.

SPECIAL ACTIVITIES DEFINITION

MY SECOND AREA OF CONCERN IS WITH THE DEFINITION OF "SPECIAL ACTIVITIES." THIS TERM IS USED TO DESCRIBE COVERT ACTION OPERATIONS. THERE CURRENTLY IS NO DEFINITION OF THE TERM "SPECIAL ACTIVITIES" IN THE LAW. THE BILL CREATES A SPECIAL ACTIVITIES DEFINITION, BUT SINGLES OUT AND APPLIES TO CIA A STANDARD THAT IS DIFFERENT FROM THAT APPLIED TO ALL OTHER DEPARTMENTS AND AGENCIES OF THE U.S. GOVERNMENT. FOR CIA, THE BILL DEFINES A SPECIAL ACTIVITY TO COVER ANY OPERATION IN A FOREIGN COUNTRY OTHER THAN ACTIVITIES INTENDED SOLELY FOR OBTAINING NECESSARY INTELLIGENCE. THIS DEFINITION IS THE SAME AS THAT SET FORTH IN THE HUGHES/RYAN AMENDMENT (22 U.S.C §2422) WHICH PROVIDES THE EXISTING STATUTORY FRAMEWORK FOR DETERMINING

WHETHER AN ACTIVITY OF THE CIA IN A FOREIGN COUNTRY REQUIRES A FINDING. BY CONTRAST, FOR ALL OTHER DEPARTMENTS AND AGENCIES, A SPECIAL ACTIVITY IS DESCRIBED AS ANY ACTIVITY CONDUCTED IN SUPPORT OF A NATIONAL FOREIGN POLICY OBJECTIVE ABROAD WHICH IS PLANNED AND EXECUTED SO THAT THE ROLE OF THE U.S. GOVERNMENT IS NOT APPARENT OR ACKNOWLEDGED PUBLICLY, AND FUNCTIONS IN SUPPORT OF SUCH ACTIVITY, BUT DOES NOT INCLUDE ACTIVITIES TO COLLECT NECESSARY INTELLIGENCE, OR DIPLOMATIC ACTIVITIES CARRIED OUT BY THE DEPARTMENT OF STATE OR PERSONS OTHERWISE ACTING PURSUANT TO THE AUTHORITY OF THE PRESIDENT. THIS DEFINITION IS SIMILAR TO THAT SET FORTH IN SECTION 3.4(H) OF EXECUTIVE ORDER 12333, ISSUED BY PRESIDENT REAGAN ON DECEMBER 4, 1981.

I UNDERSTAND THAT IN CRAFTING THESE DEFINITIONS OF SPECIAL ACTIVITIES IN THE BILL, IT WAS NOT YOUR INTENTION, MR. CHAIRMAN, TO CHANGE IN ANY WAY THE CURRENT STANDARD BY WHICH CIA DETERMINES WHETHER TO OBTAIN A FINDING TO AUTHORIZE A PARTICULAR ACTIVITY. UNFORTUNATELY, MR. CHAIRMAN, MY GENERAL COUNSEL, RUSSELL BRUEMMER, WHO IS SEATED BEHIND ME, HAS ADVISED ME THAT THIS DEFINITION, IF ADOPTED, MAY CAUSE CONFUSION ABOUT THE STANDARD USED TO DETERMINE WHETHER A FINDING IS NECESSARY TO AUTHORIZE AN ACTIVITY. WE HAVE ALSO REQUESTED THE DEPARTMENT OF JUSTICE TO EXAMINE THIS ISSUE, AND THEY HAVE REACHED A SIMILAR CONCLUSION.

THE PROPOSED DEFINITION OF SPECIAL ACTIVITIES IN THE BILL COULD ALTER CURRENT PRACTICE. THE EXECUTIVE BRANCH, AS THE COMMITTEE KNOWS, HAS INTERPRETED THE HUGHES/RYAN AMENDMENT IN A MANNER THAT WE BELIEVE IS CONSISTENT WITH ITS LEGISLATIVE INTENT. THE HUGHES/RYAN AMENDMENT, IF GIVEN AN OVERLY RESTRICTIVE INTERPRETATION, WOULD REQUIRE PRESIDENTIAL AUTHORIZATION FOR EVEN THE MOST MINOR OR ROUTINE ACTIVITIES OF THE CIA OVERSEAS IF THEY WERE NOT RELATED SOLELY TO INTELLIGENCE COLLECTION. IN MY JUDGMENT, THAT IS NOT A PROPER INTERPRETATION AND WAS NEVER THE INTENT OF CONGRESS IN ENACTING HUGHES/RYAN.

THE LEGISLATIVE HISTORY TO HUGHES/RYAN AND THE OVERSIGHT ACT OF 1980, CONTEMPLATE A FINDING FOR THOSE ACTIVITIES THAT TRULY CAN BE CONSIDERED COVERT ACTION OPERATIONS. IN THIS CONNECTION, THE DEFINITION OF SPECIAL ACTIVITIES CONTAINED IN THE EXECUTIVE ORDER GIVES MEANING TO THE LANGUAGE AND INTENT OF THE HUGHES/RYAN AMENDMENT IN DETERMINING WHETHER THAT LAW WOULD REQUIRE A FINDING TO AUTHORIZE A PARTICULAR ACTIVITY.

ENACTING H.R. 3822 AS DRAFTED WOULD MAKE IT EXTREMELY DIFFICULT TO CONTINUE SUCH AN INTERPRETATION BECAUSE THE EXECUTIVE ORDER DEFINITION WOULD BY TERMS OF THE STATUTE NOT

APPLY TO CIA. THE CLEAR IMPLICATION WOULD BE THAT CONGRESS INTENDS THAT THE LANGUAGE OF HUGHES/RYAN BE GIVEN A MORE RESTRICTIVE INTERPRETATION.

THIS COULD BE CONSTRUED TO MEAN THE FOLLOWING TYPES OF ACTIVITIES, FOR WHICH FINDINGS ARE NOT OBTAINED TODAY, WOULD HENCEFORTH REQUIRE SPECIFIC PRESIDENTIAL AUTHORIZATION IN EVERY CASE NO MATTER HOW MINOR THE CIA ROLE:

- COUNTERINTELLIGENCE ACTIVITIES.

- SUPPORT GIVEN TO THE DEPARTMENT OF STATE IN THE CONDUCT OF DIPLOMATIC ACTIVITIES. THIS WOULD INCLUDE, FOR EXAMPLE, HAVING THE CHIEF OF STATION PRESENT THE U.S. GOVERNMENT POSITION ON A PARTICULAR MATTER TO THE FOREIGN MINISTER BECAUSE OF HIS CLOSE RELATIONSHIP WITH THE FOREIGN MINISTER, OR ARRANGING FOR SECURE TRANSPORTATION OR A MEETING SITE FOR AN AMBASSADOR OR DIPLOMATIC OFFICIAL.

- MINOR SUPPORT TO THE DEPARTMENT OF DEFENSE OR DEPARTMENT OF STATE IN THE EVACUATION OF AMERICANS FROM FOREIGN COUNTRIES.

- MINOR SUPPORT PROVIDED TO THE DoD AND OTHER AGENCIES THROUGH THE PURCHASE OF EQUIPMENT OR THE PROVISION OF SERVICES UNDER THE ECONOMY ACT.

IF WE ARE IN AGREEMENT NOT TO ALTER THE CURRENT PRACTICE WITHIN CIA ON WHETHER TO OBTAIN A PRESIDENTIAL FINDING TO GOVERN A PARTICULAR ACTIVITY, I WOULD URGE THE COMMITTEE TO MODIFY THE DEFINITION OF SPECIAL ACTIVITIES CONTAINED IN THE BILL. ONE APPROACH WOULD BE TO REPEAL THE HUGHES/RYAN DEFINITION AND USE THE EXECUTIVE ORDER DEFINITION OF SPECIAL ACTIVITIES TO COVER EVERY DEPARTMENT OR AGENCY, INCLUDING CIA. THERE ARE OTHER POSSIBLE WAYS TO RESOLVE OUR CONCERN, AND I HAVE INSTRUCTED MY STAFF TO WORK WITH THE COMMITTEE TO COME UP WITH MUTUALLY ACCEPTABLE LANGUAGE. THE KEY, AGAIN, I THINK WE CAN AGREE, IS FORMULATING LANGUAGE THAT WILL MAINTAIN THE STATUS QUO. I MUST ADD AS A FINAL NOTE, MOREOVER, THAT THE DEFINITION PROPOSED IN THE BILL TODAY, AS WELL AS THAT IN THE SENATE BILL, ARE DIFFERENT FROM THAT WHICH I ADDRESSED WHEN I TESTIFIED BEFORE THE SENATE INTELLIGENCE COMMITTEE. FOR THAT REASON, I DID NOT HAVE THE OPPORTUNITY TO EXPRESS THESE CONCERNS AT THE TIME OF MY PREVIOUS TESTIMONY.

FUNDING OF INTELLIGENCE ACTIVITIES

MY THIRD AREA OF SPECIFIC CONCERN IS WITH SECTION 4 OF THE BILL, WHICH AMENDS SECTION 502 OF THE NATIONAL SECURITY ACT OF 1947. SECTION 502(A) OF THE NATIONAL SECURITY ACT LIMITS THE USE OF APPROPRIATED FUNDS. CURRENTLY, APPROPRIATED FUNDS AVAILABLE TO AN INTELLIGENCE AGENCY MAY BE SPENT ONLY IF (1) FUNDING FOR THE ACTIVITY HAS BEEN AUTHORIZED BY CONGRESS; (2) IN THE CASE OF RELEASE FROM THE RESERVE FOR CONTINGENCIES, NOTICE OF THE INTENT TO RELEASE SUCH FUNDS IS GIVEN TO THE INTELLIGENCE AND APPROPRIATIONS COMMITTEES; OR (3) IN THE CASE OF REPROGRAMMINGS OR TRANSFERS, THE ACTIVITY TO BE FUNDED IS A HIGHER PRIORITY INTELLIGENCE ACTIVITY, THE NEED FOR FUNDS FOR SUCH ACTIVITY IS BASED ON UNFORSEEN REQUIREMENTS, AND NOTICE IS GIVEN TO THE INTELLIGENCE AND APPROPRIATION COMMITTEES OF THE INTENT TO MAKE FUNDS AVAILABLE FOR THE ACTIVITY. THE BILL WOULD AMEND SECTION 502(A) OF THE NATIONAL SECURITY ACT TO RESTRICT EXPENDITURE OF ALL FUNDS, AND NOT JUST APPROPRIATED FUNDS. I AM CONCERNED THAT THIS AMENDMENT WOULD JEOPARDIZE OUR AUTHORITY TO CONDUCT CERTAIN ACTIVITIES WHICH CONGRESS HAS SUPPORTED IN THE PAST. SPECIFICALLY, THE AMENDMENT WOULD RESTRICT OUR ABILITY TO USE INCOME GENERATED BY PROPRIETARIES FOR CERTAIN EXPENSES NECESSARY TO MAKE THE PROPRIETARY APPEAR AS A COMMERCIAL ENTITY. THIS WOULD MAKE IT EXTREMELY DIFFICULT

TO OPERATE OUR PROPRIETARIES IN A SECURE MANNER. THE AMENDMENT WOULD ALSO ELIMINATE THE AUTHORITY OF SEVERAL AGENCIES IN THE INTELLIGENCE COMMUNITY TO MAKE CERTAIN ACCOMMODATION PURCHASES FOR OTHER COUNTRIES. FINALLY, THE AMENDMENT WOULD ELIMINATE OUR AUTHORITY TO RECEIVE FUNDS DONATED BY OTHER COUNTRIES TO FINANCE SPECIAL ACTIVITIES FOR WHICH A FINDING HAS BEEN OBTAINED. I SHOULD EMPHASIZE THAT I HAVE NO OBJECTION TO KEEPING THE COMMITTEE GENERALLY INFORMED OF OUR ACTIVITIES IN THESE THREE AREAS. HOWEVER, THERE HAS BEEN NO STATED RATIONALE FOR THE NEED FOR THIS CHANGE, AND IN MY VIEW ADOPTION OF THIS PROVISION WOULD HAVE A VERY SERIOUS AND DETRIMENTAL EFFECT ON OUR CONTINUING ABILITY TO CONDUCT SPECIAL ACTIVITIES, LIAISON ACTIVITIES WITH FOREIGN GOVERNMENTS, AND OPERATIONS OF PROPRIETARIES.

TRANSFER OF DEFENSE ARTICLES AND SERVICES

THE FOURTH AREA OF CONCERN IS WITH THE PROVISION OF THE BILL AMENDING SECTION 503 OF THE NATIONAL SECURITY ACT, WHICH CURRENTLY PROVIDES FOR THE REPORTING TO THE INTELLIGENCE COMMITTEES OF THE TRANSFER OF DEFENSE ARTICLES OR SERVICES IN EXCESS OF $1,000,000 BY AN INTELLIGENCE AGENCY. THE SECTION WOULD BE AMENDED TO REQUIRE THE REPORTING OF DEFENSE ARTICLES OR SERVICES WHICH ARE INDIVIDUALLY WORTH LESS THAN $1,000,000 BUT WHICH AGGREGATE TO A FIGURE MORE THAN $1,000,000. I DO NOT

BELIEVE IT IS NECECESSARY TO CHANGE THE CURRENT STANDARD FOR REPORTING THE TRANSFER OF DEFENSE ARTICLES AND SERVICES. FURTHERMORE, I NOTE THAT THE PROVISION DOES NOT PROVIDE STANDARDS TO DETERMINE WHEN DEFENSE ARTICLES OR SERVICES SHOULD BE AGGREGATED. ACCORDINGLY, IF THIS PROVISION REMAINS IN THE BILL IN ITS CURRENT FORM, I WOULD URGE THE COMMITTEE TO CONSIDER STATUTORY LANGUAGE OR LEGISLATIVE HISTORY THAT WOULD PROVIDE CLEAR GUIDANCE ON HOW THE INTELLIGENCE COMMUNITY SHOULD AGGREGATE DEFENSE ARTICLES OR SERVICES FOR PURPOSES OF REPORTING TO THE INTELLIGENCE COMMITTEES.

THERE ALSO ARE SEVERAL OTHER PROVISIONS IN THE BILL THAT, WHILE NOT AS WORRISOME AS THE ONES I HAVE TOUCHED ON, WOULD AS WRITTEN POSE PROBLEMS FOR THE INTELLIGENCE COMMUNITY. MY STAFF HAS ALREADY HAD USEFUL DISCUSSIONS WITH THE COMMITTEE STAFF ON THESE PROVISIONS.

IN CLOSING, I WOULD LIKE TO REEMPHASIZE TO EACH OF YOU MY PERSONAL COMMITMENT TO MAKING THE OVERSIGHT PROCESS WORK. IT HAS ALWAYS BEEN CLEAR, AND RECENT EXPERIENCE HAS AGAIN DEMONSTRATED, THAT THE IMPLEMENTATION OF THE FOREIGN POLICY OF OUR GOVERNMENT, INCLUDING SPECIAL ACTIVITIES, CAN ONLY BE SUCCESSFUL WHEN THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT WORK TOGETHER IN AN ATMOSPHERE OF MUTUAL RESPECT AND

TRUST. THIS SPIRIT OF COOPERATION CAN ONLY OCCUR IF THE INTELLIGENCE COMMITTEES RECEIVE THE APPROPRIATE INFORMATION NEEDED TO REVIEW AND MAKE INFORMED JUDGMENTS ON SPECIAL ACTIVITIES, WHILE AT THE SAME TIME ENSURING THAT THIS INFORMATION IS PROTECTED FROM UNAUTHORIZED DISCLOSURE. THE LAW SHOULD REFLECT NOT ONLY THE NEED FOR COOPERATION, BUT ALSO THE PRESIDENT'S RESPONSIBILITY FOR THE CONDUCT AND MANAGEMENT OF OUR INTELLIGENCE AND THE IMPORTANCE TO THE NATION OF ENSURING THAT THE PRESIDENT HAS THE NECESSARY FLEXIBILITY AND AUTHORITY TO EMPLOY OUR INTELLIGENCE CAPABILITY EFFECTIVELY.

AS I HAVE NOTED, THE PRESIDENT HAS TAKEN CORRECTIVE STEPS TO IMPROVE THE OVERSIGHT SYSTEM THROUGH A PRESIDENTIAL DIRECTIVE. AT CIA, I HAVE APPROVED A NUMBER OF MEASURES WHICH WILL HELP TO PREVENT A REPETITION OF THE SHORTCOMINGS IN THE AGENCY'S PERFORMANCE IN THE IRAN/CONTRA MATTER. IN SHORT, SIGNIFICANT CHANGES HAVE BEEN MADE. I WOULD RESPECTFULLY SUBMIT THAT THEY SHOULD BE GIVEN A CHANCE TO WORK. I AM CONVINCED THAT THE CURRENT FRAMEWORK, AND NOT NEW LAWS, REPRESENTS THE MOST APPROPRIATE AND EFFECTIVE MEANS TO ACHIEVE OUR SHARED COMMITMENT TO HAVE CONGRESS PLAY AN ACTIVE, EFFECTIVE ROLE IN THE OVERSIGHT OF UNITED STATES INTELLIGENCE ACTIVITIES.

THIS CONCLUDES MY STATEMENT. I AM PREPARED TO ANSWER WHATEVER QUESTIONS YOU MAY HAVE ON OUR POSITION ON THIS BILL.

Chairman McHUGH. Mr. Livingston.

Mr. LIVINGSTON. Thank you, Mr. Chairman.

If H.R. 3822 were adopted, Judge Webster, do you see any circumstances under which it might be unlikely that the CIA might take action to help rescue people or save the lives of threatened individuals or protect the security of the U.S. if they were bound by the sweeping provisions of this particular bill?

Judge WEBSTER. I think the Central Intelligence Agency would undertake to do whatever the President would authorize us to do on a finding made after a presentation to the National Security Council. The more practical questions would come up in terms of whether or not we could do this effectively and successfully consistent with commitments that we might have to others.

One small example—the other intelligence agencies of friendly countries with whom we work are far more sensitive to the matter of dissemination of information affecting their assets and their agents acting abroad than we have seemed to appear in the past. If, for example, we were to receive—they were to provide us with information, and I use this purely hypothetically, the location of a hostage somewhere in the world, but would want the opportunity to extradite their own asset from the scene, which normally takes place to protect that asset, and declined to give us the information without assurances that that information would go no further, we would be put in a very heavy dilemma. We could not make that commitment to our foreign service if we were compelled in that unusual circumstance to tell the Congress.

I use that as a kind of example to show that it is possible to come up with something that would present us with very real problems. But we would not back away from doing our job if we could do it and protect the lives of our sources.

Mr. LIVINGSTON. But in fact, this legislation might inhibit you from doing your job?

Judge WEBSTER. I could see circumstances under which it would raise serious questions of whether we could get and utilize the information, if there were not a possibility—we have been successful in backing some of our friends off of their positions on disclosure, but we need that little bit of breathing room. The President needs it.

Mr. LIVINGSTON. You mentioned the provision in the bill requiring all expenditures of funds by the CIA to be both authorized and appropriated. Can you tell me whether that would go too far to include your jurisdiction or ability to expend funds coming from third countries, for example?

Judge WEBSTER. That is my understanding, that the definition is more restrictive than the one we currently operate under and I would hope Congress would address it, because Congress has supported that activity in the past.

Mr. LIVINGSTON. So in fact if a country wanted to pay for activities which would suppress terrorism or activities threatening both their country and ours, and they were prepared to foot the bill, we would practically have to go through an Act of Congress to accept that money, is that correct?

Judge WEBSTER. With the language in the current bill I think you would have to do something very special. It has been my expe-

rience that again the countries which assist us in this way are often very sensitive about having their assistance publicly advertised. We have been very careful to keep the committees fully informed of the fact that foreign countries have given us assistance, and it is not an attempt to have foreign countries do something inconsistent with the foreign policy of this country, but one where their assistance has been vital and appreciated.

Mr. LIVINGSTON. You touched on changing the definition of special activity. I understood what you meant was that by the changing of that definition in this bill that it ultimately would require—why don't you explain it for me?

Judge WEBSTER. I listed a number of circumstances in my statement that I think would be adversely affected by making the distinction between CIA special activities under the Hughes-Ryan amendment and other agency special activities which would be defined consistent with the existing executive order 12333.

One of the most important of these is counterintelligence activities. Surely Congress did not intend that these activities require special findings in order to keep track of the hostile intelligence officers operating around the world targeted at us and at our agencies of government. We give considerable support to our State Department. The contacts that we make, the liaison efforts developed through the years, have been extraordinarily useful to the State Department.

The CIA does not have a foreign policy, a separate policy, it is implementing with the knowledge and approval of the State Department the foreign policy of this country.

We do other things—a number of recent elections where there was some possibility of violence in another country, preparations were underway to consider whether the CIA could assist US citizens in getting out of that country. Certainly Congress didn't intend that type of activity——

Mr. LIVINGSTON. My time has expired, but isn't it fair to say that if this bill were passed that your flexibility to carry out the operations in the interest of American citizens and in the security interests of the U.S. would be gravely curtailed?

Judge WEBSTER. I think that is correct. Particularly with respect to the last three of the four issues that I mentioned, I think that those need adjusting.

The other one is more of a judgment call in terms of our ability and the frequency with which it would be implicated. But the last three, certainly that is true.

Mr. LIVINGSTON. Thank you.

Chairman MCHUGH. Mr. Stokes.

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

Judge Webster, you mentioned in your testimony at page 4 that you have taken steps within the CIA to discipline those employees who fail to follow CIA procedures and meet the standards of conduct expected of CIA employees who have testified to Congress in a manner that is not forthcoming and candid. You have done that and I want to take this opportunity to publicly commend you for the forthright action you have taken with reference to instituting procedures to insure that CIA employees will comply with the law and that in their testimony before the Congress they will be forth-

right and candid. You dealt adequately, I think, with those who have not done so in the past. And so you are commended for that.

The problem that we see here is that, unfortunately, you are not speaking for the entire Administration. You would have no control whatsoever over people like Lieutenant Colonel Oliver North or Admiral Poindexter, people who arrogated unto themselves powers not constitutionally given to them.

So, there is a very real problem here, notwithstanding the confidence, faith and trust we place in a person of your high integrity and capability.

A part of the problem here is when you speak of placing a premium on cooperation. The essence of our foreign policy initiatives being able to work under our intelligence laws is cooperation between the Administrative and the Congressional Branches.

But what we have seen is a breakdown of that policy. I do not think the Iran-contra situation would have occurred had the President just complied with the law, had he given the Congress notice as we have been given notice of so many other covert actions.

You speak, in fact, of the new Presidential Directive. There are a couple of things I think we ought to talk about in conjunction with that. That new Presidential Directive was the response of the President to the Iran-contra hearings conducted by the House and Senate. In fact, it came about as a result of an initiative through Senator Boren and contact with the White House.

There were many meetings held. In fact, we, our committee, also attended a couple of those meetings. Finally, the President worked out, executed, and issued the Directive.

I served on the Iran-Contra Committee. During the course of those hearings, we found a covert action policy approval and coordination procedure, National Service NSDD 159, in which the President had made his findings and talked of what he would do with reference to complying with the law.

The problem was that the President did not follow his own NSDD. I don't know how you would avoid that situation now with this new Presidential finding. Obviously, the Senate Intelligence Committee did not have much faith in it, because it reported S. 1721 in spite of the Directive having been issued.

Could you respond to that for us?

Judge WEBSTER. Well, I see my responsibility to make sure that that finding is communicated to the Congress within 48 hours, as the NSDD currently requires. It would take a specific order by the President to in any way defer my getting that information to you within 48 hours, and it would—I would personally, as well as other members who have that responsibility, require the National Security Planning Group to reassess that decision every 10 days.

I agree with the chairman that there were many things that happened in Iran-contra that would not have happened had existing procedures in place been followed. The most egregious, of course, was allowing the process to be dictated by—in an operational way by the National Security Council, whose employees had no real understanding or experience with the requirements of notification and cooperation with the Congressional oversight committees.

I think it is very clear that that must never happen again. The commitments are publicly made that there will be no operational

responsibility out of the National Security Council; and the only other assurance that I can give you is that I personally—and I believe it is the requirement of every subsequent Director of Central Intelligence to see that those procedures are followed.

Mr. STOKES. Thank you very much, Judge Webster.

Chairman MCHUGH. Mr. Shuster?

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

We certainly appreciate your testimony today, Judge Webster. One of my deep concerns about this legislation is that I think we have to put it in the context of the kind of world in which we live, which is a very dangerous world in which there are many governments and many people who would like to put the United States and American citizens in harm's way.

I have read this—tried to read this proposed legislation through the eyes of intelligence directors, your counterparts, from friendly countries. I would be interested in your observation, your views on how you think your counterparts in foreign governments, friendly foreign governments, would interpret this, and what changes, if any, would they make in their dealing with the United States and with you?

Judge WEBSTER. I have already had some experience with that. When the initial discussions that Chairman Stokes referred to took place between Senator Boren and others in an effort to work out an accommodation with the President, the President wrote a letter to the Congress expressing his intentions to notify the Congress of various things.

That letter had been put together on fairly short notice. We had not had an opportunity to point out what we expected would be the concerns of other intelligence services. They really lined up, some in writing, delivering written letters, messages from Chiefs of Intelligence to me, wanting to know precisely what that meant in terms of our current relationship and expressing their alarm and concern that the sacrosanct third agency rule, which is understood throughout the intelligence world, might be breached in the process.

I think that the National Security Decision Directive appropriately deals with that issue and the language, the current language of the bill that you are considering minimizes that risk somewhat.

From language that was originally suggested, I believe, in the Senate bill. But there is anxiety whenever another government believes that we lack the capacity to protect as to their information, their information, from becoming a part of the general, widely disseminated intelligence information. We have that obligation not to pass it along without their expressed approval.

So, I think it does present some problems for us, but they have been largely minimized by the negotiations between our representatives and staff.

Mr. SHUSTER. Is it fair to say that we are significantly dependent upon other intelligence agencies of other countries for information, that we rely on them on an ongoing basis? As they rely on us?

Judge WEBSTER. That is certainly true. If it were not for the fact that they are very significantly dependent on us for places—information for places in the world where they have no coverage, I suspect the kinds of things we do in terms of spreading information around would cause them to break off relations with us entirely.

We take that view with intelligence agencies with whom we work. We do, in fact—without getting into anything in a public hearing—I recently had to take steps where I thought information that was of a very sensitive nature had not been properly handled by people to whom it was properly disseminated, but got out.

It is a sensitive area. We need to build the assurance of the capacity to protect information.

Mr. SHUSTER. In our general provisions, we say that the committees are to be kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activities.

Then we modify that to some extent over on page 6 by saying to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods.

The question of sources and methods. Is this modifying language clear enough to give you what you need to withhold sources and methods when you feel lives may be jeopardized or other intelligence activities may be adversely affected, or is this language too vague?

Judge WEBSTER. Well, I would rather not be the last word on the technical aspects of that language. It is the kind of language we have worked with in the past, and it is the kind of language that is sort of the counterpart to giving the President a little bit of breathing room.

We will try to keep Congress fully informed, recognizing that in the area of sources and methods, we need extra protection, and the Congressional committees, I think, have in most instances been very cooperative with us in not pressing for that kind of information.

Mr. SHUSTER. Thank you very much.

Chairman MCHUGH. Mr. Hyde?

Mr. HYDE. Thank you, Mr. Chairman.

Good morning, Judge Webster.

Judge WEBSTER. Good morning, Mr. Hyde.

Mr. HYDE. It just seems to me this legislation is a response to the old adage, "Don't just stand there, do something, even if it is wrong." We had a situation involving Iran-contra where the laws may well have been violated, bent, ignored, or circumvented. So, instead of focusing on the people whose misfeasance, or malfeasance contributed to that situation, we rushed to change the law, as though it were inadequate.

Now, overhanging this whole issue, it seems to me, is something we do not talk about in this committee. That is, the total criminal, obscene inability of Congress and government people in general to keep a secret.

If sensitive information cannot be held closely, cannot be kept confidential, our country has a real problem. We don't address that here. In fact, I do not know of any real serious legislative efforts on the part of the Majority to address that problem. Since I have been on the committee, I can think of three major leaks that occurred to the press that involved people's lives and sensitive operations.

One most recently, Judge Webster, involved a defector; and information was developed about him that was so closely held by this

committee that I did not know about it, as the ranking Republican. I heard about it from a Washington Post newspaper reporter who asked me some questions about it. I had never heard about it before.

It is damaging to our national security, to our entire counterintelligence operation. I guess we are conducting an investigation of that, but I will not hold my breath waiting for any results, because those things just never seem to produce any results.

We also have the phenomenon of Members of Congress believing it is their duty to leak information if they do not agree with the policy. I have citations on that. So, I guess until we deal with the problem of keeping senstitive information confidential, you are always going to have poor intelligence people and government people who have to communicate wondering whether they will be signing the death warrants of people.

Once it gets to us, it gets in the paper. I don't want to give a commercial for Woodward's book, but it seems to me if you read that, you ought to wonder whether we are equipped to survive in the world today with information of a highly sensitive nature just common knowledge on the street.

The Canadian cooperation in Iran, where for three months, Congress was not notified simply because the Canadians said, "Don't you do it, our people's lives are at stake. We will help you get your people out of Iran. They can stay at our Embassy. We will cooperate with the passports and everything, but don't tell Congress, because our people's lives are at stake."

You just could not enlist their cooperation if this bill was the law; is that correct?

Judge WEBSTER. They would not, in a situation such as you described, they might very well decline to supply the information or to take the action that exposed their own people to risk if we could not assure them that it would go no further.

It is not a reflection on the Congress as it is an effort to limit to absolute need-to-know and the fewest number of people as a process of protecting lives. I think Congress—other countries and—I must say in candor, Canada faces similar problems in current pending legislation. So, we might be reluctant to give them some information now if they could not give us the appropriate assurances that would protect our people.

Mr. HYDE. In other words, six lives would probably not have been saved at least in the way they were and gotten out of that country, because you would not guarantee—you could not live up to the conditions set by Canada, namely don't tell anybody, if this were the law; is that correct?

Judge WEBSTER. Well, I think that is correct, Mr. Hyde.

Mr. HYDE. Okay. Do you live for the day Congress will address the problem of leaks and how we deal with them? Or do you think that is too Utopian? I do, I must say.

Judge WEBSTER. It is a problem I have been observing for about 10 years. I have no quick fix for it, other than a recognition that the possibility of public dissemination grows exponentially with the number of people in government who have the information.

Mr. HYDE. It would be reassuring, though, if we address the problem, would it not?

Judge WEBSTER. It would be very helpful if everyone involved took it seriously and took serious action against known leakers.

Mr. HYDE. Thank you.

Chairman MCHUGH. Mr. McEwen?

Mr. MCEWEN. Thank you, Mr. Chairman.

Judge Webster, thank you for your excellent testimony. I believe most of my questions have been answered. Something I would like for you to address, if you could, in particular, is as we are considering this legislation, an additional recommendation is being made. Keeping in mind, as you know, people who hold information on covert activities have a virtual veto power over the success of those covert operations.

If they chose in many instances to use that information improperly, they can subvert the operation. We are going to be advised after your testimony, that is given a proposal, that the legislation should also include a provision that any government officer or employee who knowingly or willingly conspired to violate the prohibition of expenditure of funds for covert activity would face criminal penalties.

In other words, if the President did not notify in what was determined to be a timely manner, the 48 hours, then anyone in the government could be held criminally liable, and thereby a sense of responsibility to take self-protective action on their own would be created.

If the 48-hour notification isn't sufficiently troublesome, what would be your reaction to this?

Judge WEBSTER. I want to be sure that I understand the provision. Would you mind going through it again? If it becomes a criminal offense to conspire to use——

Mr. MCEWEN. It says not only must the President notify within 48 hours, but if he doesn't and proceeds to implement a covert activity, any government official—let me say any government officer or employee who then knowingly and willfully conspires to violate that prohibition against the expenditure of funds would face criminal penalties.

In other words, a carrot to the bureaucracy to say if you feel that the President has not acted properly, that in your interests, you had better do something? Any reaction to that at all?

Judge WEBSTER. You are really catching me cold on it. I would like to think through the implications. I have far less concern about the people who are charged with knowledge of the failure of compliance than someone who has been given an order out in the field to carry something out that he has every right to assume has been properly authorized.

I certainly would not want to hold that kind of person accountable for doing something that would otherwise be entirely reasonable. If you are suggesting penalties for people who violate laws, I think there is a lot to be said for putting penalties on prohibitions. Prohibitions without penalties are not always very useful.

Mr. MCEWEN. Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Richardson?

Mr. RICHARDSON. Thank you very much.

Judge Webster, first of all, I want to thank you for a series of excellent briefings I received at the Agency the other day. I think

you have an excellent staff. I appreciate the work you did to see that as a new Member, I got that exposure to the Agency.

Let me just put forth a little aside before I ask you a couple of questions. My colleague from Illinois mentioned the issue of leaks in the Congress. I think many of us would be willing to join in addressing the issue of leaks with a recognition and understanding that leaks come from every agency of the government.

I think the gentleman from Illinois mentioned the book, "Veil." If he reads that book once again, one of the major sources of Bob Woodward were agency officials, including the head of the CIA.

Mr. HYDE. That is a given. We all know that.

Mr. RICHARDSON. Yes. I just want to emphasize that I think leaks have been a problem, but they come from everybody. They come from the Executive Branch. As long as we have that understanding.

Judge, I guess my question on the 48-hour issue is this: Apart from the constitutional issue of notification, that obviously has to be formulated in the White House legal office, you mentioned this Canadian example. But are there any other sufficient reasons why this provision, this 48-hour provision messes up our intelligence operations?

What is the disadvantage of having this provision in pure, stark intelligence terms?

Judge WEBSTER. Well, I have given you the one example that comes to mind when the President's options are limited because of the involvement of necessary assistance from outside the United States, where the authorities of that country will not allow the information to be used other than inside the intelligence community.

Beyond that, I am frank to admit that my mind does not raise many hypothetical situations; and I feel a little better about it, because as I said earlier, there have only been three situations in the history of this legislation where information was withheld.

So, it is not mechanically a tough thing to handle. We can do the 48 hours. I would expect that we would do the 48 hours—I really would be surprised if, in my tenure, we ever had a situation where the President would invoke that privilege, executive privilege; but it also seems to me that it forecloses the possibility of that situation at a time when we would most need it, when lives would be involved. As long as the President has made the accommodation with Congress to publicly acknowledge his commitment to deliver and to reassess any decision not to deliver.

Mr. RICHARDSON. Then, Judge, I take it that you prefer that the definition of timely notification not be changed? I guess my question to that is how would you at this juncture define "timely"?

Judge WEBSTER. I view "timely" to mean as soon as you can reasonably get the information to the Congress. I either ought to decide that it is too sensitive to further disseminate, in which case the President has to make that finding in writing, order in writing, which is reviewed in ten days, or if he does not do that, everything should get up here as quickly as possible, considering that you would view 48 hours and he views 48 hours as leaving enough room for us to find you, get all the documentation, information, and so on to you. Less than 48 hours in almost every situation.

Mr. RICHARDSON. In the "extraordinary cases" language, you really are talking about only eight senior Members of Congress that are notified. I attended a briefing the other day where there was a small amount—there wasn't an extraordinary case situation.

But there were Department of Defense, State liaison people, there were 20 people in the room. I guess in the face of such numbers, is it realistic to contend that telling eight congressional leaders under that Senate bill is enough of a risk to override the Congress' prerogatives in this area?

I just fail to see how that——

Judge WEBSTER. I understand your position. As I repeatedly said, I can foresee very few circumstances where—scenarios where the risk would warrant it. The one that comes repeatedly to mind to me is a situation in which the information was not generated from within our own community, but was offered to us on a commitment not to further disseminate that kind of information because of the life-threatening characteristics of the information, as it relates to the citizens or agents of the country providing us with the information.

Mr. RICHARDSON. Judge, my time is up. I just want to point out the only time when prior notification was not given was this recent decision which was opposed by the Secretary of State, the Secretary of Defense, was done by mid-level NSC personnel, and was not properly staffed out even in the agency. I do think that this legislation on the early face of it is needed.

I thank you, Judge. Once again, I thank you for what appears to be very high morale at the agency and very fine officers.

Judge WEBSTER. Thank you.

Chairman MCHUGH. Mr. Glickman.

Mr. GLICKMAN. Thank you, Mr. Chairman.

I, too, as a new member want to thank you and the agency for your help. Your number-two man is a contemporary of mine from my home town. His brother is the principal of the high school I went to. So I have a stake in his success, as well as your success.

I was also pleased with your nomination. I think the agency has become too politicized, and you bring a depoliticized aura to this agency. I would like to see it so we have a CIA Director that we all could trust that could retain that position in successive administrations, kind of like we did a little bit with the FBI.

Let me pursue a different line of questioning. It looks to me like covert activities on occasion are necessary. But we may be taking the focus away from the gathering of information, which is the most significant part of your job, by what I consider to be a rather free-wheeling and routine reliance on covert activities.

Knowledge is power. If we overly focus on things other than gathering information, we are not as smart as the their side, and, therefore, we do not know what kind of foreign policy actions to take, and I guess what concerns me about all of this is we are jeopardizing the chief function of your agency: the collection of information.

I would like to ask you as Director of this agency: what is your personal philosophy on the use of covert actions vis-a-vis gathering of information, and how do you see your personal role in this proc-

ess? Are you just carrying out whatever the President and the National Security Advisor want to do?

Do you see yourself as kind of an independent operator, not only doing what is right within the law, but making an input to the process itself? Notwithstanding what we do in the law right here, you guys are going to be chiefly responsible for deciding if these things are carried out or not.

I do not want to see a CIA so focused on intervention and unfocused on intelligence and collection of information.

Judge WEBSTER. I will be glad to respond to that question. I think it is a very important one.

I think it is somewhat ironic that we are looking—we are discussing the tension between the executive and the congressional branches over the issue of 48-hour notification in covert action where, at least I have said, I have difficulty in seeing any kinds of situations where 48 hours cannot be complied with, but I would understand why the President wants to have that room.

Then we look and say, okay, we are talking about almost a nonexistent problem as it applies to covert action. We look at covert action and we find that it represents about three percent of the total resources of the Central Intelligence Agency.

So it is a very small activity in relation to what we do. Yet if we do not do it well, or if we do it other than by prescribed procedures, it becomes a matter of enormous, and legitimately so, public interest.

So our main mission is to obtain information, as you point out, which will be useful in the form in which it is printed—I am talking about analytical capability—to the policy makers of this country to make wise decision.

That information is shared full with the oversight committees as well because they have a role in policy making efforts.

But I do not think that we are ever going to be in a position where this country can sacrifice its ability to engage in covert action where appropriate. Covert action is not a separate thing, as I see it.

I think I am responding to your question. It is to implement the foreign policy of this country. It usually comes as a result of the State Department or others with the State Department asking us to deal with a problem that cannot be handled through conventional diplomatic means or diplomatic personnel, and where the United States would want, if possible, to be in a position not to acknowledge its role.

Again, there are many reasons why this can happen and does happen, not the least of which is that the country with whom we are dealing or assisting may not wish our role known, and there are other diplomatic reasons for not wanting it to be publicly known.

So they come to the one agency with worldwide bases and connections capable of engaging in covert action.

Most of that action is in the effort of getting a United States message across through various forms of communication. It does have some paramilitary capability to assist organizations, either existing governments that we favor or insurgencies that are fighting for democracy, to have a capability to succeed.

So when we are asked to do that, we comply, but in devising a covert action program, and understanding the procedures that I am satisfied are fully now in place, we review those scenarios internally through the different directorates, and then it comes to a cross directorate organization called the CARG, the Covert Action Review Group, in which all considerations are tested against such questions as is this consistent with the overt foreign policy of this country?

That would have wiped out the Iran-contra activity had we been doing it instead of the National Security Council.

We ask ourselves is it consistent as we understand it with American values?

If it becomes public, as so many of these do, will it make sense to the American people?

Having crossed all of those bridges, we take the program to the National Security Council, where it is fully vetted with the cabinet officers involved sitting on the National Security Planning Group.

Most often, I think every time since I have been doing this, chaired by the President. Everyone has an opportunity to have their say before the presidential finding approving the covert action is made.

So, truly, it is not something the CIA goes off and does by itself. It is something that has been fully thought through and authorized at the highest levels of our government with the knowledge of the President.

Those are pretty good protections for the future, and to the three percent of our funds that are used for this purpose, the very limited possibility that Congress will be deferred in knowing, I think we are on the right track.

Mr. GLICKMAN. Thank you. My time has expired.

Chairman MCHUGH. Thank you, Mr. Glickman.

At this point, we will see if any other Members have questions. I just have one or two.

Judge Webster, we have understandably focused on the 48-hour provision which is, I think, the most controversial of the proposals, but in doing so, I want to be clear that we are all in agreement as to what the current law is.

The general rule, as I understand it, is that in virtually all cases, the Administration will notify the Intelligence Committees at the beginning before a covert action commences. That is, the prior notification is the general rule. You have no disagreement with that, do you?

Judge WEBSTER. No, I don't.

Chairman MCHUGH. And the reason for that—I appreciate that answer—the reason for that is that not only does the Congress have the right to know about fundamental policy decisions, but that the President might just benefit from the feedback he gets from members of the Intelligence Committees or the leadership.

As other Members have said before, if the President had shared with us the idea of selling arms to Iran, I am sure Members on both sides of the aisle would have raised strong objections. It is possible the President could have been dissuaded from what I think most of us now agree was a mistake.

You have very honestly, I think, plumbed your line to determine if there are particular cases where 48 hours would be a problem for notification after an action commenced. And you have come up with at least one situation where I think all of us would agree we don't want to impede the intelligence community, and thus, I hope in drafting this legislation, working with your people, we can avoid that.

Contrast that with our concern of what we think—many of us think at least is not a trivial problem for Congress. That is that on a fundamental policy decision for the United States of America, no one in the Congress was told for a long period of time.

Now, our problem is not just that that happened in the Iran case, which it did, but that the Justice Department and as I understand it, the Administration generally, takes the position it is legally okay. I understand and appreciate the fact that you say we will not do that, but the position of the Administration is that "we have the right to do it. It is our constitutional lawful prerogative to withhold this information."

That is what concerns me. Let me try to explore briefly the constitutional issue. I know you prefer to defer that to the lawyers, although you are a distinguished judge.

I presume you would agree that Congress has the lawful authority to provide no funds for CIA activities?

Judge WEBSTER. That is correct. That is an admission against interest, but it is correct.

Chairman MCHUGH. There is nobody on this committee that would do that, but we are talking here about lawful authority.

Therefore, I assume it follows that we would have the lawful authority to provide no funds for your contingency fund and, therefore, for covert activity?

Judge WEBSTER. That is also correct.

Chairman MCHUGH. I have a difficult time, therefore, understanding why, when we do provide funds we do not have the right to say, "as a condition for these funds, we need to be told what is happening on fundamental policy decisions."

The position of the Administration is, yes, you have the authority not to fund us, but you don't have the authority to ask us to tell you what we are doing with those funds unless we choose to tell you.

That is what bothers me. I have a difficult time understanding that legal proposition and in practice it has led, at least in this one case, to a situation where, in fact, the Administration has withheld fundamental information about a policy decision affecting the people of the United States and the Administration takes the position to this day that that was okay legally, even though it might have been bad judgment.

Mr. HYDE. Would the gentleman yield?

Chairman MCHUGH. I will be happy to yield.

Mr. HYDE. Just to add a little addendum to your question. I suggest the problem of constitutionality is very complicated and involved here. I do not believe Congress would have the right to withhold salaries from the Supreme Court even though no one can take a gun to our head and say you must appropriate money for salaries.

But if we were to pass a law saying unless the court reverses *Roe versus Wade,* no funds appropriated may be used for salaries for the Supreme Court, clearly that would be unconstitutional. In fact, I know there is case law that we may not abuse the power of the purse to achieve certain policy decisions.

I am far from capable or competent to outline the parameters of that, but I guess what I am saying is the power of the purse is not unlimited. We cannot force certain policy decisions through the use of the power of the purse.

I simply throw that out as a qualifier to the general statement that we have the power of the purse, therefore, we can require any sort of information that Congress sees fit.

Thank you.

Chairman MCHUGH. I appreciate the gentleman's comment. I simply wanted to express to you, Judge Webster, the concern which at least some of us have about the practical implications as well as the legal implications of the position which I think the Administration is taking.

Again, I appreciate also the fact that you and the Administration in your judgment are prepared to abide by what we all think are reasonable rules. The question is, for us, in the future can we depend upon that? I do not know there is any way you can guarantee us in the absence of the law being clarified that this would not happen again.

Mr. Livingston.

Mr. LIVINGSTON. Thank you, Mr. Chairman.

I think you stated your position well. I want to commend Mr. Hyde for responding to you.

Basically, you are right. We do appropriate the funds for the CIA, and we should expect that they should notify us in all reasonable situations. But the Director in his definition of what "timely" means, in his response to Mr. Richardson, said that "timely" meant that he would bring any information about covert activities to us as soon as you can reasonably get to Congress. In most instances, he said in response to your question, that that would be before the covert activity even took place.

I think that that is reasonable. But it is also reasonable to understand that there are times when it is not possible to come to Congress before the covert activity takes place. It is not possible to come within a provisional 48 hours, or even perhaps 48 days.

In fact, it has happened three times. One time in the Iran situation, the contra situation we are dealing with here, and we may quarrel that ten months is not timely. Another time, three months was timely for President Carter. It happened one other time.

My point is that by simply arbitrarily passing legislation which binds the President's hands, which compels the CIA to live within certain defined restrictions eliminates any possibility that unforeseeable circumstances might happen and which might ultimately endanger the lives of innocent people or threaten the security interests of the United States.

When the Director says that he would get here as soon as he reasonably can, obviously that means that there may be circumstances when he cannot do so right away. I want to state for the record to Mr. Richardson that "timely" was defined by Admiral Stansfield

Turner in a committee meeting here just a few months ago. He said that, "The timeliness is not measured by a clock. Timeliness should be measured by the risk. . . . [W]e were three months getting the six people out of the Canadian Embassy. We were six months doing the other two operations. . . . So I don't think we should focus on hours and days. I think we should focus on the diminution of the risk. It could be that as an operation goes along the risk to human life drops off. . . . When that risk to human life is diminished sufficiently is when it is timely to notify the Congress. . . ."

End quotes. I might say former Directors Colby and Ray Cline agreed with that fundamental proposition. If there is an endangerment to human life, it seems to me we are just taking an extraordinary move in ignoring that possibility by binding the President and binding the Director of the Central Intelligence Agency to an arbitrary rule which might one day, in your term, Mr. Director, or in some other President's or Director's term, force you or them to take action which endangers the people or the security interests of our country.

I would be happy to yield to the gentleman.

Mr. RICHARDSON. I really do not necessarily quarrel with what the gentleman has just said. Adding to this troublesome situation—and I think Mr. McHugh made the point—is the Justice Department's December 1986 memorandum supporting the President's position in delaying notification for ten months. That new, novel theory was that the President may determine what is timely now based on the sensitivity of the covert activity. If you follow this theory, the President would never have to inform Congress of a particularly sensitive activity.

Mr. LIVINGSTON. If I may reclaim my time, I would just respond to the gentleman by saying that the President and the Administration have paid dearly for that decision. That was an interpretation which I sincerely doubt any future Administration would apply to this work.

Let us not jump into the fray and pass legislation to cure a problem that probably will not ever exist again.

Mr. HYDE. Mr. Chairman, may I make just one more comment, please?

Chairman MCHUGH. Briefly, Mr. Hyde.

I want to be sure we move on in order.

Mr. HYDE. I think there was more than failure to notify Congress. I don't want to let the Administration off the hook or be recorded as totally defending what they did. They did more than failure to notify. They should have notified some in Congress. There ought to be somebody trustworthy up here that they could notify.

But they misled Congress. There was testimony before our committees that actually, actively misled us. I have always resented that. I think it was far more than a failure to notify.

I want to go on record as saying that. But also, to fill in the mosaic, I want to point out something concerning two of the gang of eight, a previous chairman and vice-chairman of the other body's committee. The vice chairman has resigned from the committee over a release of a transcript to one of the networks which the committee voted to keep confidential. He gracefully resigned.

The Chairman of that Committee is still under investigation by the Ethics Committee of the other body for having revealed something about the Pollard spy case. So it is not a simple problem. And it involves trust, trust from the Administration, trust in Congress, and you cannot legislate that. That is all I am saying.

Thank you, Mr. Chairman.

Chairman McHUGH. Thank you, Mr. Hyde.

Mr. Stokes.

Mr. STOKES. Thank you, Mr. Chairman.

I just want to respond for a moment to Mr. Livingston's comment that we ought not try to create the impression a problem exists where one does not exist. The United States Congress has just spent several million dollars conducting an investigation of Iran-contra, the American people have sat in front of their T.V. sets and radios for three months listening to what went wrong in their government. It seems to me that the Congress has a responsibility pursuant to the expenditure of millions of dollars to try and shore up what went wrong in this government and correct that problem, not ignore it.

It seems to me we ought to admit in this context we are not tying the hands of the President or the hands of the CIA. Firstly, Mr. Webster, I am sure you would agree with me that under current law whenever the President signs a finding, you then come up before the Intelligence Committees of the House and Senate and advise us of the finding.

We have no power to stop that finding, do we? The President is free to do what he pleases?

Judge WEBSTER. That is correct, Mr. Chairman, as long as someone does not go public with it or do something like that.

Mr. STOKES. That is right. Now, under this law which we are attempting to enact here, we do not tie the President's hands. We do not prohibit him from taking that action. All we say is that 48 hours after you have taken that action, you must notify the Congress.

Isn't that correct?

Judge WEBSTER. That is correct.

Mr. STOKES. So we are not tying hands. There is an additional problem here that I think that the American people would want us to take into account. That is that if we do not do something here with reference to this third party situation where foreign countries can say to our President we will only cooperate with you provided that you do not tell your government, we are right back to Iran-contra again, where the Iranians knew, other foreigners knew about this problem, but Members of the United States Congress, representing the American people in this forum, had no knowledge.

Iranians were running all over the White House at midnight taking tours and things of that sort while Members of the United States Congress sat downstairs in Mr. Poindexter's office and were being lied to.

That is why it is important for us to say simply that the President can take whatever action he deems necessary in defense of this country in terms of a foreign policy initiative, but you must within 48 hours notify the elected representatives of the Congress

through the special mechanism, in this case being the Intelligence Committee.

Thank you.

Chairman McHUGH. Any other questions?

Mr. McEwen.

Mr. McEWEN. No, thank you, Mr. Chairman.

Chairman McHUGH. Mr. Richardson.

Mr. RICHARDSON. No.

Chairman McHUGH. Mr. Glickman.

Mr. GLICKMAN. No, thank you.

Chairman McHUGH. Mr. Hyde.

Mr. HYDE. No, thank you.

Chairman McHUGH. Judge Webster, thank you again very much for being with us. We appreciate your testimony. We look forward to working with you and your staff on trying to accommodate the legitimate interests which have been expressed.

Judge WEBSTER. Thank you very much, Mr. Chairman.

Chairman McHUGH. Our next witness is the Honorable Clark Clifford. Mr. Clifford was present at the creation of the National Security Act of 1947 while serving as Counsel to President Truman and later served as Secretary of Defense during the Johnson Administration.

He was also a member of the President's Foreign Intelligence Advisory Board. I think all of us are very familiar with his long record of distinguished public service, and his wise counsel to this Nation's leaders is well documented.

Mr. Clifford, it is an honor to have you with us today. Let me express, on behalf of the committee, our appreciation not only for your presence, but for your patience, as we went two rounds of questions with Judge Webster. Thank you very much for being with us. We would be delighted to hear your testimony this morning.

STATEMENT OF HON. CLARK M. CLIFFORD, FORMER SECRETARY OF DEFENSE

Mr. CLIFFORD. Thank you, Mr. Chairman.

Judge Webster and I have been friends for a great many years. I respect him. I admire him. I honor him for his service to our country. Through all those years, I would say that he and I have been in substantial agreement on matters of public concern.

This time, I differ with him profoundly. I think the reason must be the dramatic difference in our backgrounds in the field of intelligence.

One of my first assignments when I served as counsel in the White House in the Truman Administration was to start the study which led to the creation of the CIA. That was 42 years ago. I have been in the field in different capacities all through these years. This is possibly why he and I differ, and with that brief introduction, I have a short statement, and because I think it does highlight the differences between him and me, I would like your permission to read it.

Chairman McHUGH. By all means, go right ahead.

Mr. CLIFFORD. Chairman Stokes, Chairman McHugh, members of the committee, I am pleased to appear before you today to offer my views on the subject of covert activities, and in particular, the legislation under your consideration for improving the process whereby these activities are approved by the President and made known to the Congress.

This is a subject of great significance to our Nation's foreign policy and our system of government. It is also, as we have recently seen, a subject of serious potential abuse. Therefore, the committee's efforts are both timely and vital.

As the committee knows, covert activities have become numerous and widespread, practically constituting a routine component of our foreign policy; and with these activities have come repeated instances of embarrassing failure—where the goals of the operations themselves were not fulfilled, and unforeseen setbacks occurred instead.

I believe that, on balance, covert activities have harmed this country more than they have helped us. Certainly, efforts to control these activities, to keep them within their intended scope and purpose have failed.

We have reached the point now where we must reassess the very idea of conducting covert activities. If we are to continue and gain any benefit from them, we must find a way to keep them consistent with the principles and institutions of the Constitution and our foreign policy.

If we determine that this cannot be done, then I say we are better off without covert activities entirely than with them out of control.

On this score, we must keep in mind what is meant by covert activities. These are only part, a very small part, perhaps 2 or 3 percent, of the intelligence activities of our government. Covert activities, in my definition, are active efforts to alter political conditions in foreign countries through financial, paramilitary, and other means. That the government should want to disavow responsibility for such activities is understandable.

Over the last year or so, the cost that covert activities can inflict on our system of government also has been clear. Whatever the specific actions or individual responsibility, the sale of arms to Iran and the diversion of profits from those sales to the contras in Nicaragua caused severe damage to our government and the institution of the Presidency. The President's credibility suffered drastically and with it the integrity of the Nation's foreign policy.

One of the principal shortcomings of the Iran-contra affair was the failure of the President to notify the intelligence committees of the government's activities. The oversight process could have served a significant, salutary purpose: Giving the President the benefit of the wisdom of those who are not beholden to him, but beholden like him directly to the people, and prepared to speak frankly to him based on their wide, varied experience.

Had the President taken advantage of notifying Congress, he and the country might well have avoided tremendous embarrassment and loss of credibility.

The Iran-contra affair presents this committee and the country with a crucial question: Should the laws governing covert activities be changed?

To answer this question, we first might examine the attitude of President Reagan. In his letter to the Senate Intelligence Committee of August 7, 1987, the President said that the current laws are adequate and that any changes could occur by Executive Order. I strongly disagree.

In the Iran-contra affair, the President displayed an attitude that is antithetical to the oversight process. You will recall that the President signed a finding that explicitly instructed the Director of the CIA to notify the Congress of the activity.

For 10 months, the Director and others involved abided by this instruction. In fact, the President finally notified the Congress only after the activity had become public knowledge.

Much later, after the Congress had begun its inquiry, the President in his letter to the committee supported the concept of notification but insisted on two exceptions. These exceptions would relieve the President of the notification requirement in "cases of extreme emergency" and "exceptional circumstances." I suggest to this committee that to permit these two exceptions would make any notification requirement meaningless.

Further evidence of the Administration's attitude is the Justice Department's December 1986 memorandum supporting the President's position in delaying notification for 10 months. The memorandum offered the novel theory that the President may determine what is timely notice based on the sensitivity of the covert activity.

According to this theory, the President would never have to inform Congress of a particularly sensitive activity. This theory clearly would undermine the whole concept of the duty of the President to keep the Congress informed.

Moreover, we find that this continues to be the legal theory of the Justice Department. In testimony before the Senate Intelligence Committee in December 1987, two months or so ago, a Department representative made the following statement:

> There may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this presidential authority is protected by the Constitution, and that by purporting to oblige the President under any and all circumstances, to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this constitutional prerogative of the President.

In other words, it is the attitude of the Administration that, whatever laws exist, the President may interpret them as he chooses. This is not the way that I understand our Constitution is supposed to work. So, my answer to the question confronting us today is that the laws governing the oversight process must be changed. And the changes must be specific, direct, and as clear as possible.

I wish to lend my full support to H.R. 3822, the legislation that the Committee is considering today.

Late last year, I testified before the Senate Intelligence Committee and supported S. 1721, the companion bill to H.R. 3822. I understand that the committees have worked together on these bills, and I commend your cooperation, as well as its result.

The legislation that you have crafted meets the need for change that exists in the important area of notification to the Congress.

It would require the President to sign a written finding, setting forth the particulars of a covert activity, normally when approving it but in no event more than 48 hours afterwards.

The legislation would require the President to provide the intelligence committees with the signed finding normally before the activity begins, but in no event more than 48 hours after it is approved.

The President could limit notification to the so-called Group of Eight, but he would have to explain why he was doing so. Findings that purported to validate past activities or authorize illegal measures would violate the law.

I view these provisions as welcome and worthwhile improvements in the oversight process; however, I believe that they do not go far enough to redress the recurring perils of covert activities.

In order to discourage further abuses of our foreign policy and consequent subversion of our institutions of Government, I recommend that the legislation also should contain sanctions to penalize any failure to notify Congress within the required period.

Therefore, I would like to propose for the committee's consideration a provision to be added to H.R. 3822 that would automatically terminate and prohibit the expenditure of funds for any covert activity with respect to which the President had failed to follow the oversight process.

This provision would go beyond the ban on funding of unauthorized activities in the proposed legislation, because it would require the President, within the statutory period, to notify the intelligence committees, as well as sign a finding.

Moreover, I would go a step further. According to my proposal, any Government officer or employee who knowingly and willfully violated or conspired to violate the prohibition against the expenditure of funds for such a covert activity would face criminal penalties.

This addition to the legislation, in my view and the views of the Constitutional scholars whom I have consulted, would be fully consistent with the letter and spirit of the Constitution. Furthermore, it would be fully warranted by the principle of the rule of law which is our country's creed.

As I see it, there is no reason or excuse for failing to notify the Congress according to the law, and there should be no exception to the sanction against violating such law.

The purpose of this legislation is not to assume good faith, but to ensure good Government, and Congress should do whatever is necessary and proper towards that end.

It is a grave matter to propose criminal penalties for official misconduct. Even so, it is a recourse that has ample precedent, and regarding covert activities, it is a measure that I consider to be necessary.

I can recall testifying some 12 years ago before the Select Committee to Study Governmental Operations with respect to Intelligence Activities—the Church Committee—regarding the gross abuses in covert activities that were the concern of that committee.

In my testimony in 1975, I said,

The lack of proper controls has resulted in a freewheeling course of conduct on the part of persons within the intelligence community that has led to spectacular failures and much unfortunate publicity. A new approach is obviously needed, for it is unthinkable that we can continue to commit the egregious errors that have caused such consternation to our friends and such delight to our enemies.

The Church Committee helped enact the 1980 Intelligence Oversight Act, and this certainly was a step forward. But today we know that it was not enough. Sadly, my words from 1975 are all too pertinent today.

I wish to make another point. It bears emphasizing that it was by Act of Congress that the CIA was established and exists today; it was by Act of Congress that covert activities were authorized and continue to occur.

This is so because our Constitution confers on Congress the power to make the laws, and the President is charged with taking care that the laws are faithfully executed according to the intent of Congress.

In my judgment, the Constitution clearly provides to Congress an important role in foreign policy, and this role includes the process of overseeing covert activities.

It is part of the system of checks and balances among the separate branches of Government. And we should remember that the oversight process does not give the Congress a veto, but only a voice.

At no time in recent memory has there been more need than now for Congress to speak on the subject of covert activities. In the aftermath of the Iran-contra affair and the damage that it did to our nation's credibility and influence, it is incumbent on all who hold positions of authority to take the necessary steps toward restoring our former position.

The legislation before you is a splendid move in this direction and will be of vital importance in reducing the possibility of another similar disaster.

I thank you.

Chairman McHUGH. Thank you very much, Mr. Clifford, for your thoughtful statement.

[The statement of Mr. Clifford follows:]

UNITED STATES HOUSE OF REPRESENTATIVES

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

SUBCOMMITTEE ON LEGISLATION

February 24, 1988

STATEMENT OF THE HONORABLE CLARK M. CLIFFORD

Chairman Stokes, Chairman McHugh, and members of the Committee:

I am pleased to appear before you today to offer my views on the subject of covert activities, and in particular the legislation under your consideration for improving the process whereby these activities are approved by the President and made known to the Congress. This is a subject of great significance to our nation's foreign policy and our system of government. It is also, as we have recently seen, a subject of serious potential abuse. Therefore, the Committee's efforts are both timely and vital.

As the Committee knows, covert activities have become numerous and widespread, practically constituting a routine component of our foreign policy. And with these activities have come repeated instances of embarrassing failure -- where the goals of the operations themselves were not fulfilled and unforeseen setbacks occurred instead. I believe that on

balance covert activities have harmed this country more than they have helped us. Certainly, efforts to control these activities, to keep them within their intended scope and purpose, have failed.

We have reached the point now where we must reassess the very idea of conducting covert activities. If we are to continue with them and gain any benefit from them, we must find a way to keep them consistent with the principles and institutions of the Constitution and our foreign policy. If we determine that this cannot be done, then I say we are better off without covert activities entirely than with them out of control.

On this score, we must keep in mind what is meant by covert activities. These are only part, a very small part -- perhaps 2 or 3 percent -- of the intelligence activities of our government. Covert activities, in my definition, are active efforts to alter political conditions in foreign countries through financial, paramilitary, and other means. That the government should want to disavow responsibility for such activities is understandable.

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to our government and the institution of the Presidency. The President's credibility suffered drastically and with it the integrity of the nation's foreign policy.

One of the principal shortcomings of the Iran-contra affair was the failure of the President to notify the intelligence committees of the government's activities. The oversight process could have served a significant, salutary purpose: giving the President the benefit of the wisdom of those who are not beholden to him, but beholden like him directly to the people, and prepared to speak frankly to him based on their wide, varied experience. Had the President taken advantage of notifying Congress, he and the country might well have avoided tremendous embarrassment and loss of credibility.

The Iran-contra affair presents this Committee and the country with a crucial question: should the laws governing covert activities be changed?

To answer this question, we first might examine the attitude of President Reagan. In his letter to the Senate Intelligence Committee of August 7, 1987, the President said that the current laws are adequate and that any changes could occur by executive order. I strongly disagree.

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itly instructed the Director of the CIA not to notify the Congress of the activity. For ten months, the Director and others involved abided by this instruction. In fact, the President finally notified the Congress only after the activity had become public knowledge. Much later, after the Congress had begun its inquiry, the President in his letter to the Committee supported the concept of notification but insisted on two exceptions. These exceptions would relieve the President of the notification requirement in "cases of extreme emergency" and "exceptional circumstances." I suggest to this Committee that to permit these two exceptions would make any notification requirement meaningless.

Further evidence of the Administration's attitude is the Justice Department's December 1986 memorandum supporting the President's position in delaying notification for ten months. The memorandum offered the novel theory that the President may determine what is timely notice based on the sensitivity of the covert activity. According to this theory, the President would never have to inform Congress of a particularly sensitive activity. This theory clearly would undermine the whole concept of the duty of the President to keep the Congress informed.

Moreover, we find that this continues to be the legal theory of the Justice Department. In testimony before the Senate Intelligence Committee in December 1987, a Department representative made the following statement:

> There may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this presidential authority is protected by the Constitution, and that by purporting to oblige the President under any and all circumstances, to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this constitutional prerogative of the President.

In other words, it is the attitude of the Administration that, whatever laws exist, the President may interpret them as he chooses. This is not the way that I understand our Constitution is supposed to work. So, my answer to the question confronting us today is that the laws governing the oversight process must be changed. And the changes must be specific, direct, and as clear as possible.

I wish to lend my full support to H.R. 3822, the legislation that the Committee is considering today. Late last year, I testified before the Senate Intelligence Committee and supported S. 1721, the companion bill to H.R. 3822. I understand that the committees have worked together on these bills, and I commend your cooperation, as well as its result. The legislation that you have crafted meets the need for change that exists in the important area of notification to the Congress. It would require the President to sign a written finding, setting forth the particulars of a covert activity, normally when approving it but in no event more than forty-eight hours afterwards. The legislation would require the President to provide the intelligence committees with the

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I view these provisions as welcome and worthwhile improvements in the oversight process; however, I believe that they do not go far enough to redress the recurring perils of covert activities. In order to discourage further abuses of our foreign policy and consequent subversion of our institutions of government, I recommend that the legislation also should contain sanctions to penalize any failure to notify Congress within the required period.

Therefore, I would like to propose for the Committee's consideration a provision to be added to H.R. 3822 that would automatically terminate and prohibit the expenditure of funds for any covert activity with respect to which the President had failed to follow the oversight process. This provision would go beyond the ban on funding of unauthorized activities in the proposed legislation, because it would require the President, within the statutory period, to notify the intelligence committees, as well as sign a finding. Moreover, I would go a step further. According to my proposal, any government officer or employee who knowingly and willfully violated or conspired to violate the prohibition against the

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As I see it, there is no reason or excuse for failing to notify the Congress according to the law, and there should be no exception to the sanction against violating such law. The purpose of this legislation is not to assume good faith but to ensure good government, and Congress should do whatever is necessary and proper towards that end.

It is a grave matter to propose criminal penalties for official misconduct. Even so, it is a recourse that has ample precedent, and regarding covert activities, it is a measure that I consider to be necessary.

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> The lack of proper controls has resulted in a freewheeling course of conduct on the part of persons within the intelligence community that has led to spectacular failures and much unfortunate publicity. A new approach is obviously needed, for it is unthinkable that we can continue to commit the egregious errors that have caused such consternation to our friends and such delight to our enemies.

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I wish to make another point. It bears emphasizing that it was by act of Congress that the CIA was established and exists today; it was by act of Congress that covert activities were authorized and continue to occur. This is so because our Constitution confers on Congress the power to make the laws, and the President is charged with taking care that the laws are faithfully executed according to the intent of Congress.

In my judgment, the Constitution clearly provides to Congress an important role in foreign policy, and this role includes the process of overseeing covert activities. It is part of the system of checks and balances among the separate branches of government. And we should remember that the oversight process does not give the Congress a veto, but only a voice.

At no time in recent memory has there been more need than now for Congress to speak on the subject of covert activities. In the aftermath of the Iran-contra affair and the damage that it did to our nation's credibility and influence, it is incumbent on all who hold positions of authority to take the necessary steps towards restoring our former position. The legislation before you is a splendid

move in this direction and will be of vital importance in reducing the possibility of another similar disaster.

I thank you.

Chairman McHUGH. As you can appreciate, as a co-sponsor of the legislation, I am delighted with the substance of what you have said.

One of the arguments, as you know, against our approach is that there is a problem with leaks.

Mr. Hyde has eloquently talked about that today and on other occasions and, of course, we are concerned about leaks.

I guess I would like to draw upon your long experience both in the Executive Branch and as a person very close to Government to ask about your experience with leaks.

Frankly, we have heard arguments on both sides of the question as to where the problem is more substantial, in the Executive Branch or in the Congressional branch, and I just want to invite your comments if you have any on this problem because it is at the center, I think, of some of the opposition to the legislation which we are offering.

Mr. CLIFFORD. Two major observations.

Leaks have occurred in our Government back to the Administration of President Washington. Leaks will always occur in our Government. There is no way that I know of that they can be prevented 100 percent.

I have the feeling now that there is a greater sense of responsibility on the part of Congress. I think that reducing the group who knows to eight in those particularly sensitive matters is a step in the right direction.

I think that the experience of these last years would show that Congress holds most of the important intelligence information carefully within itself.

Leaks occur in the Executive branch of the Government. One time we had a very serious leak in the Johnson Administration and there was a lot of thundering against Congress, and as we got to the bottom of it, we found it was President Johnson who leaked the information in a telephone conversation.

I noted with interest that one time Colonel North was critical of Congress for a certain leak and when the matter was traced back, it was found it was Colonel North who had leaked the story to a reporter for Newsweek Magazine.

So they occur in both branches of the Government.

Here is my conclusion. I would rather take the risk of the possibility of leaks than leave it up to one individual in the Executive branch of Government to decide which of the covert activities would go on without anybody else being notified. That is the big danger in our Government. It is contrary, in my opinion, to the basic precepts of our system.

These were developed to have checks and balances, where in the Legislative, Executive and Judicial branches each is constantly checking the others.

Here, however, it is suggested that we carve out a new theory. It offends me that a President can say I am going to go down this road and, according to the Justice Department, because I consider it to be an extreme emergency, I don't need to tell anybody about it at all. I think that is contrary to our form of Government and I would hope we would recognize that fact.

There is a great tendency to confuse the ordinary functions of our intelligence department with this very narrow area of covert activity.

I do not want the Congress to interfere in the conduct of intelligence. We have worked on that for 40 years.

I served 7 years on the Intelligence Board. We were in constant contact with Congress and we went all over the world to try to improve our intelligence operation.

It isn't our intelligence operations that cause the trouble. It isn't dealing with foreign countries and the gathering and use of intelligence. It is when we break away from the original concept of the functions of intelligence and get into the covert field, mainly when we want to change something that is going on in the government of another country.

Look at the mistakes—we went wrong in Indonesia years ago. We tried to unseat Sukarno and a CIA pilot went down in a plane and blew our cover.

We tried to conduct an offensive against Castro in the Bay of Pigs, one of the great debacles in American history.

In the sixties and early seventies, we were conducting an effort to assassinate Castro and it came out, embarrassing us in our standing in the world.

We got into Chile and wanted to depose Allende and as a result of our efforts, he ended up dead, either by suicide or by an assassin's bullet.

Every one of these instances involved straying from the ordinary field of intelligence and getting into the covert field and they were all very serious mistakes.

This is another one.

Some 12 years ago, I sat in such a situation as this because we had a terrible embarrassment over a series of covert actions, and the Congress said we are going to take action, and they passed the law of 1980. It wasn't good enough. It hasn't done the job.

I say let's do the job. We can do it without interfering with the ordinary functions of the CIA.

Let's just stop the freewheeling in this very dangerous area of trying to go around changing governments in other areas of the world.

Chairman McHUGH. Thank you.

Mr. Livingston?

Mr. LIVINGSTON. Mr. Clifford, I appreciate your sincere concern for—as expressed in your testimony—for the conduct of our international relations, and I am just worried though that your concern, if applied by law as you propose, would, in fact, do what you say you don't want to do.

You said that you didn't want to interfere with the intelligence activities of this Nation, but in fact, if this bill were passed, there is a strong likelihood that we would be doing a great deal of interfering with the conduct of our intelligence activities.

The bill defines special activity so there is a very broad scope of activities which would come under the oversight functions of Congress, much broader than exists today.

It would redefine the process by which we authorize and appropriate funds for intelligence activities, very restrictively, which

would probably mean that Congress will be micromanaging the activities of the CIA.

There are restrictions in the bill on the transfer of articles and funds to other countries, putting in arbitrary aggregates which build up—I don't even think there is a limitation in terms of years—so that the ceiling would be reached in very short order.

We may well find that we are incapable of transferring on an emergency basis funds or articles of defense to countries that are in desperate need of help in an emergency.

Then the 48-hour notice provision as well, which does say that there are no conditions, no circumstances under which the President and the Central Intelligence Agency might reasonably withhold information from Congress, even though it might mean the loss of lives of individuals. And you would take that one step further—you would say that you would add a provision to this bill that would automatically terminate and prohibit the expenditure of funds for any covert activity with respect to which the President had failed to follow the oversight process.

As I have pointed out, this bill provides a very rigid oversight process.

Are you going to tell us that you believe that if the President, for example, delayed until 49 hours instead of the 48, even though he might be acting in good faith, the notification of Congress of a very necessary and vital intelligence covert activity, that you would just cut off all funds and terminate the program no matter what the consequences to the United States and its citizens might be?

Mr. CLIFFORD. The early part of your statement is one with which I disagree. You pick out parts of the bill. I don't believe that the bill interferes with the normal operation of the CIA or with our intelligence community.

I think there are needed restrictions, I think they are there, and I think they are reasonable. One hour over? I guess you could take any rule and draw an analogy from it. If you are going to have a rule, then I would abide by the rule. And I would enforce the rule.

If I have to file my appeal with the Supreme Court of the United States within 30 days, I must file it in 30 days. If I file it on the 31st day, it is no good.

So if you set a law, I think the law should be obeyed.

And keep in mind that all we are talking about is that when the President gets it in mind, he says, "It has been suggested to me that here would be a very interesting covert activity where we might be able to dislodge this Administration in a foreign country." And he says, "I think it is one we ought to do."

All we are suggesting is that he meet with a committee of the Congress and tell them that. I think he might get some valuable expressions from them, and he does it within 48 hours.

If they say, "We don't think you ought to do that," he says, "Thank you, gentlemen," and he goes ahead and does it, which he can do under the law, but it gives him the benefit of advice from men who have served many years, much longer than he.

I would like him to get the benefit of that wisdom before he starts off on a course of action that may result in a disaster.

Mr. LIVINGSTON. I agree that the President can get a great deal of knowledge and consultation from the Congress and should do so at every available opportunity.

I am concerned that we are rigidly imposing a set of rules that will bind his hands no matter what the circumstance might be, which ultimately require that he defer any action or defer any notification of Congress, and if we rigidly bind him to those rules—we are not talking about a case in court. We are not talking about the consequences of losing your appeal.

We are talking about the possibility that people will lose their lives and that the security of the United States might be unduly jeopardized because we have confined the President to a rigid set of rules.

In my opinion, the rules are too rigid. There is no flexibility, and I think that is a dangerous step for the Congress to take.

Mr. CLIFFORD. Mr. Livingston, our system is filled with rules. The President must veto a bill in ten days. If he waits until the 11th day, it is untimely.

We have any number of rules of that kind. I don't see why this should be subject to any different interpretation than any other rule in this very limited field.

I think it comes down to this—a person's attitude toward our present intelligence operation in this field depends to a great extent upon his attitude toward covert actions.

If he thinks that covert actions should be an ordinary, common function of our intelligence community, then he would feel concerned at any kind of limitation.

I don't feel that way at all. I think they should be launched after only the most careful consideration, because they turn up in the most embarrassing manner.

I was abroad—I don't know when it was—when it was discovered that we had been mining the waters off of Nicaragua, and I was with a group who couldn't understand it.

The United States had been mining the waters and some of our allied ships encountered the mines. One friend said something that has haunted me ever since. He said, "I have the feeling that America has lost its way."

I had that feeling in Iran-contra; we have lost our way. We took a public position, thundering in attitude, the rhetoric was harsh about not dealing with terrorist nations, while under the table we were sending anti-tank weapons, sending weapons to knock down planes from the sky.

The world saw what has happened; it looks as if America has lost its way. I want to prevent that.

The damage we sustain from one tragic covert action, in my opinion, is much more damaging than five or six or ten covert actions.

We have not had many successful covert actions.

One reason is that, if we are successful, you don't ordinarily hear about it. But we heard about them a lot through the years on the Intelligence Board and we found them, I will wager every man of the ten-man committee, working seven years in that area, I believe every man left with the feeling, "If I had my choice, I probably would say cut out covert activity; it is not worth the danger."

That is really what we are discussing—not the whole field of intelligence.

We expanded intelligence. We had 208 suggestions over a four-year period that we made to the intelligence operators, and some 204 of them were adopted and put into operation.

We have got a good intelligence operation, very effective. A lot of countries look to us.

If a country says to us, "Here is some information, Judge Webster. I am giving it to you, but I don't want you to share it with the Congress," if I were in Judge Webster's position, I would say, "Don't tell me. If I can't share it with the Government, with the Congress, don't tell me."

That should be our position. We either have a system of democracy and function in that manner or I don't think we deserve to have the feeling that we all have toward our country.

Chairman MCHUGH. Mr. Stokes?

Mr. STOKES. Thank you, Mr. Chairman.

Mr. Clifford, you have had a long and distinguished career in Government and it is a real honor to have you appear here this morning and testify on this legislation.

Mr. CLIFFORD. Thank you, Mr. Chairman.

Mr. STOKES. The last answer that you just made to us touches on a question I was going to ask and maybe you could expand upon it a little bit—the argument appears plausible on its face, whereas Mr. Webster says a foreign government or a third-party government says, "The only way we will cooperate with you is that you do not tell other persons," and, therefore, our President feels that in order to carry out this effort, he must make that type of a commitment to this foreign country and then, of course, our Government should understand why he cannot comply by telling the Congress is because he had to make this commitment to a third country.

Would you elaborate on that a little bit for us?

Mr. CLIFFORD. Yes. We get right to the heart of our system. We either have a system of checks and balances or we don't have such a system.

If a foreign government should say to you, "Mr. Chairman, while you are traveling abroad, I want to give you some very vital information regarding your country and mine, but I am only going to give it to you if you promise not to tell your President," that isn't the way our system works.

You don't say, "All right, tell me; I won't." We have to work together.

We can't isolate the President or the Executive Branch so that it can have this information having made a commitment not to inform the Congress.

We don't want to get in that posture.

To see what exists here in this effort to try to get some rules, let's go back over the situation that existed in the Colonel North days.

Two-and-a-half years this went on, operating under the table, expanding all through the world—Bill Casey had an idea that this was working so successfully that he would make it a permanent operation financed privately. They were getting money in from differ-

ent private sources and thought it would be of immense usefulness to continue.

The trouble is that it isn't our system. It isn't the way we run our Government. It is the way the Soviets run theirs. It is the way it may operate in Libya, but not in the United States. So I am suggesting let's have some rules and if Colonel North, or some other colonel in the future, decides that he is going down the road of some secret covert operation, as soon as there is no notice to the Congress, he is in violation of law and he shouldn't be using any funds so appropriated.

And if he is in violation of law and he does it in the knowledge that there was no notice to the Congress, then he is doing it knowingly and willfully—that is the language of many of our felony statutes—and he has committed an offense.

Now, I don't know that it would absolutely prevent it, but I assure you it would slow it up.

I can picture one meeting when Colonel North had his colleagues there and he said, "Here is a new idea. I think we ought to start down this road."

Somebody said, "There are a number of laws like the National Security Act of 1947, the Hughes-Ryan Act, and it is in violation of those laws, Colonel," and he said, "What is the penalty under those laws of my violating them?" and the lawyer said, "There aren't any penalties," and the colonel said, "Well, then, don't interrupt me."

I think this is the attitude. Let's take a position. Let's see if we can't get the people to conform to our system and not operate secretly in this secret kind of Government.

Mr. STOKES. I was particularly struck by your statement that this legislation has nothing to do with good faith. It is about good government. Within that phrase you really struck at the heart of what we are trying to do here.

But another seemingly plausible argument is the one advanced by Mr. Webster this morning when he says "I have initiated certain changes to correct the problem of persons who lie to the Congress, and I have dealt properly with those individuals and we are running a type of thing now where this won't occur in the future." And he says, "In addition, the President has signed an NSDD in which he says he is going to comply with the law."

Can you address that argument.

Mr. CLIFFORD. I think there are two important answers to that. We have been down that road, Mr. Chairman.

That is what the 1980 law was for. There was a lengthy hearing. Congress said, "Now we have the answer. The President or the Executive Branch must report to the Congress, give us reasonable notice"—I think that was the language—"and now we have the matter buttoned down so we won't have these embarrassing events occur anymore."

It just didn't work at all. We have tried all this. We have tried what Judge Webster told us about this morning, leaving it up to the Executive Branch.

There is another part of that, that if everybody in the Executive Branch were a Judge Webster, we could sit back and relax, but

they sure aren't and they haven't been over this past number of years.

Also keep in mind that Judge Webster could handle the CIA as expertly and as judiciously as it could be handled and things might still be going on in our country that would ultimately embarrass us deeply.

When these last events were going on and Admiral Crowe was asked his reaction, he said "I didn't know anything about it."

In the financial arrangement, nobody ever told the Secretary of the Treasury about it. They confined their information and activities to those they wanted to. This was a call within our Government. It isn't enough to say that they have dismissed some people from the CIA, and the President says that now he is going to cooperate better. That doesn't do it. Then for the President to write the letter and say, "Yes, I will cooperate and I will comply with the 48-hour notice with two exceptions; one, extreme emergencies and the other exceptional circumstances." Well, almost every opportunity in the covert field is one of them.

They are not routine. You may go months and months handling the intelligence work ably and professionally and not have a single covert activity come into view.

So each time that escape clause could be used, and it is troublesome.

So let's have a clear set of rules. Let me conclude by saying how many more times do we have to go through this? We have been through it ever since we had the law, since 1947.

We have used occasional parts of it and done it effectively, but we have had one embarrassment after another.

Now we have the most serious embarrassment of them all—the Iran-contra affair.

How much longer do we have to wait? So let's step up to it now.

It isn't just the next ten months of President Reagan. It is the next four, five, six Presidents that come along.

Let's set a clear path so we don't go down this mistaken road again.

Mr. STOKES. Thank you.

Chairman MCHUGH. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

We have revisited the Iran-contra hearings at great length and I wish we had a lot of time to go over that.

I would like to fill in a bit of background from another perspective.

Mr. Casey is not here to defend himself; he died, and the witness has characterized him as supporting his own agency and not subject to oversight. It was stated by one of the witnesses that he had talked to Casey about that, but Mr. McMahon said that would be the furthest thing from Mr. Casey's mind.

So it is unfortunate that we don't have Mr. Casey to defend himself.

You have hypothecated North talking to people and saying, "Let's disobey the law."

I sat through all the hearings; I don't recall any such occurrence, but it is helpful, I suppose, to the argument. And, when it comes to diverting money to the contras, $3.5 million, which may or may not

have been the Treasury's money, I view that in the light of diverting $8 million of the taxpayers' funds in the continuing resolution for a school in Paris, for "refugees" from North Africa, which the Senator who pushed that had the good grace to ask that it be revoked.

So there are diversions and there are diversions.

Let me ask you, I take it when you were in the Truman Administration, you opposed the covert activity that helped save Italy in the post-war years from being taken over by the communists who were pouring millions of dollars in there? Your distaste for covert activity, I take it, was expressed in the Truman Administration?

Mr. CLIFFORD. No. I heartily supported it.

Mr. HYDE. That is one covert activity you supported?

Mr. CLIFFORD. I sure did. And it was very successful.

Mr. HYDE. Then you support the successful ones, but not the unsuccessful ones?

Mr. CLIFFORD. No. That is not the point. Here was a carefully structured plan to meet the communist menace in Italy. They were making an all-out plan to get a communist government in Italy. Careful, lengthy study indicated to us that the proper, intelligent use of funds in Italy might prevent that from occurring.

So we did it. We did it successfully. I would do it today. That is a very useful covert activity.

Mr. HYDE. That is my point. You are not against all covert activity?

Mr. CLIFFORD. Oh, my, no.

Mr. HYDE. I misunderstood you. I thought you said if you had your way, you would do away with all covert activity.

You understand the Bay of Pigs, what really happened there, don't you? You certainly do not blame it because it was a "covert activity"?

You blame it, I am sure, as most people do, by the change of mind in the Administration, the decision to deny air cover to those people we had trained, we had supplied, and we had said go hit the beach at the Bay of Pigs, worst possible place. At the last minute, the President changed his mind and withheld air cover. Some people, like Oliver North analogize that case of leading people into fighting and then not supporting them to the contras case of leading people into fighting and not supporting them. They view that as a betrayal.

You mentioned the Bay of Pigs as a debacle. It was. Oh, was it ever.

But I think why it was a debacle is important to know.

Now, I would never fence with you on the law, because you are a distinguished lawyer with one of the great reputations of all time, and deservedly so let me say. I simply am puzzled by your statement that you disagree with the Justice Department when it says that to notify Congress of a covert action within a fixed period of time infringes on this constitutional prerogative of the President. You say, "In other words, the attitude of the Administration that, whatever laws exist, the President may interpret them as he chooses. This is not the way I understand our Constitution is supposed to work."

Well, I would say that is too flat a statement from my imperfect position as a lawyer. The President signs the law as Congress passes it. It seems to me the signer of the document has something to say about what it means to him, what his interpretation is, as much as those who debate and put the language together and pass it.

It seems to me that with regard to the Executive function of determining that a covert action will occur and the performance of that as to time, telling the President, okay, but you have got 48 hours to tell us about it, I wouldn't say that is constitutionally flawless, would you?

Don't you see a constitutional question there?

Mr. CLIFFORD. I do not.

Mr. HYDE. You do not?

Mr. CLIFFORD. I do not. I think that the Congress has a reasonable right when it passes a law to have the President keep it informed of the manner in which the law is being carried out.

Mr. HYDE. I would agree with that, but covert activity, you say, depends on some statutory enactment. Isn't our history replete with covert activities back to the presidency of Jefferson that did not have statutory warrant?

The Barbary pirates? Things were done in Florida. Even the Louisiana Purchase was covert. Congress never knew about it.

Mr. CLIFFORD. You go to the Barbary pirates; that was military action.

Mr. HYDE. Yes, but Congress did not know what the President did. He did it. He achieved his purpose.

I am just suggesting that covert activities may well be a part of the inherent Executive power of the President which is given by the Constitution to the President generically, and that for Congress to fine-tune and say, you will perform an Executive function within the time we say you will, I just see a constitutional question.

I don't know whether it is right or wrong, but I don't think it is as clear, Mr. Clifford, as you say.

Mr. CLIFFORD. Well, then I have not been very persuasive.

Mr. HYDE. Oh, with those who agree with you, I am sure you are totally persuasive.

Mr. CLIFFORD. It is clear to me; I do not believe there is any inherent power in the President to go off and make these very important decisions affecting the security of our country and to do it all alone. I don't think the Constitution gives him any such power as that. I do not think the President has the sole right of conducting foreign policy in the United States.

I don't find that in the Federalist Papers at all.

Mr. HYDE. You find it in the *Curtiss-Wright* decision, but of course that is the invitation to struggle that has gone on for many, many years. What are the parameters?

Mr. CLIFFORD. There are two points about the *Curtiss-Wright* case. One, it has been almost completely overruled. It was 50 years ago.

It has been almost completely overruled by the *Youngstown Sheet and Tube* case.

Second, a comment in there regarding the power of the President is plainly *obiter dictum.*

Mr. HYDE. I will send you my paper on that, Mr. Clifford. You don't have to read it, but I will send it to you.

Mr. CLIFFORD. I look forward to it.

Mr. HYDE. Thank you.

Chairman MCHUGH. Mr. Richardson.

Mr. RICHARDSON. I would hate to get into an argument with you because of your breadth of knowledge and experience. Let me say I have been persuaded by a good part of your testimony, except for one provision that you are recommending, and that is the provision that deals with criminal penalties.

The concern I have is I think there is no question when you talk about being on the edge of legality and illegality if there is something out there that the official might make sure he acts on proper legal grounds.

However, can this provision be interpreted by those that are concerned about having an effective intelligence gathering agency and a covert action that is prescribed within law and the national interests?

Are we not, perhaps, clipping the agency a bit? Won't this provision have a deleterious effect in that maybe that official that sees all these restrictions on him—again, not on the legality question, but sees these numerous constraints—let me be the devil's advocate and say, what about that argument?

Mr. CLIFFORD. I think it is not an appropriate argument. Ninety-eight percent of our intelligence activities are devoted to what they should be: The gathering and evaluation of intelligence. We do it very well. That is not our danger.

We do not have embarrassments that come from the ordinary conduct of our intelligence. We are doing that 24 hours a day.

It is the toughest, meanest activity that goes on. We do it because we have to.

We probably would not survive without it. I strongly support it in every way.

All we are talking about is that very narrow two percent again. That is what has gotten us into the trouble.

This last Iran-contra affair did not have to do with ordinary intelligence. Again, it was that very narrow two percent.

On that two percent, I would like to surround that with such restrictions that it makes it much less likely that we are to have another tragedy in that area. That is why I think it is appropriate to do it.

I do not think it interferes with the other 98 percent in any way. I think it just justifies and sends the warning out that you cannot free-wheel in this area. Two-and-a-half years this group was doing it. It expanded all over. They owned ships, they sent arms, they did all kinds of things. It was going on all the time, using—much of it—government funds. I would like to say that, if you do not give notification to the Congress, then you cannot use government funds.

I find that reasonable. That is one of the fundamental functions of Congress, to appropriate. The only branch of the government that can.

So you say, "we appropriate the funds, but if you don't comply with this reasonable restriction, then you may not use those

funds." I think you have the right to say that. Then, if anybody knowingly and willfully despite that knowledge goes ahead and uses funds, then I think he should be subject to criminal penalties.

Mr. RICHARDSON. I do not quarrel with the notification of Congress provision and on the propriety in enacting some kind of statute. I just think there may be within that narrow two percent some contingency where the appearance of this kind of provision might be in the long run deleterious.

I will not press that.

I have a second question which may have been touched in your testimony. Regrettably I was not here. That is on the CIA's fund, the reserve for contingencies. By the time these funds end up in the regular budget process—we are talking about the congressional power of the purse role—it is very difficult to cut these funds off.

Are you also advocating some restraints on the use of the reserve to initiate covert actions, such as perhaps setting a maximum amount that can be used for a particular action, for prohibiting the use of the reserve for certain kinds of activities? Are you going that far in advocating congressional control?

Mr. CLIFFORD. No. The distance that I do go is that when a President decides that he is going to launch a new covert activity, 99 percent of the time, it will take some funds to be carried out. The President decides the source of those funds. I say, if he comes up and gives you the notification, all right, perhaps he uses those funds at his discretion. If he does not give you the 48-hour notification, which I consider to be reasonable, then whatever funds he intended to use he must not use because he has failed to comply with the law.

Mr. RICHARDSON. That makes it clear.

Thank you, Mr. Chairman.

Chairman MCHUGH. Thank you, Mr. Richardson.

Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I, too, was sorry I was not here when Mr. Clifford delivered his testimony. I did hear his testimony before the Senate Intelligence Committee some months ago and thought it was extraordinarily effective and useful not only for its recommendations but for the historic perspective that Mr. Clifford gave to the question and for his analysis. I happened to be persuaded.

I also happened to be persuaded by the necessity of including criminal penalties. I think it is extremely difficult for any country, particularly a free society, to cope with its perhaps necessary national security trappings, because very often they are driven by idealogical concerns and excesses, and there is very little normally to restrain such activity.

As Mr. Clifford suggests, it is likely to recur again. It has in the past. When we think we have restrained some of the excesses, we see in another year that they have returned to us.

I wonder whether, Mr. Clifford, you are sanguine about being able to deal with that issue of the embarrassments and excesses in the name of national security that might be committed in the long-term? Or are we doomed to have to re-learn these lessons over and over again?

Mr. CLIFFORD. I think in every nation's history, at some point, the country must face reality. I think that time has come for our country. We have been through this. We have had setback after setback. As I mentioned earlier, we made a determined effort in 1980 to come to grips with this. The Administration at that time said, oh, you do not need to go nearly so far as you are considering; rely upon us, depend upon us, we will cooperate with you.

And I think somebody mentioned at the time that it was a Democratic President and a Democratic Congress.

So we have been down this road of expecting that good fellows will work together and we will get results. It has not paid off at all. We are right back where we were.

I say how long do we have to go through this? Let us face up to it now. I think that this committee has an opportunity of rendering a significant service to the country by saying we have been through this enough.

Now, let us take a new approach to it, let us confine this area very carefully.

I want a President to think much more carefully about starting off on a covert course of action than they have been doing in the past. It has been pretty easy. You do not tell anybody about it. You say, "well, it is up to me as to whether I sign a finding. I may do it ten months later or I may give notification ten months later."

It is so loose and all. He may say, "this is such an opportunity to make such a great gain," and he may be doing it with the best of intentions. They go just as sour as those that perhaps don't have such good intentions.

We have learned enough now, I believe, from the record that we can say let us have a new set of rules and see if that does not limit us from going through these national tragedies.

Mr. KASTENMEIER. I thank you.

Thank you, Mr. Chairman.

Chairman MCHUGH. Thank you.

Mr. Glickman.

Mr. GLICKMAN. Thank you very much.

First of all, I think I need to respond to one thing Mr. Hyde said. Quite frankly, I thought it was not subject to the substance of what we were talking about. Somehow the comparison was made that some funds that Congress has spent improperly itself was equivalent to improper expenditures on covert activities by the Executive Branch of Government.

It is true. We sometimes are wasteful. The example was given, the $8 million to a French school which we have subsequently repealed. That in no way, in no way parallels the use of funds for covert activities that have not been approved and may be done in connection with violations of law because as bad as the $8 million to French schools was, it did not involve war and peace, did not involve the possible lives of Americans in action, did not involve American prestige in the world.

I do not want the public of this country to think that maybe one example of wasteful spending is equivalent to another example which goes far beyond wasteful spending and goes to the heart of our checks and balances.

It looks to me like the heart of all this is the question of mistrust. That is why you have laws in the first place, to prevent people from doing things they ought not to be doing.

I wanted to try to go again to Mr. Richardson's question. I agree with you about criminal penalties. I wanted to ask a question. Your penalties for anybody who would willfully and knowingly violate the section, would that apply to the President of the United States, as well?

Mr. CLIFFORD. It would.

Mr. GLICKMAN. I happen to believe, like yourself, that that is the best inhibitor of—best preventer of illegal conduct. It may not be utilized very often, but the cloud of criminal activity is what we use in voluntary compliance with our tax laws and just about everything else in this country.

I do disagree with you a little bit on the issue. You say if there is an illegal activity we would automatically terminate and prohibit the expenditure of funds for those covert activities. You might be involved in the middle of something that would be far more dangerous for the United States to stop because of the peculiarities of international politics.

I am just wondering, would not the criminal activities really take care of this problem, rather than stopping a covert action right in the middle of it, when perhaps that could involve a loss of lives to some of our friends?

Mr. CLIFFORD. In the event that there has been a covert activity that has been going on for some period of time, and if the President chose not to comply with the law and he had not given the 48-hour notice and it might have been going on for some three months thereon, and then possibly there is a leak someplace and it comes to your attention, I think the law should be applicable.

I don't believe you can create exceptions. If he chooses not to comply with this reasonable requirement and report to you, then he operates at his peril, in my opinion.

Mr. GLICKMAN. The problem is it is not just his peril at that point; it is the country's peril. We may have other objectives that would be far more seriously damaged from a standpoint of loss of American lives and folks out in the field not withstanding the mistake he has made.

What I am trying to say to you is that I would like to punish him and his people for doing improper activities by failure to notify us, and therefore I support the criminal penalties.

Maybe we ought to terminate the employees as well as some form of criminal penalties, but we may be punishing innocent folks by just automatically terminating that activity after a period of time. I think we have to be very careful about going down that road.

Otherwise I find your testimony to be extraordinarily credible. I have learned a lot today.

Thank you, Mr. Chairman.

Chairman MCHUGH. Thank you, Mr. Glickman.

Are there any other questions?

Mr. HYDE. Mr. Chairman?

Chairman MCHUGH. Mr. Hyde.

Mr. HYDE. Just for my friend's edification or disedification, the similarity between the $8 million and the alleged diversion of funds to the contras is simply that they were both done in the dead of night without people knowing about it.

Secondly, I am not sure the $3 million that went to the contras were taxpayers' funds. They were from the proceeds of the sale of the arms to the Iranians, the price jacked up by General Secord. Secord paid for the arms, every penny the CIA wanted.

It was just that things happened, and nobody knew about them. One was $8 million, one was $3 million. I don't find them too dissimilar.

One last question to my friend—a person I admire. I wish he were my friend.

I wish we knew each other better. That is what I meant. Insofar as we know each other, I certainly consider you to be my friend.

Do you still agree with this statement that you made before the Church committee on April 26, 1976—I want you to know beforehand, I certainly agree with it; I hope you do—"Second, the creation of an effective joint House-Senate committee to oversee intelligence operations. I consider this the most important function of a new law. Proper congressional oversight has been sadly lacking. I would hope that a small oversight committee of possibly five members of each chamber might be created. It should be considered an assignment of outstanding importance and the members should be willing to give the necessary time to it. By keeping the committee small, security can be maintained and the possibility of disclosures can be minimized."

I say "amen" to that. I wonder if you still stand by that statement.

Mr. CLIFFORD. I support that today.

Mr. HYDE. Thank you, sir.

On a winning streak, I yield back the remainder of my time.

Chairman MCHUGH. I find Mr. Hyde always comes back until he wins.

Mr. GLICKMAN. Who says he won?

Chairman MCHUGH. Well——

Mr. HYDE. You weren't listening.

Chairman MCHUGH. Mr. Clifford, we are very much indebted to you for your presence here today and for your testimony. We hope that we will have the opportunity to hear from you again on other matters, as well.

Thank you very much.

Mr. CLIFFORD. Thank you, Mr. Chairman.

Chairman MCHUGH. Our next witness is a former colleague and friend, the Honorable John Buchanan, Jr. He represented the 6th District of Alabama for many years, serving on the Foreign Affairs Committee.

John is a senior associate at the Kettering Foundation and Chairman of its International Affairs Committee. Since 1981 he has served as Chairman of People for the American Way.

Mr. Buchanan is accompanied this afternoon by the Legislative Counsel of People for the American Way, Mr. Steven Katz.

John, it is a pleasure to have you with us. We appreciate your staying with us during the prior testimony, as well. Please proceed.

STATEMENT OF JOHN H. BUCHANAN, JR., CHAIRMAN, PEOPLE FOR THE AMERICAN WAY ACTION FUND, ACCOMPANIED BY STEVEN KATZ, LEGISLATIVE COUNSEL, PEOPLE FOR THE AMERICAN WAY

Mr. BUCHANAN. It is a privilege to testify before you and the distinguished members of your committee on behalf of the 270,000 members of the People for the American Way, the nonpartisan constitutional liberties organization which it is my privilege to chair.

The importance of secrecy to the security of our nation is undeniable. But even national security is not very well served by excessive government secrecy.

In December 1987, People for the American Way released its report, "Government Secrecy: Decisions Without Democracy." We sent each member of this committee a report. It costs $8.75. Keep it, read it. I hope you will. Steve Katz was its author. We hope it will make a contribution not only to this discussion but to the overall problem we addressed in that report.

It culminates almost two years of investigative research into the growth of official secrecy in the United States and its consequences for our government and citizens. It documents the ongoing tension between secrecy and democracy, the existence of a secrecy system at work well before the Iran-contra affair, and the potential for excessive secrecy by future administrations—Democrat or Republican.

The bill you consider today, the "Intelligence Oversight Act," is an essential piece of legislation, a reform mandated not only by the Iran-contra affair, but also by the rightful role of congressional oversight in our constitutional government.

Mr. Chairman, it seems to me you are acting to make sure the prerogatives of the Congress are honored and its responsibilities fulfilled under the Constitution in our system of checks and balances.

We believe that Americans strongly support congressional oversight and access to information. In a November 1987 nationwide poll commissioned by People for the American Way, the Roper organization asked Americans about government secrecy. Overall the response to the poll was a call for greater "openness in government"; 93 percent of those surveyed specifically supported "openness in government" because Congress needs the information to perform its oversight role.

The question before us today, of course, is not simply congressional access to information in general. It is information about intelligence activity, particularly notification of covert activity performed by the Central Intelligence Agency and other government entities.

Congressional oversight of the intelligence community, particularly "special" or covert activities, is central to the legitimate foreign policy and national security role of Congress. This goes beyond the fundamental oversight role of Congress in the authorization, funding and execution of government programs and policies.

American foreign policy and our system of government cannot succeed unless the President and the Congress cooperate. The Con-

stitution gives both the Congress and the Executive specific foreign policy powers. It does not make foreign policy the exclusive domain of one branch of government.

The result is a system of checks and balances which ensures that our nation's foreign policy and national security framework is consistent with the policy, law and interests of our nation. To do otherwise, as we have seen in the Iran-contra affair, is to subvert our constitutional system, contravene established foreign policy and ignore the rule of law.

Indeed, the former Director of Central Intelligence, Admiral Stansfield Turner, states in his book, "Secrecy and Democracy":

> In gauging whether congressional oversight has done more good than harm, we have to look at the benefits it affords . . . Most of all, the requirement to report to Congress is valuable because it forces the DCI and his subordinates to exercise greater judiciousness in making decisions about which espionage operations are worth the risks. We have seen some of the unfortunate past excesses that can be attributed to the absence of adequate accountability . . . Finally, contact with the congressional committees is salutary for the CIA's people because it helps them keep in touch with national views . . . For all these reasons, congressional oversight is a definite plus.

The proposed Intelligence Oversight Act, like its Senate counterpart passed in committee last week, provides the necessary reforms to guarantee that the legitimate role of Congress and our checks and balances system are functioning effectively.

Democracy demands the vigilance of its citizens and elected officials. The passage of the legislation before us today is necessary for such vigilance to be meaningful.

Congress must be kept fully and currently informed of the intelligence activities of the United States, whether it is the CIA, the National Security Council or other entities. Notification of "special" or covert activities is particularly important.

We support the proposed requirement that the intelligence committees are informed of a finding "as soon as possible after such approval and prior to the initiation of the special activity authorized by the finding," and in exceptional circumstances, we support the proposed 48-hour time limit for notification pursuant to initiation of a covert operation.

Congressional oversight and notification as outlined in this bill is essential for our support of legislation on covert activities.

It is also important to recognize, however, that the proposed legislation not only makes the president more accountable, but appears to expand the president's power to authorize covert activity.

Under current law and executive order, authority to engage in covert activity is limited to the CIA unless the president makes a determination that another agency can do the job better. We have reservations about your using language that would encourage the president to reach out beyond the CIA in this kind of activity.

We have some reservations about what could be interpreted as an apparent expansion of authority, particularly as our nation emerges from a scandal where agencies outside the CIA acted with indifference to the law.

Covert operations should be limited. By their very nature and as a matter of policy, covert operations are not accountable to many in government. They lack the broad congressional and public support necessary to serve and protect the nation's vital interests.

Mr. Chairman, at this juncture in our nation's history, it is unclear why Congress would so readily dispatch the performance of covert activities to more, not fewer, agencies of our government.

Mr. Chairman, our organization supports the proposed legislation in large measure because it aims to ensure that our government operates under established policy and law on intelligence activity, even though particular covert operations and plans remain vital secrets.

We believe, however, that the legislation will fall short of its goal of an established policy and law on intelligence activity unless the committee recognizes the impediments posed by the promulgation of secret presidential directives.

These directives are issued through the National Security Council and have established covert action policies binding on the government today. Such directives have made it possible for government officials to operate outside the scope of public laws and executive orders on covert action, and are indifferent to statutory action for congressional oversight.

The use of such directives, evolving through administrations since President Truman, has increased in sophistication and authority. They started out almost as position papers. They are far stronger than that today.

In 1976 a special Senate committee studying presidential power concluded that these directives:

> Represent a new method for promulgating decisions, in areas of gravest importance. Such decisions are not specifically required by law to be published in any register, even in a classified form; none have prescribed formats or procedures; none of these vital Executive decisions are revealed to Congress or the public except under irregular, arbitrary or accidental circumstances.

That description holds true today. Under President Reagan, the series is called the National Security Decision Directives, or NSDDs. Awareness of the series in Congress is very limited. As Representative Anthony Beilenson, Chairman of the Intelligence Oversight and Evaluation Subcommittee, stated before a House Government Operations subcommittee last year:

> What I have to say about NSDDs, as they are called, will be brief. It is based on an incomplete understanding of this form of presidential decision. That is because the Permanent Select Committee on Intelligence does not receive copies of NSDDs.

I share with the former Secretary Clifford great admiration—and the members of this committee—great admiration for Judge Webster. I think we are all reassured to have a person of his caliber in the position of being Director of Intelligence for our country.

Like Secretary Clifford, I disagree with his position on this matter. I was particularly intrigued that he cited an NSDD as the cure to the problem which confronted us in the Iran-contra affair.

Actually I would say it is part of the disease, not part of the cure. It is part of the problem, not the answer.

The President could sign—and in this case notify—the Congress of the content of that NSDD today. You could decide it sufficed, and tomorrow it could change and you would not necessarily know it.

But if this President stood by his present policy and did not in secret—as happened before—change, modify the NSDD or create

new ones that would contradict that policy as expressed in Judge Webster's testimony, the next president could certainly do so.

I would advise the committee to hear the wise words of Thomas Jefferson and "bind men with the chains of law."

As of January 1, 1988, President Reagan has issued at least 286 NSDDs. Some are innocent, but many are not. On three occasions Congress has overturned or nullified specific NSDDs through legislation. NSDDs have been found to secretly create national policy, to permit fugitive policymaking and to avoid oversight and accountability.

President Reagan has issued NSDDs to authorize an array of activities, including the secret transfer of millions of taxpayers' dollars to Argentina to train Nicaraguan rebels in 1981, increasing U.S. military activity in Central America and the Caribbean in 1983, and authorization of the Libyan disinformation campaign in 1986.

In the case of covert action policies, at least two NSDDs demonstrate the ability of the President to secretly modify established policy and law, and we believe could undermine the purpose of this legislation. These are NSDD 159, "Covert Action Policy Approval and Coordination Procedures," and NSDD 286, which is untitled, but sets policies and procedures regarding congressional oversight of covert action which fall short of the stricter requirements of today's bill.

Focusing on NSDD 159, its history tells much about its purpose and its danger. NSDD 159 was issued by the President on January 18, 1985, shortly after the most significant of the Boland amendments had taken effect terminating military and paramilitary aid to the Nicaraguan rebels.

As stated in the Iran-contra committee report:

> Still the President felt strongly about the contras, and he ordered his staff, in the words of his National Security Adviser, to find a way to keep the contras "body and soul together." Thus began the story of how the staff of a White House advisory body became an operational entity that secretly ran the contra assistance effort, and later the Iran initiative. The action officer placed in charge of both operations was Lieutenant Colonel Oliver L. North.

NSDD 159 facilitated the operational independence of the National Security Council in two important ways: appeared to increase the ability of agencies other than CIA to engage in covert activity; second, it carves out an exemption from reporting to Congress about a vast array of activities in support of CIA operations performed by non-CIA government entities.

First, NSDD 159 grants the use of a finding by agencies other than the CIA, appears to contravene President Reagan's own Executive Order on intelligence activities. Issued in 1981, the order states that "no agency except the CIA may conduct any special activity [covert activity] unless the President determines that another agency is more likely to achieve a particular objective." [E.O. 12333, Section 1.8(e)]

In the arms-for-hostage transfers, for example, which the National Security Council coordinated, no determination was ever made that the NSC would "more likely achieve [this] particular objective" than the CIA. Nonetheless, one finding was issued for this action in December, 1985, and two in January, 1986. Even so, the

findings were deliberately withheld by the President from Congress, which learned of the arms sales, with the rest of the world, from a disgruntled Iranian middleman.

Second, because the NSDD carves out an exemption from reporting to Congress about an array of activities in support of CIA covert, we believe the proposed legislation will fall short of its goals. NSDD 159 weakens the reporting requirement by distinguishing "substantial support" to the CIA which must be described in the "finding or memorandum of notification" from "routine support" which is exempt from the reporting requirements.

On its face, "routine support" may sound minimal, but NSDD 159 describes its scope as including "personnel, funds, equipment, supplies, transportation, training, logistics, and facilities." The dimensions of these activities enlarge significantly when one considers the unreported covert NSC activities in Central America and the Middle East following issuance of NSDD 159.

We cannot be certain that even the reforms proposed today will prevent bizarre and mistaken actions by our Government. However, every effort should be made to ensure that the legislation will be able to meet its objectives.

We urge you to include the following provisions in the bill or in its legislative history.

One, existing NSDDs on covert action not consonant with the terms of this law should be understood as inoperative and should be officially rescinded by the President.

Two, the National Security Council must provide the Congress with copies of all existing NSDDs, and to the extent classified, then the appropriate committees and leadership.

Three, copies of all newly issued Presidential National Security Council directives must be provided to the Congress when promulgated, and to the extent classified, then to the appropriate committees and leadership.

Four, lastly, all support—"substantial," "routine," or otherwise—by non-CIA Government components to CIA covert actions must be fully and currently described in the finding or memorandum of notification provided to the Congress by the Director of Central Intelligence.

Mr. Chairman, we support this legislation and appreciate the opportunity to testify.

[The prepared statement of Mr. Buchanan follows:]

People For The American Way
ACTION FUND

TESTIMONY OF

JOHN H. BUCHANAN, JR.
CHAIRMAN, PEOPLE FOR THE AMERICAN WAY ACTION FUND

February 24, 1988

HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE
SUBCOMMITTEE ON LEGISLATION

HEARING ON H.R. 3822 "INTELLIGENCE OVERSIGHT ACT"

I am John Buchanan, Chairman of the People for the American Way Action Fund, a nonpartisan constitutional liberties organization. I am pleased to testify today on behalf of the 270,000 members our organization. I am accompanied by our legislative counsel Steven Katz.

Today's hearing is not without historic importance. It is one of the first opportunities since the Iran-contra hearings for the public, Congress, and administration officials to debate the scope of intelligence oversight reforms. In a larger sense, it is a debate over the foreign policy and national security role of the Congress. As a citizen, and as a former Member of Congress who served on the Foreign Affairs Committee, I am very pleased to appear before you today to address these crucial issues.

SECRECY AND DEMOCRACY

The importance of secrecy to the security of our nation is undeniable; but even national security is not very well served by excessive government secrecy. In December, 1987, People for the American Way released its report "Government Secrecy: Decisions Without Democracy." The report culminates almost two years of investigative research into the growth of official secrecy in the United States and its consequences for our government and citizens. It documents the ongoing tension between secrecy and democracy, the existence of a secrecy system at work well before the Iran-contra affair, and the potential for excessive secrecy by future administrations -- Democrat or Republican.

As historian and former presidential aide Arthur Schlesinger states in the preface to our report:

> Secrecy is the bane of democracy because it is the enemy of accountability. The framers of the American Constitution designed a system of government intended to bring power and accountability into balance. The secrecy system, as it has been nurtured by the executive branch over the last forty years and with special zeal over the last seven years, is the indispensable ally of the Imperial Presidency.

CONGRESSIONAL OVERSIGHT

The bill you consider today, the "Intelligence Oversight Act" is an essential piece of legislation, a reform mandated not only by the Iran-contra affair, but also by the rightful role of congressional oversight in our constitutional government. We believe that Americans strongly support congressional oversight and access to information. In a November, 1987, nationwide poll commissioned by People for the American Way, the Roper Organization asked Americans about government secrecy. Overall, the response to the poll was a call for greater "openness in government." 93% of those surveyed specifically supported "openness in government" because Congress needs the information to perform its oversight role.

OVERSIGHT OF INTELLIGENCE ACTIVITY

The question before us today, of course, is not simply congressional access to information in general. It is information about intelligence activity, particularly notification of covert activity performed by the Central Intelligence Agency (CIA) and

other government entities.

Congressional oversight of the intelligence community, particularly "special" or covert activities, is central to the legitimate foreign policy and national security role of Congress. This goes beyond the fundamental oversight role of Congress in the authorization, funding, and execution of government programs and policies. American foreign policy and our system of government cannot succeed unless the President and the Congress cooperate. The Constitution gives both the Congress and the Executive specific foreign policy powers. It does not make foreign policy the exclusive domain of one branch of government. The result is a system of checks and balances which ensures that our nation's foreign policy and national security framework is consistent with the policy, law, and interests of our nation. To do otherwise, as we have seen in the Iran-contra affair, is to subvert our constitutional system, contravene established foreign policy, and ignore the rule of law.

Indeed, former Director of Central Intelligence, Admiral Stansfield Turner, states in his book Secrecy and Democracy:

> In gauging whether congressional oversight has done more good than harm, we have to look at the benefits it affords. ... Most of all, the requirement to report to Congress is valuable because it forces the DCI and his subordinates to exercise greater judiciousness in making decisions about which espionage operations are worth the risks. We have seen some of the unfortunate past excesses that can be attributed to the absence of adequate accountability... Finally, contact with the congressional committees is salutary for the CIA's people because it helps them keep in touch with national views...For all these reasons, congressional oversight is a definite plus.

The proposed "Intelligence Oversight Act", like its Senate counterpart passed in committee last month, provides the necessary reforms to guarantee that the legitimate role of Congress and our checks and balances system are functioning effectively. In a perfect world, these principles would be self-executing. We know from experience, however, that the mechanisms for accountability must be both crafted and implemented carefully. Democracy demands the vigilance of its citizens and elected officials. The passage of the legislation before us today is necessary for such vigilance to be meaningful.

Congress must be kept fully and currently informed of the intelligence activities of United States, whether it is the CIA, the National Security Council (NSC), or other entities. Notification of "special" or covert activities is particularly important. We support the proposed requirement that the intelligence committees are informed of a Finding "as soon as possible after such approval and prior to the initiation of the special activity authorized by the finding," and in exceptional circumstances, we support the proposed 48-hour time limit for notification pursuant to initiation of a covert operation.

The present notification system is ineffective for purposes of proper congressional oversight. Frequently, the White House has failed to comply with the notification rules, and when it has, Congress's role is no greater than that of an umpire dusting off homeplate after the batter has hit a home run.

Congressional oversight and notification as outlined in this bill is essential for our support of legislation on covert activities. It is also important to recognize, however, that the proposed legislation not only makes the president more accountable, but appears to expand the president's power to authorize covert activity. Under current law and executive order, authority to engage in covert activity is limited to the C.I.A. unless the president makes a determination that another agency can do the job better. The bill you consider today establishes, a new section of the National Security Act entitled "Presidential Approval and Reporting Of Special Activities," and states that "the President may authorize the conduct of a special activity by departments, agencies, or entities of the United States Government." We have some reservations about this apparent expansion of authority, particularly as our nation emerges from a scandal when agencies outside the C.I.A., acted with indifference to the law. Covert operations should be limited. By their very nature and as a matter of policy covert operations are not accountable to many in government. They lack the broad congressional and public support necessary to serve and protect the nation's vital interests. Mr. Chairman, at this juncture in our nation's history, it is unclear why Congress would so readily dispatch the performance of covert activities to more, not fewer, agencies of our government.

NATIONAL SECURITY COUNCIL COVERT ACTION POLICY

Mr. Chairman, our organization suppports the proposed legislation in large measure because it aims to ensure that our government operates under established policy and law on intelligence activity, even though particular covert operations and plans remain vital secrets.

We, believe, however, that the legislation will fall short of its goal of an established policy and law on intelligence activity, unless the committee recognizes the impediments posed by the promulgation of secret presidential directives. These directives are issued through the National Security Council and have established covert action policies binding on the government today. Such directives have made it possible for government officials to operate outside the scope of public laws and executive orders on covert action, and are indifferent to statutory action for congressional oversight.

The use of such directives, evolving through administrations since President Truman has increased in sophistication and authority. In 1976, a special Senate committee studying presidential power concluded that these directives

> represent a new method for promulgating decisions, in areas of gravest importance. Such decisions are not specifically required by law to be published in any register, even in a classified form; none have prescribed formats or procedures; none of these vital Executive decisions are revealed to Congress or the public except under irregular, arbitrary, or accidental circumstances.

That description holds true today. Under President Reagan, the series is called the National Security Decision Directives or

NSDDs. Awareness of the series in Congress is very limited. As Representative Anthony Beilenson, Chairman of the Intelligence Oversight and Evaluation Subcommittee stated before a House Government Operations Subcommittee last year:

> What I have to say about NSDDs, as they are called, will be brief. It is based on an incomplete understanding of this form of Presidential decision. That is because the Permanent Select Committee on Intelligence does not receive copies of NSDDs.

As of January 1, 1988 President Reagan has issued at least 286 NSDDs. Some are innocent, but many are not. On three occasions Congress has overturned or nullified specific NSDDs through legislation. NSDDs have been found to secretly create national policy, to permit fugitive policymaking, and to avoid oversight and accountability. President Reagan has issued NSDDs to authorize an array of activities including the secret transfer of millions of taxpayers dollars to Argentina to train Nicaraguan rebels in 1981, increasing U.S. military activity in Central America and the Caribbean in 1983, and authorization of the Libyan disinformation campaign in 1986.

In the case of covert action policies, at least two NSDDs demonstrate the ability of the president to secretly modify established policy and law; and we believe could undermine the purpose of this legislation. These are NSDD 159 "Covert Action Policy Approval and Coordination Procedures," and; NSDD 286, which is untitled, but sets policies and procedures regarding congressional oversight of covert action which fall short of the stricter requirements of today's bill.

Focusing on NSDD 159, its history tells much about its purpose and its danger. NSDD 159 was issued by the President on January 18, 1985, shortly after the most significant of the Boland Amendments had taken effect terminating military and paramilitary aid to the Nicaraguan rebels. As stated in the Iran-contra Committee report:

> Still the President felt strongly about the Contras, and he ordered his staff, in the words of his National Security Adviser to find a way to keep the Contras "body and soul together." Thus began the story of how the staff of a White House advisory body, became an operational entity that secretly ran the Contra assistance effort, and later the Iran initiative. The action officer placed in charge of both operations was Lt. Col. Oliver L. North.

NSDD 159 facilitated the operational independence of the National Security Council in two important ways. First, it extended the use of a Finding, the presidential license for covert activity, to agencies other than the CIA. Second, taking the opposite tack towards accountability, it carved out an exemption from reporting to Congress about a vast array of activities in support of CIA operations performed by non-CIA government entities.

First, the use of a Finding by agencies other than the CIA appears to contravene President Reagan's own executive order on intelligence activities. Issued in 1981, the order states that

> No agency except the CIA may conduct any special activity [covert activity] unless the President determines that another agency is more likely to achieve a particular objective. [E.O. 12333, Sec. 1.8(e)]

In the arms-for-hostage transfers, for example, which the

National Security Council coordinated, no determination was ever made that the NSC would "more likely achieve [this] particular objective" than the CIA. Nonetheless, one Finding was issued for this action in December 1985 and two in January 1986. Even so, the Findings were deliberately withheld by the President from Congress, which learned of the arms sales with the rest of the world from a disgruntled Iranian middleman.

Second, because the NSDD carves out an exemption from reporting to Congress about an array of activities in support of CIA covert, we believe the proposed legislation will fall short of its goals. NSDD 159 weakens the reporting requirement by distinguishing **"substantial support"** to the CIA which must be described in the "Finding or memorandum of notification" from **"routine support"** which is exempt from the reporting requirements. On it's face, "routine support" may sound minimal, but NSDD 159 describes its scope as including **"personnel, funds, equipment, supplies, transportation, training, logistics, and facilities."** The dimensions of these activities enlarge significantly when one considers the unreported covert NSC activities in Central America and the Middle East following issuance of NSDD 159.

Mr. Chairman, my incredulity increases each time I revisit the facts of the Iran-contra Affair, and yet it happened. What's worse is that it happened after Watergate and after the Church Committee investigations of the CIA.

We cannot be certain that even the reforms proposed today

will prevent bizarre and mistaken actions by our government. However, every effort should be made to ensure that the legislation will be able to meet its objectives.

I urge you to include the following provisions in the bill or its legislative history: (1) Existing NSDDs on covert action not consonant with the terms of this law should be understood as inoperative and should be officially rescinded by the President. (2) The National Security Council must provide the Congress with copies of all existing NSDDS, and to the extent classified, then the appropriate committees and leadership. (3) Copies of all newly issued presidential National Security Council directives must be provided to the Congress when promulgated, and to the extent classified then to the appropriate committees and leadership.(4) Lastly, all support, "substantial," "routine" or otherwise by non-CIA government components to CIA covert actions must be fully and currently described in the Finding or memorandum of notification provided to the Congress by the Director of Central Intelligence.

Mr. Chairman, and distinguished members of the committee, thank you again for the opportunity to appear before you today.

Chairman McHUGH. Thank you very much, Mr. Buchanan. I appreciate your being here today and giving us your insights. Perhaps you can begin by just saying an extra word or two about the organization that you represent and its purpose.

Mr. BUCHANAN. We are, as I indicated, 270,000 strong. We are private citizens; we are nonpartisan. Our purpose is to protect, enhance the constitutional liberties of American citizens, and we sought to do so in a series of ways.

One of our areas of operation is in protecting freedom to learn and combatting censorship activity in public education. We have sought to combat religious intolerance in political life in the United States. We think the pluralism of this country is its strength and we have sought to protect the 1st amendment and other constitutional rights and liberties of American citizens.

We also are attempting to do our part to uphold democratic values, and toward that end, we are trying to increase voter and citizen participation in the Government.

Chairman McHUGH. I am sure some of the people observing these hearings did not know about your organization.

I would like to make one point. I think you have raised a number of interesting and important issues in your testimony which we should look at more carefully.

I want to reassure you that, at least on my behalf, there is no intent to expand the authority that the President holds. There is no real attempt to restrict the President from conducting covert operations as compared to what he has now.

The real thrust of this legislation, as you know, is to require that the Congress know what decisions are being made with respect to covert operations so that we can perform our oversight function and so that the President might have the benefit of our advice in the case of a significant policy decision.

And, therefore, at least with respect to the one point you made, it may appear that we are attempting to expand the President's authority, but we really are not intending to do that. We are simply saying that if in fact he uses one of these organizations under existing authority, which perhaps is a question here, he must notify us through the procedures described in the bill.

Beyond that, I will pass to my colleagues in the interest of time. But thank you for your presentation this morning.

Mr. LIVINGSTON. Thank you, Mr. Chairman.

Mr. Buchanan, you have made a good contribution to this effort although I don't completely agree with you. I am curious—I notice you have come out in favor of the restrictive reporting period compelling the President to consult with the Congress before he engages in covert activity, under the most exceptional circumstances, within 48 hours.

When the intelligence oversight legislation of 1980 was under consideration by the Foreign Affairs Committee of Congress, on which you served in the House, at that time Chairman Zablocki offered an amendment which provided the President the realistic flexibility to defer prior reporting if essential to meet extraordinary, vital interests of the United States or was essential to avoid unreasonable risk to the safety or security of the personnel or methods provided.

It seems to me that was a pretty good rule, and unfortunately I am not sure that the Iran situation complied with that rule, but you voted for that rule and now you have changed your mind apparently, and I wanted you to have a chance to explain your reversal.

Mr. BUCHANAN. I yield to no one in my admiration for the gentleman from Louisiana, whose integrity and reliability are quite an asset to your district and to the Congress.

I guess we both have the right to be wrong, since perhaps I erred in fulfilling similar responsibilities to the ones you are fulfilling here. I was in the position of trying to defend the prerogatives of the President, which, as a minority Member of the committee, often fell my lot. When I first came to Congress, there were a few people who would say "I agree with your voting record 100 percent." I was tempted to say, "If we are lucky we may be 75 right, but the chances are it is more like 50/50."

I feel strongly at this juncture that what is more broadly at stake is what I believe to be an affront to the Constitution in the Iran-contra affair and to the constitutional prerogatives of the Congress. I think there is an effort to get at something very important, that Congress fulfill its constitutional responsibilities and that its prerogatives be honored.

You represent the people. I have faith in the American people themselves, and more faith in elected representatives than you seem to have in yourselves and each other, because we are talking about eight persons who have to be notified, eight persons in whom I have specific trust, and eight persons who ought to be persons the people can trust.

It seems to me we should not, in the name of preserving of a democratic society, stray away from the very system that has made it a democratic society, and therefore, if I had that vote to cast again, I might cast it differently. But I urge the Committee to deal with the present problem as illustrated in Iran-contra, and one that we in our report found to be a growing problem in Government in areas beyond this.

The American people in majority, we have found, want greater openness in government. They specifically want the Congress to have the information it needs to exercise oversight in their behalf, and I don't think it is an unreasonable provision of law to require it.

Mr. LIVINGSTON. I appreciate your position, but I am concerned that rigid rules will cause greater problems. I agree with you. The implementation of the Iran-contra affair rubs against my sensibilities for the same reason it does every Member of this Committee. Mr. Hyde has expressed his opinion to that end. There were errors made in implementation of that policy. The policy was well-motivated, that we free our hostages and help the Freedom Fighters in Nicaragua, but there were errors committed.

My concern is down the line if you are going to use this as an example to compel the Central Intelligence Agency to make sure that they dot their "i's" in every circumstance, we may find ourselves in some circumstance in the future whereupon, frankly, American lives again or the security interests of the United States are seriously jeopardized.

For example, right now we have a possibility of—let me backtrack. The CIA, in conducting operations, often need some menial support from other agencies, such as weather reports from NOAA. They can have the flexibility to rely on those other agencies to provide those functions and those services for people, to do it without reporting to Congress, without reporting to the President, to do it as a day-to-day routine matter.

What you are saying is that if we pass this bill, they have to report to Congress virtually everything they do, and wouldn't this, in addition to jeopardizing the security of the country and the safety of Americans, wouldn't this end up in Congress being overwhelmed with paperwork and oversight to the extent that we couldn't possibly accomplish the micromanagement that is required by the bill?

Mr. BUCHANAN. I don't think reporting of the NSDDs to Congress would constitute a burden on the Administration, and it could be limited to Members of Congress holding these responsibilities. So I don't think that does constitute an overwhelming burden.

Let me say that I think that congressional oversight may give you the kind of need-to-know in the language of the Intelligence Community that to do your job constitutionally, you have the need-to-know about these things. If I were President, I would seek the gentleman from Louisiana's counsel, that of the gentleman from Illinois, Mr. Hyde, the gentleman from Ohio, Mr. Stokes and others in Congress I trust, to get your judgment on whether we should do A or B in the area of covert activities. If you had been consulted, for example, you might have in 1984 not have agreed to the CIA mining of harbors in Nicaragua, certainly not when two Members of the Senate were on the scene there and could have been blown up in the process.

There has been a series of decisions that had Congress been in this way notified, your counsel might have been of benefit to the President or the Director of Intelligence in a way that would have been persuasive and prevented mistakes.

Mr. LIVINGSTON. We were notified. There was an instance involving the Libyan raid in which Members of Congress were notified in advance, and whether you trust us or not, Sam Donaldson half an hour before the raid came on the air and said there was going to be a significant event involving Libya. There is a problem with disclosure.

Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Stokes.

Mr. STOKES. Thank you, Mr. Chairman.

I want to express my appreciation to Mr. Buchanan for his appearance here and his testimony. Most of us remember when he served in this body with us and the high esteem we had for him and the great integrity with which he served in this body. It is indeed always a pleasure to see him.

Mr. BUCHANAN. Thank you, sir.

Mr. STOKES. I have one question, perhaps just to invite a comment. I think in this whole picture people sometimes tend to lose sight of the fact that in this case, the Iran-contra case, what really happened is that the law was circumvented. There was nothing in

Iran-contra which prohibited the President of the United States either from calling in the "Gang of Eight" or calling the Intelligence Committees of the House and Senate and advising them of what he was going to do.

Then he had a third alternative. Had he decided it was so sensitive he could not comply with the law in that respect, he could have then initiated his action, then given timely notice to the Congress, and Iran-contra would never have been out of control as it was.

Here, instead of complying with any one of the three options, the President chose to instruct the CIA not to notify the Congress and to let this action proceed in this unconstitutional manner.

From time to time our Committee receives in the normal course of business notification about covert actions and those covert actions proceed without any leaks or without any disclosures of any kind, and in most instances, they are successful ventures. The problem here got out of hand because they actually circumvented the natural, normal processes of government and actually circumvented the CIA.

People in the CIA, had they been permitted to carry out this function in the normal way, could have carried it out because of their ability to carry out actions of this sort, so this legislation really deals with a situation were the President and others in our administration attempted to circumvent the laws.

I don't know how much good it will do to enact this law. If they choose to disobey the law, we are still in the same position. But at least I think the American people will have seen the Congress act responsibly in this respect.

Do you have a comment?

Mr. BUCHANAN. Mr. Chairman, I think your words I would simply echo. It seems to me that while the American people overwhelmingly want more openness in government and they want you to have the information you are seeking to acquire by the reporting requirements of this legislation, I don't think outside the Beltway people have generally perceived the constitutional crisis that is embodied in Iran-contra that I perceive. It seems to me that it is a scandal. It is outrageous and it constitutes a challenge to the Constitution itself.

We simply can't have a situation where lieutenant colonels run secret wars from the basement of the White House as functionaries of an agency that was never intended to be an operational agency but an advisory body to the President. We can't have a situation where the President and the Secretary of State are denouncing a policy of doing business with terrorists while we are implementing that policy from the basement of the White House.

We don't need a situation in which we have a disinformation campaign going on toward Libya and all in secret, without knowledge or participation by the people or their elected representatives. I think that is a challenge to the Constitution and Bill of Rights, whose bicentennial we celebrate now.

If the American people don't understand how precious a heritage this is, they need to get themselves educated. They need to be concerned about this. And if they are not, they ought to be ashamed.

Mr. STOKES. Thank you.

Chairman McHUGH. Mr. Hyde.

Mr. HYDE. I, too, welcome John Buchanan, a very able Congressman and useful person now that he is elevated from the political fever swamps to citizenhood.

On page 4 of your prepared statement, you say, "Frequently, the White House has failed to comply with the notification rules. . . ." Background material prepared by committee staff for last year's hearings stated, "As far as we know, since enactment of the Oversight Act in the fall of 1980, the Committee has been given notice, prior to implementation, of all findings, except for the January 17, 1986 Iran finding." So how do you reconcile your claims of frequent Administration noncompliance with notification rules with our committee's knowledge that in only one instance since 1980 has prior notice not been given?

Mr. BUCHANAN. The White House has engaged in a struggle with Congress over the spirit and level of White House requirements, and timely notice has been stretched to its limits—the invasion of Libya is a good example.

Mr. HYDE. Once.

Mr. BUCHANAN. There was no effective way for Congress to respond. This behavior only contributed to the inability of Congress to support the invasion. The letter of the law requiring findings and reporting of findings has been ignored in coordinating Iran arms sales, covert action without a finding or notification to the Congress.

In November '85 the President authorized the covert sale of Hawk missiles to Iran supposedly in exchange for hostages. The hostages were never forthcoming.

Mr. HYDE. I wonder if I could interrupt. Regarding your reference to the exchange of arms for hostages, really that is not the way it was supposed to work. The hostages were held in Lebanon by Hizballah or the Islamic Jihad. We hoped the Iranians could influence the terrorists who were holding the hostages. Because you couldn't deal with the terrorists, and Iran subsidized, trained and supported the terrorists, you tried to get at the terrorists through them. So it wasn't exactly weapons for hostages, it was weapons for access. It is very complicated, and we say things so trippingly from the tongue that make it weapons for hostages. It wasn't conceived as such.

Mr. BUCHANAN. I think the whole phenomenon of NSDDs, which I urge the committee to look at in further consideration of the legislation, would start as position papers and then become what Mr. Brooks calls secret laws. The number of these directives, the content of some of those you know about seem to say there was an effort on the part of this President to do a good many things which were at least unknown to you and some of which appeared to contravene a law you had passed and the will of the American people. Perhaps that has not been true in as many instances as I believe, but we know that the problem has existed. I need to make sure that that particular problem can't exist.

Mr. HYDE. I agree with almost everything that Mr. Stokes said. He talked about options that were available to the President. I don't see how you can have a successful foreign policy, especially a high risk one, without taking into your confidence at least some of

the important leaders in Congress. It is risk insurance. It shares some of the responsibility. You get advice from a different perspective that the "yes men" around the President might not give him, and I think it is foolish and counterproductive not to get that notification. I think that is wise, I agree.

I have a problem with rigidly circumscribing it by a number of hours, because you deny a flexibility that I think the President has constitutionally, but also that he may have to have, as we saw in the Carter administration's Iran situation. Where we had six of our people in the Canadian Embassy for a matter of some three months. There President Carter on two occasions failed to notify Congress when they went in to test the ground and later when the planes came in, because lives were at stake.

Ultimately notice was given in a timely fashion. I think the standard of "timely fashion" makes sense. I think to try to micromanage it down to 48 hours is to put a chilling effect on operations that may be necessary to save lives in a world of increasing terrorism and the need to cooperate with other countries who may have people on the ground in places, whose lives are at stake, too. So I think we need the "timely" notification, and I think it should be statutory.

I think the President should have flexibility there. Ten months in the Iran arms transfer situation is not timely, I couldn't agree more, but I think he has not gone unscathed for failing to notify in a timely fashion.

Mr. BUCHANAN. He supports timely fashion. The 48 hour period, it seems to me that is a matter of negotiation for the committee itself. But I would remind my distinguished friend that 200 years ago today we were in the midst of the ratification struggle for the Constitution of the United States and it was really threatened and there had to be promised a Bill of Rights before some states would ratify it.

And during that period of writing of the Federalist Papers, the Bill of Rights—during that time frame, the Constitution was fully explored by conventions of the various states, and the words were pored over, and in the conventions the words were very carefully drawn. It seems to me that it was very wise of the American people to take a hard look at that which was to become the basic law of the land.

It seems to me further that it is always right to bind men by the chains of law—in Jefferson's words—and if you have a situation where a President and his functionaries have disregarded the law, have failed to do what the law required and in so doing, have brought a challenge to the Constitution, I think it is not unreasonable that Congress try to make sure that that not happen again.

I won't argue about the 48 hour thing. You can negotiate what is reasonable and timely notification, but even with the 48 hours we are talking about eight persons, or four if the Senate provision is adopted, and four I believe to be trustworthy.

I want to say finally, and my good friend from Illinois I know agreed with this, that the real strength of this country lies not in our military establishment, though it is necessary. It certainly does not lie in covert operations, although sometimes they may be necessary. The real strength of our country lies in its people, like

Bonnie Blair of Champaign, Illinois. People of courage and people who are champions, I think, are the strength of this country.

I believe that the Congress is like a mirror reflecting what the American people are. You see the strengths and the weaknesses, the diversity, but I see no reason to trust more that vast array of people in the military down at the low ranks who are privy to classified information, that vast array of people in the Executive Branch, foreign nationals, as in the case of Iran/contra, private citizens as in that case, more than we trust the elected representatives of the people, and more than we trust a carefully selected group of leaders who get to share in this process that can be important to the American people.

I really think that you are doing right in this bill and I thank you for it.

Chairman MCHUGH. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I think you are right. We haven't, I suppose, as a committee done a survey on whether notice was timely in a number of situations that may or may not have been, but certainly as to the Iran/contra, the Iran affair—there have been others, as you point out, both the attack on Libya and the Grenada invasion—this committee was notified as a committee, the leadership was I think in both cases, brought down to he White House and notified that the attack was underway and in terms of what the statute contemplates, notification and consultation, they were not consulted, they were merely informed, and informed so late in the process that anything they would have said would have been irrelevant. That is not the spirit of the law. Would you admit to that?

Mr. BUCHANAN. Absolutely.

Mr. KASTENMEIER. We heard the preceding witness suggest if we were serious that we might consider in light of past failures, the invocation of criminal penalties. I don't know that you dealt with that question. What is your reaction to Mr. Clifford's suggestion in that regard?

Mr. BUCHANAN. I think if I were in the gentleman's position, I would have to very carefully weigh that proposal and anything I said would be opinion, not judgment, because it is also new to me. I do share the frustration of the gentleman from Illinois, Mr. Hyde, about the problem of leaks and how to handle it. It seems appropriate for the Congress to do something to put some kind of teeth into law that would make it more injurious to guilty parties to leak information that could affect human lives or the national security of the U.S.

I am not sure whether this is the right thing to do, and I would share the reservations of the gentleman from Kansas about cutting off an operation that might in itself have importance, but the criminal provisions I think you should at least consider. I think you should take a hard look and try to find some way—although you can never completely eliminate leaks that are costly to the country—I think it is appropriate to try to do something about it.

Mr. KASTENMEIER. You raise—you devote quite a bit of your testimony to the interesting subject of national security directives, NSDDs. Obviously, none of the directives would apparently be op-

erable if the text of the directive were in opposition to existing statutory law, isn't that correct?

Mr. BUCHANAN. Yes, but I don't know what has happened in the past in that area. It would appear to me that some of the NSDDs that were in-house being enacted by Lt. Colonel North and others, from my point of view appeared to be in contravention of existing law, and therefore, it seems to me if you can make sure either in language in the legislation, or in the legislative history, to try to strengthen the possibility that that doesn't happen in the future, it would be a good thing to do.

Mr. KASTENMEIER. I want to join my colleagues in thanking you for appearing today, both your organization and you personally, because it is a very sensitive area and there are many who testified who have a direct interest institutionally in the area, and not very many who have an interest which is not institutional in the sense of being part of it, and you and your organization are in that mold and the objectivity you bring to us is I think beneficial and appreciated.

I thank the gentleman for his appearance.

Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Buchanan, let me, as chairman of the subcommittee, express for all of us our appreciation. We admire your record in Congress, which was a long and distinguished one, but it is obvious that you are continuing to contribute in important ways as a private citizen, and we thank you for your help here today.

The subcommittee stands in recess until 2 o'clock.

[Whereupon, at 12:45 p.m., the subcommittee was recessed, to reconvene at 2:00 p.m., the afternoon of the same day.]

Chairman MCHUGH. The Subcommittee will please come to order.

We are delighted this afternoon to have as our first witness our colleague and good friend, Congressman Lee Hamilton, who has served very capably as a Representative for Indiana's Ninth District since 1965. He is a senior member of the Committee on Foreign Affairs and chairs that Committee's Subcommittee on Europe and the Middle East.

He is also Vice Chairman of the Joint Economic Committee.

From 1981 through 1986, Congressman Hamilton was a member of the Permanent Select Committee on Intelligence serving as Chairman during his last two years on the Committee.

He was also Chairman of the Select Committee to Investigate Covert Arms Transactions with Iran, and we were all, I might say, Lee, very proud of the job you did for us in that capacity. We very much appreciate your coming this afternoon to give us the benefit of your insights on this legislation and we welcome your testimony.

STATEMENT OF HON. LEE HAMILTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

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

I appreciate the opportunity to testify and to appear before your subcommittee and the Intelligence Committee whose work I respect and for whose members I have the highest esteem.

I, of course, support H.R. 3822 and urge its enactment. In the opening part of my testimony, I identify several provisions which I think are important provisions, and so far as I know, relatively uncontroversial. Nonetheless, I want to mention them in the testimony because I think it is important to identify several of those provisions which will provide a better understanding of the requirements and structure of congressional oversight of intelligence activities. I ask my statement be included in the record in full.

The requirement that you have a written covert finding, it seems to me, is crucial. The requirement that the covert action support foreign policy goals is important, a prohibition on retroactive findings is important, a requirement that you have a full description of the scope of the covert action and those parties that are going to participate in it is important, and the requirement that you have a signed presidential finding submitted to the Committee likewise is important for the reasons I set forth in my statement.

I understand, of course, that the prior notification requirement is the critical feature of H.R. 3822. The structure of the bill is that prior notification must be given to the Intelligence Committees or to the Gang of Eight in all cases unless things are moving so fast and you have an extraordinary situation which makes that provision for such notification impossible.

This is the formulation that I thought the Congress had enacted in 1980. Timely notification was inserted into the statute to reflect that formulation. At that time, the Administration—a Democratic administration—persuaded the Intelligence Committees and the Foreign Affairs Committees that the term "timely notification", although ambiguous, was more in keeping with the spirit of intrabranch comity and less offensive to Executive Branch sensibilities.

Now, we are told by the Administration that "timely" means whatever the President says it means and that he can withhold notification as long as we wants. It seems to me if we let this interpretation stand, an interpretation that says the President can withhold information from the Congress at his discretion, then Congress will have seriously weakened its oversight capabilities and consented to a basic shift of power away from the Congress to the Executive Branch.

Once the power to withhold information from the Congress is granted to the President, how can it then be maintained that Congress stands equal in power to the President?

The record suggests to me that Congress should pass an unambiguous, straightforward statute that permits no evasion from the responsibility to keep Congress currently informed. Such a statute must provide for prior notification of covert actions. Covert actions do not fit comfortably within the traditional processes of our government.

Many times I believe—and I think most members of this committee believe—that covert actions are necessary. They can be a most useful instrument of policy when their objectives are understood and focused, when they complement accepted policy, when they are used as a tool of foreign policy and not as a substitute for foreign policy.

Because covert actions can be so bound up with important foreign policy issues and because only the Intelligence Committees can provide independent oversight over them they must be the subject of thorough discussion and divergent advice within the Intelligence Committees.

Someone outside the foreign policy bureaucracy must have the President's ear. When it becomes known within that bureaucracy that the President is tilting one way or another on an issue, the bureaucracy tilts the same way. That tilt is, it seems to me, appropriate. He is, after all, the President of the United States.

But few, if any, will tell the President that a proposed activity is unwise. That is why it is so important for him to have outside independent advice. And, when covert actions are at issue, that advice cannot come from the public. It cannot come from the press, and it cannot come from the Congress as a whole. It can only come from the Intelligence Committees or the Gang of Eight. It must come at a time when it will do some good.

That is why, in my opinion, the prior notice provision of the bill is so crucial. Covert actions are too important, their implications are too great, to consign their formulation to a closed group of policymakers loyal to the President. Remember, too, that once a major covert action is begun, it is next to impossible to stop it.

Some say covert actions are too sensitive to divulge to the Intelligence Committees, or to the gang of eight, or, as in the Senate bill, to the gang of four.

What an astounding admission that argument is. It says, in effect, that our most distinguished members, our leadership, cannot be trusted. Also, the Intelligence Committees regularly receive information concerning intelligence programs and covert actions that directly involve risk to human life. These secrets, and covert action secrets, are protected, and protected well by the Intelligence Committees.

Dozens, even hundreds of people in the Executive Branch know of covert actions. A few more senior Members do not expand the risk.

Moreover, if Congress grants that some things are too sensitive to tell Congress, is not then the whole oversight process irreparably undermined? We have a government of coequal branches. Secrets are not Executive Branch secrets; they are U.S. Government secrets.

Each branch must be responsible for them. Each House of Congress must act to discipline any Member or staffer of the Intelligence Committee thought to have breached his duty to protect information. But the Congress cannot, without seriously eroding its powers, accept the notion that some secrets can be held only by the Executive Branch, and not by the leadership of the Congress.

In the final analysis, it is a question of balance. We must balance the harm that may result from the disclosure of a secret against the value of consultation and independent advice for the President prior to the initiation of a covert action. Have not the events of recent years shown us that the President needs that kind of advice in all circumstances? When covert actions are contemplated that

will have profound effects on our security interests, the balance, in our democracy, must be struck in favor of prior consultation.

In the long run that approach will serve us best.

Thank you very much, Mr. Chairman.

[The statement of Mr. Hamilton follows:]

STATEMENT

OF

THE HONORABLE LEE H. HAMILTON

FEBRUARY 24, 1988

SUBCOMMITTEE ON LEGISLATION

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE. I APPRECIATE THE OPPORTUNITY TO APPEAR HERE TODAY TO DISCUSS CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES.

I SUPPORT H.R. 3822 AND URGE ITS SWIFT ENACTMENT. IT SETS OUT REASONABLE AND PRECISE PROCEDURES UNDER WHICH THE CONDUCT OF NECESSARILY SECRET GOVERNMENT ACTIVITIES CAN BE SQUARED WITH THE TRADITIONS AND VALUES WHICH UNDERLIE OUR REPRESENTATIVE DEMOCRACY. IT DOES SO WITHOUT ANY RADICAL CHANGE IN EXISTING STATUTES, AND WITHOUT RESTRICTING THE ABILITY OF THE PRESIDENT TO RESPOND RAPIDLY IN EMERGENCY CIRCUMSTANCES. H.R. 3822 IS, I BELIEVE, A MODEST RESPONSE TO RECENT EVENTS.

THE BILL HAS SEVERAL IMPORTANT AND SALUTARY PROVISIONS, INCLUDING:

- A REPEAL OF HUGHES-RYAN, AND COMBINING ITS SUBSTANCE WITH THE PROVISIONS OF THE NATIONAL SECURITY ACT, MAKES IT EASIER TO UNDERSTAND THE REQUIREMENTS AND STRUCTURE OF CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES;

- A REQUIREMENT, IN MOST CASES, FOR A WRITTEN COVERT ACTION FINDING INSURES ACCOUNTABILITY AND MORE THOROUGH STAFFING;

- A REQUIREMENT FOR THE PRESIDENT TO FIND THAT A COVERT ACTION IS "NECESSARY TO SUPPORT THE FOREIGN POLICY OBJECTIVES OF THE UNITED STATES" WILL FORCE THE PRESIDENT AND HIS STAFF TO FOCUS DIRECTLY ON THE FOREIGN POLICY IMPLICATIONS OF THE COVERT ACTION;

- A PROHIBITION ON RETROACTIVE FINDINGS WILL AVOID RESORTING TO LEGAL STRATAGEM TO COVER PAST ERRORS OF JUDGMENT OR POLICY;

- A REQUIRMENT THAT THE FINDING CONTAIN A FULLER DESCRIPTION OF THE SCOPE OF THE COVERT ACTION AND OF THOSE THAT WILL PARTICIPATE IN IT INSURES A MORE THOROUGH REVIEW OF THE PROPOSAL, IN BOTH THE EXECUTIVE BRANCH AND THE CONGRESS; AND

- A REQUIREMENT THAT A SIGNED PRESIDENTIAL FINDING BE PROVIDED TO THE INTELLIGENCE COMMITTEES MAKES CLEAR THAT THE DOCTRINE OF PLAUSIBILE DENIABILITY APPLIES TO THE ABILITY OF THE UNITED STATES TO DENY TO THE WORLD RESPONSIBILITY FOR A COVERT ACTION; NOT TO THE ABILITY OF THE PRESIDENT TO AVOID ACCOUNTABILITY AND RESPONSIBILITY WITHIN THE UNITED STATES GOVERNMENT.

THE PRIOR NOTICE REQUIREMENT, HOWEVER, IS THE CENTRAL FEATURE OF H.R. 3822. AS I UNDERSTAND IT, PRIOR NOTICE MUST BE GIVEN TO THE INTELLIGENCE COMMITTEES -- OR THE GANG OF EIGHT -- IN ALL CASES, UNLESS THE EXIGENCIES OF A FAST MOVING AND EXTRAORDINARY SITUATION MAKE THE PROVISION FOR SUCH NOTICE IMPOSSIBLE. THIS FORMULATION IS WHAT I THOUGHT CONGRESS HAD ENACTED IN 1980. "TIMELY NOTICE" WAS INSERTED INTO THE STATUTE TO REFLECT THAT FORMULATION. AT THAT TIME, THE ADMINISTRATION, A DEMOCRATIC ADMINISTRATION, PERSUADED THE INTELLIGENCE COMMITTEES AND THE FOREIGN AFFAIRS COMMITTEES THAT THE TERM "TIMELY NOTICE", WAS, ALTHOUGH AMBIGUOUS, MORE IN KEEPING WITH THE SPIRIT OF INTRA-BRANCH COMITY AND LESS OFFENSIVE TO EXECUTIVE BRANCH SENSIBILITIES.

NOW WE ARE TOLD BY THE ADMINISTRATION THAT "TIMELY" MEANS WHATEVER THE PRESIDENT SAYS IT MEANS AND THAT HE CAN WITHHOLD NOTICE AS LONG AS HE WANTS. IF WE LET THIS INTERPRETATION STAND -- AN INTERPRETATION THAT SAYS THE PRESIDENT CAN WITHHOLD INFORMATION FROM CONGRESS AT HIS DISCRETION -- THEN CONGRESS WILL HAVE WEAKENED SERIOUSLY ITS OVERSIGHT CAPABILITIES AND CONSENTED TO A BASIC SHIFT OF POWER AWAY FROM THE CONGRESS TO THE EXECUTIVE BRANCH. ONCE THIS POWER TO WITHHOLD INFORMATION FROM THE CONGRESS IS GRANTED TO THE PRESIDENT, HOW CAN IT THEN BE MAINTAINED THAT CONGRESS STANDS EQUAL IN POWER TO THE PRESIDENT?

THE RECORD SUGGESTS TO ME THAT CONGRESS SHOULD PASS AN UNAMBIGUOUS, STRAIGHTFORWARD STATUTE THAT PERMITS NO EVASION FROM THE RESPONSIBILITY TO KEEP THE CONGRESS CURRENTLY INFORMED.

SUCH A STATUTE MUST PROVIDE FOR PRIOR NOTICE OF COVERT ACTIONS. COVERT ACTIONS, AS A CONCEPT, DO NOT FIT COMFORTABLY WITHIN THE TRADITIONAL PROCESSES OF OUR GOVERNMENT.

MANY TIMES COVERT ACTIONS ARE NECESSARY. THEY CAN BE A MOST USEFUL TOOL OF POLICY:

- WHEN THEIR OBJECTIVES ARE UNDERSTOOD AND FOCUSED;

- WHEN THEY COMPLEMENT ACCEPTED POLICY; AND

- WHEN THEY ARE USED AS A TOOL OF FOREIGN POLICY, NOT AS A SUBSTITUTE FOR FOREIGN POLICY.

BECAUSE COVERT ACTIONS CAN BE SO BOUND UP WITH IMPORTANT FOREIGN POLICY ISSUES, AND BECAUSE ONLY THE INTELLIGENCE COMMITTEES CAN PROVIDE INDEPENDENT OVERSIGHT OVER THEM, THEY MUST BE THE SUBJECT OF THOROUGH DISCUSSION AND DIVERGENT ADVICE WITHIN THE INTELLIGENCE COMMITTEES. SOMEONE OUTSIDE THE FOREIGN POLICY BUREAUCRACY MUST HAVE THE PRESIDENT'S EAR. WHEN IT BECOMES KNOWN WITHIN THAT BUREAUCRACY THAT THE PRESIDENT IS

TILTING ONE WAY OR ANOTHER ON AN ISSUE, THE BUREAUCRACY TILTS THE SAME WAY. THAT TILT IS, IT SEEMS TO ME, APPROPRIATE. BUT FEW, IF ANY, WILL TELL THE PRESIDENT THAT A PROPOSED ACTIVITY IS UNWISE. THAT IS WHY IT IS SO IMPORTANT FOR HIM TO HAVE OUTSIDE INDEPENDENT ADVICE. AND, WHEN COVERT ACTIONS ARE AT ISSUE, THAT ADVICE CANNOT COME FROM THE PUBLIC, FROM THE PRESS, OR FROM THE CONGRESS AS A WHOLE. IT CAN ONLY COME FROM THE INTELLIGENCE COMMITTEES OR THE "GANG OF EIGHT." IT MUST COME AT A TIME WHEN IT WILL DO SOME GOOD.

THAT IS WHY, IN MY OPINION, THE PRIOR NOTICE PROVISION OF THE BILL IS SO CRUCIAL. COVERT ACTIONS ARE TOO IMPORTANT, THEIR IMPLICATIONS TOO GREAT, TO CONSIGN THEIR FORMULATION TO A CLOSED GROUP OF POLICYMAKERS LOYAL TO THE PRESIDENT. REMEMBER, TOO, THAT ONCE A MAJOR COVERT ACTION IS BEGUN IT IS NEXT TO IMPOSSIBLE TO STOP IT.

SOME SAY COVERT ACTIONS ARE TOO SENSITIVE TO DIVULGE TO THE INTELLIGENCE COMMITTEES, OR TO THE GANG OF EIGHT, OR, AS IN THE SENATE BILL, TO THE GANG OF FOUR.

WHAT AN ASTOUNDING ADMISSION THAT ARGUMENT IS. IT SAYS, IN EFFECT, THAT OUR MOST DISTINGUISHED MEMBERS, OUR LEADERSHIP, CANNOT BE TRUSTED. ALSO, THE INTELLIGENCE COMMITTEES REGULARLY RECEIVE INFORMATION CONCERNING INTELLIGENCE PROGRAMS AND COVERT

ACTIONS THAT DIRECTLY INVOLVE RISK TO HUMAN LIFE. THESE SECRETS, AND COVERT ACTION SECRETS, ARE PROTECTED, AND PROTECTED WELL BY THE INTELLIGENCE COMMITTEES.

NEXT, DOZENS, EVEN HUNDREDS OF PEOPLE IN THE EXECUTIVE BRANCH KNOW OF COVERT ACTIONS. A FEW MORE SENIOR MEMBERS DO NOT EXPAND THE RISK.

MOREOVER, IF CONGRESS GRANTS THAT SOME THINGS ARE TOO SENSITIVE TO TELL CONGRESS, IS NOT THE WHOLE OVERSIGHT PROCESS IRREPARABLY UNDERMINED? WE HAVE A GOVERNMENT OF COEQUAL BRANCHES. SECRETS ARE NOT EXECUTIVE BRANCH SECRETS; THEY ARE U.S. GOVERNMENT SECRETS. EACH BRANCH MUST BE RESPONSIBLE FOR THEM. EACH HOUSE OF CONGRESS MUST ACT TO DISCIPLINE ANY MEMBER OR STAFFER OF THE INTELLIGENCE COMMITTEE THOUGHT TO HAVE BREACHED HIS DUTY TO PROTECT INFORMATION. BUT THE CONGRESS CANNOT, WITHOUT SERIOUSLY ERODING ITS POWERS, ACCEPT THE NOTION THAT SOME SECRETS CAN BE HELD ONLY BY THE EXECUTIVE BRANCH, AND NOT BY THE LEADERSHIP OF THE CONGRESS.

IN THE FINAL ANALYSIS, IT'S A QUESTION OF BALANCE. WE MUST BALANCE THE HARM THAT MAY RESULT FROM THE DISCLOSURE OF A SECRET AGAINST THE VALUE OF CONSULTATION AND INDEPENDENT ADVICE FOR THE PRESIDENT PRIOR TO THE INITIATION OF A COVERT ACTION. HAVE NOT THE EVENTS OF RECENT YEARS SHOWN US THAT THE PRESIDENT

NEEDS THAT KIND OF ADVICE IN ALL CIRCUMSTANCES? WHEN COVERT ACTIONS ARE CONTEMPLATED THAT WILL HAVE PROFOUND EFFECTS ON OUR SECURITY INTERESTS, THE BALANCE, IN OUR DEMOCRACY, MUST BE STRUCK IN FAVOR OF PRIOR CONSULTATION.

IN THE LONG RUN IT WILL SERVE US BEST.

Chairman McHUGH. Thank you, Lee, very much for your statement.

You and your colleagues on the special committee investigating the Iran-contra episode spent many months looking into the circumstances of that case, and heard from many witnesses, including many Administration witnesses.

During the course of those investigations, what justification was offered, if any, by the White House, by the Administration officials, for not telling Congress about its covert operations to transfer arms to Iran?

As you know, the express policy of our government was to not deal with the terrorist-supporting states, including Iran, but there was this covert, secret policy to do just the opposite.

Did the Administration have any justification to offer during the course of your investigation about why Congress was not advised of that covert operation?

Mr. HAMILTON. I think the position of the Administration was that they did not advise the Congress of those activities that you have correctly described because they did not trust the Congress with the information. They thought the Intelligence Committees would leak it.

The events of Iran-contra occurred when you had a law on the books that required prior notice in most instances, and I guess, in a few cases, limited instances, it required timely notice. The basic justification by the Administration was its constitutional theory that the President of the United States has an inherent power to withhold information.

And if you accept that, then it really does not matter what we write into statute. We can put the President has to notify us immediately, or we can say 10 days, 100 days; but if you take the position the Administration has taken that there is an inherent constitutional power not to inform the Congress, then the statute in a real sense becomes irrelevant. That was the justification. It is a constitutional theory.

Quite frankly, when we passed the Intelligence Oversight Act in 1980 with that preambular clause in it, we simply did not address this question head on.

This was, as you all know, passed under a Democratic Administration. The Executive then, as the Executive now, was trying to protect the Executive Privilege.

I think you have an extraordinarily expansive view of that power today.

Chairman McHUGH. I presume it is fair to say that from your perspective, given all the facts of that case, there was no justification for withholding that information from the Intelligence Committees, or certainly the Gang of Eight?

Mr. HAMILTON. I think there was no justification for it. Indeed, I would argue just the other side.

I think we would have had a very good chance to have saved ourselves a lot of agony in this Nation if the procedures of the statute had, indeed, been followed and elected members of the Intelligence Committees or the Gang of Eight had had an opportunity, which I am almost certain they would have exercised, to object vigorously to the policies that were followed.

Chairman McHUGH. Indeed, this is one of the reasons why prior notice should be written into the law and seen as the normal procedure?

Mr. HAMILTON. Yes. I agree.

Chairman McHUGH. Judge Webster, when he was here this morning, emphasized that the President, has agreed through the President's National Security Decision Directive, to abide by more reasonable rules, taking the position, in effect, that although he has the legal right to withhold information under the Constitution, he promises not to do that.

What is your opinion about the National Security Decision Directive as a guarantee that Congress will have an opportunity to get notice of these kinds of covert operations in a timely way? Is that sufficient protection for the Congress?

Mr. HAMILTON. First, I think we should recognize that the President has taken a lot of commendable steps, as a result of the hearings, as a result of the Tower Review Board, as a result of the Intelligence Committees activities. The steps he has taken with respect to the procedure to be followed on covert actions are commendable.

They have been done by the National Security Decision Directive, as I understand it. I believe that those steps are sincerely taken, and I would doubt that this Administration would carry on any covert action today without informing the Congress.

In other words, I think I would argue that the Iran-contra hearings have had a deterrent effect on the manner in which covert actions are carried out. Nonetheless, you are dealing here with a matter that will affect far more than just the Reagan Administration, and we all know the difference between an Executive Order and a law.

This matter is so basic—it is so fundamental—that I think it should be a matter of statute. The President of the United States must clearly understand that if he is going to conduct these covert operations, he must notify the Congress in all circumstances. I think the country will be strengthened as a result of that.

If I were the President, it would seem to me I would want that power. I would want to take an idea for a covert action and get an opinion on it from elected representatives who have some sense of what the American people think and what this country should do and to test my proposal against their independent judgment.

Presidents must know that the people that advise them so closely are people many of whom he has appointed and are loyal to him, as they should be, but even those who are not appointed by him are people who believe that the President is the Commander in Chief, and they serve the President, not the Congress.

Chairman McHUGH. Thank you very much.

Mr. Livingston?

Mr. LIVINGSTON. Thank you, Mr. Chairman.

Welcome, Mr. Hamilton. I have always enjoyed working with you throughout your service and my service in Congress. I certainly enjoyed serving under you when you were chairman of the full Committee on Intelligence.

Mr. HAMILTON. Thank you.

Mr. LIVINGSTON. But as luck would have it, we do disagree on this issue, and I hope you will not take offense if I say, in response to your statement, I am aware that you are under the impression that the only issue before us is the 48-hour notice and the prior consultation by the President.

Let me say, referring back to the testimony of the current Director of the Central Intelligence Agency, Judge Webster—there are several concerns about this particular bill.

There are concerns about the vague language on the aggregation of the dollar value of arms transfers which applies to specific countries.

There are concerns about the requirement to impose a process of authorization and appropriation on nonappropriated funds at the micro-management level of Central Intelligence Agency activities, covert activities, and to involve the U.S. Congress at that level.

There are concerns that our definition of "special activities," as this bill would change the Hughes-Ryan Act, became too broad and that, frankly, a number of activities which have never been anticipated by the drafters of this bill might be under the purview of Congress as covert action requiring a finding, again resulting in micro-management.

All of these are problems. If you would like to comment on any one of those problems, I certainly welcome your thoughts.

But I do want to go further and talk specifically about the 48-hour notice.

Mr. HAMILTON. Well, I appreciate the gentleman's comments. I saw the Director's statement this morning. I recognize that he brought out several problems that, frankly, until then I did not know were problems with the bill.

The early part of my statement, that portion of it not related to the 48-hour notice provision, comments on important aspects of the bill under consideration, which arose out of, incidentally, our experience in the Iran-contra hearings.

I would hope the gentleman would take a look at those, and my comments with respect to the specific provision you mentioned are limited because I do not know much about those.

Mr. LIVINGSTON. We will certainly have an opportunity to look at those at greater length later on. We do have hearings on this subject scheduled, I think, for March 10th; is that correct?

Let's talk about the 48-hour notice. You said the events of recent years have shown us that the President needs that kind of advice, meaning consultation with Congress, in all circumstances. Let's talk about "all circumstances."

This bill seeks to rigidly compel the President and the CIA to consult with Congress in almost all circumstances before they engage in covert action; then under extraordinary circumstances, always, without exception, within 48 hours after commencing the covert activity.

I question whether or not that really envisions all circumstances. I wonder if we are not foreclosing our options and if—in fact, Mr. Hamilton, can't you foresee some circumstance so volatile that if even one person comes into the loop and gets the information and finds out about the information who doesn't really need to know

about the activity, that the project—and, more importantly, lives of people—could be jeopardized?

Don't you think there is any situation that could develop at such a time that if Congress is notified prior to or 48 hours after a covert action is authorized in response to the incident, that such an event might occur and that people might genuinely be placed in danger if just one person finds out that doesn't really need to know about that project?

Mr. HAMILTON. Mr. Livingston, I think the risk is greater on the other side. I think the risk is greater when the President does not have the independent advice than is the risk that you describe.

I really can not think of any specific factual circumstance when a president could not notify at least the gang of eight within the 48-hour period.

Any covert action is going to—certainly any paramilitary covert action, but probably any covert action—is going to involve a lot of people. It is going to involve scores of people at the White House, it is going to involve scores of people in the Central Intelligence Agency. If you use military forces, it is going to involve hundreds of people. If all of those people can know about it, but the Speaker of the House and the Minority Leader of the House cannot know about it, I just think that is a situation that is unacceptable to the Congress.

If you take the position of the Administration, Mr. Livingston, you do not define the circumstances where a president can withhold notice. It is a wide-open situation for them, if you use the phrase "extraordinary circumstances."

When we asked Mr. Meese what kind of circumstances you are talking about, he responds in the most vague kind of sentences, so that, in effect, a President has extraordinary power just to withhold information.

My view is that the risk really is not great that you described, but it is much greater for a President to act without sufficient independent advice.

Mr. LIVINGSTON. I think your reference to Mr. Meese's testimony really describes his approach or his interpretation of timeliness at the time they were conducting the Iran covert activities. I daresay his interpretation of timeliness today would be much different and that he would probably say that it was a much briefer period of time.

Mr. HAMILTON. Keep in mind, Mr. Livingston, that we never would have been notified of the activities of Iran-contra had it not come out in the press. The Administration never did come to a position.

Mr. LIVINGSTON. Let's just put the shoe on the other foot for a second.

You recall the incident where we attacked Libya. Our planes went in and attacked. There was consultation there. There was a leak to the press, which resulted apparently in Sam Donaldson's announcement that some big project was about to occur some half an hour before the raid. We ended up losing a pilot.

I don't have any idea who ended up leaking that information, but it is quite possible that whoever did leak it could have enhanced the anti-aircraft readiness of the Libyan government. We

might have lost that plane and that pilot because that information was leaked prematurely.

It seems to me that we ought to have some concern for the people who are out there in the field protecting the security interests of the nation and who frankly could be jeopardized by some unforeseen event, an event we can't contemplate today, which does require a withholding of information from the Congress for longer than 48 hours.

Mr. HAMILTON. Well, I think you need to be commended for your sensitivity to that. I hope I do not appear insensitive to the problem that you raise, because the problem of leaks can be a serious one.

I want to check my recollection here, but my recollection is that the bombing in Libya was printed in the European newspapers a day or two before it occurred. I will check that. But that is my recollection of that particular instance. So I don't think it was any overwhelming surprise that that raid took place.

But let's assume that the information is terribly sensitive. The premise really of your position is that the leadership of the Congress is going to leak it, that the most respected members of our institution are going to leak that information. I just do not think that is the case.

I would share your view if we were requiring the President to notify the Congress of the United States, but every member of this Intelligence Committee is selected with enormous care. I know that because I participated in the selection process, although it is obviously the Speaker's call. You do not put members onto this committee unless those members are respected and are thought by their peers to be able to keep silent.

What is true of the members of the Intelligence Committee is surely true of the leadership of this Congress. If we cannot trust the Speaker and the Minority Leader and the Gang of Eight, our institution is in grave peril.

Mr. LIVINGSTON. Thank you.

Chairman MCHUGH. Mr. Stokes?

Mr. HAMILTON. May I make one comment, Mr. Chairman?

Chairman MCHUGH. Yes, please.

Mr. HAMILTON. This respects the Gang of Eight. This is not relevant to Mr. Livingston's question. But I noticed the Gang of Eight excludes the Majority Leader of the House.

I just put that before you for your consideration. You identify the Speaker and the Minority Leader, the leaders of the Intelligence Committees, but I just wonder if you ought to exclude the Majority Leader of the House from the people who are notified.

Chairman MCHUGH. Thank you for that thought. We will certainly take that under consideration.

Mr. Stokes?

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

I just want to express my appreciation to Lee Hamilton for his appearance here this afternoon and his testimony on this bill.

I had the pleasure of serving under his chairmanship on this full Intelligence Committee and under his distinguished chairmanship of the Iran-contra committee. It is indeed an honor to have him here this afternoon.

I wonder if I might ask you to comment upon what I thought was some excellent testimony this morning from the Director of the CIA, Judge Webster. I thought he made two points which I think need to be given serious consideration.

One point was, as he said in his testimony, "I have taken steps within the CIA to discipline those employees who failed to follow CIA procedures and meet the standards of conduct expected of CIA employees or who testified to Congress in a manner that was not candid or forthcoming." To his credit, he has done that, and he is to be commended for it.

He also says in his testimony, "Similarly to the extent there were any procedural shortcomings demonstrated by the Iran-contra matter, they have already been addressed by the new Presidential directive within the present statutory framework."

As you know, Lee, during the course of the Iran-contra hearings we ran across another NSDD that had been issued by the President relative to Presidential findings and notice to Congress which had been totally ignored by the President.

I just wonder if you would comment on those two aspects of the Director's testimony?

Mr. HAMILTON. Well, with respect to the discipline steps taken, I am not familiar with those in detail, but my impression is the same as yours. I think the Director should be commended for the steps he has taken, and I know he has been responsive, in part at least, to the pleas of members of Congress. I would join you in your commendation of him.

I also note, with regard to the second point, that he himself recognizes that the Presidential directive is not the same as legislation. He goes on to say that he is persuaded that new legislation is not the best way to address the concerns that members have.

I think the fundamental difference here is a kind of a difference in time perspective. Members of Congress serve through several administrations, sometimes many administrations, and we recognize that presidential directives, after all, do not get much publicity within the Congress.

There are few members of Congress who know what is in a presidential directive. We tend to know much more about legislation, and there is a permanence to the legislation that is important.

You are dealing in this area with the fundamental national security interests of the United States, and you are dealing with it not with respect to President Reagan but with respect to many presidents to come.

I think the features of the bill deserve to be stated in permanent legislation.

Mr. STOKES. Let me ask you this. In light of our experience in terms of the Iran-contra investigation, the things we learned there, do you have an opinion as to whether or not we should write some prohibition into this legislation that the NSC should not have an operational role in covert actions?

Mr. HAMILTON. I think the NSC should not have an operational role in covert actions and, as I understand it, the President has written that into a Presidential directive. I think he is to be commended for that.

I think I would feel more comfortable about it if it were written into law.

Mr. STOKES. Thank you very much.

Thank you, Mr. Chairman.

Chairman MCHUGH. Thank you, Mr. Stokes.

Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I guess my recollection is a little bit different than that of my colleague, Mr. Livingston, about a couple of matters in which there was alleged to be notice and consultation, the Libyan attack and the Grenada invasion.

It is my recollection that the leadership, certainly privately and perhaps publicly, complained that they were called in at the last minute when, as a matter of fact, the operations were underway; that in no way can one suggest that they were, pursuant to law, consulted. They were informed and probably not timely informed.

Is that not your recollection?

Mr. HAMILTON. Mr. Kastenmeier, I am not certain about that. I think my recollection is that they were informed when the planes were in the air. That is when the actual notification was made at the White House.

It seems to me that is what I recall.

Mr. KASTENMEIER. That is my recollection, as well.

One witness this morning suggested that based on his long experience and based on the fact that we have been through this a couple of times, several times, one as late as 1980—I am referring to Mr. Clifford—he suggested that failure to observe the statutory restraints should be accompanied by a criminal penalty. Of course, that is not, as I understand it, in either the House or Senate legislation pending before us, but I am wondering what your reaction to Mr. Clifford's suggestion is.

Mr. HAMILTON. It is a new suggestion to me. I have not considered it. My initial reaction to it is not supportive. I don't think a violation would ordinarily rise to the level of a criminal sanction, if by criminal sanction you mean a felony, a prison sentence and all the rest. I don't think that would be necessary.

Mr. KASTENMEIER. In other words, is it your view that you think no sanction would be necessary?

Mr. HAMILTON. I think what is necessary is a clear and precise statement of what the Congress of the United States expects the President to do in these situations and I think presidents will do it so long as it is clear.

When you have a phrase like "timely notification", that obviously invites a difference of interpretation, an ambiguity. Before I would want to consider a step that I would consider to be quite serious, the inclusion of criminal sanctions, I think the first step surely should be just a clear statement of what we think the responsibility of the President is.

Incidentally, I think all of us here would agree that the Constitution would permit the Congress of the United States to prohibit these activities if we wanted to. We do not want to, but if the Congress has the power to prohibit these activities, then surely we have the power to say that these activities may go on, but that the President must notify us.

That is much less of a requirement than prohibition.

Mr. KASTENMEIER. Another suggestion that was parenthetically made by our colleague, Mr. Hyde, with which the witness agreed—that is to say, Mr. Clifford—was that the Congress ought to think about terminating the present arrangement of two intelligence committees and go to a single joint committee with a very limited number of members.

What is your reaction to that suggestion?

Mr. HAMILTON. Well, the Select Committees considered that. It is a point there was some difference on. The majority recommendation was that we should not approve a joint committee. I agreed with that majority recommendation.

I was reminded by some of my staff friends that I at one time had supported the idea of a joint committee. From time to time here, you change your mind on matters. I have come to the view that the lesson of Iran-contra and other events, too, I guess, is that the intelligence communities require a very rigorous oversight, and my suspicion is that many who favor a joint committee really favor less oversight, not more.

I don't think that is true, may I say, of all who support the joint committee idea, but I think it is true of many.

I believe that the independent evaluation by the two separate intelligence committees makes sense.

There is another factor here, I think, that is important. That is the intelligence committees are extremely sensitive committees within the Congress.

And you all know that Members of Congress look carefully to what you do and think about issues and there is a certain respect that builds up in the House for Members of the Intelligence Committees that I think is peculiar to the institution of the House and peculiar to the institution of the Senate, and if you combined them in a joint committee, I think you would have less respect than you may now have.

So I do not approve of the idea of a joint committee.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Chairman MCHUGH. Thank you, Mr. Kastenmeier.

Are there any other questions?

Thank you very much, Lee, for being with us and for your testimony and especially for all the fine work you did as chairman of that select committee and as chairman of this permanent committee.

Mr. HAMILTON. Thank you, Mr. Chairman.

Chairman MCHUGH. Our next witness is Professor Alan Goodman, Associate Dean of the School of Foreign Service at Georgetown University.

From 1975 to 1980, he served in the Central Intelligence Agency as an analyst with the Directorate of Intelligence, then as Special Assistant to the Director of the National Foreign Assessment Center, and as Presidential Briefing Coordinator for the Director of CIA.

He holds an MPA and Ph.D. from Harvard and a BS from Northwestern. At present, he is also a lecturer at the Foreign Service Institute, a consultant to the Rand Corporation, and Chairman of the Editorial Advisory Board of The Atlantic Quarterly.

We are delighted to have you with us and we appreciate your testimony.

Mr. Goodman.

STATEMENT OF DR. ALLAN E. GOODMAN, ASSOCIATE DEAN, SCHOOL OF FOREIGN SERVICE, GEORGETOWN UNIVERSITY

Dr. GOODMAN. Thank you, Mr. Chairman.

I do appreciate the chance to express my views and I have focused my statement which you have and would like to focus my remarks largely on the prior notice requirement of H.R. 3822.

I think this legislation is very important. I think it strengthens congressional oversight. I think it incorporates further into intelligence law the principle of checks and balances. I also think it is consistent with sound intelligence practices.

Rather than read my statement, I think I will try to summarize by doing two things: One, refer to how I think the intelligence community is going to positively benefit from a prior notice requirement; and second, address two questions that I know from prior testimony are on your minds.

One is, is this consistent with security; and the other is, will it inhibit foreign intelligence services from cooperating with the United States?

Let me begin with the first point in terms of how the intelligence community, I think, will positively benefit from the prior notice requirement.

I would like to make two points; the first by quoting a publication of the Central Intelligence Agency which is an extract from their in-house journal called "Studies in Intelligence" published this fall in commemoration of our Constitution.

On pages 78 and 79, a top intelligence officer who has appeared many times at your committee, I think, writes, "Another benefit of congressional oversight is that it forces the CIA, an organization schooled in activities abroad, to confront the American political process. Many CIA managers are well informed about situations in other countries, but uninformed about the home front. Exposure of these managers to Congress not only forces them to learn how a closed intelligence agency fits into an open society, but also forces them to acquire skills and experience that make them better managers. The result is development of a CIA cadre that appreciates from experience the role of Congress in the political system."

It seems to me in perhaps no other facet of intelligence work is the need for the manager at Langley to be aware of and sensitive to our political process greater than in the area of covert action, and I think this bill furthers that goal, because covert action operations involve the CIA deeply and directly in something that intelligence agencies rarely do, namely, the active promotion and support of American foreign policy.

I think it is especially vital that those who propose and manage covert activity have access to the political experience and the independent appraisal and wisdom of the members of the Intelligence Oversight Committees before these operations are launched.

So I think the confrontation with Congress, the exposure to our political process, is a very positive political benefit and something which the CIA recognizes itself in this publication.

Second, I think it is really important to look at the matter of prior notice from the perspective of an intelligence officer and from the perspective of those officers who may have to carry out a covert action.

In previous testimony, I know several DCI's referred to the difficulty they would have had in looking an agent in the eye and asking them to conduct a covert operation if they had to also tell that agent that the senior leadership of Congress was being informed before the operation was launched.

I think the next DCI is going to find a changed attitude among intelligence officers at Langley, and I think it is the direct result of the Iran-contra affair.

The intelligence officer today, and especially tomorrow, who may have to carry out a covert operation is going to want to know two things: First, that the operation can be kept secure, and I will come to that when I address whether or not prior notice is consistent with security. But the other thing he will want to know is that Congress has been duly and properly informed and that he is going to undertake an activity that is fully consistent with U.S. laws.

Because not to have that kind of assurance results as it did in the Iran-contra affair in ruined careers, recriminations, low morale, and ultimately the exposure of a covert operation through the investigation and hearing process.

So it seems to me that from the perspective of a professional intelligence officer they would want to know that Congress has been informed, that it is a lesson they are going to draw from the Iran-contra affair and something that a DCI in the future owes them just as much as they owe secrecy and security.

I know two questions are much on your minds: Is prior notice consistent with security?

The answer to that question, in my mind, is yes, partly because we have had good experience with it.

As the CIA General Counsel testified before you in June of 1987, prior notice has been the norm, and I can only find three instances between the Carter and the Reagan Administrations when prior notice has been withheld.

So it would seem to me that the oversight process with respect to voluntary prior notice is working well from the point of view of security.

It also occurs to me because we have to think about unforeseen circumstances that what we have going for us today which we didn't have a few years ago is the new Crisis Management Communications Center in the White House, something created by Mr. Meese and Judge Clark a few years ago and it has been substantially upgraded.

This Crisis Management Center, I think, provides the secure communication facilities that would make it possible to inform at least the senior membership of Congress, if not the appropriate members of the Oversight Committee of a covert operation before it is launched, no matter how serious the crisis, how precious the time, how dire the emergency.

I think the capability in the facility is here now and it might not have been here a few years ago, and I think it is something that would facilitate briefing the appropriate senior Members of Congress without risking the disclosure of a covert action operation before it was launched.

The second issue I know of concern is the question of whether having a requirement for prior notice would inhibit foreign intelligence services from cooperating with the United States.

This is a very sensitive area, but I think you have to look at the record of the Casey administration, because my answer is no, I don't think it will inhibit the kind of cooperation we need from foreign intelligence services.

The late Mr. Casey made it a high priority to increase foreign intelligence cooperation, particularly in the area of counterterrorism and narcotic interdiction with foreign intelligence services.

From statements he made about this priority and the success he had with it, I think he did succeed. He did so at a time, of course, when prior notice had been given to Congress of virtually all covert operations and it seems to me that the decision about whether or not a foreign intelligence service cooperates with us or vice versa is based much more on considerations of what is in it for us or them than it is on whether or not their parliament or our Congress has intrusive oversight of covert action in intelligence operations.

So it seems to me that intelligence cooperation is going to continue whether or not this provision is enacted into law, and enacting a prior notice requirement, I don't think, will have a chilling effect on this important area of intelligence, namely the cooperation between the United States and foreign intelligence services.

In conclusion, Mr. Chairman, I think that the H.R. 3822 makes good sense and I also think it sends, if passed, a very important signal that we have put the Iran-contra affair behind us; we have learned appropriate lessons from it, and we have applied them in a way that won't cripple the effectiveness of American intelligence in the future.

Thank you very much.

Chairman McHugh. Thank you very much for a good summary.

[The statement follows:]

STATEMENT BY

Dr. Allan E. Goodman
Associate Dean, School of Foreign Service
Georgetown University

House Permanent Select Committee on Intelligence
Hearing on H.R. 3822

24 February 1988

Mr. Chairman, I appreciate your invitation to express my views on H.R.3822. The focus of my statement will be on that part of the bill which requires the president to assure that the intelligence oversight committees of Congress are fully informed about covert action operations before they are initiated.

Covert action is a very small part of what the intelligence community does, but has repeatedly gotten the CIA into enough trouble with Congress to warrant this change in the law. As the CIA's own in-house journal, STUDIES IN INTELLIGENCE, recently concluded: "When an administration resorts frequently to covert action, credibility problems are exacerbated, and CIA pays a high price." It has certainly done so in the wake of the Iran/Contra affair, where covert action was used to carry out operations directly contrary to stated U.S. foreign policy positions and in a manner that violated basic tenets of the intelligence profession.

But unless or until the president finds that covert action is no longer in the nation's interest, I think it is vital that its use be regulated by our laws and that the

course of action it represents be wisely chosen. The requirement of H.R. 3822 for prior notice would at least assure that these operations are legal and that they are credible to more than the strong personalities who make national security policy in the White House. And it would incorporate the principle of checks and balances --one of the cornerstones of our constitutional system-- into intelligence law.

Moreover, given the necessity for effective oversight of covert action, the prior notice requirement is essential to allowing Congress to perform its proper function. H.R. 3822 is, thus, a major step both toward improving congressional oversight and one that is consistent with sound intelligence practices.

As previous testimony before this committee and before the Senate Select Committee on Intelligence (on S. 1721) has established, such prior notice has been given to the Congress for nearly every covert action authorized by presidents Carter and Reagan. Prior notice thus does not appear to have been an encroachment on the president's power to conduct foreign policy. In reviewing the testimony previously given to this committee, I was struck by the fact that while prior notice of covert action has been the norm for at least a decade (according to the CIA's general counsel), it has not had a chilling effect on the Reagan administration's vigorous resort to this instrument of foreign policy. In fact, the

number of covert action operations increased in the Reagan administration some five times compared to the record of the Carter administration.

Nevertheless, the administration's spokesmen have opposed H.R. 3822 (and its companion bill in the Senate) on grounds that to require prior notice in all instances would compromise security, would be logistically difficult to implement in crisis situations, and would weaken the credibility and effectiveness of the intelligence community.

The experience to date suggests that when prior notice has been given, the Congress has kept the operation secret. While details of many covert actions have eventually been revealed, this has not occurred as a result of the DCI providing the oversight committees or congressional leaders with prior notice. Moreover, the operations run as covert actions where such notice was withheld -- the aborted rescue of American hostages in Iran in 1979 (when a considerably larger number of representatives and senators had to be informed of covert actions than is the case today), the Iran arms-for-hostages initiative undertaken by the NSC staff in 1985-1986, and the Contra re-supply effort -- have resulted in far more damage to the credibility of the United States and the effectiveness of the intelligence community than would have been the case had Congress been properly informed. And clearly in the case of the Iran arms initiative, the oversight committees would have been more

reliable in keeping the details of the operation secure than foreign privateers and Iranian mullahs.

Another frequently-made argument against the prior notice requirement is that unforseen circumstances in a crisis may make it impossible for even a handful of senior Congressional leaders to be briefed before an operation had to be launched. I do not find this argument compelling in light of the secure communication capabilities that the White House now has as a result of the creation of its crisis management center. Even in the most dire of circumstances, this facility makes it possible to contact at least some congressional leaders immediately and to brief them on the operation without risking disclosure.

Nor does the practice of giving the congressional oversight committees prior notice of covert action appear to have had a chilling effect on the cooperation of foreign intelligence services with the CIA. I infer this from the statements made by the late William Casey (at conferences sponsored by SRI International and the Fletcher School of Law and Diplomacy in 1985), indicating that such cooperation had been increasing during his tenure as DCI, especially in the areas of counter terrorism and narcotics interdiction. In any case, the principal motives for foreign intelligence services to cooperate with United States agencies have been traditional friendships and affinities, as well as hard-headed appraisals of what they were likely to gain from

such intelligence sharing. These considerations appear to have far outweighed concerns with the ability of either the U.S. or allied intelligence services to keep secrets or limit parliamentary oversight. For example, the relationship the U.S. has maintained over the years with British intelligence continues despite the fact that the British services have been repeatedly penetrated by the KGB and the CIA has, according to the Deputy Director of Central Intelligence (writing in the winter issue of FOREIGN AFFAIRS), become "the most visible, most externally scrutinized and most publicized intelligence service in the world."

Instituting a prior notice requirement now would benefit the intelligence community in two important ways. First, as a top intelligence officer recently noted in the CIA's in-house journal, STUDIES IN INTELLIGENCE, "congressional oversight...forces the CIA...to confront the American political process. Many CIA managers are well informed about situations in other countries, but uninformed about the home front. The exposure of these managers to Congress not only forces them to learn how a closed intelligence agency fits into an open society, but also forces them to acquire skills and experience that make them better managers." In perhaps no other facet of intelligence work is the need for the manager to be aware of and sensitive to the American political process greater than in the area of covert action. Because covert action operations involve the CIA directly

in active measures to support U.S. foreign policy, it is vitally important that those who propose and manage them have access to the political experience and independent appraisals of the members of the intelligence oversight committees before such operations are launched.

Second, I think it is important to look at the matter of prior notice from the perspective of an intelligence officer who may have to carry out a covert action. In previous testimony, several former DCI's have referred to the difficulty they would have had in asking their agents to undertake a covert action mission if it had to be reported to Congress before it was underway. To do so, they argue, would increase the probability that details of the operation would be revealed and that the agent's life would be put at even greater risk. But the Iran/Contra affair, especially, has changed the outlook of many intelligence officers. Today, an operative would want to be assured both of secrecy and of the fact that the Congress was given the appropriate prior notice of the covert action they were about to undertake in order to avoid charges of impropriety later, charges which might well result in the hearings and public exposure that ruins careers and damages the credibility of the U.S. intelligence community.

In short, Mr. Chairman, prior notice makes good sense for both the intelligence community and the oversight process. Swift passage of H.R. 3822 would be an important

signal at home and abroad that we have learned some lessons from the Iran/Contra affair and have begun to put it behind us without crippling the nation's intelligence services.

Chairman McHUGH. I think it is interesting at least to me that you have taken a different perspective on the attitude of intelligence agents than we have heard before from other witnesses.

As you have said, your former superior at the CIA testified that he would be reluctant to tell an agent who was going out on a sensitive mission that he had to share that information with Members of Congress.

Your experience here is relevant because you take a different tack, which is that agent might well appreciate knowing that at least the leadership in Congress is advised and, therefore, is not likely to raise objections later if the operation becomes public.

Perhaps in that context you could tell us a little bit more about your contacts with intelligence agents and the agency.

I know you have worked in the agency, but you have continued, I think, to take an interest in these issues.

Perhaps you can expand a bit on your background and what leads you to believe beyond your own instinct that agents of the CIA or other agencies would feel this way.

Dr. GOODMAN. Let me point out, first, with respect to Admiral Turner's testimony that he did qualify it by saying that the time he withheld prior notice, the rescue mission for hostages in Iran, notice was given to a much larger number of Congressmen and Senators than it is today.

I don't know if he would feel with a smaller number more secure, but I think that was a difference.

Another interesting point that the publication makes is that two-thirds of the people working at Langley these days have grown up under a system of strong congressional oversight. I think that they respect it. I think that they do feel that Congress has an important role to play in something that no other country has ever done, had a secret intelligence service in an open society subject to rule of law and subject to congressional oversight.

I think the younger people at Langley understand this, appreciate it, and see the need for it because they see the negative consequences.

They see that failures to comply with law or failure to provide Congress notice create problems for them, for public confidence when these fundamental principles are not followed, so I think you will increasingly be working with the CIA personnel system that is producing people who respect oversight and appreciate the need for it most importantly in the operations area because the last thing an operations officer wants is to conduct an operation that is going to end up on national television all through the summer being investigated because it is illegal, improper, or because there was not prior notice. They want to be protected in that regard.

Chairman McHUGH. I would like to ask your views on two issues, first with respect to the notice requirement. Where the President believes it is a particularly sensitive operation, he may choose in his discretion to notify the so-called "Gang of 8." The Senate bill has a provision which would reduce that number to four.

Do you have any views on whether it should be eight or four, and if so, why? And secondly, the issue which Mr. Kastenmeier raised earlier with Mr. Hamilton, with regard to a Joint Intelligence Com-

mittee compared to the two separate committees we have today, which would be better in terms of oversight?

Dr. GOODMAN. I strongly favor notice to the Gang of 8, or every conceivable human effort made to create that notice, because I think on particularly risky, sensitive, time-sensitive operations, the President and the DCI need the independent appraisal and to make sure that these stand the test of your scrutiny which you are going to have to give judgment on, either in your annual report or later on.

So, I support your version of the bill and think you should aim at eight. If someone is out of the country and totally unreachable, if you have eight and can only reach six, I think you have gone closer to the spirit of the law than if you have four and can only reach two.

The principle of prior notice is so important, because the DCI gets the benefits of the checks and balances system. I favor a joint committee, but until Congressman Hamilton spoke, I didn't realize that many support it because it would weaken intelligence oversight.

I don't think that should happen, but to the extent that a joint committee would create greater security so that people at Langley and elsewhere would feel that they could share more with this committee, that it would create the kind of staff and time that you might need to go into more detail on things that are appropriate, those are some of the positive benefits.

I think the present system has worked very well, both oversight committees do different things, their annual reports and investigations are quite different, and I think we benefit a lot from that as well.

Chairman MCHUGH. Thank you.

Mr. Livingston?

Mr. LIVINGSTON. I want to commend you on your lucid testimony. You have given us a lot to think about. Let's explore a couple of your points.

You said that probably most foreign countries would not be inhibited because we involve Congress in the decision-making process whether or not to engage in covert actions, yet Canada specifically said as a requirement for their housing those individuals, they didn't want any word sent to Congress.

What makes you think that won't happen again and again and again where some countries are going to not only hesitate to act in the best security interests of the U.S., but even perhaps fail to act to save lives of Americans unless under the conditions that the President not inform the Congress?

Dr. GOODMAN. With respect to the Canadian case, I think you are referring to the rescue of the hostages when a much larger number of Congressmen and Senators had to be informed, when this oversight process was much newer, when there was a fear than Congress was going to be the great source of leaks rather than the Executive——

Mr. LIVINGSTON. You think that is not a fear anymore?

Dr. GOODMAN. I don't think so.

Mr. LIVINGSTON. As a matter of record, we have had one incident involving a member of the other body who is currently under some

degree of investigation for statements of confidential material, secret material, and that does go on. We have had Members who have admitted publicly or who have been investigated.

What makes you think that is any less likely today than it has been in the past?

Dr. GOODMAN. I think in the area of covert action, pending the investigation that you are referring to, there has been no leak from Congress. In all my experience dealing with you in the Carter Administration and outside observing it since, there is no question in my mind that the Congress takes this as a very serious, very risky operation.

Mr. LIVINGSTON. Certainly the Congress as a whole does, but questioning your attitude that eight Members are better than two, isn't it a fact in intelligence circles that any one extra person can be a security threat to an operation?

Dr. GOODMAN. Yes, it is.

Mr. LIVINGSTON. We are politicians and given to working with our mouths, and isn't it human for good politicians to talk about things, and isn't it a possible risk to human life and safety and to the security interests of the United States by involving any more Members of Congress in the decision-making process on covert activities than is absolutely necessary?

Dr. GOODMAN. Yes, sir, but the question is, what is necessary, and it seems to me in our system it is necessary to have them informed before these are launched. We are dealing with a situation where the record of Congress is excellent. We don't have a record of lots and lots of leaks and lots of compromises of covert operations.

I think the risks on the other side are greater. We are in worse shape if we haven't consulted you and then end up on national television.

Mr. LIVINGSTON. I am not going to argue that there haven't been mistakes made. But your initial point that operational security and the full informing process, bringing Congress into the loop, are compatible is questionable to me, and I am concerned about the rigidity, excluding any possibility that not informing Congress so soon might be a lot safer and a lot wiser in the long run in certain isolated circumstances.

But we are excluding that with this legislation, and you don't seem to worry about that.

Dr. GOODMAN. I knew you were going to ask me that question, and I have been thinking about it ever since you asked Congressman Hamilton. I can't foresee those circumstances except in the case of a declared war, and that is where covert action began in our country. We didn't have covert action all the time. We never had it in peacetime until 1947, when it was created by the Act.

In wartime, it seems to me the Congress gives the President through emergency powers the latitude, and the only circumstances that I could see where time and risk and security might make it impossible might be covered by a wartime situation in which you would pass special legislation.

Mr. LIVINGSTON. In fact, isn't it true that properly secure covert activity might avoid the probability of war? That is what covert ac-

tivity is about in many instances, is keeping us from going to armed conflict.

Dr. GOODMAN. I think we owe it to you and to the political process to make sure that you are informed that we are about to do that, and have you prepared that if this operation fails, we are moving close to war.

Mr. LIVINGSTON. Were you here for the Director's testimony this morning?

Dr. GOODMAN. I was not.

Mr. LIVINGSTON. I would like you to get a copy of his testimony and respond to other points other than the notice issue that was raised by him, if you could comment on those, because he has indicated that there are grave concerns in addition to the notification that we ought to take into consideration, and the fear is that Congress may well be into the micromanagement of the activities of the CIA, and we really don't need to be.

Look at it, and we would love to have your letter on it.

Dr. GOODMAN. I will do so.

Chairman MCHUGH. Let me state for the record for Mr. Livingston's benefit that our staffs have been working closely with the intelligence agency staffs on these points which the Director raised this morning.

It is my impression that there is not real substantive disagreement between the Agency and the drafters of the bill and that these language questions, which are legitimate questions, can be worked out between our staff and the Agency staff.

So, I think the really fundamental difference in principle does go to the heart of this notice issue, and the other issues, while perfectly legitimate to address, are being worked out between the staffs.

Mr. Stokes?

Mr. STOKES. Thank you, Mr. Chairman.

Dr. Goodman, we thank you for an excellent statement. I was interested in your comments with reference to the CIA in-house journal, and I think one of the ironic things about the Iran-contra hearing is that the CIA got painted with a very broad brush.

As you know, under ordinary circumstances, covert action is authorized by law to be carried out by the CIA. CIA got brushed here for something that the Agency as such did not do. We know from the Iran-contra hearings that Director Casey was involved with Poindexter and North, but the Agency as an agency was circumvented here, and this operation was carried out by the NSC, which is not authorized by law to carry out covert actions.

So, I would suppose that men who are involved in their business and who take pride in the fact that, notwithstanding some of the adverse publicity the Agency gets, they are professionals, dedicated to their country and performing their jobs professionally, would possess a great deal of a situation, wouldn't you?

Dr. GOODMAN. Yes, sir, I do. In fact, in the article I quoted earlier, in it there is another statement from a CIA officer that said when Administrations frequently resort to covert action, the CIA pays a very high price, and I think we have witnessed this, whether or not it conducted the operation or whether or not it was circumvented.

As you know from my statement and prior writings, I have major reservations about using this instrument of foreign policy.

Mr. STOKES. The other thing I would like you to comment on is this argument about a third country saying to the United States, "Because of the possible risk to life, that we won't cooperate unless you agree that you will not tell other officials."

That, to me, is really very offensive, particularly as one who sat in as a member of the Iran-Contra Committee, and listened to how Iranians knew all about this operation, here are foreign government officials and persons not even officials of that government, the so-called moderates who had all of this information, but our government said, we can't trust the Speaker of the House and the Majority or Minority Leader of the House or the leaders of the Senate, but yet they were trusting foreign officials who have no relationship to this government whatsoever, and Members of Congress, elected representatives of the people, could not be provided this kind of information.

It just seems to me that by any adherence to this argument we allow ourselves to get into a situation that is totally contemptuous. Would you aggree?

Dr. GOODMAN. I agree, and I think any professional intelligence officer would want to be absolutely certain that Congress was informed of what they were doing. In this situation, I do think it was ludicrous that they would withhold information from Congress and give it to Iranians and foreign privateers rather than the elected representatives of our people.

I think most foreign intelligence services probably understand and know that we have an oversight system, know that it is getting stronger, and know that it is irreversible and are prepared to work with it.

Mr. STOKES. Thank you.

Chairman MCHUGH. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I would like to compliment Dr. Goodman for his presentation. I have very little to ask him. We, of course, constantly get the suggestion that there is a danger in informing the Congress, that we put certain persons at peril, but that seems to be just one side of the coin.

The other side of the coin is that if an Administration scrupulously acknowledges the law and abides by it in terms of carrying it out and indeed does solicit the views of the Congress, that in some cases it may not enter a covert action which, if they had entered it, would have been dangerous for personnel indeed.

I think sometimes this is overlooked in this argument, the other side of it. I surely do not want to revisit the rescue mission argument with respect to Iran, but the irony is that the Congress was not informed, maybe for good reason, but the fact is that it turned out disastrously anyway.

Lives were lost, it had nothing to do with the fact that the Congress was informed; in fact it was not, and indeed the hostages all did return home safely. So, I think the question of putting people at risk cuts both ways, and the balancing of objectives in terms of public policy suggests that you recommend here in terms of support of the bill.

That is my only observation. If you care to comment——

Dr. GOODMAN. I do. I think that any DCI would want to think very carefully about using covert action, and part of the thinking very carefully is consultation of the Congress. This might result in fewer covert operations, and that might be a healthy thing.

It also might prepare us for the risk that one of them fails, but I think in future, that is something we ought to leave, as Congressman Hamilton said, unambiguous. That ought to be part of the way we do our business, and I think this law makes it so.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Livingston.

Mr. LIVINGSTON. Just to answer your last question and something you wrote, an article called "Reforming U.S. Intelligence," published last year, it leads me to believe that you are not only just in favor of restricting covert activity as this bill would do, but you would like to see it abolished altogether, wouldn't you?

Dr. GOODMAN. Yes, sir.

Mr. LIVINGSTON. Don't you foresee any opportunities for covert action that might enhance the security of the Nation or protect the citizens of this country?

Dr. GOODMAN. In that article I mentioned the many dimensions of covert action, black propaganda, support of political parties covertly abroad, that most of those activities could be better accomplished either openly through institutions that the Congress and State Department have created, like the National Endowment for Democracy.

I did say that in the paramilitary area particularly with respect to the rescue of hostages, there probably was a role for covert action operations, but I thought it was better placed in the Department of Defense than in the CIA, because the latter really has been long since out of the business of training, fielding armies and having experience with them.

But I do believe in general it is a very risky and very unwise option, and I would urge any future President not to use it, and would prefer that we didn't have it.

Mr. LIVINGSTON. You don't deny that the Soviet Union and the communist bloc countries engage in covert action on a regular basis, do you?

Dr. GOODMAN. No, and I think a great deal of it falls flat on their faces, particularly their propaganda and active measures campaigns, which are revealed almost all the time. But because they have it doesn't mean we ought to have it.

Mr. LIVINGSTON. You see no benefit at all in our using covert activity to combat that, then?

Dr. GOODMAN. I see very little benefit.

Mr. LIVINGSTON. If it were up to you, you would be here advocating the abolition of covert activity rather than simple restriction of it?

Dr. GOODMAN. I think so, but first, I advocate prior notice.

Mr. LIVINGSTON. Congressman Hyde asked of Clark Clifford earlier this morning about an incident involving post-war Italy. We engaged in a covert activity which ultimately led to keeping Italy in the Western bloc as opposed to losing it to the Eastern bloc.

Even Mr. Clifford, who does not like covert activity, said that was outstanding.

Dr. GOODMAN. I agree. I think a lot of the covert activity that we engaged in between 1947 and 1955 was effective, was secret and was kept secret, and served our interests very well, but I think that the world has changed.

Mr. LIVINGSTON. It has, and I would venture to say that the Executive Branch didn't labor under anywhere near the amount of second-guessing and restrictions that the Executive Branch now suffers under, and you want to intensify it. You want to increase those restrictions.

So, in effect, you would say bye-bye Italy.

Dr. GOODMAN. Two points—I am not increasing it all that much from what it is at present, because all but three covert actions have been given prior notice to Congress in the past 10 years in both Administrations, and we are talking about a number much larger than three that have been given prior notice.

The Italian operation is a good case in point. We could do it secretly then and we were able to keep it secret then, but we could have done it then as now just as effectively through the National Endowment for Democracy, through a chartered organization of Congress that most other countries do the same thing with. The German political party institutes do the same kind of thing today.

So I think it could have been done equally well.

Mr. LIVINGSTON. Don't you agree we kept it secret because we didn't have all that oversight and all the Congressional interference in the operation?

Dr. GOODMAN. I don't.

Mr. LIVINGSTON. Thank you.

Chairman MCHUGH. Thank you very much for your testimony here today. We appreciate it, particularly given your background in the field, and you have given us material which I think will be very helpful to us during our deliberations.

We have one more committee hearing scheduled for March 10, and hopefully, speaking for myself as chairman, after the conclusion of that public hearing, we will proceed to consider the bill in committee.

The hearing is now adjourned.

[Whereupon, at 3:30 p.m., the subcommittee was adjourned.]

H.R. 3822—INTELLIGENCE OVERSIGHT ACT OF 1987

THURSDAY, MARCH 10, 1988

HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
SUBCOMMITTEE ON LEGISLATION,
Washington, DC.

The subcommittee met at 1:30 p.m. in room 2203 of the Rayburn House Office Building, Hon. Matthew F. McHugh, chairman of the subcommittee, presiding.

Present: Representatives McHugh, Stokes, Kastenmeier, Livingston, and Shuster.

Full committee members present: Representatives Beilenson, Hyde, and McEwen.

Staff present: Thomas K. Latimer, committee staff director, Michael J. O'Neil, committee chief counsel, Thomas R. Smeeton, committee associate counsel, Bernard Raimo, Jr., subcommittee counsel, Stephen D. Nelson, subcommittee counsel, Diane S. Dornan, professional staff, Jeanne M. McNally, clerk, Karen W. Schindler, secretary, and Merritt R. Clark, chief, registry/security.

Mr. MCHUGH [presiding]. The subcommittee will please come to order. This is the fifth and final day of the hearings on legislation to amend the Intelligence Oversight Act of 1980. More specifically, the Subcommittee is considering H.R. 3822, a bill introduced by Chairman Stokes, Congressman Boland and me. It incorporates many of the recommendations of the Special House and Senate Committees that investigated the Iran-Contra Affair and is substantially similar to a bill reported favorably by the Senate Intelligence Committee, S. 1721.

The provisions of H.R. 3822 have been described and debated at some length at our prior hearings. Suffice it to say that the centerpiece of the legislation is a requirement that the President notify the Intelligence Committees of any covert operation he has authorized prior to its implementation.

In extraordinary circumstances, the President may limit such prior notice to a small group of eight in the leadership.

And when the President believes that time is of the essence, he may dispense with notice to anyone in Congress for up to 48 hours after the covert action has begun.

There are other provisions in the legislation, but the heart of the debate is whether the President's discretion to withold notice to Congress should be limited in any way.

Under current law, the President is generally required to give prior notice to the Committee, or to the leadership group of eight. But he may withhold notice at his discretion, in which case he is obligated to provide it to the committee "in a timely fashion."

In the case of the arms sales to Iran, the President construed current law as permitting him to withhold notice for more than 10 months after the covert sales had been authorized, an interpretation which is totally unacceptable if congressional oversight is to have any meaning. This is not a hypothetical case.

The President signed his finding authorizing arms transfers to Iran in January of 1986. The first arms delivery had actually been made some months beforehand. In any case, the President did not provide anyone in Congress with notice of these transfers before he made them.

If he had done so, as the law generally requires, he would surely have heard some strong objections and might have spared the country a serious foreign policy setback and himself a major political embarrassment.

Not only did the President withhold prior notice of this covert action, he never informed Congress of the arms transfers to Iran at all. Although Iranian officials, arms merchants and others knew about them, the elected Representatives of the American people were never told.

We learned of this policy only because a publication in the Middle East reported the information. We've indicated previously, and I would like to reemphasize, that our purpose here is not to dwell on past mistakes, or engage in criticism of the Iran arms case for the sake of any partisan purpose.

But I don't think any Member of Congress with any interest in meaningful oversight of covert activities can accept the situation as it presently exists.

While the Administration witnesses have admitted that the circumstances in the Iran case deprived Congress of timely notice, and while they pledge to do better in the future—and we appreciate that, the Justice Department has taken the position in these hearings and in the Senate that the President was wholly within his legal authority to withhold notice from Congress, as he did in the Iran arms case.

This is an interpretation of law which we simply can't accept, and that's why we've introduced H.R. 3822.

This afternoon, we have a number of very distinguished witnesses who will comment on the legislation, as well as on the general issue itself, including our old friend, the Secretary of Defense, Frank Carlucci.

Before calling upon you, Mr. Secretary, however, I'd like to invite Mr. Livingston and Mr. Stokes to make any opening remarks they may have.

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

I'm firmly convinced that H.R. 3822 is an unnecessary and potentially harmful piece of legislation. To this point, the committee has had the benefit of a great deal of testimony on both sides of the issue, but one of the things which struck me with the greatest force

is the practical difficulties this bill would cause for our covert activities, which comprise a small but important part of our intelligence activities.

There are also some very serious constitutional concerns that a number of witnesses have brought to our attention as well.

Former intelligence officials in both Democratic and Republican Administrations have told the committee that the Iran-Contra Affair was an aberration, that the failure was in the people running the program rather than the process itself.

They pointed out that the 48-hour notice period could potentially increase the danger to the lives of foreign operatives and would have a chilling effect on the cooperation that we have come to expect from our allies.

I believe that covert operations are an important part of our effort to protect the national security interests of the United States. It's clear to me that the majority of the witnesses that support this legislation do not believe that we should be engaging in covert activities at all.

If we pass this legislation as it stands, their wish could come true. Our allies would become increasingly reluctant to cooperate with us if they felt that the information would be broadcast to too many people, and future administrations would think twice about engaging in any covert activity unless they felt that there is a concensus among all members that must be notified.

That's a bad way to do business. As I said, I'm very concerned about the practical difficulties that H.R. 3822 will cause. But there are also major concerns about the constitutional impact of this legislation.

Scholars and, for that matter, officials of both branches argue about the constitutional prerogatives of the executive and the legislative branches. But this bill's rigid procedural constraints and micromanagerial rules in the guise of oversight create conditions of permanent constitutional conflict that will be harmful to the spirit of cooperation that must exist between future administrations and Congress.

I believe it is a serious mistake to build into the statutory structure of executive/legislative branch relations a permanent invitation to discord.

We need to think whether in our zeal to extend the bounds of congressional oversight what we are actually doing is harming our national security interests.

The original drafters of this law recognized that there were legitimate interests of both the executive and the legislative branches that needed to be protected.

They realized that the cooperation between the branches was necessary in order to have both effective oversight and a useful intelligence program.

So they did not try to overregulate the intelligence functions of the administration. In effect, they opted for pragmatic ambiguity instead of statutory micromanagement.

There is no doubt that the administration was less than cooperative in this regard during the Iran-Contra Affairs, but it has also made a major effort to install corrective procedures.

We should allow enough time to see if the new rules will work. At this point, I see no reason to inflict a statutory formula for constitutional conflict between the branches.

In addition, Eugene B. Rostow, currently Sterling Professor of Law Emeritus, and Senior Research Scholar at Yale Law School and formerly Under Secretary of State for Political Affairs in 1966 through 1969, and then later Director of the Arms Control and Disarmament Agency for 1981 through 1983, has submitted a statement which we would like to incorporate in the record at this point.

[The statement and articles follow:]

Hearings on H. R. 3822, the Intelligence Oversight Act 1987

Before the Subcommittee on Legislation
Permanent Select Committee on Intelligence
House of Representatives

Prepared Statement

of

Eugene V. Rostow*

March 10, 1988

Mr. Chairman, I appreciate your invitation to testify on the constitutionality of H.R. 3822, the Intelligence Oversight Act of 1987. The Bill would require the President to ensure that the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activities.

The term "intelligence" is not defined by the Bill, except by indirection in Section 503 (e), which distinguishes the "special activities" of the Central Intelligence Agency from its operations in foreign countries intended solely for obtaining necessary intelligence. For other departments and agencies of the United States, "special" activities are defined as activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States government is not apparent or acknowledged publicly, and does not include activities to collect necessary intelligence, or diplomatic activities carried out by officers of the Department of State or other persons

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* Sterling Professor of Law Emeritus and Senior Research Scholar, Yale Law School. Formerly Undersecretary of State for Political Affairs, 1966-69, and Director of the Arms Control and Disarmament Agency, 1981-83.

representing the President. Section 503 (e) also covers foreign countries or private citizens requested by United States officials to conduct a "special activity" on behalf of the United States. In short, the "special" activities covered by Section 503 (e) seem to be "covert" or deniable operations initiated or conducted secretly by our government in order to influence the policy of foreign governments. As section 501 (f) makes clear, however, the Bill is not confined to so-called "special" intelligence activities defined in Section 503 (e), but encompasses a vast and uncharted range of activities undertaken in support of the foreign policy of the United States by civilian officials and military officers under the direction of the President. It is impossible to tell how far the Bill could be interpreted to reach into the activities of the government outside the intelligence community. In my experience, intelligence routinely flows into the government from many sources, public and private, and many routine secret or confidential diplomatic negotiations would seem to fit the definition of "special" activities in the Bill.

I attach two articles as a fuller exposition of the legal theory from which the conclusions of this statement are drawn.

In my opinion, H. R. 3822 is unconstitutional for four related reasons:

1. The Bill would require the President to disclose information which Congress can request but not command the President to provide;
2. In fact, the Bill does more than require information: it seeks to establish a procedure of compulsory consultation between the President and two designated committees of Congress. This goal is beyond the legislative powers of Congress;
3. De facto, the Bill would give the two intelligence committees of Congress, or one acting alone, an unconstitutional legislative veto over a wide and undefined class of Presidential decisions in the field of intelligence; and
4. The procedures mandated by the Bill would largely remove the Central Intelligence Agency and other intelligence entities in the executive Branch from the control of the President with respect to many of their functions, and place them under the direct control of Congress instead.

I.

The first reason why the Bill is unconstitutional is that it would command the President to provide two Congressional Committees with information dealing with extremely sensitive areas of his responsibility for the conduct of foreign relations and for limited military and quasi-military operations in self-defense. Section 501 (a) properly recognizes that the power to decide whether such operations should be undertaken and how they should be carried out is entrusted to the President by the Constitution.

As judicial opinions and constitutional practice since the Presidency of George Washington attest, Congress does not have the power to compel such disclosures of information. In Marbury v. Madison, Chief Justice Marshall declared that "the secrets of the cabinet" were beyond judicial scrutiny, and "executive privilege" has been recognized both in the Courts and in Congress ever since. The Bill therefore violates the principle of the separation of powers, by crossing the boundary between the legislative and the executive departments of our tripartite government. The balance among conflicting Constitutional policies is of course different where the information is sought by the accused in a criminal proceeding, but there are limits to even these. For example, Thomas Jefferson did not comply fully with judicial demands in the trial of Aaron Burr.

It cannot be recalled too often that ours is not a Parliamentary system, and that the President is not a Prime Minister. Chief Justice Marshall said in Marbury v. Madison, that ",b.y the Constitution of the United States, the President is

character, and to his own conscience." As Marbury v. Madison itself demonstrates, the principle does not mean that the President is ever above the law, or that appropriate means for assuring democratic responsibility are not available and should not be used. It does mean, however, that the means chosen for the purpose in H. R. 3822 are inappropriate and unconstitutional.

When Congress seeks information from the President, it should follow nearly invariable precedent by "requesting" the information "only insofar as the transmission of it, "in the President's judgment," is compatible with the public interest," to recall the language used by Senator Spooner of Wisconsin in 1906. This is not a matter of courtesy or comity between the two branches of government. Senator Spooner explained his judgment in the following terms:

> "The State Department stand upon an entirely different basis as to the Congress from other Departments. The conduct of our foreign relations is vested by the constitution in the President. It would not be admissible at all that either House should have the power to force from the secretary of state information connected with the negotiation of treaties, communications from foreign governments, and a variety of matters which, if made public, would result in very great harm in our foreign relations--matters so far within the control of the President that it has always been the practice, and it always will be the practice, to recognize the fact that there is of necessity information which it may not be compatible with the public interest should be transmitted to Congress--to the Senate or to the House.
>
> "There are other cases, not especially confined, Mr. President, to the state Department, or to foreign relations, where the President would be at liberty obviously to decline to transmit information to Congress or to either House of Congress."*

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* Quoted in Edward S. Corwin, The President: Office and Powers (1940) at p. 404.

Every study of the subject agrees with Corwin's conclusion. From the earliest days of the government, the overwhelming majority of attempts by Congress to obtain information from the President or the Secretary of State in the field of foreign affairs were requests, not demands, and were qualified by provisions authorizing the President to withhold information if he thought its disclosure would be inconsistent with the public interest. Where Congressional requests for information did not include the usual qualification, Presidents treated them as if the qualification had been included, and declined to answer nearly as often as they responded. President Washington's refusal to give the House of Representatives information about the negotiation of Jay's Treaty in 1794 is perhaps the most famous of these episodes. Others concerned military, and quasi-military and even covert operations during the period of acute controversy with Spain prior to the acquisition of Florida, the Civil War, and later periods of strain.

The reasons for the practice and the rule are rooted in the nature of things. The President is often called upon to prepare or to initiate lines of policy for which public and Congressional opinion is not yet ready. In response to those initiatives, circumstances may change, and opinion with it. Could Lincoln have obtained Congressional support for many of the steps he took before and after Fort Sumter, while the Civil War was still a threat rather than a consuming reality? In handling those problems, Lincoln kept his own counsel, consulting with very few persons, each carefully chosen by him. Nearly every President has faced problems of the same character, though not of the same magnitude (save in the case of Franklin D. Roosevelt), and they all acted in the same way.

II.

Despite its form, however, H.R. 3822 is not a Bill simply requiring the transmission of information the Congress regards as important to it in discharging its legislative functions. As most of its supporters freely concede, the Bill is designed, despite the disclaimer of section 501 (a), to put the members of the two intelligence committees squarely into the center of the President's decision-making process as active and indeed "equal" participants. This is surely unconstitutional, for a number of obvious reasons, not the least being the provisions of Article I, Section 6.

Some defend this extraordinary Congressional intrusion into the President's domain as no more than a requirement that under certain circumstances H. R. 3822 "merely" requires the President to "consult" Congress, as if such a requirement were of obvious constitutionality. This is not the case.

Consultation between the President and members of Congress is a political necessity both for members of Congress and for the President. It is an endless process which takes place continuously in a thousand forms--at meetings and poker games; over the telephone; at funerals and weddings; and at solemn meetings in the White House. The President can never "consult" Congress; he can only consult members of Congress. The word "consultation" is not a term of Constitutional import. Congress is a collective body which can act authoritatively only by passing a bill or joint resolution which is then presented to the President for signature. When, how, and whom to consult is a political art, often one of supreme importance

to Presidents and members of Congress alike. But it cannot be structured and regulated. As I said two years ago in an article called Once More Unto The Breach, a copy of which is enclosed, "Congress cannot command the President to consult with a particular Member of Congress any more than it can tell him who his Secretary of State or his most trusted advisers should be. Any such attempt would interfere with the President's most sensitive executive discretion, that of political leadership." That comment was addressed to the War Powers Resolution of 1973. It applies equally to H. R. 3822.

The President's Constitutional discretion to conduct aspects of his foreign policy in secret has not been seriously challenged until the recent past, when the circumstances leading to President Nixon's resignation in 1974 encouraged Congress to take a number of radical steps in seeking to change the Constitutional balance between Congress and the Presidency in the making and conduct of foreign policy. The recent dispute over President Reagan's secret arms sales to Iran has stimulated the further step in this direction of H. R. 3822.

Some of the witnesses before this Committee, notably Clark Clifford, have defended the constitutionality of the Bill on the ground that it is consonant with our system of "checks and balances." Checks and balances in managing the relationship among the three branches of our government have proved to be an admirable source of friction and tension in the working of the government, thus helping to prevent tyranny and to protect personal liberty. But the formula is not a universal panacea. In creating the Presidency, the goal of the Founding Fathers was to establish an executive capable of "energy, secrecy, and dispatch."

One cannot recite the words "checks and balances" as a magic incantation to justify a Bill which would introduce a serious check on a Presidential power hitherto deemed to be exclusively executive in character. Congress cannot supplement the Constitution by inventing new Constitutional checks at will. The Constitution itself has been extraordinarily effective in this respect,--some would say much too efffective, and it requires no augmentation.

At first glance, the reporting requirements of the Bill seem innocuous. Nonetheless, they challenge the President's Constitutional discretion in extremely important ways. They are not in fact reporting requirements at all, but would confer upon two committees of Congress the right and power to advise the President in advance of his decisions about how to execute the laws. It is a long Constitutional step between making laws and applying them to particular cases. Congressman Hamilton was commendably frank in his testimony before you on February 24, 1988, where he said,

> "Now we are told by the Administration that "timely" means whatever the President says it means and that he can withhold notice as long as he wants. If we let this interpretation stand--an interpretation that says the President can withhold information from Congress at his discretion--then Congress will have weakened seriously its oversight capabilities and consented to a basic shift of power away from the Congress to the Executive Branch. Once this power to withhold information from the Congress is granted to the President, how can it then be maintained that congress stands equal in power to the President?"

But Congress and the President are not constitutionally equal in power with respect to all aspects of the making and conduct of foreign policy. Congress has enumerated legislative powers, the President, "the" executive power. In some areas Congress is clearly supreme, in others, the President. Only Congress can appropriate money,

declare war, and enact laws; only the President can nominate and remove high officials, recognize foreign governments, and conduct foreign relations. In all areas, however, cooperation between Congress and the President is necessary if our complicated government is to function effectively. But cooperation is not a simple rule of thumb, equally applicable in every case. And it is not a matter for legislative timetables. The timing and sequence of that cooperation must be flexible and responsive to circumstance. Its success depends ultimately on the political insight and intuition of the chief participants in the process.

The unfettered Executive autonomy of the President has been a critical factor over and over again in assuring the survival of the nation. Washington, Lincoln, Franklin Roosevelt, and many other Presidents have exercised their executive powers in decisively important ways without informing the Congress or consulting with Congressional leaders. At a later point, when in their judgment the situation was ripe for such action, they turned to Congress for legislative or political support.

The necessity for dealing with problems in stages--the executive usually first, and Congress thereafter--is often a matter of supreme importance, fully congruent with the animating ideas of our Constitutional arrangements. Our constitutional system of separate powers is in fact a system of intermingled powers, as Madison saw clearly. Neither Congress nor the President can proceed very far in any given direction without the help of the other. Congress can declare war but the President must conduct it. Congress declared war on Great Britain in 1812. President Madison secretly initiated negotiations for peace eight days later.

President Washington declared our neutrality in the great European war of the time despite our Treaty of Alliance with France, and then discovered that he could not enforce neutrality without a statute, which came a year later. So now, in dealing with the confused and often obscure thrusts of the Cold War the Soviet Union has been waging against us for more than forty years, the conduct of American diplomacy and security policy requires an active, resourceful Presidency, taking advantage of every opportunity to advance the interests of the United States, in public and in secret, by methods which must include first-rate intelligence and effective defense against the covert and quasi-military attacks of our adversaries as well as more visible military attacks.

III.

In fact, however, the purpose and effect of the reporting requirements of H. R. 3822 are not to transmit information or to require consultation; they are designed and defended as devices which would allow two Congressional Committees to prevent Presidents from acting as President Reagan did in seeking to improve our relations with Iran by methods which included secret arms sales. As Senator Cohen said in his speech on the floor of the Senate on March 3, 1988, the object of the Bill is to allow small groups of Congressmen to keep the President from making what they regard as mistakes--that is, in plain language, to substitute their judgment for that of the President on how to conduct our foreign relations.

Senator Cohen insists that Congress is looking for a "voice" in the decision making process, not a "veto". The Senator's contention is without constitutional substance. Neither the Constitution nor the pattern of Constitutional practice

before 1980 gives the slightest support to the claim that the law-making authority has the right to offer the President advice in advance of his decision about how to carry out his constitutional duty faithfully to execute the laws. The Senator's claim of such a right crosses the boundary line between the legislative and the executive power. There is no such right, even with respect to treaties. In many, perhaps most cases, a wise and prudent President will consult members of Congress or citizens he regards as specially qualified to advise him on a given subject before he decides on his course of action. But the choice has always been his. The cases where a President chooses not to consult in advance have been among the most important in our history.

In any event, under the highly charged circumstances of cases covered by H. R. 3822, a Congressional voice cannot be distinguished from a Congressional veto. It requires a robust imagination to suppose that a President would continue in a covert operation if an influential group of important Congressmen advised him vehemently that the proposed action would be a political disaster:--another Watergate or Irangate. Senator Cohen concedes that in consultations under the 1980 Statute, Congressional advice has invariable been followed. The conclusion is hardly surprising.

Thus the Constitutional problem presented by Section 503 is similar to that presented by the War Powers Resolution. To be sure, there is no formal provision in H. R. 3822 for a legislative veto which would override a President's decision to undertake the intelligence activity he has reported to the Intelligence Committees of Congress. It does not provide for veto by concurrent Resolution or one-House Resolution, but by the secret advice of one or both of the Intelligence Committees, or of a smaller group.
11

IV.

The focus of public controversy over H. R. 3822 has been Section 503 (c), which provides that no special intelligence activities may be initiated before the intelligence committees are formally notified, except where the President determines in special circumstances that time is of the essence. Even where delay in notification is justified, the Committees are to be notified not later than forty-eight hours after the special activity has been authorized by the President.

These provisions are fundamental to the character of the Bill with respect to the compulsory provision of information, consultation, and the legislative veto, which I have already discussed. They have another constitutional dimension.

In Section 502, the Bill seeks to impose separate and comprehensive reporting requirements on the Director of Central Intelligence and the heads of all other departments, agencies, and other entities involved in intelligence activities. Such a requirement would be constitutionally appropriate for ministerial functions of the branches of the government involved in intelligence, but not for their policy programs. As written, the Bill can only have the effect of weakening the ties between the intelligence community and the President and bringing it more and more under the control of the two Congressional Intelligence Committees. Manifestly, this would be an unconstitutional development, which all concerned with the integrity of the Constitution should oppose.

V.

Many justify the Bill as an attempt to prevent what are widely regarded as the errors or follies of the Iran-Contra affair. Rigid procedures of disclosure and consultation, however and a de facto legislative veto vested in a small group of Congressmen and Senators cannot guarantee that all the policies and programs the United States government undertakes will always be wise, or will always succeed. Members of Congress are quite as capable of error as the President.

It is characteristic of us to believe that if something goes wrong we can fix it by passing a law. So, in the mood of shock and agitation caused by Watergate and President Reagan's secret dealings with Iran, we turn automatically to legislative remedies. I urge you to resist the temptation and approach your task in the spirit of No. 41 of the Federalist Papers. Measures of self defense will always be governed, Madison wrote, by "the impulse of self-preservation." It is better not to confine the discretion of the government in dealing with such problems by rigid rules. The problems usually arise in unfamiliar forms and without warning. Rigid rules may hamper the government when action contrary to the rules is necessary, and tempt government to act in violation of the rules when such action is not necessary. The example of the War Powers Resolution should stand as a warning in your minds. With the best intentions in the world, it is easy to do more harm than good.

H. R. 3822 belongs with a group of most unfortunate statutes passed since the time when the campaign in Vietnam became unpopular. Through those statutes, Congress has attempted to "micromanage" the President's conduct of foreign relations. The Supreme Court has long since indicated that most of these statutes are unconstitutional. Its decisions on the separation of powers have been sharp and clear for many, many years. In my view, the greatest contribution Congress could make to the future of our foreign policy and to the preservation of the rule of law in the commonwealth is to bring the statute book into conformity with the law of the Constitution on the relation between Congress and the President in the field of foreign affairs.

Faculty Opin

Yale Law Report
Spring 1976 p. 12

Eugene V. Rostow

On Foreign Covert Action Operations

Mr. Rostow is Sterling Professor of Law and Public Affairs.

We reproduce here the text of a September 23, 1975, letter from Mr. Rostow to William G. Miller, staff director, and Frederick A. O. Schwarz, Jr., chief counsel, of the Select Committee to Study Government Operations with Respect to Intelligence Activities, United States Senate.

I am happy to respond to your letter of July 30, asking my views (1) on the legal basis for the conduct by the President of what you call "foreign covert action operations" in the absence of specific statutory authority; and (2) whether, or to what extent, Congress may by statute limit or prohibit the conduct of such "foreign covert action operations" by the President. Your letter gives several examples of what you mean by the phrase, ranging from the Bay of Pigs episode to sabotage, propaganda, and assistance to foreign political groups.

I have prepared this letter during a sabbatical in the country, without benefit of library. It will therefore be general and informal in character.

In brief, my answers to your questions are as follows:

(1) In the absence of statutory authority, the President has inherent constitutional power to conduct "foreign covert action operations" because he is the President under our Constitution: that is, he is the sole organ of the nation in the conduct of foreign relations; the commander-in-chief of our armed forces; and the head of State.

(2) Congress cannot prohibit the President from carrying out "foreign covert action operations," but it may establish and regulate the methods through which the President carries them out, as it establishes and regulates the work of the courts and the action of the President in other aspects of his duty. Congress cannot deny the President the capacity to function effectively in this area any more than it could deny the courts the capacity to carry out their independent constitutional duties, or deprive the President, for example, of his pardoning power, or his power to remove Cabinet officers at will.

I

Let me start with the unassailable proposition that since 1776 the United States has been a nation among the nations, fully vested with sovereignty, as that concept is known to international law, and endowed with the capacity to do whatever nations do in world politics, in accordance with the effective norms of international law.

But the limitation of the previous sentence does not help much in articulating a sound answer to your questions. The nations are of course under an obligation to respect and obey the generally accepted norms of international law. The United States has always purported to base its foreign policy on scrupulous respect for international law, a policy I strongly support. But other nations do not always follow the same policy. And international law fully acknowledges the fact that nations have the sovereign power, if not the right, to breach their obligations under international law and take the consequences. Our constitutional law fully recognizes this fact (*Gray v. United States*, 21 Ct. Cl. 340 (1886); *Diggs v. Schultz*, 470 F.2d 461 (Ct. App. D. of C. 1972)). It follows, both under international law and our own constitutional law, that we must be capable of employing the remedies of self-help contemplated as legitimate under international law to deal effectively with such wrongful acts. International law does not know the remedy of specific performance.

To paraphrase Chief Justice Hughes' famous comment about the scope of the war power, the authority of the nation to protect its interests in world politics is the authority to protect those interests successfully. As a matter both of international and of constitutional law, the extent of the nation's rights, duties, powers, and privileges in foreign affairs will therefore depend upon the condition of world politics and upon circumstance. In all legal systems law derives from the nature of things. What the United States can do turns on what it must do: that is, on what its responsible political officials believe it should do to safeguard the security, prosperity, and honor of the nation, both in serene times, and in times of trouble.

Under the Constitution of 1787 the authority of the United States to act as a sovereign nation in "the great external realm" is divided between the Presidency and the Congress. The allocation of power between Congress and the Presidency in dealing with external affairs has never been and can never be mapped with precision. As Hamilton said, the threats which may arise to plague the nation are infinite and beyond prediction. The powers of the nation must always be adequate to deal with whatever menace may arise. The point I am trying to make is nowhere more evident than in the astonishing arrangements we have made, and take for granted, about the President's singular duties with regard to the nuclear weapon. Since the

Presidency is the only institution of our government capable of dealing with the problem, we entrust it to the President.

A familiar constitutional paradox dominates your enquiry. On the one hand, the Presidency is one of the three autonomous branches of the government, often called "independent"; on the other, as Madison saw from the beginning, the principle of the separation of powers does not mean that the three branches of the government are really separate at all. For the most part, their powers are commingled and shared. They are therefore not independent but interdependent, although there are some functions unique to each branch. Only a judge can issue a mandamus. Only Congress can declare war. Only the President can order the troops into battle. If one visualizes the powers of the President and of Congress in the field of foreign affairs diagramatically, they could be represented by two circles, tangential to each other, with a third circle, its center on the point of tangency, including about half of each of the others. The parts of the first two circles outside the third would represent the distinct and independent powers of Congress and of the Presidency; the third circle, the powers they share. I shall not attempt here to survey the field, reconciling the respective foreign affairs powers of Congress and the President. You are familiar with Corwin's magisterial book on the Presidency and Professor Louis Henkin's comprehensive recent treatise. I examined one panel of the problem in an article in the *Texas Law Review*, "Great Cases Make Bad Law," 50 *Tex. L. Rev.* 833 (1972).

Suffice it to say, for the purposes of this letter, that nearly two centuries of experience permit us to identify the ideas which govern the division of authority between the Presidency and Congress in the Foreign Relations Law of the United States.

In my judgment, that allocation of authority corresponds to functional necessity—that is, to the nature of the tasks involved and of the institutions themselves. I have no quarrel with the existing constitutional plan, difficult as it is to carry out. In my opinion, it corresponds to the nature of our constitution and people, combining the capacity for swift executive action with ample means for assuring democratic responsibility.

The President speaks for the nation in diplomacy. He is commander-in-chief of the armed forces. And he is head of state, endowed therefore with residual emergency powers Lincoln used. In many areas, the President makes policy himself, in addition to carrying out the policies of Congress. The Monroe Doctrine, for example, is a presidential policy but not less a national policy for that reason.

The Congress is the legislature, deliberately denied any executive power. The Senate has a special role in certain appointments and in treaty-making. And only Congress can declare war.

Defining the limits of Congressional power in relation to the inherent authority of the other two branches is never an easy task, but it is a familiar one in our constitutional system. We know, for example, that while Congress can regulate the jurisdiction of the federal courts and the appellate jurisdiction of the Supreme Court, it has never deprived the courts of the capacity to carry out their judicial duties. Confronting such a possibility, Justice Story once said that the courts would exercise their inherent rule-making power to assert jurisdiction. The test has never arisen, and I trust it will never arise. But I believe Justice Story was right. There is a point beyond which regulation becomes usurpation. In relation to the Presidency, too, all sorts of limits are recognized. Congress can, for example, establish a Civil Service System, but it cannot deprive the President of his indispensable power to remove Cabinet officers and other high officials at will. Nor can Congress interfere with the President's pardoning power, although it can, I should suppose, pass amnesty statutes of its own.

What your letter identifies as "foreign covert action operations" belong to two realms in which the President and Congress are at once independent and interdependent—the conduct of foreign relations and the international use of force. Perhaps it would be more accurate to say that diplomacy and the limited use of coercive measures are equally normal aspects of the conduct of foreign relations in times of war and peace alike. As the Supreme Court once commented, secret services "are sometimes indispensable to the government," both in hostilities and in "matters respecting our foreign relations." *Totten v. United States*, 92 U.S. 105, 106-107 (1876). Since the conduct of foreign relations under our Constitution is peculiarly Presidential in character, especially in those of its aspects where secrecy is essential, the task of defining the limits of Congressional authority with respect to the secret aspects of diplomacy is unusually difficult.

II

I assume that you are mainly interested in the international and constitutional legal problems raised by foreign covert action operations during peace time. Once Congress has moved the nation to a state of war, within the intendment of international law, most of the questions suggested by your letter disappear.

International law contemplates the possibility that a long list of limited coercive measures may be employed in international relations during peace time to redress violations of international law which cannot be dealt with by less drastic means. They range from ordinary intelligence gathering procedures to the exercise of what Article 51 of the United Nations Charter acknowledges as each nation's "inherent right of self-defense" against armed attack (or the imminent threat of armed attack), and its equally "inherent" right to respond reciprocally to lesser forms of coercion or to assist another nation under attack or threat of attack. The clumsy drafting of Article 51 subsumes a comprehensive array of measures of self-help a nation may take in peace time to defend itself against violations of international law by another nation to its detriment. Some involve the use of force. Others, like ordinary diplomacy and less visible methods of gathering information, seek to discover, to anticipate or to deal with harmful or hostile actions other states may be planning or taking against the best interests of the United States. Such measures of self-help should be limited and addressed to the breach itself. They are never intended as acts of general war, nor are they intended to affect the territorial integrity or political independence of the nation to which such defensive measures are addressed.

One of the accepted rules of this branch of international law, both before and since the enactment of the Charter of the United Nations, authorizes the international use by force by way of proportional response to the use of force by or from another nation in breach of its obligations in international law. For example, when guerrillas conducted raids within the territory of the United States from Spanish Florida in 1819 or from Mexico in 1916, Spain in the one case and Mexico in the other had violated their duties to us under international law by failing to prevent such activities from their territories. Prompt relief being unavailable through diplomatic channels, the United States was legally authorized to send troops in order to eliminate the danger. We acknowledged the principle when the shoe pinched the other foot. In 1837, armed bands assembled in up-state New York to help an insurrection in Canada. We conceded that, in such a case, Great Britain could send troops into the United States for the limited purpose of eliminating the threat to Canada if the United States did not disarm and disperse the guerrillas with dispatch.

This principle of international law has been appropriately invoked nearly every week in the Middle East during recent years, when Israel has raided guerrilla camps in Jordan or Lebanon from which attacks have been launched against it, or made limited attacks in Egypt or Syria, in response to guerrilla attacks from those countries.

Constitutionally, such limited uses of force to defend the United States or its allies against breaches of international law have been considered to be among the duties of the President, acting alone. The President has sometimes had the support of a Congressional Resolution before or after the event in cases of this kind. It is always desirable, when it is also feasible, for the Congress to join the President in putting the full weight of the nation behind an American warning or other act of permissible self-help. But Congressional support is not necessary to the legality of such actions under the Constitution. Thus, the President has used force on his own authority many, many times since 1789, not only in dealing with armed attacks, like those from Spanish Florida or Mexico I have just mentioned, but also in protecting American citizens and property abroad, when they were subjected to treatment which violated the standards of international law and when, as a practical matter, political or judicial remedies could not be obtained immediately.

The practice is so familiar that it requires no evocation of precedents. The *Mayaguez* episode is the most recent occasion on which a President deemed it necessary to use force in the exercise of his responsibility to protect American citizens and property abroad against a breach by another state of its obligations to us under international law.

The use or the threat to use military force or other coercive measures is also a familiar feature of diplomacy, especially, of course, during periods of turbulence like the modern era. Thus, the United States put 50,000 troops on the Mexican border after the Civil War to back the President's suggestion that France withdraw its support from the government of Maximilian. The United States made this threat to use force on the authority of the President alone, as an integral part of his responsibility for the conduct of foreign relations in general and the enforcement of the Monroe Doctrine in particular. Under our constitutional practice, it would have been time to involve Congress

formally before or after hostilities broke out if the President's warning had failed of its purpose.

President Kennedy's handling of the Cuban Missile Crisis in 1962 should be viewed, I believe, in the same perspective, as permissible self-help authorized by Article 51 of the Charter. We actually used a small amount of force, in stopping Soviet vessels on the high seas, and threatened a greater use of force, in order to reinforce a diplomatic demand on the Soviet Union. Our policy in the Cuban Missile Crisis of 1962 was not a move to defend the United States against the threat of imminent nuclear or other attack. There was no risk of any such attack. As President Kennedy pointed out at the time, the emplacement of Soviet missiles in Cuba was not in itself the crux of the controversy: Soviet missile-carrying submarines roamed the Atlantic at will.

Here again, the action taken was Presidential. Because of the controversy over the constitutionality of President Truman's course in Korea and the amendment to the Constitution proposed by Senator Bricker, a hasty Resolution had been passed by Congress purporting to deal with the Cuban crisis. But it did not cover the situation as it developed. There is no doubt, however, that Congress supported the President in what he did.

The most recent and most portentous threat to use force in aid of diplomacy was President Nixon's series of warnings to the Soviet Union not to attack China. This was the essence of his diplomacy for achieving a rapproachement with China as a step towards stabilizing the relationships among the Soviet Union, China, and the United States and its European and Asian allies. The President was addressing the ominous Soviet mobilization on the Siberian frontier between China and the Soviet Union. What he said, in context, was a secret threat to use force in the event of a Soviet attack on China. Thus far, that Presidential threat has been effective.

Here too, what the President did has had general and Congressional support. I am not aware of any criticism of President Nixon's rapproachement with China on constitutional grounds.

In all these instances, and many others, the action required of the United States was Presidential in character. In some—like President Nixon's recent warnings to the Soviet Union to protect China and Israel—secrecy added to the possibility of success and was perhaps essential to success. It is easier for a nation to yield to a secret than to a public threat. In such affairs a hint is far more likely to be effective than an ultimatum. All were situations requiring a quick response and a nearly continuous course of action. They were "executive" rather than "legislative" in nature—if those two slippery words can be considered to possess tangible cores of meaning. They involved either limited defensive responses to an attack on the interests of the nation or equally limited recourse to pressure in aid of diplomacy.

III

What you describe as "foreign covert actions" are accepted and relatively minor examples which fit into both the general categories I have sketched out in the second part of this letter.

The Soviet Union and some other nations engage in large-scale and systematic programs of "foreign covert operations" directed against our interests all over the world. I assume your Committee has carefully studied the events behind the important Mexican decision in 1971 to expel over fifty Soviet diplomats and the corresponding decision of the British government (in the same year, I believe) to expel an even larger number "for espionage and sabotage." These were dramatic instances which came close to the surface of public knowledge. Neither customary international law nor the law of the United Nations Charter—insofar as it may differ from customary international law—provides any remedies against such policies, save self-help in the pattern of Article 51. Are we to stand by and allow NATO allies, like Portugal, Italy, Greece, or Iceland to be subverted and conquered by well-financed Soviet programs of propaganda, sabotage, and even direct revolutionary activity (like that publicly revealed in Mexico in 1971) without any response?

It seems to me that the long tradition of using secret agents in diplomacy provides the simple and sensible answer to that question. That answer must be, "Of course not." The use of secret agents was a familiar feature of the diplomacy our Founding Fathers knew and practiced. It has been commonplace ever since. And today it is employed by our adversaries on a larger and more sophisticated scale than at any previous time in history. It makes no sense to claim that either international law or our own Constitutional law prevents the United States

from defending its interests against such pressures.

The defense of the nation against these unremitting pressures may sometimes involve elements of international coercion which would be of doubtful international legality if they were not intended to defend our interests against illegal coercive pressures mounted against us by the Soviet Union or other states. But they are far less burdensome than the uses of coercion mentioned in Part II of this letter. If it was permissible under international law for President Wilson to send troops into Mexico in order to capture Pancho Villa—and it was—it is *a fortiori* legal for the United States to provide funds for democratic newspapers or political parties in Chile or Portugal or to engage in some of the other kinds of foreign covert actions contemplated by your letter. Such operations should be deemed proper exercises of our inherent right of self-defense, as activities normal to the conduct of our foreign relations in this period of intense and dangerous international rivalry.

IV

Finally, I come to the question whether Congress can constitutionally limit or prohibit the activities of the President in this field.

Let me start by making it crystal clear that I oppose, and I believe our constitution opposes, unreviewable power in any branch of the government. The American constitutional system is based on the principle of democratic responsibility. It has an answer for the famous and ultimate question of all government, "Quis custodiet custodes?" Our answer is plain, and the passion of our convictions on the subject was fully revealed in the Watergate affair through which we have just passed.

The forms and methods of public accountability are not uniform, however. Some involve judicial or congressional review; for others, the only available remedy is at the polls. If the Supreme Court errs, in the judgment of the country, the remedy is a statute or a constitutional amendment, embodying the sober second thoughts of the American people.

Many, many decisions of government are necessarily entrusted by the Constitution and the laws to the uncontrolled discretion of the President, or Congress, or both. These are the so-called "political questions" courts cannot review. Some are purely Presidential; others purely Congressional; many involve the action of both branches—a declaration of war, for example. For such exercises of the power of the political branches to make political decisions, the appropriate way to assure democratic responsibility is oversight and ultimate recourse to the political process. Great Britain, France, and other democratic countries make it a rule never to discuss their secret services in public. So strict a standard is not congenial to our political system. Nonetheless, in my view, Congress should follow the holding in the *Totten* case, which requires the courts to respect the government interest in secrecy and conduct their oversight hearings in private.

Such, I believe, is the constitutionally correct predicate for an answer to the questions posed by your letter, "Can Congress limit or prohibit the President's activities in the field of foreign covert action operations?"

The question of prohibition is easy, I think. Congress cannot deny the President authority to use secret agents in the conduct of his constitutional duties as President any more than it could interfere with any other "inherent" or "independent" feature of his power.

Regulation within the boundaries established by our constitutional history is another matter.

The problem, I suggest, is like that involved in establishing and organizing the State Department. Only Congress can establish ongoing governmental institutions to assist the President in carrying out his responsibility for the conduct of foreign relations. It can pass comprehensive legislation to regulate the functioning of the State Department. But in doing so, Congress cannot limit or control the exercise of the President's constitutional discretion. It could not, for example, decide questions of recognition or non-recognition. They are for the President alone. It cannot, I believe, require the President or any other executive officer to reveal what Chief Justice Marshall, in *Marbury v. Madison,* called "the secrets of the cabinet." Congress could not require the President to act only on the recommendations of the Secretary of State, or the National Security Council, or the Senate Foreign Relations Committee. It could not require the President to use only members of the Foreign Service or Ambassadors as his agents in diplomacy. From the time President Washington sent the Chief Justice to negotiate Jay's Treaty to the day of Colonel House, Harry Hopkins, or Henry Kissinger (before he became Secretary of State), Presidents have often chosen to conduct diplomatic business through

channels convenient to them.

Similarly, Congress cannot control the President's discretion as Commander-in-Chief, save through its power of the purse, although it can and does legislate on a large scale to organize and regulate the military establishment. It could not order President Roosevelt to start a Second Front in France or prevent a President from negotiating and signing an armistice or a cease fire.

In the nature of world politics today, what your letter calls "foreign covert action operations" will often be "indispensable to the government" to recall the phrase from the *Totten* case. Under most circumstances, they come well within the areas of action the President is fully authorized to take on his own responsibility. In *Totten* the Court ruled that in hiring a secret agent without statutory authority, the President made a contract binding on the United States and payable from contingent funds entrusted to him by Congress. Congress can probably alter that practice and regularize the President's mode of making such contracts. But it cannot deprive him of the function.

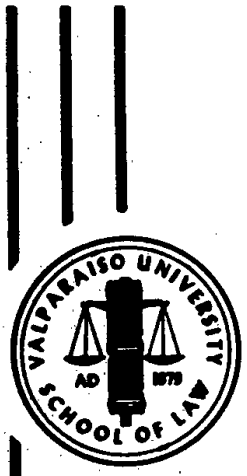
Can Congress limit or control the President's discretion in carrying on foreign covert operations, save through a refusal to appropriate funds? To a degree, I believe it can. For example, I see no reason why Congress could not declare that it is against the policy of the United States to engage in political assassination. To my official knowledge, that was the firm and immutable policy of the United States while I served in the government in high enough positions to know, and I was assured that it had always been the policy of the United States. Congress has passed legislation and ratified treaties dealing with many aspects of the law of war. Those statutes and treaties restrict the powers of the President as commander-in-chief. If the Senate can ratify treaties and Congress pass legislation outlawing the use of poison gas or the bombing of open cities, I see no reason why Congress could not outlaw certain practices by our CIA agents, so long as the function itself is not crippled or controlled.

Manifestly, there is no chance whatever that the rules of the game for the secret services will ever be prescribed by international agreements like the Geneva Conventions regulating the use of force in war and other hostilities. Whether it is prudent to consider such legislation is therefore a difficult question. But your letter asks only whether under the Constitution Congress has the power to pass any substantive legislation at all in the field beyond housekeeping statutes.

My answer to that question is a qualified "Yes." In my opinion, Congress can pass legislation dealing with foreign covert action operations of the President as chief diplomat of the nation, commander-in-chief of its armed forces, and head of state, so long as it does not cross the intangible boundary between the legislative and executive aspects of the problem. Admittedly, the delineation of that frontier is difficult and will always be difficult for the reasons I suggested earlier. Certainly my colleague Professor McDougal was correct when he wrote to you on August 21 that "Congress has no more authority to regulate the independent powers of the President than the President has to regulate the independent powers of the Congress." But which part of the President's powers are truly independent and which are shared with Congress? There are many fields in which the President can and should act in the absence of Congressional action but where Congress can act if it wishes to do so: the abrogation of treaties, for example; the exclusion of aliens; the regulation of international cables and other devices of telecommunication.

In trying to analyze the division of the foreign affairs power and the war power between Congress and the President, the conduct of foreign covert action operations is surely an aspect of diplomacy and of the President's duties as commander-in-chief, which should be classified close to the Presidential end of the spectrum. It is necessarily secret and intimately associated with the conduct of foreign relations, rather than the articulation of legislative policy. Nonetheless, I should be the last to deny that there is some room for substantive policy legislation in the field, so long as the basic process of the Constitution is respected.

The democratic quality of American life depends ultimately not only on the rectitude of our governors but on the inevitable rivalries and jealousies of the three branches of government. Those rivalries produce the tensions which have made it possible to preserve our Constitutional system for nearly two centuries and thus to protect our liberty. The present study of your Select Committee represents one manifestation of that constitutional tension. Of course tension should not be carried so far as to paralyze government. It never has. But it should go far enough to satisfy us that any abuses of the system have been cured; that every reasonable precaution against possible future abuse has been established; and, above all, that the proper functioning of the President's secret services as indispensable agencies of government has been facilitated and assured.



Valparaiso University Law Review

THE EDWARD A. SEEGERS LECTURES

VOLUME 21, NUMBER 1 FALL 1986

Valparaiso University Law Review

Volume 21 Fall 1986 Number 1

"ONCE MORE UNTO THE BREACH:" THE WAR POWERS RESOLUTION REVISITED

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LECTURE I.

The War Powers Resolution was enacted over President Nixon's veto in 1973, as the twin dramas of Vietnam and Watergate were approaching their climax in the President's resignation nearly a year later. The sponsors of the statute told the American people it would protect the nation from "another Vietnam" and piously restore the constitutional balance the Founding Fathers intended between Congress and the President with regard to the use of the national force. That balance had been disturbed, the supporters of the Resolution claimed, by a series of Presidents since McKinley who had stolen the war-making powers entrusted to Congress by the Constitution, and thereby made Congress the impotent slave of an Imperial Presidency. Once we return to the true constitutional faith, these Solons said, the peace, security, and prosperity of the United States and its allies would be assured.

The critics of the statute were equally apocalyptic. The Resolution,

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My purpose in this paper is to reconsider and supplement my earlier writings on the War Powers Act and bring them up to date. Those writings include: *War, Foreign Affairs and the Constitution*, 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2007-2013 (1986); *Commander-in-Chief*, 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 316, 317 (1986); *Great Cases Make Bad Law*, 50 TEX. L. REV. 833 (1972); *Response to Professor Henkin*, 61 VA L. REV. 797 (1975); *Learning Lessons from Vietnam*, CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 89 (1984); *War Powers: Hearings Before the Subcomm. on Nat'l. Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93rd Cong., 1st Sess 395 (1973) (statement by Eugene V. Rostow). The present article rescues some pages of my testimony in the 1973 War Powers Hearings from the unindexed limbo of such documents.

they argued, rested on a mistaken understanding of the intentions of the Founding Fathers and the course of constitutional history. The proponents of the Resolution were guilty of a cruel and hypocritical deception in promising the American people immunity from "another Vietnam." Not even an Act of Congress can guarantee that our wars will always be conducted wisely and effectively, and won. In any event, they pointed out with some asperity, the Vietnam War had been authorized not only by the decisions of four Presidents, but by two treaties and repeated Congressional acts and joint resolutions which amply satisfied the procedural requirements of the new statute. Moreover, the War Powers Resolution could not "restore" the balance of the Constitution; that balance had never been disturbed. The foreign affairs powers, including the war powers of the United States, had been exercised in much the same way between the time of Washington and John Adams and that of Franklin Roosevelt, Truman, and Lyndon Johnson. If enforced, the War Powers Resolution would accomplish the most revolutionary constitutional change in American history. It would deprive the President of his capacity for prompt and decisive action which has been critical to his effectiveness both in the conduct of foreign relations and in the management of crises. These powers are inherent in the Presidency and necessary to the security of the nation—more necessary today than ever before. Actually enforcing the War Powers Resolution would convert the strong, autonomous President which is one of the great achievements of the Constitution into a mere lackey of an omnipotent Congress. Such action would repudiate Hamilton's theory of the Presidency which has dominated judicial decisions and constitutional practice in the domain of foreign affairs since 1789, and for the first time embrace what Corwin scornfully called the "ultra-Whig" view of the office.[1] If the War Powers Resolution had been in effect, Lincoln could not have saved the Union, Franklin Roosevelt could not have taken the early steps which made it possible in the end to defeat Hitler, and Kennedy could not have conducted the Cuban Missile crisis successfully. Thus, in the eyes of Hamiltonians, the War Powers Resolution would restore the Articles of Confederation as our norm for handling the foreign affairs of the nation, and leave the United States drifting helplessly in stormy seas, naked before its enemies. In their view, the ultra-Whigs have revived a familiar and beloved constitutional controversy in order to avoid the disagreeable fact that changes in the magnetic field of world politics since 1789 have imposed novel and dangerous tasks on the people and government of the United States.

With the benefit of hindsight, these two lectures attempt to review the continuing debate about the War Powers Resolution against the background of international law and politics and the nation's experience in con-

1. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957 at 17 (4th ed. 1957). *See also* CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 126-207 (1917).

ducting its foreign relations under the Constitution of 1787. The first lecture examines the controversy in the light of constitutional theory and early practice; the second takes up the War Powers Resolution and its reception.

I

For purposes of international law, the United States is a unitary, not a federal state. Internationally, the American states are provinces, devoid of "sovereignty." Since we prevailed in the Revolutionary War, the United States is considered legally to have come into being as a full fledged member of the family of nations with the Declaration of Independence, vested as of that date with all the powers, rights, immunities, and privileges acknowledged by international law as the prerogative of widely recognized states. Correspondingly, the United States is liable to other states for the performance of the duties imposed upon all states by international law. In the "great external realm" of foreign affairs, the United States can do whatever other states do—that is, whatever it deems necessary and reasonable to assure its safety and well-being in international society.

The Constitution does not purport to "grant" international powers to the United States any more than it purports to create the United States. On the contrary, as is natural in a document reorganizing the institutions of a functioning government for the second time more than a decade after its creation, it treats the United States as an existing and on-going political entity. The Constitution is written in the name of "the people of the United States,"[2] and notes as obviously valid the treaties made under the authority of the United States between 1776 and 1789.[3] Thus the international powers of the United States are conferred and defined by international law. Internationally, the government of the United States possesses all the powers possessed by any other state under international law, including the sovereign power to violate international law. The Constitution commits these powers to the political discretion of Congress and the President in accordance with the principle of functional necessity. If Congress or the President should decide to use the national force in violation of international law, courts and citizens are bound thereby, as they are bound by other official decisions with in the discretion of the political branches of government.[4] The division of the foreign affairs and war powers between Congress and the President reflects the grand Design of the American polity, to recall

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2. U.S. CONST. preamble.

3. U.S. CONST. art. VI, cl. 2.

4. Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1972); Cook v. United States, 288 U.S. 102 (1933); The Chinese Exclusion Cases, 130 U.S. 581 (1899); Whitney v. Robertson, 124 U.S. 190 (1888); Head Money Cases, 112 U.S. 580 (1884); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 15-16 (1972).

the favorite major premise of John Marshall's constitutional opinions.[5] In this instance, the great purpose of the Constitution is to fullfil the twin objectives of executive effectiveness and democratic responsibility: a strong, energetic President and a strong, energetic Congress. The international powers of the nation which are legislative in character, with some exceptions, are Congressional, and those which are executive in character, with some exceptions, are Presidential. The Senate must give its advice and consent to the appointment of high officials and the ratification of treaties, and only Congress can "declare" war.

The President created by the Constitution was in no sense to be a Prime Minister. No member of Congress can serve in the executive branch.[6] And the President is elected not by Congress but by an independent national constituency for a different term. As Professor Corwin wrote,

> [t]he fact is that what the Framers had in mind was not the cabinet system, as yet nonexistent even in Great Britain, but the 'balanced constitution' of Locke, Montesquieu, and Blackstone, which carried with it the idea of a *divided initiative in the matter of legislation and a broad range of autonomous executive power or 'prerogative'*. Sir Henry Maine's dictum that 'the American Constitution is the British Constitution with the monarchy left out' is, from the point of view of 1789, almost the exact reverse of the truth, for the presidency was designed in great measure to reproduce the monarchy of George III with the corruption left out, and also of course the hereditary feature.[7] [italics in original]

There is comfort in reciting these familiar words, and it is intellectually necessary to do so, but they are no more than a starting point for analysis, and a fairly boggy starting point at that. The boundary between the legislative and the executive power is not always easy to draw in the domestic governance of the United States, although with regard to some problems one can in desperation invoke Justice Potter Stewart's celebrated comment about "hard-core" pornography:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this

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5. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 17 (1824); McCullogh v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

6. U.S. CONST. art I § 6, cl. 2.

7. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 14-15 (4th ed. 1957).

case is not that.[8]

With regard to foreign affairs, including the respective powers of the President and Congress over the use of force, the normal difficulties of constitutional construction are complicated by two special factors: (1) modern American citizens and lawyers are less familiar with international law than their predecessors in the late eighteenth and early nineteenth centuries; and (2) the turbulence of the world since 1914 has required a far more active American foreign policy than was the case for most of the nineteenth century. Since 1914, foreign affairs have been a much more constant preoccupation of American domestic politics and a much more important factor in the perennial tug of war between Congress and the President than has been the case since the Presidencies of George Washington and John Adams. It is no wonder that John Quincy Adams once remarked that the boundary between Presidential and Congressional power in the field of foreign affairs is as yet undetermined, and perhaps never could be defined.[9]

A great deal of the heat in the debate over the War Powers Resolution derives from a popular and sometimes even professional misunderstanding of the clause in the Constitution which specifies that Congress has the power "to declare war."[10] The phrase has acquired a mystic denotation in the vocabulary of American politics quite unjustified by its meaning and history. Despite nearly two hundred years of experience to the contrary, people cling to the view that there is something improper, perhaps illegal or even a bit dictatorial in hostilities authorized by the President alone, or by the President and Congress acting together but without benefit of a Joint Resolution labelled a "Declaration of War."

The national force has been used abroad more than two hundred times since 1789, and its use hinted at or threatened by Presidents in secret or public diplomatic messages many more times, but only five "Declarations of War" have been adopted.[11] The practice of other nations in this regard is the same. "Declarations" of war are rare; and no nation has issued a "Declaration of War" since the United Nations Charter was adopted in 1945.

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8 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

9. ADAMS, EULOGY ON MADISON 47 (1836).

10. U.S. CONST. art. I, § 8, cl. 11. *See* W.REVELY, WAR POWERS OF THE PRESIDENT AND CONGRESS (1981); C. THACH, CREATION OF THE PRESIDENCY, 1775-89 (1923); C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES (1921).

11. J. ROGERS, WORLD POLICING AND THE CONSTITUTION 46-47 (1945); A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER, THE ORIGINS (1976); Javits, *War Powers Reconsidered*, 64 FOREIGN AFFAIRS 130, 140 (1985); *War Powers Legislation: Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59*, before the Senate Comm. on Foreign Relations, 92nd Cong., 1st Sess. 359-79 (1972) (testimony of Senator Goldwater). Senator Javits' solution of the problem is to characterize all Presidential actions since 1789 which do not conform to his model as "unconstitutional."

Nonetheless, the words "declare war" and "declaration of war" remain the focus of uneasy concern in the endless American argument about the war powers of the nation. The War Powers Resolution does not commit this vulgar error in form, but it does so in spirit. Politicians find it all too easy to exploit that concern when wars become unpopular, as all wars do, and escape from the battlefield by denouncing "John Adams' Undeclared War," "Harry Truman's Undeclared War," or "Lyndon Johnson's Undeclared War," as the case may be.

There is no excuse for the survival of this hoary bit of verbal necromancy. Both the text and the context of the Constitution give an obvious substance—indeed a "plain meaning"—to the words "declare war."

With the possible exception of the clause endowing each state with two Senators, no provision of the Constitution is less ambiguous than the paragraphs of Article I Section 8 which state that Congress has power:

> To define and punish piracies and felonies committed on the high seas and offenses against the law of nations; and
> To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

The language of these paragraphs is peculiar to international law, and can only be understood in the setting of international law. The phrase "to declare war" in the Constitution has a specific meaning in international law. Under international law, force may be used between states both in time of war and in time of peace. All international uses of forces are not "war" in the legal sense of the word, however bloody and extended the conflicts may be. The older treatises on international law generally appeared in two volumes, one devoted to the Law of War, the other to the Law of Peace. A "declaration of war" transforms the relationship between the belligerents into a state of war and challenges the relation of non-participants to the belligerents. The state of war contemplates unlimited hostilities between the belligerents, the internment or expulsion of enemy aliens, the termination of diplomatic relations, the sequestration or even confiscation of enemy property, and the imposition of regulations—censorship, for example—which would be unthinkable in liberal-minded states during peacetime. And it gives rise to thorny and nearly insoluble problems of neutrality which were important factors in the involvement of the United States in a least four wars and a number of diplomatic controversies which approached the point of war.

On the other hand, the permissible international use of force in time of peace, as international law defines peace, stretches across a wide spectrum of situations from "showing the flag" and other kinds of diplomatic warnings to actual hostilities in the exercise of a state's sovereign and inherent

right of self-defense.[11]

The doctrines of international law on the subject of self-defense are reasonably clear cut. The dominant characteristic of such international uses of force in peacetime is that they should be limited and proportional responses to a prior illegal act of a forceful character for which another state is responsible.[12] Thus if State A violates certain fundamental rights of State B—for example, by sending guerrillas, armed bands, or terrorists from its territory into that of State B in order to assist a rebellion against the government of State B or by failing to prevent such incursions—and diplomacy, arbitration, and other peaceful procedures for curing the breach are unavailing, State B and states which decide to help it are entitled to use whatever force against State A is necessary to cure State A's breach of international law: so much and no more.

In one of the leading cases of this kind, which took place in 1837, the United States had failed to prevent some anti-British enthusiasts assembled on the Niagara River in northern New York from forming armed bands which crossed the river to join an insurrection against British authority in Canada. After remonstrance failed, the British sent a company of soldiers into New York to disperse the "freedom fighters." In the Anglo-American diplomatic correspondence on the subject, still frequently cited, the United States conceded that Britain had the abstract right under international law to do what it did, but should have given the United States more time to eliminate the camps itself. There was no confusion about what was happening. The United States did not suppose that Great Britain was waging general war against it. The British intervention was limited by the nature of the breach of international law it was intended to cure.[14]

In an even more famous episode, Great Britain paid the United States a large sum in damages, as established by arbitration, for having failed

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12. *See* BOWETT, SELF DEFENSE IN INTERNATIONAL LAW (1958); BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961); N. Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1981); Waldock, *The Regulation of the Use of Force by Individual States in International Law*; 81 ACAD. DROIT INT'L, HAGUE RECEUIL DES COURTS 455 (1952); N. Rostow, *Nicaragua and the Law of Self Defense*, 12 YALE J. INT'L L.(in press).

13. *See* BRIERLY, THE LAW OF NATIONS 405-32 (6th ed. 1963); L. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); INTERVENTION IN WORLD POLITICS (H. Bull ed. 1984); LAW AND CIVIL WAR IN THE MODERN WORLD (J. Moore ed. 1974); E. Rostow, *The Politics of Force*, YEARBOOK OF WORLD AFFAIRS 38, 46 (1982); O. SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE Ch. 7-11 (1985); J. STONE, AGGRESSION AND WORLD ORDER 41-77 (1958).

14. *See* J. MOORE, DIGEST OF INTERNATIONAL LAW 409-14 (1906); H. WHITEMAN, DIGEST OF INTERNATIONAL LAW 211-36 (1969); R. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

during the Civil War to prevent the Confederate cruiser *Alabama* from slipping out to sea unarmed from Liverpool where it was being built. The United States repeatedly warned Great Britain that the ship was intended to be used as a commerce raider. Britain agreed that its failure to prevent the escape of the vessel violated its international legal duty to the United States.[15]

Another important branch of the law of self-defense in international law concerns assistance to friendly states in putting down riots, insurrections, rebellions, and civil wars, as well as incursions from other states. A state has an absolute right to assist another state if it wishes to do so under such circumstances. Article 51 of the United Nations Charter refers to this right as the right of "collective self-defense" and provides that nothing in the Charter shall impair "the inherent right of individual and collective self-defense." On the other hand, states are absolutely prohibited by international law from assisting rebels against the government of a state, even if hostilities reach the level of actual belligerency, as the *Alabama* episode demonstrates. The civil wars in the Congo and in Nigeria during the sixties were modern applications of the principle. There states were considered free to assist Nigeria in putting down the Biafran secession, and three states did so publicly, but no state was allowed to help Biafra.[16]

There have been many comparable applications of the principle of self-defense throughout modern history, involving not only the protection of borders, but the protection of citizens and nationals in danger abroad; the elimination of what a state perceives to be a threat to its national interests, like President Kennedy's limited use of force during the Cuban Missile crisis of 1962;[17] and interventions on humanitarian grounds where organized government has broken down.[18] Israel, for example, had the right under international law to use whatever force was reasonably required to gain the release

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15. *See* PAPERS RELATING TO THE TREATY OF WASHINGTON (1872-73); C. CAMPBELL, THE TRANSFORMATION OF AMERICAN FOREIGN RELATIONS, 1865-1900 at 25-49 (1976); A. COOK, THE ALABAMA CLAIMS (1975); J. DAVIS, MR. FISH AND THE ALABAMA CLAIMS (1893).

16. *See* L. BUCHHEIT, *supra*, note 13; T. FARER, THE REGULATION OF FOREIGN INTERVENTION IN CIVIL ARMED CONFLICT (1974); THE INTERNATIONAL LAW OF CIVIL WAR (R. Falk ed. 1971); THE INTERNATIONAL REGULATION OF CIVIL WARS (E. Luard ed. 1972); J. MOORE, LAW AND THE INDO-CHINA WAR (1972), *reviewed in* 82 YALE L.J. 829 (1973); E. LEFEVER, UNCERTAIN MANDATE, POLITICS OF THE U.N. CONGO OPERATION (1967).

17. WOHLSTETTER & WOHLSTETTER, CONTROLLING THE RISKS IN CUBA (1965). *See also* H. DINERSTEIN, THE MAKING OF A MISSILE CRISIS 1962 (1976). In his memoir, THE CUBAN MISSILE CRISIS (1974), Abram Chayes advances the untenable argument that the American legal position in 1962 was based on the authority of the Organization of American States, not on the right of self defense. A regional organization cannot supersede the Security Council by its own *ipse dixit*, as Article 53 of the United Nations Charter makes clear.

18. *See* M. MCDOUGAL, H. LASSWELL & CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980).

of its citizens held hostage at Entebbe in 1976, and to attack PLO installations in Lebanon in 1982 and in Tunisia in 1985.[19] The United States had the same right to use force when our Embassy staff was held in Tehran during the Carter Administration, and when citizens were similarly held in Beirut more recently.[20]

There are many diplomatic episodes, arbitrations, and judicial opinions dealing with the legality of such uses of force under international law. The rule they represent is applied and discussed with striking uniformity at the professional level. This uniformity is hardly surprising, since the rule reflects the principle of the sovereign equality of states on which the system of world order is based.[21]

In addition, the United States like other countries has used force or the threat of force many times in support of its diplomacy, from the visit of Commodore Perry to Japan in 1853 to President Nixon's secret nuclear warnings that induced the Soviet Union not to attack Chinese nuclear installations in 1969. This behavior, too, is accepted as legitimate under international law in times of peace.

How should this wide array of national power to use force internationally, both in times of peace and of war, be exercised under the American Constitution - by Congress, by the President, or by both? Can there be a single rule applicable to situations of such unpredictable diversity, beyond the provision that only Congress can declare war?

II

The outbreak of the second round of the Great European War in 1793 created as many difficult problems for the United States and as much heated disputation about the foreign affairs powers of the President and Congress as the Vietnam War. The United States was embroiled from the beginning. We fought twice in order to protect what we considered our legal rights as neutrals, once on each side - in John Adams' famous "Undeclared War" against France between 1789 and 1800,[22] and later against Great Britain in

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19. E. Rostow, *Remarks*, Proc. Of The 77th Ann. Meeting, Am. Soc'y. Int'l L.J. 217 (1983)

20. Falk, Editorial Comment, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 Am. J. Int'l L. 411 (1980); Fisher, *The Iranian Crisis: Who Should Do What?* 14 Akron L. Rev. 1 (1980); Gross, *The Case Concerning United States Diplomatic & Consular Staff in Tehran. Phase of Provisional Measures*, 74 Am. J. Int'l L. 395 (1980); Grzybowski, *The Regime of Diplomacy & the Tehran Hostages*, 30 Int'l & Comp. L. Q. 42 (1981); E. Rostow, *Rescuing Missions*, American Spectator 10 (1980); Note, *The Iranian Hostage Agreement under International and United States Law*, 81 Colum. L. Rev. 822 (1981).

21. E. Rostow, *Obtaining Peace*, chapter in David Abshire, Ed., History And Modern Strategy: War in an Historical Perspective (in press).

22. A. Sofaer, *supra* note 11, at ch. 3; De Conde, The Quasi-War (1962).

the War of 1812, which was formally declared.[23] There was a most controversial Presidential proclamation of neutrality in 1793,[24] backed the next year by an equally controversial Neutrality Act, parts of which are still on the statute books.[25] And in Jefferson's administration we indulged in a trade embargo which proved to be as futile as every other act of economic warfare and stirred the first cry for secession in the nation's history.[26]

Out of the crucible of that experience there emerged a workable and consistent division of authority between Congress and the President with regard to the making and execution of foreign policy, including the use of the national force. That division has survived with little change until the present time. It constitutes a pattern of cooperation and rivalry characteristic of all our constitutional arrangements. Its main lines are determined by the nature of things. Only the President can conduct the day to day diplomacy of the nation and command its armed forces. Only Congress can pass laws needed to make conduct criminal,[27] appropriate money, or give longer range policy a completely solid footing. As Judge Abraham D. Sofaer concludes in his comprehensive study of the early constitutional development of the war power, the framework of executive-congressional relations achieved during the first eight years of the Constitution "differs more in degree than in kind from the present framework."[28] The President has inherent constitutional rights and obligations, Judge Sofaer contends, to use the national force under many circumstances, at least until Congress acts to the contrary, and, absent valid legislative direction to the contrary, may well be considered to be "a sufficient embodiment of the national sovereignty to exercise its rights under the law of nations."[29]

The controversy over Washington's Neutrality Proclamation of 1793 is a useful point of departure.

France declared war on Great Britain in 1793, initiating a world crisis which did not end until Napoleon was safely ensconced on St. Helena. The United States was bound to France by treaties of perpetual alliance negoti-

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23. Declaration of War of 1812, ch. 102, 2 Stat. 755 (1812).

24. C. THOMAS, AMERICAN NEUTRALITY IN 1793 (1931); C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 105 (1932); *Henfield's Case*, 11 F. Cas. 1099 (D. Pa. 1793) (No. 6360).

25. Neutrality Act of 1794, ch. 50, 1 Stat. 381 (1794).

26. D. MALONE, JEFFERSON THE PRESIDENT, Vol. 5, THE SECOND TERM, 1805-1809, ch. 15-16 (1974).

27. The Supreme Court has held that there is no federal common law of crimes. United States v. Hudson & Goodwin, 11 U.S (7 Cranch) 32 (1812); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816). Story and Jay, among others, had taken a different view. Story in the United States v. Coolidge, 25 F. Cas. 619, 619-20 (D. Mass. 1813) (No. 14,857). Jay in presenting *Henfield's Case* to the Grand Jury, *Henfield's Case*, 11 F. Cas. at 1105.

28. A. SOFAER, *supra* note 11, at p. 127.

29. *Id.* at 5.

ated in 1778 by Benjamin Franklin.[30] Those treaties were universally (and rightly) regarded in the United States as the rock on which the independence of the nation was founded. Franklin's treaties seemed to require the infant Republic, in the event of war between France and Great Britain after the end of the Revolution, to side with France, protect the French colonies in the Caribbean, and allow France to fit out privateers in the United States, conduct naval war from American ports, and hold consular prize courts in the United States.

Any such course of action by the United States would have been an act of war against Great Britain, entitling Britain to respond with force. In 1793, the United States could easily have been reconquered by Great Britain both from Canada and from the seas. The other frontiers of the nation were held by British or Spanish forces which could readily have attacked or incited Indians to do so. Spain was dubious both about the fact and the example of the American Revolution, and would become Britain's ally in the war with France. The United States had no navy at the time, and little by way of an army. Washington and his cabinet—including both Jefferson and Hamilton—were determined to preserve neutrality despite the treaties with France. They were equally agreed in advising the President not to call Congress into special session, because of the inflamed state of public opinion.[31]

With the passions of the Revolution still very much alive, the country was violently pro-French and anti-British, and the Jeffersonian party made enthusiasm for France and the French Revolution a political principle. As John Marshall commented in his book Life of Washington, "by a great proportion of the American people, it was deemed almost criminal to remain unconcerned spectators of a conflict between their ancient enemy and republican France."[32]

Some argued that since only Congress could adopt a Declaration of War, only Congress could adopt a Declaration of Neutrality. To their minds, Congress' authority to declare war included every possible facet of the sovereign national power to use force or not to use it: to avoid the apparent obligation of the treaties, or to embrace them heroically.

Hamilton recommended that the President side-step the issue. In his view, Franklin's treaties did not apply because they were defensive in char-

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30. Treaty of Alliance, Feb. 6, 1778, United States-France, 8 Stat. 6, T. S. 82; Treaty of Amity and Commerce, Feb. 6, 1778, United States-France, 8 Stat. 12, T. S. 83. *See generally* S. BEMIS, THE DIPLOMACY OF THE AMERICAN REVOLUTION, ch. 5 (1956); W. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1920, 468-483 (1910).

31. S. BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 94-101 (3d ed. 1950).

32. THE LIFE OF GEORGE WASHINGTON 256-57 (2nd ed. 1834).

acter and France had declared war on Great Britain. If the President considered this construction too controversial politically, Hamilton advised him not to recognize the revolutionary government in France, nor to receive its Minister, the notorious Citizen Genet, thus suspending the treaty until a better day; or, in any event, to make his interpretation of the treaties a condition of receiving Genet. All sides in the controversy agreed that the President had the sole power of recognizing foreign governments. Jefferson supported the policy of neutrality, although in deference to his pro-French sensibilities the word "neutrality" was avoided in the Proclamation the President finally issued. But Jefferson was offended by the thought that revolutionary America, which had dealt happily with Bourbon France as an ally, might treat republican France as a pariah. If the President decided to receive Genet, Hamilton replied, he should issue the Proclamation on his own authority.[33]

Hamilton's exposition of the President's power to act under the circumstances was published after the event in a series of seven newspaper articles, signed Pacificus. They are one of the neglected masterpieces of our literature both about the Constitution and about our foreign policy.[34]

The Proclamation of Neutrality had two functions, according to Hamilton: (1) to notify the world that the United States was at peace with both belligerents, and intended to respect its international law duties of neutrality towards each; and (2) to warn United States citizens to abstain from acts which would contravene these duties and thus risk dragging the United States into war. The issuance of the Proclamation necessarily rested on the President's opinion that under the circumstances the United States was not bound to execute certain key features of the treaties with France. Does the President have the authority to make such a decision, and act on it, at least in the first instance?

Hamilton's answer is a categorical "yes." The same answer would be generally accepted today. A recent instance of the exercise by a President of his power to act on his own interpretation of a treaty was President Carter's decision that he could exercise the authority of the United States pursuant to its Security Treaty with the Republic of China to terminate that Treaty in accordance with its text on one year's notice.[35]

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33. *See, e.g.*, C. THOMAS, *supra* note 24, at 95; J. FOSTER, A CENTURY OF AMERICAN DIPLOMACY 141-59 (1900).

34. THE WORKS OF ALEXANDER HAMILTON 432-89 (H. Lodge ed.). The key essays are conveniently available, together with Madison's answer, signed Helvidius, in E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 7-32 (1917).

35. Goldwater v. Carter, 617 F.2d 697 (D. C. Cir.) *vacated as non-justiciable with directions to dismiss*, 444 U.S. 996 (1979). *See also* Gable, *Taiwan Relations Act : Legislative Rerecognition*, 12 VAND. J. TRANSNAT'L L. 511 (1979); Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19

As for the particular problem of neutrality, the constitutional power is joint and several—a concurrent power. Both the President and Congress can proclaim neutrality, each in its respective sphere. Congress' view is necessarily final. But circumstances often make it prudent for the President to act quickly and decisively, and the President's action can affect the situation with which Congress may have to deal later.

A Proclamation of Neutrality, Hamilton pointed out, is a normal and proper act for a government determined to remain at peace. Its principal purpose is *"to prevent the nation's being responsible for acts done by its citizens, without the privity or connivance of the government, in contravention of the principles of neutrality*; an object of the greatest moment to a country whose true interest lies in the preservation of peace."[36] Can such a proclamation be issued by the President alone, or does it require an act of Congress? Hamilton's argument for Presidential power goes to the essence of the problem the nation faced: "a correct mind," he wrote, "will discern at once that it can belong neither to the legislative nor judicial department, and therefore of course must belong to the executive."[37] The President, not Congress, is charged with conducting the foreign relations of the United States. Congress is not responsible for making or interpreting treaties and is "not naturally that member of government which is to pronounce on the existing condition of the nation with regard to foreign powers or to admonish citizens of their obligations and duties in consequence; still less is it charged with enforcing the observance of those obligations and duties."[38] The proclamation of neutrality did not alter the legal status of the nation with regard to the war raging in Europe and on the seas; it simply called attention to the fact that the United States continued to be at peace with both belligerents, a condition only Congress could change. The question could not be submitted to the courts, which have jurisdiction over treaties, to be sure, but only when contending parties bring such matters before them as part of a justiciable controversy. As everyone at the time knew, Washington had asked the Supreme Court for its opinion on the matter, and the Court had refused, on the ground that it was not authorized to issue advisory opinions, but only to decide actual cases or controversies.[39] It follows, Hamilton concludes, that since the United States has the power and the duty under international law to make its neutrality clear promptly, and since neither Congress nor the courts can carry out that duty effectively, it must be considered the function of the executive, who conducts the

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HARV. INT'L L.J. 931 (1978).

36. THE WORKS OF ALEXANDER HAMILTON, *supra* note 34, at 436 (italics in original).

37. *Id.*

38. *Id.*

39. Letter from Secretary of State Thomas Jefferson to Chief Justice John Jay, (July 18, 1793), and Jay's reply to Jefferson (Aug. 8, 1793), *reprinted in* 3 Johnston, Correspondence and Public Papers of John Jay 486-89 (1891); C. WARREN, *supra* note 24, at 105-11.

foreign relations of the United States; interprets treaties in the first instance in cases where the courts are not competent—that is, between government and government; is the power charged with the execution of the laws, of which treaties form a part; and is Commander-in-Chief of the armed forces.[40]

This "natural and obvious" view of the matter, Hamilton continued, anticipating the magisterial style of some of Marshall's greatest opinions, is not precluded by the language of the Constitution. The grant of the executive power of the United States to the President in the Constitution is comprehensive; the mention of certain aspects of the executive power in the document does not confine the President's authority to those enumerated. Under the Constitution, the President has the full executive power of the nation — that is, the powers of the British Crown, subject only to the exceptions and qualifications stated in the instrument. Among those exceptions and qualifications, of course, is the right of Congress "to declare war, and grant letters of marque and reprisal." "It deserves to be remarked," Hamilton said, "that as the participation of the Senate in the making of treaties, and the power of the legislature to declare war, are exceptions out of the general 'executive power' vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution."[41] Jefferson later expressed the same view that Congress' war power should be strictly construed as an exception to the President's executive power.

In the exercise of its power to declare war, Hamilton continued, Congress can and should consider whether the treaties with France put the United States under an obligation to make war. But before Congress acts, the President has the same right of judgment in fulfilling his own obligation to conduct the foreign relations of the country in accordance with its best interests as he perceives them.[42] Because of the division of the executive power in the Constitution, the authority of Congress and of the President in this regard is concurrent. Congress has the last word, but often under circumstances carefully arranged by the President acting independently. Normally, the procedure adopted to deal with the emergency represents the best judgment of the President and the Congressional leadership as to the most appropriate way to reach the end they both have in mind, taking political reality into account. To make delicate judgments of this kind and importance is the quintessence of the President's political responsibility as President — his share in the nation's sovereign prerogative.

To recapitulate Hamilton's reasoning from the vantage point of mod-

40. THE WORKS OF ALEXANDER HAMILTON, *supra*, note 34, at 437.
41. *Id.* at 437-43.
42. *Id.* at 440-442.

ern constitutional law: Since the nation has all the powers conferred on states by international law, each of those powers must exist somewhere in the government. If they are not within the judicial province, and could not be or have not yet been exercised by Congress, the President may exercise them both in his own right as holder of the executive power and as the embodiment of the residual sovereignty of the United States.[43]

Hamilton's Pacificus papers were so influential that Jefferson, who wavered badly on the issue of neutrality under the pressures of politics, induced an unwilling Madison to reply. Madison's response, signed Helvidius, failed in its purpose, although it has remained a persistent dissenting view, and has recently been revived somewhat under the pressure of events.[44]

Hamilton's analysis of the Presidency leads logically to the conclusion that while only Congress can move the nation into a state of "public, notorious, and general war," as that term is known to international law, the President can use the national force under all the other circumstances in which international law acknowledges the right of states to use force in time of peace. While the President alone has authorized most of the two hundred or more international uses of force the United States has undertaken in time of peace, the pattern of practice is by no means so symmetrical. When it is politically possible for a President to do so, he prefers to obtain Congressional support for his military actions before or after the event. No President can forget the outcry against "John Adams' Undeclared War," which helped make Adams a one-term President and killed the Federalist Party.

The irony of the problem of course, is that obtaining congressional support for his actions does not always protect a President against the political storms normally stirred up by war. Poor John Adams had at least four statutes to support his limited maritime war against France. They did him no political good. Later Presidents have had the same experience. As President Lyndon Johnson once remarked about the Vietnam War,

> I said early in my Presidency that if I wanted Congress with me on the landing of Vietnam, I'd have to have them with me on the take off. And I did just that. But I failed to reckon with one thing: the parachute. I got them on the takeoff, but a lot of them bailed out before the end of the flight.[45]

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43 *See, e.g.*, E. CORWIN, *supra* note 1, at 170-226; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); A. SOFAER, *supra* note 11, at ch. 2.

44 *See* CORWIN, *supra* note 1; at 17 (referring to Madison's Helvidius papers as a major statement of the ultra-Whig conception of the Presidency).

45. Letter from President Lyndon Johnson to Eugene Rostow (March 25, 1972). *See also* E. Rostow, *Organizing the Government to Conduct Foreign Policy: The Constitutional Questions*, 61 VA. L. REV. 797, 801-03 (1975) (Response to Henkin's article, immediately preceding, at 747).

As Professor Thomas M. Franck has written, "Much of Congressional-presidential jockeying appears to proceed with Snoopy's epigram in mind (which was directed towards the playing of mixed doubles tennis): 'It matters not whether you win or lose, it's how you lays the blame.' "[46]

This fact of American political life is one of the main reasons why the War Powers Resolution is so profoundly misconceived. It purports to require Congressional approval for every international use of the national force. But unless great national issues are at stake, most Congressmen and Senators prefer not to take responsibility for the President's use of the armed forces. It is a political risk they are happy to leave to the President. As Congressmen and Senators have often told me when, as a government official, I solicited their support for the President on the Hill, "The President has to do what has to be done. I want to be re-elected next year."

The constitutional battles of the first generation after 1789 settled the respective roles of Congress and the President with regard to the use of the armed forces in the Hamiltonian mode. Later experience has only filled in the details. Until the War Powers Resolution was passed, the debate over the respective powers of the President and Congress was largely a matter of political rhetoric or ideological advocacy, not constitutional law. Congress' power to "declare" war does not embrace all aspects of the nation's authority to use or threaten to use armed force in international affairs. And it does not mean that the national force can only be used if Congress has first approved the President's action through a declaration of war. In the early case of *Talbot v. Seeman*, dealing with a problem arising out of John Adams' Undeclared War, Chief Justice Marshall welcomed the fact that neither counsel in the case made any such claim.[47] The Supreme Court commented in a comparable case, *Bas v. Tingy*:

> Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal law . . . [t]he acts of congress have been analyzed to show that a war is not openly denounced against France, and that France is nowhere expressly called the enemy of America: but this only proves the circumspection and prudence of the legislature.[48]

As Professor Franck says, "Since the decision of the Supreme Court in *Bas*

46. Franck, *Constitutional Practice until Vietnam*, CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 15, 16 (1984).

47. 5 U.S. (1 Cranch) 1, 28-29 (1801).

48. 4 U.S. (4 Dall.) 37, 43-45 (1800).

v. *Tingy* in 1800 and in the *Prize* cases in 1862, and up to and including the Vietnam cases of 1971 to 1973, the courts have refused to sustain the proposition that the use of force by the President is unconstitutional except after a formal declaration of way by the Congress."[49]

It is equally settled that it is constitutionally proper—indeed inevitable—that the President can use or threaten to use the armed forces without any action by Congress both in support of his diplomacy and in situations where international law justifies the limited and proportional use of force in times of peace in order to deal with forceful breaches of international law by another state.

President Andrew Johnson did not require an Act of Congress before sending 50,000 hardened troops to the Mexican border in order to help persuade France to withdraw its troops from Mexico at the end of our Civil War.[50] Nor did President Truman need congressional permission, at a time of great tension with the Soviet Union over Greece and Turkey, before sending the battleship Missouri to Turkey with the body of a deceased Turkish Ambassador.[51] For the same reason, President Kennedy acted constitutionally in using a limited amount of force during the Cuban Missile Crisis, and threatening to use a great deal more if necessary, without the comfort of a statute behind him. The President did not seek Congressional action as the crisis approached, but the Congress passed and the President signed a law nonetheless. The statute was hastily drafted, however, and did not cover the situation President Kennedy actually faced, although it does cover the problems President Reagan faced in Grenada and is currently facing in Nicaragua. The Act provides that the United States is determined

> (a) to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere; [and] (b) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States.[52]

Thus military actions to preserve the nation's maritime rights, protect its citizens or other nationals abroad, or carry out its treaty obligations, do

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49. Franck, *supra*, note 46, at 17.

50. Bancroft, *The French in Mexico and the Monroe Doctrine*, 2 POL. SCI. Q. 30 (1896).

51. D. MCLELLAN & D. ANDERSON, THE STATE DEPARTMENT YEARS 98-101 (1976); M. MILLER, PLAIN SPEAKING 242-244 (1973).

52. S. J. Res. 230, Pub. L. No. 87-733, 76 Stat. 697 (1962). *See also* A. CHAYES, THE CUBAN MISSILE CRISIS 10-11 (1974); E. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833, 839-40 n.12 (1972).

not require Congressional approval, before or after the event. It is characteristic that when Congress passed a Joint Resolution supporting President Wilson's extensive military operations in Mexico in 1914, it did not purport to "authorize" what President Wilson had done. Instead, it stated that the President was "justified" in his use of force in Mexico, and disclaimed any hostility toward the Mexican people or any purpose to make war on them.[53]

As the Supreme Court remarked in the great case in *In Re Neagle*, the President has the inherent power to use force without the support of a statute not only to enforce "acts of Congress [and] treaties . . . according to their *express* terms, [but also to protect] rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[54] This view of the Constitution echoes Chancellor Kent's comments early in the nineteenth century about the scope of the power of the government to deal with the "great interests which relate to this country in its national capacity."[55]

LECTURE II.

III

In the literature of the American Constitution, there has always been a minority view opposing the Hamiltonian gospel sketched in the first lecture. The dissenters, broadly speaking, interpret the foreign affairs powers of the nation in the constitutional spirit of those who opposed the ratification of the 1787 Constitution. Where Hamilton extolled a strong national government, led by a strong President and a strong Congress, the ultra-Whigs argue for a weak national government, a weak President, and a somewhat stronger Congress, but a weak Congress nonetheless, checked and balanced at every turn by the states, the courts, and the people. Constitutionalists of this persuasion fear a strong national government, and above all a strong President, as dictatorship in disguise. With respect to foreign affairs, they fear that a Hamiltonian government could well drag the United States into foreign adventures which do not concern the security of the nation, and convert the ideal bucolic Republic of their dreams, the beacon of enlightenment and the hope of mankind, into just another grubby imperial power.

To people of this persuasion, it seems reasonable to suppose that if the United States were weak, pacifist, and unarmed, the predators of the jungle would fully respect its rights under international law. The constitutional doctrine of the ultra-Whigs fully matches their perception of world affairs.

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53. H.R.J. Res. 251, 63d Cong., 2d Sess., 51 CONG. REC. 7076-78 (1914).
54. 135 U.S. 1, 64 (1890).
55. *Ex Parte Yarbrough*, 110 U.S. 651, 666 (1884); 1 KENT'S COMMENTARIES 201.

They read the Constitution with suspicious literalism as a document imposing limitations on government, and rarely granting power. And they are shocked and repelled by the Marshallian mode of constitutional interpretation, which Hamilton anticipated with grace and skill, and particularly by the notion of "inherent" or "implied" powers. The ultra-Whigs exemplify the naive jurisprudence of those who read text without context, and believe that every power of the national government must be grudgingly derived from "specific" words in the Constitution, rather than from the design and purposes of the Constitution as a whole and from its history as an instrument of government.

The fullest flowering of the ultra-Whig view with respect to the foreign affairs powers of the nation, including the war power, occurred during and after the Vietnam War, especially in connection with Congressional efforts to draft legislation which would restrict the President's authority to use the national force.[56] There were many other manifestations of the ultra-Whig outlook. Congress sought to take advantage of President Lyndon B. Johnson's unpopularity and President Nixon's political weakness by passing a series of statutes which encroached on the President's authority to conduct the foreign relations of the country.[57] But the successful campaign which achieved the War Powers Resolution in 1973 is by far the most important victory in the Congressional assault on the Presidency since the Vietnam War turned sour.

I should make it clear that I participated in the controversy about the passage of the War Powers Resolution,[58] and that I am and have been a firm opponent of unlimited Presidential discretion in using the armed forces, and a firm believer in the constitutional pattern of shared power between Congress and the President as it has evolved for nearly two hundred years. The argument of my earlier articles is that the Hamiltonian principle of shared power, which requires cooperation and concurrence between Congress and the President as the exigencies of circumstance permit, cannot be reduced to a simple formula. As Hamilton wrote in Federalist

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56. R. CLARK, A. EGELAND, JR., & D. SANFORD, THE WAR POWERS RESOLUTION (1985) (particularly useful bibliography); W. REVELY, WAR POWERS OF THE PRESIDENT AND CONGRESS (1981); R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE (1983); Tuley, *The War Powers Resolution*, 25 A.F. L. REV. 244 (1985).

57. *See, e.g.*, Balmer, *Use of Conditions in Foreign Relations Legislation*, 7 DEN. J. INT'L L. & POL'Y 197 (1978); Berger, *Tug-of-War Between Congress and the Presidency: Foreign Policy and the Power to Make War*; 16 WASHBURN L.J. 1 (1976); Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L L. 605 (1977); Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397 (1977). *See generally Presidential Power* (I & II), 40 LAW & CONTEMP. PROBS. (Spring 1976 & Summer 1976).

58. *See supra* prefatory note, at p. 1.

Paper No. 23, the developments which may endanger the safety of the nation and call for the use or the threat to use the national force are infinitely varied, so that "no constitutional shackles can wisely be imposed on the power to which the care of it is committed."[59]

Since the early seventies, there have been a number of serious and well considered scholarly studies of the constitutional issues,[60] as well as Judge Abraham D. Sofaer's meticulously careful *War, Foreign Affairs, and Constitutional Power: The Origins*.[61] In order to bring out the intellectual background of the War Powers Act, I thought it might be useful to begin by reviewing a few of the articles of that period published after my 1972 article was written - articles which fairly represent the ultra-Whig view, as well as Professor Franck's important 1977 article, "After the Fall,"[62] which derives from the same intellectual universe. I shall direct my observations here first to articles by Prof. Charles A. Lofgren, Prof. William Van Alstyne, Prof. Francis D. Wormuth, and Mr. Raoul Berger.[63] These writers offer related, but somewhat different hypotheses as restatements of the original intent of the Founding Fathers embodied in the text of the Constitution.

Mr. Berger believes that the Constitution "conferred virtually all of the warmaking powers" upon Congress, leaving the President only the power "to repel 'sudden attacks' on the United States."[64] Professor Lofgren is more cautious. He says: "[t]aken together, then, the grants to Congress of power over the declaration of war and issuance of letters of marque and reprisal likely convinced contemporaries even further that the new Congress would have nearly complete authority over the commencement of war."[65] Lofgren carefully points out that in the cases arising from the undeclared war with France, "none of the Justices explicitly stated that only Congress might wage imperfect war, but that conclusion," he believes, "was clearly implicit in their remarks."[66] He sums up in these terms: "Evidence from the years immediately following ratification of the Constitution thus cor-

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59. A. HAMILTON, J. JAY & J. MADISON, THE FEDERALIST 142 (Modern Library ed., 1937).

60. *See supra* notes 56 and 57.

61. (1976).

62. *See supra* note 57.

63. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. OF PA. L. REV. 1 (1972); Berger, *War-Making by the President*, 121 U. OF PA. L. REV. 29 (1972); Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623 (1972).

64. Berger, *supra* note 63, 121 U. OF PA. L. REV. 29, 82 (1972).

65. Lofgren, *supra* note 63, at 700.

66. *Id.* at 701.

roborates the conclusion that Americans originally understood Congress to have at least a coordinate, and probably the dominant, role in initiating all but the most obviously defensive wars, whether declared or not."[67]

Van Alstyne reaches much the same conclusions as Berger, but with important variations on subsidiary issues. To Van Alstyne, the grant to Congress in Article I of the power "to declare war" includes by implication the power to authorize every possible use of the national force, save to repel attacks on the United States, its armed forces, or its citizens abroad.

In Van Alstyne's view, the lodgment of the power to declare war in Congress forbids the sustained use of armed force by the President in the absence of a prior, affirmative, explicit authorization by Congress. Van Alstyne would permit only one exception to the rule he distills from the text: an interim emergency defense power in the President to resist invasion or repel sudden armed attack until Congress can be convened to decide whether it will sustain or expand the President's defensive effort by specific declaration or, by doing nothing, require the President to disengage our forces from the theater of action.[68]

Berger and Wormuth appear willing to accept the holding in the *Prize* cases allowing Congress to ratify what the President has done in a situation of emergency.[69] Van Alstyne does not agree. He sums up his analysis in this way:

> 1. In the absence of a declaration of war by the Congress, the President may not sustain the systematic engagement of military force abroad for any purpose whatever.
>
> 2. The interim use of military force solely to repel invasion of the United States or to relieve American citizens from an existing attack is an authorized executive war power granted by the Constitution. That power expires *ex proprio vigore* when the Congress has had reasonable opportunity immediately to convene and to authorize the continuation or enlargement of hostilities by express declaration. i.e., even the constitutional authorization of emergency executive war power of immediate self-defense terminates upon opportunity and failure of Congress to sustain it by express declaration.
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> 3. In the event that the Congress authorizes the initiation, continuation, or enlargement of military hostilities by express

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67. *Id.* at 701-702.

68. Van Alstyne, *supra* note 63, at 9.

69. Berger, *supra* note 63, 121 U. OF PA. L. REV. 29, 61-67; Wormuth, *supra* note 63, at 628-629, 699.

declaration, the constitutional initiative of logistical, tactical, and strategic decision in the conduct of those authorized hostilities belongs to the executive.

4. A residual power of review and control is vested in the Congress through its continuing authority over appropriations, levies upon manpower, and its prerogative to modify or to repeal its declaration of war.[70]

Wormuth can accept no advance "delegation" of authority by Congress to the President to determine the occurrence of defined events which, Congress says, require or authorize the use of force.[71] Berger's position is almost the same. But Van Alstyne is willing to allow some small and conservatively construed practical leeway for the necessities of circumstance by way of Congressional delegation to the president of authority to use force in certain contingencies.[72] It is difficult to see how Berger and Wormuth can justify their purist positions, in view of the fact that since 1792 at least Congress has repeatedly joined its powers to those of the President in supporting the use of force by the President under specified circumstances, e.g., in dealing with Indian raids and other attacks.[73]

These nuances aside, all three writers assert congruent positions—the President can act only as the agent of Congress in the use of force, except for a short time in narrowly defined emergencies directly affecting the territory or the armed forces of the United States. Some writers of this school go a quarter of an inch further and allow for the possibility—perhaps—that the President might be conceded to possess the authority to rescue citizens in distress abroad: a commonplace right which all nations have under international law and which the President of the United States has asserted and exercised repeatedly ever since the United States became a sovereign nation.

IV

According to the laws of logic, one fact inconsistent with a theory disproves the theory. The hypothesis must be discarded and reformulated in terms which are consistent with the demonstrable evidence.

Much can be said of the related theories of Messrs. Berger, Lofgren, Van Alstyne, and Wormuth as versions of the original intent of the Founding Fathers—their relationship, for example, to the President's autonomous

70. Van Alstyne, *supra* note 63, at 13.
71. Wormuth, *supra* note 63, at 692-703.
72. Van Alstyne, *supra* note 63, at 15-18.
73. *See* E. Rostow, *supra* note 52, at 851-856, 858-863.

constitutional authority over the conduct of foreign relations, which in troubled times has often involved the use of force or the threat to use it. But one fact looms up as the missing Hamlet of these four articles, a fact which conclusively disproves all their hypotheses at once: the treaty power, and the Founding Fathers' immediate experience with that power in connection with Benjamin Franklin's Treaties with France of 1778.[74]

The contemporary debate about the war powers of the President and of Congress is a response to the bitter experience of Korea and Vietnam. Those wars were fought under the authority of treaties—the United Nations Charter in the case of Korea, and the Charter and the Southeast Asia Collective Defense Treaty in the case of Vietnam.[75] Without reference to those treaties and to the respective role of the President and of Congress in making, interpreting, applying, and abrogating treaties, the conflicts in Korea and Vietnam would be constitutionally far more difficult to explain. But the treatment of the problem is cursory, at best, in all four of the articles selected for examination here.

Van Alstyne recognizes the issue when he writes

> Even assuming a limited power in Congress to shift the determination to embark upon war to the President, under specified conditions expressed in clear and definite guidelines, the transfer of such authority cannot be accomplished by treaty. The House of Representatives' prerequisite consent to this nation's involvement in war was most deliberately required by the declaration of war clause after consideration of several alternatives, including the specific proposed alternative of vesting the power jointly in the Senate and President alone which was itself rejected. As the House does not consent to treaties, manifestly a treaty cannot be among the possible means of delegating its authority. To imply that the constitutional draftsmen could possibly have formulated a document so specific in its precautions against involvement in war while simultaneously creating an enormous loophole of exclusive Senate power to give it away by simple treaty ratification is wholly without logic or evidence.[76]

Van Alstyne's argument is perfectly logical. Like many logical arguments, however, it is destroyed by a page of history.

While the attempt to reconstruct the Founding Fathers' state of mind is always shadowy and intangible work, and "original intent" can never be

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74. *See supra* note 30.

75. Signed September 8, 1954, entered into force February 19, 1965, 6 U.S.T. 81 (1955)

76. Van Alstyne, *supra* note 63, at 22.

more than one guiding factor among many in the growth of the law, we can be certain of one feature of the original intent of the Founders: they accepted the possibility that the United States, like every other nation, could if it wished enter into treaties of military alliance. The United States had such an alliance with France, embodied in two treaties, plus a secret annex, a Treaty of Alliance, signed in Paris on February 6, 1778, ratified on May 4, 1778, and abrogated by Act of Congress on July 7, 1798, and a Treaty of Amity and Commerce, signed on February 6, 1778, and ratified on May 4, 1778.[77] And the Founding Fathers regard the French alliance with gratitude and reverence as a pillar of the Nation's existence. Surely these two related treaties are covered by the provision of Article VI of the Constitution, that "all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the Land."

For present purposes, two aspects of those treaties are of special importance: (1) the American guaranty of "the present possessions of the Crown of France in America" in Article 11 of the Treaty of Alliance; and (2) the provisions of Articles 21-29 of the Treaty of Amity and Commerce, which France, and many Americans, construed as authorizing France to fit out privateers and establish consular prize courts in American ports, in the event of war between France and Great Britain after the end of our War of Independence.

The debate over the American policy of neutrality adopted in 1793 is a sufficient answer of principle to the argument made by Messrs. Van Alstyne, Berger and Wormuth. Legally, Van Alstyne's argument against military commitments by treaty cannot be admitted. Treaties and statutes are equally the supreme law of the land. Even tax and tariff problems are often handled by treaty, despite the Constitutional requirement that money bills originate in the House of Representatives.

It is however, worth taking the argument a step further. In 1793, President Washington decided not to join France in war with Great Britain under the treaty and to declare our neutrality. Congress acted to the same effect a year later. Suppose, however, that the President's initial decision had gone the other way, and had in turn been duly supported, or not opposed, by Congress. Suppose President Washington had put garrisons and naval forces in the French islands of the Caribbean which were among the French possessions in America we had guaranteed to France "from the present time and forever" under Article 11 of the Treaty of Alliance. Suppose he had convoyed vessels to those islands, and repelled British attacks on the vessels or the islands.

Would it be possible under those circumstances to say that the Presi-

77. *See supra* note 30.

dent could not respond to attacks exactly as if they were "sudden" attacks upon the United States? When through a treaty, or through a joint resolution of the Congress, or both, the United States guarantees the territorial integrity and political independence of an ally, or of another nation, isn't the President duty bound to see to it that the treaty is faithfully executed? Can he take no steps to implement the guaranty, in order to head off a danger that might have to be fulfilled later by war itself, without the prior consent of Congress? Is it Constitutional for a treaty to declare, as Article 5 of the North Atlantic Treaty does, that an armed attack against one or more of the allies shall be considered an attack against them all?[78] The declaration of the NATO Treaty flies in the face of the supposed constitutional principles the four scholars selected for examination here, and, I should add, Professor Franck as well,[79] find the original intent of the Founding Fathers. Their version of the Constitution would confine the President's emergency powers to attacks on the territory of the United States. Either the North Atlantic Treaty is unconstitutional, or their version of the original intent is inadequate and erroneous.[80]

The reasoning of Van Alstyne, Berger, Wormuth, Lofgren, and Franck would equally disable the United States from participating in the activities of the United Nations, as the peace-keeping policies adopted by the United Nations during the crises in Korea, the Congo, Greece, and Rhodesia, among others, demonstrate. That organization sometimes authorizes, encourages, or indeed requires the use of coercive measures, including the use of force, both under Article 51 and Chapter VII of the Charter. The ultra-Whig view would forbid such activities under the United Nations Charter and the United Nations Participation Act unless ratified in each case by Congress.[81]

Berger notes with apparent approval the activities of Presidents Wilson and Roosevelt before the First and Second World Wars, when they convoyed vessels, and, in President Roosevelt's case, established bases in Greenland, Iceland, and Bermuda, without benefit of a treaty obligation to Britain or France, or a Joint Resolution of the Congress.[82] Would he equally approve preventive and precautionary steps of this order with regard to the obligations of a treaty?

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78. 63 Stat. 2241 (1949).

79. *See supra* note 57.

80. Professor Franck recognizes the problem by contending that the War Powers Resolution is a breach of the international legal obligations of the United States in this regard, requiring the President to call Congress into special session if necessary in order to consider a declaration of war or a joint resolution authorizing hostilities, *see supra* note 57, at 634-637.

81. United Nations Participation Act of 1945 *as amended*, P.L. 264, 79th Cong., 59 Stat. 619 (1945), 63 Stat. 734 (1949), and 79 Stat. 841 (1965), 22 U.S.C. 287 (1980).

82. Berger, *supra* note 63, 121 U. OF PA. L. REV. 29, 66.

In applying a treaty, there is clearly a spectrum of decisions which can and should be made, from the purely Presidential to the purely Congressional. As the experience of 1793 attests, the President has an independent power to interpret and apply the treaty in the first instance, in the exercise of his share of the national authority to conduct foreign relations, a vital part of the Executive power. That is what the United States does every day, on the President's instructions, in voting at the United Nations. When such decisions involve coercive measures, or other substantive policies, Congress may tacitly accept the President's construction and application of the United Nations Charter, which is a treaty, or overrule it, as it did a few years ago in the case of an embargo on imports from Rhodesia.[83] Exactly the same process occurs in the conduct of our affairs at the North Atlantic Council, the International Monetary Fund, and many other multilateral bodies based on treaties, executive agreements made under the authority of treaties or statutes, or purely Presidential executive agreements.

This realistic sense of the wide range of policies and actions which may be involved in carrying out a treaty obligation animates the testimony of Secretary of State Dulles in his exposition of the Southeast Asia Collective Defense Treaty before the Senate Foreign Relations Committee in 1954. Article IV of that treaty provides:

> 1. Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.
>
> 2. If, in the opinion of the Parties, the inviolability or the integrity of the territory or the sovereignty or political independence of any Party in the treaty area or of any other State or territory to which the provisions of paragraph 1 of this Article from time to time apply is threatened by any fact or situation which might endanger the peace of the area, the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense.
>
> 3. It is understood that no action on the territory of any State designated by unanimous agreement under paragraph 1 of this Article or on any territory so designated shall be taken except at the invitation or with the consent of the government

83. Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972).

concerned.[84]

The Treaty, the Secretary said, was based on the inherent right of individual and collective self-defense recognized in Article 51 of the United Nations Charter—a right whose initial exercise is not subject to the prior decision of the Security Council. So far as the United States is concerned, the Treaty includes "the understanding," in the words of President Eisenhower's transmittal statement, "that the only armed attack in the treaty area which the United States would regard as necessarily dangerous to our peace and security would be a Communist armed attack."[85]

With regard to action under Paragraph 1 of Article IV—that directed against "armed attack"—Dulles said:

> The agreement of each of the parties to act to meet the common danger 'in accordance with its constitutional processes' leaves to the judgment of each country the type of action to be taken in the event an armed attack occurs. There is, of course, a wide range of defensive measures which might be appropriate depending upon the circumstances. Any action which the United States might take would, for course, be in accordance with its constitutional processes.[86]

The term "armed attack" in Paragraph 1 of Article IV is the operative phrase of Article 51 of the United Nations Charter. It is used in a number of other treaties and international documents. By 1954, it had a considerable gloss, and a long history, embracing the support of revolution in Greece from Yugoslavia, Albania, and Bulgaria in the late forties to the attack on Korea.[87]

Berger does not discuss the meaning of the term "constitutional process" in paragraph 1 of article IV: whether the President can act to initiate and conduct hostilities pursuant to the treaty, as President Truman did in Korea; or take preparatory and precautionary measures "short of war" without obtaining prior congressional approval; or whether every step under the treaty, from diplomatic consultation and secret or public warnings to deter an adversary, to the making of military contingency plans, requires prior Congressional assent. Van Alstyne, as was indicated earlier, takes the view that it is constitutionally impossible to consider treaties as a legitimate

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84. *Southeast Asia Collective Defense Treaty, Nov. 11, 1954: Hearings on Exec. K, Part 1, before Senate Committee on Foreign Relations*, 83rd Cong., 2nd. Sess. 6 (1954).

85. *Id.* at 1.

86. *Id.* at 4.

87. Reviewed in E. ROSTOW, THE POLITICS OF FORCE, THE 1982 YEARBOOK OF WORLD AFFAIRS 38; O SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE ch. VIII-IX (1985).

basis for authorizing war. He therefore reads the treaty not as empowering the President to undertake the use of force, but as establishing an international contractual obligation which requires the President to call Congress into special session if necessary, and requires Congress to make a declaration of war if it intends to fulfill the treaty commitment by the use of force.[88]

Secretary Dulles' testimony dealt with the full range of possible responses the United States might consider using once the President has determined that "an armed attack" has occurred, thus justifying any country protected by the treaty to exercise its inherent right of individual and collective self-defense under the United Nations Charter. In response to a question from Senator Smith, one of the signers of the treaty, he explained that the obligation under Section 1 of Article IV was substantially the same as that in the North Atlantic Treaty. Secretary Dulles' and Senator Smith's exchange is reported as follows:

> Secretary Dulles. You will remember, Senator Smith, the constitutional debate which was evoked in relation to that clause in the North Atlantic Treaty, which said that an attack upon one is an attack upon all. It raised the question as to whether that automatically gave the President powers to exercise so that in the event of an attack upon Norway, for example, he would have exactly the same power as he would have if there was an attack upon New York or Washington.
>
> That matter was very fully debated in the Senate at the time. I had the honor of being a Member of your body at that time and participated in that debate.
>
> Therefore, when I had the responsibility of starting to negotiate treaties in the Pacific, I felt that it would be preferable to adopt the language which was taken from the declaration of President Monroe, and which reflects our oldest and, in a sense, most respected foreign policy, the Monroe Doctrine, where we declared that an intrusion would be dangerous to our peace and security.
>
> Now, that was a formula which I recall that Senator Taft, who opposed the North Atlantic Treaty formula, has said would have been acceptable so far as he was concerned.
>
> It seemed to me that the practical difference between the two from the standpoint of its giving security to the other parties was not appreciable, and that it was better to avoid a formula

88. *See supra* note 63, at 14.

which would reopen the constitutional debate which took place in reference to that provision of the North Atlantic Treaty, so that formula was used in the Philippine Treaty, in the ANZUS Treaties, it has been reproduced now in the Korean Treaty, and been reproduced in this treaty.

I think that the difference practically is not great, but that the present formula does avoid at least a theoretical dispute as to the relative powers of the President and the Congress under these different formulas.

Senator Smith. Well, this particular treaty which we have just signed and the other bilaterals that you have initiated might be said to have the Monroe Doctrine approach, which over a period of a good many years now has been very effective. This approach has accomplished the results that were sought originally by the Monroe Doctrine. We are practically giving a Monroe Doctrine warning here against aggression and we are standing by the votes that we took.

Secretary Dulles. The language used here which has now become, I would say, almost conventional with reference to these treaties, makes perfectly clear the determination of our Nation to react to such an armed attack. It does not attempt to get into the difficult question as to precisely how we act and precisely how the responsibilities are shared between the President and Congress.

But as far as our national determination is concerned, it is expressed here; that is the thing that other countries are concerned with, and the question of our internal procedures is not properly a matter of their concern, and, in fact, none of the countries with whom we have dealt are concerned about the difference in the formula.

Therefore I think it is better to use this language, which does avoid constitutional controversy, which has been used in these other treaties, and which stems from one of our oldest foreign policies, that of the Monroe Doctrine.

In a sense, it is perhaps not quite as automatic as the other, but that would depend on circumstances. It is a clear determination of our national resolve, which I think will adequately serve to deter, if it is possible to deter at all.[89]

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89. *The Southeast Asia Collective Defense Treaty: Hearings Before the Senate Committee on Foreign Relations*, 83rd Cong., 2nd Sess. 21, 22 (1954) [hereinafter cited as Hearings].

The obligation of the United States in the event of an armed attack within the treaty area, as he made clear, is of course several, and not dependent upon the prior agreement of other members of SEATO, except for the country concerned. That action could take many forms, including the use of mobile striking power against the source of the attack.[90] Far from repudiating the precedent of President Truman's handling of the Korean war, Secretary Dulles had the following colloquy with Senator Wiley:

> The Chairman. Well, in any case, I take it that paragraph 1 of Article IV applies—that part particularly—to meeting the common danger. Would it be in accordance with the constitutional processes?
>
> Secretary Dulles. Yes Sir.
>
> The Chairman. So whether it were the threat mentioned in Section 2 or the common danger resulting from open attack, action could be taken only after consultation with Congress?
>
> Secretary Dulles. Yes Sir.[91]

Thus, both the Senator and the Secretary carefully avoided the view that the United States could act under paragraph 1 of Article IV only after a congressional declaration of limited or unlimited war.

As for threats other than "armed attacks," Secretary Dulles testified:

> The danger from subversion and indirect aggression is dealt with in paragraph 2 of article IV, which meets this difficult problem more explicitly than any other security treaty we have made. It provides for immediate consultation by the parties whenever any party believes that the integrity of the treaty area is threatened by other than armed attack. The threat may be to the territorial inviolability or integrity, or to the sovereignty or political independence of any party in the treaty area or any other state or territory to which paragraph 1 of the article may from time to time apply. The paragraph contains no obligation beyond consultation, but the purpose of consultation is to agree on measures to be taken for the common defense. In its understanding with reference to article IV, paragraph 1, the United States affirms that in the event of any aggression or armed attack other than Communist aggression it will observe the consultation provisions of article IV, paragraph 2.[92]

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90. Hearings, *supra* note 89, at 13-14.
91. Hearings, *supra* note 89, at 20 (testimony of Secretary Dulles).
92. Hearings, *supra* note 89, at 4 (testimony of Secretary Dulles).

He was repeatedly questioned on the distinction between action under Section 1 and Section 2 of Article 4 of the Treaty.

> Senator Smith. Now, referring to Indochina where we are all very much concerned. According to a number of reports, one of the areas mentioned in the protocol, the present territory and jurisdiction of Vietnam, is in danger of falling under Communist domination. If that occurs, due to internal or external pressure, will the treaty involve us in measures to resist Communist control of the area? I think you answered that before, but I would like to get a clear answer as to whether a sudden movement toward Communist domination in South Vietnam would bring this treaty into operation.
>
> Secretary Dulles. Are you referring now to armed attack?
>
> Senator Smith. It would be armed attack; but suppose there were internal pressures—the subversive activity; was that not one of the questions we were trying to include?
>
> Secretary Dulles. Yes, I just was not clear as to whether your question is directed to article IV, paragraph 1, or article IV, paragraph 2.
>
> Senator Smith. Let us consider them both. Suppose there is an armed attack under article IV, paragraph 1. I would think there would be no question in this instance, but if there is subversive activity which is threatening the integrity of South Vietnam—free Vietnam—would we feel that we were called upon under the treaty to give a danger signal and get together with our allies and consider it?
>
> Secretary Dulles. Well, article IV, paragraph 2, contemplates that if that situation arises or threatens, that we should consult together immediately in order to agree on measures which should be taken. That is an obligation for consultation. It is not an obligation for action.
>
> Of course, we are free to and taking measures already, apart from the treaty and before the treaty is enforced to assist in combating subversion in that area.
>
> But we can do much more effectively, I think what needs to be done, if the treaty is in force, and we have procedures for consultation under the treaty as to how to deal with these situations.[93]

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93. Hearings, *supra* note 89, at 25-26 (testimony of Secretary Dulles).

Secretary Dulles developed the idea further in an exchange with Senator Gillette.

> Senator Gillette. Mr. Secretary, I have just one question to ask. Referring to article IV again, the first section is clear. It states that each party recognizes an armed attack as threatening all, and agrees to act in meeting the common danger according to its constitutional processes.
>
> But section 2 provides that any similar threat, other than by armed attack will be met by consultation among the parties and agreement as to what action will be taken.
>
> Now, keeping those two things in mind, we come to the concluding paragraph, which states that we only recognize the obligation under section 1 in case of Communist aggression when we will proceed by our constitutional processes.
>
> Now, this is a hypothetical question—very improbably—but one that I should like to have answered. In the event that there is armed attack in this area by other than a Communist country, does that mean that we, as a signatory cannot take any action in case of such armed attack in accordance with our constitutional processes until we have consulted with all the others and obtained agreement as to what we should do?
>
> Secretary Dulles. No sir. In that respect we retain entire control of our own policy, according to our own judgment. If there should be an armed attack which is not a Communist attack, affecting one of the parties to this treaty, the question of what we should do would then be determined by us as a matter of national policy. We would not be obligated under this treaty.
>
> Senator Gillette. May I supplement my question by saying I do not quite see why that follows. We provide by agreement that in case of an armed attack by a Communist country, we shall proceed, as you have just designated, by our constitutional processes, but we specifically provide in this concluding paragraph that if there is an armed attack by any other than a Communist country that we shall first consult with these associates and obtain their agreement before we take any action.
>
> Secretary Dulles. No. I think you have read into that more than it contains.
>
> Senator Gillette. Well, I hope I have.
>
> Secretary Dulles. It does not say that we will only act in agreement or consultation. It does say that in that event we will be willing to consult.

Senator Gillette. No; it says that we will consult under the provisions of article IV, paragraph 2.

Secretary Dulles. Yes Sir.

Senator Gillette. The language does not state that we will be willing to consult but before we take any action we "will" consult under that provision and obtain agreement as to what action shall be taken.

Secretary Dulles. No Sir. It does not say that we will consult before we act. All it says is we will consult.

Senator Gillette. And that may be subsequent to action that we take?

Secretary Dulles. It could be.

Senator Gillette. That we take independently?

Secretary Dulles. As you say, it is quite unlikely as a practical matter that we would act first, because as I indicated unless the armed attack is of Communist origin, it is difficult to say truthfully that is seriously affects the security of the United States. If communism throws aside all restraints and goes in for armed attack, then I think we can reasonably conclude that it is starting on a course of action which is directly aimed at the United States, that we are the target. We could not say that truthfully in the event that there is an armed attack which occurred between two of the parties to this treaty, which would not be of Communist origin. That would not prove that there was any design against the United States. Therefore, we do not assume the same commitments in that respect.

We do say that we will consult. We do not say that we will consult prior to any action. We merely say we will consult, period.[94]

There is thus no possible way to assert, as many do, that the obligations of the treaty could be carried out, so far as the Senate was concerned, only by a vote of the entire Congress. Both the Senators and the Secretary preserved the full range of possibilities implicit in past practice, including the precedent of President Truman's pattern of action in Korea.

As Senator Cooper points out in his memorable statement of Individual Views with respect to the Javits bill, one of the ancestors of the War Powers Resolution, there is no basis in constitutional usage for declaring

94. Hearings, *supra* note 89, at 35-36 (testimony of Secretary Dulles).

the Korean war unconstitutional.[95] Cooper wished to clarify the point by statute, if he could, by requiring congressional action to justify the use of force in behalf of treaty obligations "beyond the emergency authority of the executive."[96] His position fully accepted the authority of the President to take emergency action in carrying out treaty obligations, as President Truman did in the first few hectic days and weeks of the Korean war, not with regard to the territory of the United States, but with regard to the territory covered by our treaty obligation—in that case South Korea, protected by the Charter of the United Nations. In this, Senator Cooper's position rests on the principles which governed President Washington's handling of the neutrality problem in 1793.

In the Vietnam war, both the Presidency and Congress went beyond the formal pattern of Korea. Starting in 1957, the executive branch repeatedly invoked Article IV of the South East Asia Collective Defense Treaty, and characterized the activities of North Vietnam against South Vietnam as "deliberate aggression," invoking Section 1, not Section 2 of Article IV.[97] So did the Council of the South East Asia Treaty Organization.[98]

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95. *Senate Committee on Foreign Relations - War Powers*, S. REP. No. 606, 92nd Cong., 2nd Sess. 28 (1972), *to accompany* S. 2956, 92nd Cong., 2nd Sess., 30-32 (1972).

96. *Id.* at 30.

97. Joint Statement of President Eisenhower and President Ngo Dinh Diem, May 11, 1957, 36 DEP'T ST. BULL. 851 (1957) ("Noting that the Republic of Viet-Nam is covered by Article IV of the Southeast Asia Collective Defense Treaty, President Eisenhower and President Ngo Dinh Diem agreed that aggression or subversion threatening the political independence of the Republic of Viet-Nam would be considered as endangering peace and stability.") State Department Bulletin, May 27, 1957, at 851-852; Message of President Johnson to Congress on May 4, 1965, H.R. DOC. No. 157, 89th Cong., 1st Sess.(1965) ("We will do whatever must be done to insure the safety of South Vietnam from aggression . . . South Vietnam has been attacked by North Vietnam. . . . Our commitment to South Vietnam . . . rests on solemn treaties, the demands of principle, and the necessities of American security . . . The Southeast Asia Collective Defense Treaty 'committed us to act to meet aggression against South Vietnam.'" State Department Bulletin, July 12, 1965; Address by Secretary Rusk, 53 DEP'T ST. BULL. 50, 53 (1965) ("A cruel and sustained attack by North Viet-Nam upon the people of South Viet-Nam. . . . [The President] has recognized the obligations of this nation under the Southeast Asia Treaty."); Statement of Undersecretary Ball at Meeting of Ministerial Council of the Southeast Asia Treaty Organization on May 3, 1965, 52 DEP'T ST. BULL. 920, 921 (1965) ("The evidence establishes beyond the shadow of a doubt that South Viet-Nam is the victim of deliberate aggression. . . . We have provided assistance for the same reason that we aided Greece and Turkey in 1947, that we fought in Korea, that we joined in forming NATO, and ANZUS, and SEATO. . . .") State Department Bulletin, June 7, 1965.

98. Communique of May 6, 1965, 52 DEP'T ST. BULL. 920, 924 (1965) ("9. The Council reaffirmed its conclusion at Manila a year ago that the defeat of this Communist campaign is essential not only to the security of the Republic of Viet-Nam but to that of Southeast Asia, and would provide convincing proof that Communist expansion by such tactics will not be permitted. Member governments recognized that the state of affairs in Viet-Nam, as described above, constitutes a flagrant challenge to the essential purpose for which they had associated together under the Treaty: to resist aggression.")

Congress fully supported this view of the affair. The Tonkin Gulf Resolution recites that it was passed in accordance with our obligations under the South East Asia Collective Defense Treaty.[99] And the Supplemental Appropriation Act of May 5, 1965, and other statutes and resolutions, were specifically addressed to the hostilities in Vietnam.[100]

As I commented elsewhere, "the unsettled state of doctrine analyzed by Senator Cooper permitted some to indulge in a meaningless gesture of protest against the war in Vietnam by voting for the repeal of the Tonkin Gulf Resolution, while leaving the SEATO Treaty untouched. By accepting Truman's view of the matter—for the moment, at least—they could enjoy the best of both worlds."[101]

By concentrating here on the treaty-power aspects of the problem I do not mean to suggest that the President does not have some independent constitutional authority to use force, or to threaten its use, in the absence of treaty or advance congressional authorization through Joint Resolutions like the Middle Eastern Resolution of 1957 and 1961.[102] These dimensions of the war powers have been extensively discussed elsewhere.[103]

V

Between the Congress of Vienna and the turn of the twentieth century, the United States was not a major action in world politics. We were a ward of the Eurocentered state system which governed the world in those days - and, on the whole, governed it a great deal more effectively than it has been governed since. The system of order conducted by the Concert of Europe left much to be desired in the realm of justice, although it did take the lead in abolishing slavery. But it did achieve a high degree of international peace, which proved to be a political environment congenial to rapid social progress throughout the world.

Even during this period, the United States pursued an active regional foreign policy which involved the nation in three general wars and many international uses of limited force in times of peace, both in aid of our diplomacy and by way of self-defense. Many of these episodes generated strain between Congress and the Presidency, and some became heated political issues within the United States, and led to the recitation once more of

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99. *Southeast Asia Collective Defense Treaty*, Pub. L. 88-408, 78th Stat. 384 (1964).

100. *Senate Committee On Foreign Relations, Background Information Relating To Southeast Asia And Vietnam*, 89th Cong., 1st Sess. 219 (1965) (message of President Lyndon B. Johnson).

101. *See supra* note 52, at 880 n.88.

102. *Middle East Resolution - Promotion of Peace and Stability*, Pub. L. 87-70, 71 Stat. 5 (1957), *as amended by* Pub. L. 87-195, 75 Stat. 424 (1964).

103. *See, e.g.*, E. Rostow, *supra* note 52.

the constitutional arguments of the Hamiltonians and the ultra-Whigs about the constitutional division of authority over foreign affairs between Congress and the President.

There were five principal areas of international contention for the United States during the century before the United States became a decisive factor in the world balance of power.

A number of problems arose from the twin sacred texts of American foreign policy: George Washington's Farewell Address and John Quincy Adams' Monroe Doctrine. The Farewell Address laid down some practical rules for keeping the infant republic out of Europe's consuming political quarrels during times of relative peace and stability. Washington carefully recognized that periods of extraordinary convulsion in European politics might well require extraordinary remedies, including temporary alliances and participation in war. However, Washington advised the United States to take advantage of its distance from Europe by refraining from participation in the ordinary combinations and collisions of European politics.[104]

The obverse of the policy Washington recommended was that Europe should stay out of the political life of the Western Hemisphere. During the period of revolution against Spanish authority in South and Central America after 1815, Britain was concerned about the possibility that Spain, France, and even Austria might attempt to reconquer the former Spanish colonies, and thereby affect the equilibrium of Europe. The British Foreign Minister, George Canning, therefore proposed that Britain and the United States jointly adopt the principle of the Monroe Doctrine. The United States, equally alarmed by the possibility of new European intervention in the Western Hemisphere, but anxious not to be "a cock-boat in the wake of the British man of war," as John Quincy Adams remarked, announced the policy as its own. But the Monroe Doctrine would have been meaningless without the backing of Great Britain, the Queen of the Seas in those far off days.[105]

While American popular opinion gave these two eminently pragmatic documents an absolute character they did not have, they were and continue to be a powerful influence in the American mind. Perhaps it would be more accurate to describe them as a powerful part of America's collective unconscious.

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104. S. BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES (1936); A. BURT, THE UNITED STATES, GREAT BRITAIN, AND BRITISH NORTH AMERICAN FROM THE REVOLUTION TO THE ESTABLISHMENT OF PEACE AFTER THE WAR OF 1812 (1940); F. GILBERT, TO THE FAREWELL ADDRESS (1961).

105. S. BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY (1949); E. MAY, THE MAKING OF THE MONROE DOCTRINE (1975); D. PERKINS, THE MONROE DOCTRINE 1823-1826 (1927).

The third factor in America's nineteenth century foreign policy which led to a good deal of international friction was the doctrine of Manifest Destiny. From the beginning, the American imagination was possessed by the glowing vision of the nation as a great empire stretching from the Atlantic to the Pacific. Manifest Destiny was the driving force in American foreign policy, leading to the acquisition of Spanish Florida, the Louisiana Purchase, the Transcontinental Treaty of 1819, the Oregon Question, Alaska, and the Mexican War. The same impulse led also to the American presence in China and other parts of the Far East from the earliest days of the Republic; the opening of Japan in 1853; the acquisition of Hawaii and later of the Philippines, Guam, and the Marianas.

The fourth key problem of our foreign policy during this period was the gradual disintegration of the Spanish Empire and above all the revolt in Cuba at the end of the nineteenth century.

Finally, the Civil War had critically important international dimensions, which generated both diplomatic and constitutional controversy - the blockade; the long struggle to prevent British and French recognition of the Confederacy; the *Alabama* affair; and the expulsion of the French from Mexico. Constitutionally, President Lincoln's management of the tense early months of the Civil War is the supreme example of the Presidency as an independent branch of the American government. On issue after issue, the President acted alone on the basis of his inherent authority as Chief Executive and Commander-in-Chief of the armed forces; the Congress followed.

The pattern of constitutional practice in the handling of these controversies confirmed and deepened the Hamiltonian construction of the Constitution which took shape during the first thirty-five turbulent years of the nation's experience under the Constitution of 1787. There were areas of foreign policy recognized as exclusively presidential - the recognition of governments, for example, and the conduct of diplomatic business. And there were exclusively congressional areas such as declarations of war and the enactment of other kinds of legislation. For the rest, Corwin commented, "the Constitution, considered only for its affirmative grants of power capable of affecting the issue, is an invitation [to Congress and the President] to struggle for the privilege of directing American foreign policy."[106]

Corwin's celebrated remark misses the Constitutional point. It is often read as criticizing the draftsmen of the Constitution for ambiguity and confusion. In my view this is unjustified because sooner or later most aspects of the conduct of foreign affairs involve both legislative and executive deci-

106. Corwin, *supra*, note 1, at 171.

sions. They are therefore the business of both Congress and the President, in a pattern which reflects no sharp lines of constitutional power but hundreds of subtle and supremely political judgments about how the indispensable cooperation between the branches can best be organized under the circumstances of the moment. It would have been foolish of the Founders, as well as impossible, to try to draw the line between executive and legislative power in the field of foreign affairs precisely and in detail.

The flexibility of the constitutional arrangements for making and carrying out the foreign policy of the nation is not peculiar to the field of foreign affairs. As Madison saw from the beginning, the principle of the separation of powers does not mean that the three branches of the government are really separate at all.[107] For the most part their powers are commingled. The branches are not independent but interdependent, and the preservation of the functional boundaries between the legislative and the executive depends as much on the conditioned reflexes of the political system and the political strength of the President as on the occasional rulings of the Supreme Court. For example, Congress can establish a Civil Service Commission, but it would be unthinkable for Congress to interfere with the President's power to remove Cabinet officers and other high officials at will. The one occasion on which Congress sought to do so — the Tenure of Office Act of 1867 — became a constitutional crisis of extreme gravity, leading to the impeachment of Andrew Johnson.[108]

As Justice Brandeis once said, "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among the departments, to save the people from autocracy."[109]

VI

The traditional tension between Congress and the President with respect to the making of foreign policy in general, and the use of the armed forces in particular, was greatly intensified during the Twentieth Century. The cause of this phenomenon was not the malign ambitions of Presidents who dreamed of becoming emperors, or the supine passivity of Congressmen and Senators who abdicated their historic responsibilities. The cause was quite different, and quite simple. The structure of world politics had changed profoundly. The state system governed by the Concert of Europe

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107. THE FEDERALIST, Nos. 47, 48 (J. Madison).

108. Myers v. United States, 272 U.S. 52, 276 (1926); *Trial Of Andrew Johnson* (Washington 1868); CORWIN, *supra* note 7, at 62-66, 351-356.

109. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

collapsed in 1914. No new Great Power Concert has emerged to replace it - a new grouping with the wisdom and the will to govern world politics as the Concert of Europe did in the century which followed the Congress of Vienna. For the United States, the era of free security was over.

After 1914, we began reluctantly to realize that if our primary national security interest, that in preserving the world balance of power, was to be assured, we should have to take an active part in the process of doing so. There was no alternative. Thus the United States felt impelled to fight in both World Wars in order to prevent Germany from conquering Russia and thereby achieving an unacceptable accumulation of power. In 1949, alarmed by Soviet expansion, we helped to organize NATO in order to prevent the Soviet Union from gaining control over Germany and Western Europe.

The two World Wars and the dissolution of all the European Empires, except for the Russian, caused a profound change in the balance of world power and the magnetic field of world politics. Europe ceased to be the center of the world political universe. The Concert of Europe could no longer manage the system of world public order. Japan and the Soviet Union were factors in world affairs on a new scale. The United States, no longer a peripheral adjunct to the European system, faced altogether new tasks in attempting to protect its national security. In 1823, when Canning suggested the policy now known as the Monroe Doctrine, he said he was calling in the New World to redress the balance of the Old. Since World War II, the United States has had to play Britain's role as arbiter of the world balance of power. No other power could organize and lead the coalitions required to contain the Soviet Union's thrust for dominion, especially because of the history of the nuclear weapon.

This transformation of the American national interest in world politics naturally stimulated an active debate within the United States both about the ends and the means of foreign policy and imposed new strains on the American political system. That debate reached an explosive climax during the early Nineteen-seventies. The bitter and prolonged war in South East Asia dragged on, to the accompaniment of anti-war rioting and disorder of a kind the nation had not experienced since the Draft Riots of the Civil War period and the troubles of Reconstruction. At the same time, the controversy over President Nixon's behavior with respect to the Watergate scandal envenomed the political atmosphere, and produced so strong a movement for the President's impeachment that in August, 1974,—less than two years after his triumphant reelection in 1972—President Nixon resigned.

In this atmosphere of extreme political excitement, a bipartisan major-

ity in Congress succeeded in passing the War Powers Resolution of 1973.[110] Its nominal purpose was to assure the people that a vigilant Congress could and would protect the nation against future Vietnams. The political goal of Congress in its perennial war with the President, however, was quite different. That goal was to take advantage of President Nixon's weakness and annex some Presidential territory as its own. For the first time in nearly two hundred years, the Hamiltonian view of the Presidency suffered at least a nominal defeat.

The Resolution is an assertion of Congress' claim to supremacy with regard to the war power, but it does not adopt an extreme form of the ultra-Whig view. It does not say, for example, that the national force can be used by the President only if Congress has first passed a Declaration of War. Nor does it adopt the position that the President's right to use force without the prior approval of Congress is confined to cases of "sudden attack." On the contrary, it acknowledges what history and common sense make obvious—that in the nature of world politics there will be many occasions when the United States, like other nations, will have to use force quickly and decisively in order to protect its security, and that the President is the only possible representative of the nation capable of carrying out such actions. This is the essence of the argument for an "energetic" President which echoes through the Federalist papers.

The War Powers Resolution begins with the statement that its purpose is to fulfill the intent of the framers of the Constitution, and purports to summarize their intent in three propositions: (1) the armed forces should not be introduced into or continued in hostilities or situations where they might well become involved in hostilities without the collective judgment of both the Congress and the President; (2) Congress has the power to pass all laws necessary and proper for carrying into execution the powers of the President; (3) the constitutional powers of the President as Commander in Chief can be exercised by him to introduce the forces into hostilities or into situations where their imminent involvement in hostilities is "clearly indicated by the circumstances" only pursuant to a declaration of war, "specific" statutory authorization, or a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces. It will be noted at once that this attempt at restatement omits any reference to treaties and the role of the Senate.

Section 3 requires the President to "consult" with Congress "in every possible instance" before introducing the armed forces into hostilities or into situations where hostilities are an imminent risk, and also to "consult" regularly with Congress after hostilities have begun until they are

110. *War Powers Resolution of 1973*, Pub. L. 93-148, 87 Stat. 555 (1973) (passed over President Nixon's veto November 7, 1973).

terminated.

"Consultation" between the President and Congress is not a term of constitutional import. The President cannot consult with "Congress." He can consult only with members of Congress and of course he does so in a nearly continuous political process that occurs in many forms—through meals, telephone calls, poker games, meetings over drinks or more solemn meetings between Congressional leaders and the President at the White House, funerals, weddings, and so on. The Resolution makes no attempt to define the word "consultation," and none is possible. The injunction requiring the President to "consult" with Congress is meaningless piety. Congress has many vital functions in the political process. Its debates help to lead and crystallize public opinion, the ultimate source of political power in a democracy. Its Committees can serve as the Grand Inquest of the nation, investigating, probing, and proposing. But Congress can *act* only as a collective body, by enacting legislation. The Constitution confers certain legislative powers on Congress, and it can have no other powers. Furthermore, Congress cannot command the President to "consult" with a particular member of Congress any more than it can tell him who his Secretary of State or his most trusted advisers should be. Any such attempt would interfere with the President's most sensitive executive discretion, that of political leadership.

The fourth section of the Resolution requires the President to report to Congress within forty-eight hours and regularly thereafter whenever he has introduced armed forces into hostilities or into situations risking involvement in hostilities in the absence of a declaration of war. Section 5 is paired with Section 4, and provides that the President shall terminate any use of the armed forces coming under Section 4 within sixty days, unless Congress has declared war or enacted a specific authorization for the use of the armed forces in another form, or extended the sixty-day period to not more than ninety days upon certification by the President that unavoidable military necessity requires an extra thirty days. Subsection (c) of Section 5 provides that where hostilities are being conducted abroad without a declaration of war or a "specific" statutory authorization in another form, Congress may require the President to terminate hostilities and remove the armed forces by concurrent resolution—that is, a resolution not signed by the President or passed over his veto. Subsections (b) and (c) of Section 5—the guillotine provisions—are the heart of the Resolution.

Sections 6 and 7 undertake to establish procedures purporting to bind future sessions of Congress to consider issues arising under Section 5 expeditiously. Section 8 prescribes that Presidential authority to use the armed forces shall not be inferred from any statute unless it "specifically authorizes the introduction of United States armed forces into hostilities, . . . and states that it is intended to constitute 'specific' statutory authorization

within the meaning of this joint resolution," and that no treaty shall be deemed to authorize the President to use the armed forces unless it is implemented by legislation of the same tenor. The Section concludes with the ineffable thought that nothing in the Resolution is intended to alter the Constitutional authority of the Congress or the President. This Section, too, with its emphasis on "specificity," is legal nonsense. Where would it leave the reasoning of *Marbury v. Madison* or *McCullogh v. Maryland*?

If the War Powers Resolution were to be carried out literally, it would constitute the most fundamental change in the Constitution ever accomplished—far more drastic in its effects than the shift of authority from the states to the national government which began after the Civil War. It would reduce the Presidency, as Senator Javits had urged, to the status of General George Washington as Commander-in-Chief during the Revolution, subject to the orders of an omniponent Congress and its officious Committees.[111] The deterrent influence of American treaties, already weakened by the experience of Vietnam, would decline even further. The United States would be the only country in the world which lacked the capacity to enter into normal treaties and alliances and to conduct secret negotiations where the use of force was in question, and it would be hampered in many others ways in the conduct of its foreign relations.

Enforcing the Resolution would produce all kinds of paradoxes. No President could do what Lincoln did during the Civil War, what Franklin Roosevelt did during the tense period before Pearl Harbor, or what Kennedy did during the Cuban Missile Crisis in 1962. But the legal arrangements for the Vietnam War would have fully satisfied the requirements of the War Powers Resolution of 1973. That war was authorized not only by the United Nations Charter and the Southeast Asia Collective Defense Treaty of 1954, but by the highly "specific" Tonkin Gulf Resolution of 1963 and other explicit acts of Congress as well. Above all, as has been evident in the thirteen years since it was passed, the Resolution would convert almost every serious problem of American foreign policy into an acrid, arid, and irrelevant debate about constitutional power, making our procedures for the conduct of foreign relations even more cumbersome and contentious than they are already.

Constitutional theology is our national passion. Every American heart beats faster when we try to divine the intentions of the Founding Fathers from materials Justice Jackson once said were "almost as enigmatic as the dream Joseph was called upon to interpret for Pharoah." Such exercises are more than lively sport and evidence of our profound commitment to the rule of law. When guided by error or wishful thinking, or when they transcend the permissible limits of construction in interpreting the policies and lan-

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111. E. Rostow, supra note 52, at 840.

guage of the Constitution, they can do a great deal of harm—witness the Neutrality Act of 1939,[112] which helped to convince Hitler that the United States would never help Britain, France, and the Soviet Union, and the War Powers Resolution, which similarly hobbles our diplomacy, makes deterrence less credible, and therefore greatly increases the risk of major war. The methods of the ostrich are of no avail in the realm of foreign affairs.

The War Powers Resolution is in profound conflict with the necessities of governance in the turbulent world of the late twentieth century and with the Presidency which has evolved from the experience of the nation under the Constitution of 1787. It is therefore safe to anticipate that the Hamiltonian conception of the War Powers to which Washington, Lincoln, both Roosevelts, Wilson, and Truman made such notable contributions will prevail as the constitutional norm, and that the War Powers Resolution will become a footnote to history, either through repudiation or desuetude.

Institutional pride may keep Congress from confessing error and repealing the Resolution directly, although a face-saving repeal disguised as a revision is not unthinkable. The courts will almost surely declare the Resolution unconstitutional if an appropriate case should arise. The 1983 ruling of the Supreme Court in *I.N.S. v. Chadha*[113] is fully applicable to the chief operative part of the War Powers Resolution, Section 5. According to that section, the President's authority to use force evaporates unless, within sixty days, Congress votes a Declaration of War or a statute supporting the President's use of force in limited war. Section 5 also allows Congress to terminate a Presidential use of force within the sixty-day period, or at any time in the future (even after it has once voted to support the President's use of force) by Concurrent Resolution, that is, by a Resolution passed by both Houses of Congress but not signed or vetoed by the President.

Section 5 is a classic example of the legislative veto, a modern development in legislation. It purports to reserve to Congress the power to terminate or reverse a President's action under a statute or even to repeal the statute by Concurrent Resolution. The practice originated in 1932, at the dreariest point of the Great Depression, when a doomed Republican President faced a vigorous Democratic Congress already scenting the blood of power. Since then nearly two hundred such statutes have been forced upon protesting Presidents. They authorize both Houses, or one House, or even a

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112 Neutrality Act of 1939, 22 U.S.C. § 441 (1982).

113. *I.N.S. v. Chadha*, 462 U.S. 919 (1983); Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. OF INT'L L. 912 (1985); Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 COLUM. L. REV. 1808 (1985); Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182 (1984); Note, *The Aftermath of Chadha: The Impact of the Severability Doctrine on the Management of Intragovernmental Relations*, 71 VA. L. REV. 1211 (1985).

Congressional Committee to enact legislative vetoes, often in statutes of the greatest importance, like the War Powers Resolution of 1973.

But *Chadha* ruled that Congressional action can have legislative effect only through Acts or Joint Resolutions fully subject to the President's veto. If Congress cannot terminate a war by passing a Concurrent Resolution, it can hardly do so by not passing such a Resolution.

Section 5 is not separable from the rest of the War Powers Resolution. Without Section 5, the statute is devoid of substance. As was pointed out earlier,[114] the provisions about "consultations with Congress" are at best an admonition or a prayer. Even the reporting requirements of Section 4, which seem innocuous at first glance, may well be unconstitutional as a usurpation of the President's discretion in the conduct of foreign relations, and especially of his discretion to use force in situations short of general and unlimited war. Should the President trumpet to the world the substance of a secret warning or signal designed to deter a hostile move by another power? It will normally be easier for a target state to heed a secret warning than a public one. Can Congress require the President to make all such warnings or signals public?

The *Chadha* case has not been popular in the law reviews.[115] Professor Tribe's treatment of the case is characteristic of a currently fashionable view among law professors and law journal editors. It appears as Chapter 6 of *Constitutional Choices*.[116] Tribe mentions the application of the *Chadha* decision to the War Powers Resolution obliquely, discussing it in a series of footnotes.[117]

The first sub-heading of Tribe's chapter gives the reader a clue to the thrust of the author's argument: "The Judiciary's Renewed Assertion of Structural Checks on Congressional Innovation." The topic sentence of the first paragraph sounds the theme: "At least since 1976, the Supreme Court has been anything but receptive to Congress' more innovative assertions of authority."[118] A page later Tribe identifies such "innovative assertions of authority" by Congress as "the pragmatic accommodations of our times" to

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114. *See supra* text accompanying notes 42-55.

115. Elliott, *I.N.S. v. Chadha: the Administrative Constitution, the Constitution, and the Legislative Veto*, Sup. Ct. Rev. 125 (1983); Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. OF INT'L L. 571 (1984); Levitas & Brand, *Congressional Review of Executive and Agency Actions After Chadha: "The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801 (1984); Note, *Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto*, 94 YALE L.J. 1493 (1985).

116. L. TRIBE, CONSTITUTIONAL CHOICES (1985). The paragraphs which follow borrow a few passages from a review of Professor Tribe's book in the *Washington Post*, December 22, 1985.

117. *See, e.g., id.* at 78 and 316; *Id.* at 79 and 317.

118. *Id.* at 66.

the development of administrative agencies and other extensive "delegations" of legislative authority.[119] A page further on, it is suggested that the legislative veto appealed both to those who oppose the executive regulation of American life and industry and to their opponents "who resist deregulation but espouse increased democratic control over those regulations which remain."[120] We are not told why Presidential and judicial controls over the activities of the executive branch are inadequate or "undemocratic," or at least less "democratic" than Congressional controls, especially when Congressional controls like the legislative veto preclude judicial review.

One of the basic structural features of the Constitution is what Corwin called "the divided initiative" in legislation, the President's capacity to veto bills passed by a simple majority of both Houses, and Congress' capacity to override such vetoes promptly by a two-thirds majority. Wilson thought the President's veto power was his most important prerogative. The veto is certainly one of the most important tools available to the Presidency. Starting long before 1976, the Supreme Court, has gone to great lengths to safeguard both the President's veto and Congress' capacity to override it.[121]

It is therefore hardly surprising that many serious students of American politics do not perceive the legislative veto as an "innovative assertion" of democratic legislative authority or "a pragmatic accommodation" to the development of administrative law, but a naked grab for Congressional supremacy intended to transform the American President into a weak Prime Minister. Tribe gingerly concedes that such concern with Congressional encroachment on the President's power might justify the conclusion that some (unspecified) legislative vetoes are unconstitutional. He denies, however, that the issue was raised by *Chadha*, in which the Supreme Court said that all legislative vetoes are unconstitutional.[122]

The *Chadha* case involved the deportation of an alien by the vote of one House of Congress, reversing a decision in favor of the alien by the Immigration and Naturalization Service. Tribe nowhere tells us flatly whether he considers the Court's decision to be right or wrong, although he clearly prefers the position taken in Justice White's dissent. Apart from his cursory reference to a desire to bring administrative agencies under "democratic" control, he makes no attempt to examine the problem of the legislative veto in its broader setting of history and constitutional policy and of its application to the President's executive authority, particularly in the field of foreign affairs. Instead, he indulges in a few pages of verbal jousting with

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119. *Id.* at 67.

120. *Id.* at 68.

121. The Pocket Veto Cases, 279 U.S. 655 (1929); Wright v. United States, 302 U.S. 583 (1937); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

122 TRIBE, *supra* note 116, at 74.

the arguments of the Court's opinion in the pyrotechnical style of "Paper Chase." Tribe thinks he has disposed of the logical contradictions and infelicities of the Court's opinion and left the decision in intellectual ruins as a "mystery."[123]

But has he? Tribe says it is hard to refute the Court's thesis, which he ridicules as the proposition that "a law is a law is a law," and adds that the Court's statement "sheds little light on *why* the veto at issue in *Chadha* was so 'law-like' an action that it 'had' to be deemed legislative."[124] A few paragraphs later, however, he commends Justice Powell for his contention that the legislative veto provision ruled upon in *Chadha* was a bill of attainder. Tribe says the decision in *Chadha* might be deemed defensible on this ground.[125]

A bill of attainder is punishment imposed by legislation rather than by judicial action. Is Powell's argument therefore really different from Burger's? The vote of the House of Representatives deemed unconstitutional in *Chadha* purported to have effect, in Justice Powell's view, as a legislative punishment. What Powell and Tribe contend in effect is that is would have been an unconstitutional bill of attainder if it had been approved by both Houses and signed by the President, and therefore must be condemned as doubly unconstitutional because it was passed by one House and not signed by the President. Alternatively, Tribe could have said that the bill of attainder issue was not reached because what purported to be "legislation" was passed by one House only, and not signed by the President. In either case, isn't Tribe, like Burger, saying that "a law is a law is a law," for an extremely important reason of constitutional policy, namely, the protection of the President's veto?

I have no difficulty with the Court's decision and opinion in *Chadha*, and believe they will and should survive as a bulwark against legislative encroachment on the executive power—a danger against which Madison warned eloquently in the *Federalist*. I should also contend that *Chadha* most emphatically applies to the problems of the War Powers Act, which purports to deal not only with the acts of the President under statutes and treaties, but also with exercises of his inherent and independent constitutional power as head of the third branch of government.

In holding the War Powers Resolution unconstitutional, the Court may well go beyond the *Chadha* case and deal with features of the Resolution which raise even more fundamental aspects of the separation of powers principle, for example, its effects on the President's power to conduct secret negotiations and on his hitherto unquestioned authority as Commander-in-

123. *Id.* at 75-76.
124. *Id.* at 70.
125. *Id.* at 74.

Chief to bring hostilities to an end, by receiving surrenders or negotiating cease-fire or armistice agreements; and its attempt, recalling the thrust of the Bricker Amendment, to require legislation before treaties can actually be applied as the supreme law of the land.[126] Even the reporting requirement of the Act, so innocuous at first glance, challenges the President's constitutional discretion in fundamental ways. Suppose there is growing tension in one or another troubled area of the world, and the President moves to protect our interests and at the same time prevent a crisis. He may wish to warn an adversary secretly, or signal our purposes by shifting troops to the theatre of possible conflict; going on alert; or taking a number of other possible measures of comparable import. It is usually easier for the adversarial power to heed such warnings if they are made secretly than if they are trumpeted to the world and thus become a matter of pride and prestige. Should Congress try to control the President's judgment on how to handle so delicate a problem in the conduct of foreign relations? Under the Constitution, can it do so?

If the Resolution is neither repealed nor declared unconstitutional by the Courts, it is bound to be ineffective nonetheless as an influence on the behavior of Presidents. It will be repealed in fact by a force more powerful than Congress or the Supreme Court, the nature of the problems of foreign policy and national security with which the government has to deal. It is striking, for example, that even at the height of the agitation which produced the War Powers Resolution, a Congressional vote rejected the proposal to subject the President's control of the nuclear weapon to the procedures of the Act.[127] The most extreme of the ultra-Whigs who supported one or another version of the War Powers Resolution conceded that the control of the nuclear weapon has to be Presidential.

At least eleven episodes involving the use of force or the imminent risk of using force occurred during the first decade after the War Powers Resolution was passed. Several more have occurred since then. In each case the Presidents involved (except for President Carter) protested that the Resolution was unconstitutional, but made an effort at least to consult with Congressional leaders and to keep Congress informed about the course of events. In no case did the procedure mandated by the statute prove convenient or appropriate and in no case was it followed. And in each case the Resolution precipitated Congressional protests that the War Powers Resolution was being violated, and even that the President should be

126. Professor Franck characterizes Section 8(a) (2) of the War Powers Resolution as "a stunning and, in international law, perhaps illegal alteration of the conditions" of United States accession to the North Atlantic Treaty and others. Franck *supra*, note 57, at 635. In effect, the Resolution attempts to do what Senator Bricker and his colleagues thought could be done only by Constitutional Amendment, i.e., make all treaties non-self-executing.

127. *Id.* at 608.

impeached.[128]

VII

This review of the controversy over the War Powers Resolution would be incomplete without a comment on Professor Thomas Franck's article in the American Journal of International Law, one of the most significant of the recent treatments of the subject.[129]

After recalling the pattern of constitutional practice with regard to the use of the national force much as it is described here, Franck writes: "None would deny that the rules relating to the conduct of our foreign relations have been fundamentally altered or restored to something nearer the classic intent of the Constitution's framers" by the recent assertion of Congressional activism in seeking a larger role in the making of foreign policy and the conduct of foreign relations.[130] It is one of the purposes of these lectures to puncture that familiar but altogether erroneous myth, a product of the self-deceptions so common during the Vietnam period. Unless we assume that the men who directed and debated the stormy diplomacy of the United States between 1789 and 1825—many of them alumni of the Constitutional Convention of 1787—knew less than we do about the "classic intent" of the Founding Fathers, the myth cannot survive even a cursory examination of the record.

Professor Franck's argument suffers from an even deeper weakness. He allows his analysis and his prescriptions to be shaped by an untenable major premise. We should not be trying to guide the evolution of our constitutional practice closer to what we imagine to be "the classic intent" of the Founding Fathers. Even if we could define that goal - and we cannot - it would not in itself be a relevant or appropriate objective for policy. The policy goals of the Constitution - effective government and democratic responsibility - should of course continue to govern the growth of our constitutional law of foreign relations. That is the essence of the process through which any body of law grows. But the principle does not require us to create a kind of Williamsburg Government, with Tip O'Neill costumed in silk knee britches and a wig. The problem facing the nation is to fashion and refashion the Presidency and Congress as responsible and cooperative institutions capable of carrying out a foreign policy adequate to the security needs of our times and of the foreseeable future. That is an entirely differ-

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128. R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE (1983); CLARK, EGELAND & SANFORD, THE WAR POWERS RESOLUTION (1985); Tuley, *The War Powers Resolution: A Questionable Solution*, 25 A.F. L. REV. 244 (1985).

129. *See* Franck, *supra* note 57.

130. *Id.* at 605.

ent matter.

Professor Franck gives his case away when he concedes that only the President can decide when to use the nuclear weapon. He quotes Professor Henkin with approval to the effect that the President's power to use the nuclear weapon must include the power to execute a preemptive nuclear strike when the President and the President alone decides that a major attack on the United States or its vital interests is imminent.[131] If the President has this awesome power, on what conceivable ground can it be claimed that he lacks the inherent constitutional power also to use ordinary conventional force, or to threaten its use, in order to limit, defuse, or resolve ordinary diplomatic confrontations before they become catastrophic? Those who deem orthodoxy a serious problem in answering that question can take appropriate comfort from the fact that Presidents have used force to this end since we first had Presidents in 1789.

Professor Franck refuses to follow this course. Instead, he would make the nuclear weapon an exception to an otherwise implacable rule, and rewrite the War Powers Resolution to that end. In other words, he would revise the Act in order to achieve the goal of having Congress "participate fully" in making all decisions about the use of force except those involving the use of nuclear weapons. At various points in his article, he describes this goal as "healthy" and suggests that it was once the norm of practice, a suggestion conclusively refuted by the evidence he himself marshals.[132]

In order to accomplish "full participation" by Congress in decision making for situations within the ambit of the War Powers Resolution, Professor Franck proposes a Congressional "consultation," not a vote. The persuasiveness of his conclusion is not enhanced by his assertion that "it is virtually beyond debate that some form of consultation is both legally and politically necessary."[133] He recommends amending the War Powers Resolution to meet President Ford's trenchant account of his adventures in attempting to "consult" with Congressional leaders who were scattered at the critical moment between China, Greece, the Middle East, and Mexico. President Ford concluded that in times of crisis, decisiveness is everything—and the constitution plainly puts the responsibility for such decisions on the President of the United States. There are constitutional limits on the Congress which cannot be legislated away.[134] Professor Franck responds by suggesting that the War Powers Resolution be amended to designate ten congressional leaders as a committee to consult with the President before he

131. *Id.* at 608, 613, 639, 641.
132. *Id.* at 605, 606, 610, 625.
133. *Id.* at 625.
134. *Id.* at 624.

sends the armed forces into situations of conflict.[135]

Franck characterizes the provisions of the War Powers Act about treaties as "a stunning and, in international law, perhaps illegal alteration in the conditions of U.S. accession" to the NATO Treaty, the Rio Pact, and presumably, other security treaties as well.[136] After a page of discussion, however, he concludes that the provisions of the War Powers Resolution about treaties should be left untouched, although he says that under the Resolution all a President could do in the event that Germany or Japan were attacked would be to call Congress into special session.

This feature of Professor Franck's article is its most startling and dangerous proposal. It is incompatible with the basic thesis of *Perez v. Brownell*[137] and many other cases that the United States has all the powers possessed by other states under international law — in this instance, the power to make effective treaties of alliance —and it flies in the face of what President Washington did and Alexander Hamilton wrote during and after the Neutrality Crisis of 1793.

Writing in 1977 — that is, before the decision in *Chadha* —Professor Franck concluded that the concurrent resolution and guillotine features of Section 5 of the Resolution should be scrapped as unconstitutional. In their place, he recommends that Congress attempt to codify the circumstances in which the President could use the national force without prior approval by Congress, and then to have those limitations enforced by unenforceable advisory opinions of the courts. The remedy of codification, as long experience has shown, is far worse than the disease, especially because Franck would confine the President's inherent constitutional authority to use force to cases of attack on United States territory, its armed forces, and "perhaps" its citizens abroad. The provisions he suggests for having the courts act as umpire of the revised Act—without the power to order compliance—are certainly unconstitutional under Article III, since they would require the courts to perform non-judicial functions. Even more important, they would further clog the conduct of our foreign relations. Franck reproaches Congress for not insisting on Presidential compliance with the War Powers Resolution, and wants to give the task to the courts. But Congress' refusal thus far to insist on Presidential compliance with the War Powers Resolution has rested in each case on sensible political judgments. This is precisely the kind of judgment the nature of the issues requires. Strict judicial compliance procedures would only make a difficult problem unmanageable.

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135. *Id.* at 624, 625.
136. *See supra* note 126.
137. 356 U.S. 44 (1958).

VIII

Once the constitutional aberration of the War Powers Resolution has been digested and forgotten, it will be apparent again that the President and Congress, separately and together, have been entrusted by the Constitution and by its history with sovereign prerogatives in exercising the foreign affairs and war powers of the nation. Those prerogatives have been in uneasy balance for two hundred years. Over a wide range, the President and Congress can exercise their discretion as a matter of their joint or several political judgments in dealing quickly with complex and swiftly moving events on the basis of often fragmentary information. The only constitutional restraints on which the people can rely to secure them from the abuse of such discretion, as Chief Justice Marshall commented in *Gibbons v. Ogden*, is the electoral process itself.[138]

This conclusion applies, I hasten to add, only to the truly political decisions Presidents and Congress make about foreign affairs and the use of the national force. I do not mean to question the constitutional rightness of decisions like *Ex parte Milligan*,[139] *Youngstown Sheet and Tube*,[140] *Covert*,[141] *Kent v. Dulles*,[142] and other cases in which the courts have held that certain decisions purporting to be based on the foreign affairs and war powers of the nation unjustifiably trespassed on the legislative powers of Congress or the rights of citizens. On the contrary, I revere that line of decisions as one of the finest justifications of our claim to be a nation under law.

The real lesson of the War Powers Resolution, I suggest,—and the main lesson of the Vietnam experience of which it is a part—is the primacy of substance over procedure. We try to devise procedural solutions for problems like Vietnam because the leaders of our public opinion have not achieved a national consensus about the kind of foreign policy the safety of the nation requires at this stage of world history. Part of the responsibility rests on our educational institutions which do not often train our youth to understand history, the processes of politics, and the phenomenon of war. Another part represents a failure of leadership. When the war in Vietnam became unpopular, far too many Congressmen were willing to forget their own repeated votes for the war, denounce what they called a Presidential war, and assure their constituents that no President in the future would be able to lure America into war by "stealth."

Democracy will not survive—and will not deserve to survive—unless it

138. 9 Wheat. 1, 42 (1824).
139. 2 Wall. 2 (1867).
140. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
141. Reid v. Covert, 354 U.S. 1 (1957).
142. 357 U.S. 116 (1958).

takes foreign policy seriously, for in that realm, to recall Holmes' vivid phrase, "the price of error is death." We cannot, we must not escape from the demanding but manageable task of dealing with reality by retreating into the insoluble and dangerous realm of myth—myth about the nature of the world, and myth also about the nature of our constitution.

Mr. LIVINGSTON. I simply would point to his specific four summary points in support of my own statement against this legislation.

Professor Rostow says that, in his opinion, "H.R. 3822 is unconstitutional for four related reasons:

"1. The bill would require the President to disclose information which Congress can request but not command the President to provide;

"2. In fact, the bill does more than require information: it seeks to establish a procedure of compulsory consultation between the President and two designated committees of Congress. He says this goal is beyond the legislative powers of Congress";

Third, and I think this answers the question raised by Mr. Stokes earlier on, and specifically, how it ties the President's hands, Mr. Rostow says:

"3. De facto, the bill would give the two intelligence committees of Congress, or one acting alone, an unconstitutional legislative veto over a wide and undefined class of Presidential decisions in the field of intelligence;" and

Fourth, he maintains, "The procedures mandated by the bill would largely remove the Central Intelligence Agency and other intelligence entities in the executive branch from the control of the President with respect to many of their functions, and place them under the direct control of the Congress instead."

Mr. MCHUGH. Thank you, Mr. Livingston.

I will ask Mr. Stokes, the chairman of the committee, if he has any opening remarks.

[The complete statements follow:]

STATEMENT OF HON. LOUIS STOKES

Mr. Chairman: I would just take a moment to commend you for the leadership you have exercised on this issue, and for the informative, and fair hearings you have organized and conducted. You have gone out of your way to accommodate those Members of this Committee who oppose this legislation, although strongly supporting it yourself. You have insured that all sides were heard, all issues aired, and that the discussion was full and frank.

I would also note that you and I and other Members of the Committee began working on this legislation well over a year ago. As you noted, hearings began last April. We have examined the issues presented by H.R. 1013 and H.R. 3822 carefully, thoroughly, and at length. Prior to the Iran-Contra revelations, the Intelligence Committee, members and staff, engaged in review and oversight of the 1980 Act. Indeed, in 1983 the Full Committee conducted public hearings on covert action oversight. So these issues are not new; our deliberations are fully informed; we have not rushed to judgment.

STATEMENT OF HENRY J. HYDE

Mr. Chairman and distinguished Committee colleagues, today we have our second, and I understand final, hearing on H.R. 3822.

In view of the revelations which emerged from the comprehensive Legislative and Executive Branch inquiries into the Iran/Contra Affair, it is understandable that some would urge that a significant tightening of the intelligence oversight statutes is necessary. However, I think that on more mature reflection, such measures do not appear necessary, at least not yet.

The Tower Commission (President's Special Review Board) wisely concluded that statutory changes in the system of decision-making on intelligence operations and oversight were not necessary, and that the failures of the system should be laid to the failures of individuals to follow the pertinent procedures of the established process. As the Commission's report notes:

"In the case of the Iran initiative, the NSC process did not fail, it simply was largely ignored. The National Security Advisor and the NSC principals all had a duty to raise this issue and insist that orderly process be imposed. None of them did so."

Similarly, despite their somewhat inconsistent and superficial recommendations, in my view, the congressional select committees on Iran laid responsibility on human rather than systemic failings. The committees' majority report concluded.

". . . that the Iran/Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance."

It is also fundamentally important to keep in mind the fact that the covert Iran arms transfer was an aberration, a unique departure from past experience of at least a decade or more involving executive and congressioinal relations on covert action. That fact was made clear in the materials prepared by our committee staff for last year's series of subcommittee hearings on H.R. 1013, the predecessor bill to H.R. 3822. A staff background paper prepared for those hearings noted in part:

"As far as we know since enactment of the Oversight Act in the fall of 1980, the Committee has been given notice prior to implementation of all findings except for the January 17, 1986, Iran Finding.

"In addition, as far as we know, all covert actions carried out since 1980, again with the exception of the pre-January 17, 1986, Iran arms transfer activities, have been the subject of findings. There has been one occasion when prior notice was given only to the Chairman and Ranking Minority Member of the Committee and one occasion when notice was limited to the designated leadership group."

President Reagan did take expeditious and appropriate action to reform and strengthen the NSC process for approval and review of covert actions as soon as he received the Tower Commission's report and recommendations on what had gone wrong in the handling of the Iran initiative. A year ago, on March 4, 1987, the President announced his commitment to implementation of the Tower Commission's recommendation and took the first steps to commence that implementation. After very lengthy and intense study, as well as some consultations with Congress, at both the Member and staff level, last year the President signed a new National Security Decision Directive (NSDD) 286 setting forth the revised procedures for the approval and review of covert actions, including procedures for effectively carrying out the President's responsibilities for notification to Congress on those matters.

NSDD 286 addresses in a very constructive manner a number of issues related to those processes which are of interest to the Congress, and this Committee in particular. Among its important features, NSDD 286 provides that: (1) no covert action ("special activity") may be conducted except under the authority of a written finding; (2) there can be no "retroactive" findings; (3) all findings will be reviewed at least annually and will "sunset" unless the President specifically takes action to prevent their termination; and (4) a copy of each finding signed by the President will be provided to the intelligence committees as part of the notification procedures. Moreover, the directive makes clear that there is a well-understood and accepted expectation of prior notification to Congress of covert actions. Only if the President determines that it is necessary, in order to meet rare, extraordinary circumstances, will notification be delayed until after the initiation of a "special activity" and then only consistent with the timely notice standard of section 501(b) of the National Security Act of 1947. In those very rare cases where notice would be deferred, NSDD 286 provides for notification within two working days unless the President specifically directs otherwise. In those truly exceptional circumstances of a deferral of notification for longer than two days after a special activity has been authorized by the President, the grounds for that delay must be memorialized in writing and reevaluated by the National Security Planning Group (NSPG) of the NSC at least every 10 days. That procedural requirement is certainly calculated to keep the President and NSC members constantly mindful of the need to notify Congress as soon as possible.

I believe procedures such as these and the obviously strongly renewed commitment of the Administration for a constructive relationship with Congress in the field of special activities should enable us to conduct effective oversight on those operations without the troublesome statutory changes proposed in H.R. 3822. So far, those procedures seem to be working well, I believe we should give this revised and strengthened process a reasonable chance to demonstrate its workability before we start setting narrow and inflexible legislative requirements into statutory concrete.

I know that some feel burdensome restrictions such as those in H.R. 3822 are needed or, notwithstanding the reforms of NSDD 286, the Executive Branch will indefinitely ignore, whenever it pleases, its responsibilities to give timely notice to Congress. However, it should be clear to even casual observers that any Administra-

tion clearly risks paying a fearful political cost when it unreasonably defers congressional notification. The effects of the political penalties President Reagan has paid have been felt throughout the breadth of his program initiatives, foreign and domestic. The consequent loss of political capital has emboldened opponents of Administration policies and programs in a wide range of areas, both at home and abroad. Certainly this has been a costly lesson which this Administration and future presidents for years to come will long and vividly remember. As I have indicated before, congressional notification and consultation are a valuable form of "political risk insurance" whose importance has been starkly reemphasized in the wake of the Iran/Contra Affair.

My most fundamental concerns about H.R. 3822 are the potentially serious practical problems which the rigidity of its prior notification and extremely limited, 48-hour deferral provisions represent. In the most sensitive circumstances where covert action might be an extremely valuable policy tool, these very inflexible notification requirements could exert a fatally chilling effect. The problems with attempts to legislate a rigid limit of 48 hours on the circumstance-dependent concept of timely notice was highlighted eloquently by expert testimony regarding the predecessor bill, H.R. 1013, last year.

Admiral Turner, President Carter's DCI, described two covert activities related to the Desert I Iran hostage rescue and a covert action in cooperation with the Canadian Government to secretly exfiltrate six U.S. diplomats from the Canadian Embassy in Tehran. He convincingly explained circumstances laden with serious risks to the lives and physical safety of personnel involved which he felt left him no reasonable choice but to defer notice to Congress until the high level of dangerous risks declined sufficiently. Moreover, as we recall, in the "Canadian operation" the essential participation of Canada was contingent on deferring congressional notification until the safety of Canadian personnel was reasonably secure. That case involved a very friendly government with long democratic traditions and a relatively sophisticated understanding of the U.S. system of government. Not all governments we might have to cooperate with will possess these attributes.

In his very persuasive testimony, Admiral Turner gave a thoughtful and realistic explanation of what timely notice means:

"The timeliness is not measured by a clock. Timeliness should be measured by the risk. I waited three months in one of those cases, and we were three months getting the six people out from the Canadian Embassy. We were six months doing the other two operations I mentioned to you.

"So I don't think we should focus on hours and days. I think we should focus on diminution of the risk. It could be that as an operation goes along the risk to human life drops off but the operation under the Finding is still continung. That would be the point at which the Executive should come to Congress. When that risk to human life is diminished sufficiently is when it is timely to notify the Congress. . . ."

Former DCI William Colby and former senior intelligence official Dr. Ray Cline basically concurred with Admiral Turner's views. At a subsequent hearing President Carter's counsel, Lloyd Cutler, who played a major role in the drafting of the existing statute, expressed similar serious reservations about the very restrictive 48-hour time limit contained in H.R. 3822. During his appearance, Mr. Cutler told us:

"[I]t does seem to me that none of us are bright enough to devise an absolute 48-hour rule that will cover all situations and to drive the President into the refuge of a constitutionally inherent right to do something which Congress cannot interfere with, it seems to me goes a bit too far.

"I think the point of notice is not so much that it be beforehand, so that there is consultation with the band of eight or two committees that might amount to 40 or 50 members and their staffs, it is that nothing can be done and kept secret, so that you never know that it happened, and whether you get the notice two days later or a week later, or a month later, it seems to me, in most cases, isn't going to make that much difference. And we can all conjure up situations in which 48 hours isn't enough. * * *

"There are all sorts of situations like that that could come up and I think myself, you have got to allow a certain amount of intitiative to the President, although you require him to account to you afterwards."

The thoughtful, compelling concerns of such experienced witnesses are powerful arguments against the basic approach of H.R. 3822 to the intelligence oversight process. Those concerns are given additional weight when we consider the epidemic proportions which the Washington disease of leaking has assumed. Of course leaks come from both the Executive and Legislative Branches, and ironclad proof of their sources is extremely rare. They are probably greater in number from the Executive

Branch because numerically more people are privy to classified information than here on the Hill. However, as a percentage of the number of people in each branch with access to classified information, Congress, despite its sanctimonious and outraged pretense of unsullied virtue, may be ahead in this dubious competition.

A Senate Intelligence Committee study released to the press and others, reportedly found that in selected leaks of classified information, journalists referenced congressional sources only eight to nine percent of the time, but cited Reagan Administration officials 66 percent of the time. This research methodology is suspect, since journalists are alleged frequently to protect their most vulnerable sources, and persons on the intelligence oversight committees would in many cases be particularly exposed by virtue of being the only knowledgeable "congressional" sources. Let us take the Senate study at face value, however, and also generously assume that Congress has 2,500 people with clearances, as opposed to 2.2 million in the Excutive Branch and military. Reliance on the Senate study forces us to conclude that Congress maintains just over 0.1 percent of the number of Executive Branch clearances, but is responsible for eight to nine percent of the leaks on national security issues. Specifically, on average, a cleared person in Congress is 60 times more likely than his counterparts elsewhere to engage in unauthorized disclosures.

In any case, it is a cliche to acknowledge the widespread existence of a permissive culture regarding unauthorized disclosures to the media. "Leaking has become a standard operating procedure for a significant number of Washington insiders," Robert Garcia concluded in an August, 1987 article for *American Politics* on leaks by a variety of Washington officials, including congressmen. We, therefore, can no longer honestly claim, contrary to all common sense and experience, that Capitol Hill somehow has risen above it all.

As Chapter 13 of the Minority Report of the Iran Committees makes clear, leaks have been a problem since the days of the Church and Pike Committees, Moreover, the Iran Committees themselves had their own problems with numerous leaks of sensitive classified information given in executive session to the Members and/or staff. That chapter concludes with a simple truth:

"In the final analysis, as Chairman Hamilton noted in a perceptive article on protecting secrets that appeared in the September 4, 1985 *Congressional Record,* 'Leaks are inevitable when so many people handle secrets.' The most effective way of ensuring secrecy is to restrict access to sensitive information to just a handful of responsible people."

Interestingly, Lee Hamilton and his Senate counterpart, Daniel Inouye, followed their best instincts on how to keep secrets when it came time to depose Admiral Poindexter. As the Minority report observes:

"The two select Committees recognized that the Admiral's testimony on the diversion of funds was the pivotal, and potentially most explosive political question of this whole investigation. As a result, extraordinary steps were taken to protect the information. Specifically, only three staff attorneys and no members of either Committee participated in the secret questioning. The success of these procedures speaks volumes on how to protect secrets."

While the remedy for reducing leaks is thus well-known, the circumstances we must work with ignore it. For even the most sensitive intelligence information is available to some 67 Members of Congress and 60 to 65 congressional staff between the two intelligence committees and certain appropriations subcommittees in each house.

Of course, the fact as well as the more widespread perception that Congress is a source of leaks means that requiring the kind of inflexible prior reporting called for in H.R. 3822 will have a chilling effect on the willingness of some to cooperate with us on some extremely important covert actions in the future. Ultimately, that chilling effect will extend its influence to the minds of those officials who must consider whether in any specific case to propose covert action as a policy option. Unfortunately, they may refrain from even suggesting a covert action, although the rewards of its success could be great, because they believe necessary participants will fear premature disclosure to Congress under an inflexible congressional prior notification requirement and decline to cooperate. Those supporters of H.R. 3822 who are opposed to any and every covert action as a policy tool fervently hope and expect the bill to have such a chilling effect.

There are other concerns with H.R. 3822 touched upon by Director Webster. The expansion the bill would make in the categories of funds which must be "specifically authorized" under current law, in the sense of being both authorized and appropriated, could have very disruptive and deleterious effects on some important intelligence activities, such as the maintenance of "proprietaries" and the handling of financial support from friendly governments to joint covert actions which might be

approved by Congess. There are also serious potential problems with the way the bill phrases the definition of "special activities." Director Webster has indicated that as it now reads that definition might well result in cumbersome and impractical requirements for signed Presidential findings for categories of intelligence activities which have never previously been considered to be covert action.

For all of these important reasons, I strongly conclude that this legislation, no matter how well intentioned, is a fulfillment of the old adage, "Do something, even if it's wrong!" We are encroaching on the President's constitutional prerogatives by diminishing essential flexibility he may need, especially when cooperating allied citizens' lives, as well as our own, are at stake. Unusual circumstances make bad law—and the Iran/Contra Affair was more than unusual, it was one of a kind. I think we don't need new laws, just better observance of the ones we have.

Mr. McHUGH. So, Mr. Secretary, as I said earlier, we are delighted to have you. We understand the pressures on your time. As we all understand, there are few people with as much experience in Government as you and, therefore, your insights on not only the legislation itself, but also the issue of the general relationship between the Congress and the executive are important to us.

And we are delighted to have you. Please proceed.

STATEMENT OF HON. FRANK C. CARLUCCI, SECRETARY OF DEFENSE, UNITED STATES OF AMERICA

Secretary CARLUCCI. Thank you very much, Mr. Chairman. I appreciate this opportunity to appear before you. I also appreciate your accommodating my schedule and the rather extraordinary arrangements under which I have asked to appear.

I asked to appear on a one-time basis as a former National Security Advisor, as opposed to a sitting Secretary of Defense.

At the outset, let me say that I am a strong supporter of the oversight process. In my experience in the Agency and DOD, it has been extraordinarily helpful. I believe that the relationship between the executive branch and the Intelligence Committees has evolved into a very solid and productive relationship.

At the outset, let me say I am certainly not going to claim that mistakes were not made in the Iran-Contra Affair. The President has admitted the mistakes. Let me make only two quick points.

The first is that the kind of mistakes that were made do not lend themselves to a legislative solution. The Congress' own Iran-Contra report said, and I quote:

"The Iran-Contra affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law. Experience has shown that these laws and procedures, if respected, are adequate to the task." End quote.

The second point I would make is that the managerial and personnel deficiencies revealed as a result of those events have been fully addressed. The President appointed a new National Security Advisor. There is a new and very capable director of Central Intelligence. Under the President's direction, I as the National Security Advisor, did much what any CEO would do coming into a somewhat troubled company.

There was a sizable turnover in the staff, a complete reorganization of the NSC, and the Office of Political and Military Affairs was abolished because it didn't make any sense for me to have that kind of cross-cutting office.

On direction of the President, we banned the National Security Council staff from having any role in the implementation of covert action programs because, in my judgment, it was a conflict of interest.

NSC is the overseer of the system. We've upgraded substantially the Office of General Counsel and given him direct access to me and direct access to any of the papers, documents or any of the meetings in the NSC.

We also developed early on in cooperation with the Senate Select Committee on Intelligence a new NSDD, which you are all familiar, requiring that all findings be in writing and that they not be retroactive.

We called for annual review of all covert actions with a sunset clause after 1 year. And the President personally attended the review of all the covert action programs.

It called for prior notification of the Congress in all but extraordinary circumstances, and in extraordinary circumstances, the so-called "gang of eight" could be identified. In rare extraordinary circumstances, the President could delay notification until after initiation of the covert action and notify within 2 working days.

And in the event further delays were necessary, the President must say so in writing and there would be an NSC review of that action every 10 days.

As a result of this NSDD, it's my own believe that a statute is unnecessary. It's also my belief that the provision to which you referred in the statute could damage the oversight process in a serious way; that is to say, the 48-hour mandatory reporting requirement.

I am not a lawyer. The Justice Department has made its case on constitutional grounds. But I can assure you that this President feels strongly about the issue, as did his predecessor. As you know, I was in the CIA under President Carter and he felt very strongly on this issue.

The heart of our constitutional process is trust between the executive and legislative branches. Admittedly, this trust broke down in the so-called Iran-Contra Affair. It seems to me that our job is to restore it in a way that makes the oversight process more effective, not less effective.

We must ask ourselves the question:

If this legislation were passed and if it provokes a veto, as it most surely will, then will it be followed by an interminable debate about its constitutionality, much like the War Powers Act? If that happens, will it help or hinder the oversight process? Will it contribute to trust and dialog? Or will it perpetuate an adversarial relationship for years to come in an effort to ensure that a one-time human error can never be repeated?

I think we have to admit that there are some things that just cannot be done by statute. At some point, we have to re-impose trust in the management of the executive branch and measure what that branch has done to correct its managerial mistakes—and there will always be managerial mistakes—rather than attempting to correct them by circumscribing what the Justice Department regards as the President's constitutional authority.

This of course is not just a theoretical issue or a separation of powers issue. It can become a practical issue. You cited the Iran-Contra Affair. The other one which the committee is aware of on the other side is the rescue operation in Iran from the Canadian Embassy.

I was in the CIA at the time and I can remember participating in the planning of that operation, worrying about whether the disguises were right, how would they get through the airport, would the Canadians cooperate?

We were holding our breath while they went in and got those six people out. The Canadians—and we received testimony on this, or at least testimony has been received on the Senate side—made it a condition of their cooperation that the Congress not be notified.

You and I can say that's wrong. And you and I could argue that the Congress does need information.

But, that is not always convincing to foreign governments. Had we chosen to ignore the Canadian offer, who knows what would have happened to those people. Do we really want to force a future President to make a choice between lives—because, in this case, it was a question of lives—and a law which his Justice Department tells him is unconstitutional?

I submit, sir, that that kind of an agonizing choice put before the President does not further the oversight process.

Let me just comment on one specific aspect of the bill. And I would hope that this Committee could affirm, as the Senate did in its committee report on S. 1721, that it intends to preserve the current understandings and practice on what constitutes a "special activity".

As Secretary of Defense, to put my other hat on for the moment, I'm concerned that the tactical military activities which are clearly not intelligence covert actions continue to be treated as such.

For example, when we attempt to deceive the Soviet Union concerning the movement of nuclear weapons, that clearly should not require Presidential findings.

This is important because, if we change the current practice and understanding, the result could be confusion in the field as to when a Presidential finding should be sought for military-related activities.

I do not think that is the intent of the committee, but I would hope that you could spell that out in report language as the Senate has done.

In summary, I don't believe the new legislation is necessary to restore the trust, confidence and accountability between the executive and legislative branches. The Iran-Contra Affair is, by and large, behind us.

Under the improved procedures set up by the President, much better cooperation is now taking place between the executive branch and the Intelligence Committees. And I hope the committee will act in a way that promotes that kind of cooperation, and that our efforts over the past year will not be dissipated in a fruitless and enervating constitutional haggle that will impact adversely on the oversight process.

Thank you, Mr. Chairman. That completes my statement.

[The complete statement follows:]

TESTIMONY OF THE HONORABLE FRANK C. CARLUCCI
SECRETARY OF DEFENSE
BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE
SUBCOMMITTEE ON LEGISLATION
ON H.R. 3822
THURSDAY, 10 MARCH 1988

Mr. Chairman, at the outset, allow me to thank you and the Committee for the opportunity to exchange views with you on the proposed Intelligence Oversight Act of 1987. Historically, Secretaries of Defense testify before only one Subcommittee on each side of the Capitol. My appearance here today should not be construed as a change in that policy. The subject matter of the legislation, the degree of Presidential interest, and my prior position as National Security Advisor during the period when important NSC reforms were made which bear directly on these hearings brings me here today on behalf of the Administration. In effect, I am testifying on a one-time basis as a former NSC Advisor, not as a sitting Secretary of Defense.

Since H.R. 3822 is very similar to the Senate bill, S. 1721, you may already be familiar with the many concerns which I raised before the Senate Select Committee on Intelligence on December 16. The changes subsequently made by the Senate committee in its mark-up of S. 1721 addressed some of my earlier concerns. H.R. 3822 reflects a number of the Senate's modifications. Therefore, I will not repeat all of the same points here today.

Instead, I would like to offer the Committee my thoughts on this entire process of reconsidering our intelligence statutes -- to reflect on the circumstances which prompted the intelligence committees to consider new legislation, and to ask whether this

bill would improve the situation. I hope that the members will give my message serious consideration before committing themselves to a position on this legislation or on any particular provision within it. The consultation which has taken place at the staff level over the past two months, and the Committee's evident desire to consider all the facts and arguments before endorsing any change in the law, give me confidence that the Administration's views are receiving a thoughtful hearing before this committee.

I do not mean to patronize the members. The reason I raise the question of adequate consultation is that I strongly believe that this legislative proposal is the unhappy result of a breakdown in consultation between the Executive and Legislative branches. It serves no purpose to cast blame. An attitude of mistrust on both sides complicated the kind of confidence in one another which our Presidents and our legislators need in order to carry out their respective Constitutional duties effectively and successfully.

The Congressional Iran-Contra report was right when it said:

> "In a system of shared powers, decisionmaking requires mutual respect between the branches of government.... Democratic government is not possible without trust between the branches of government and between the government and the people." (p. 20)

Today, I would like to offer the committee my thoughts on H.R. 3822 as it relates to the goal of fostering these all-important relationships of trust and respect between the branches and between the government and the people. Those relationships suffered a setback in the Iran-Contra affair, as actions were

concealed from Congress and, in one key instance, from the President himself. An unhealthy lack of shared purpose between the Congress and the Executive -- to be blunt, an adversarial relationship -- kept key actors on each side from sharing confidences and building a lasting consensus which would apply to all of the tools of statecraft which support national foreign policy objectives.

I can think of no step by the Congress which would do more harm to the process of rebuilding an atmosphere of trust and candor between the branches than unilaterally to lay claim to prerogatives which the President firmly believes are vested in the Executive by the Constitution. Who among us can say with absolute certainty that no future President will ever be faced with circumstances requiring that notification of a covert action to the Congress be delayed beyond 48 hours?

One recent example, which both intelligence committees have discussed, is the assistance which Canada rendered to the United States in 1980 in helping to smuggle six American hostages out of Iran. As the Subcommittee has heard from a colleague who served on the full Committee at the time, Canada had one request in offering its cooperation: that the President not tell the Congress. Was this unreasonable? You and I might say "yes," believing that the Congress could be trusted to protect this information. But from Canada's perspective, clearly it feared having its own Embassy in Teheran laid siege, as our own had been, if its assistance became known. President Carter authorized

a covert action to get those six Americans safely out of Iran. He did not tell the Congress until after the fact. Some members disagreed but others argued that President Carter had done the right thing.

This example helps us to separate politics from process, and to understand how the founding fathers did the same thing when they designed our Constitutional separation of powers. Virtually all Americans would regard the rescue of six citizens in that situation as a goal justifying covert action, and they would view the Government of Canada as a worthy partner in that endeavor. Canada's demands for extreme secrecy would also appear reasonable. Yet the cold fact remains that if H.R. 3822 had been the law of the land in 1980, President Carter would have had to say "thanks but no thanks" to Canada. What would have happened to those six Americans, who were separated from the fifty-two Americans held in the American Embassy in Teheran, no one can say.

So there is more to the 48-hour notification issue than abstract theory. President Reagan's policy, as laid down in NSDD 286, is to do precisely what H.R. 3822 would compel him to do -- to notify the intelligence committees of covert action findings no later than 48 hours after they are signed. If this policy cannot be followed for exigent reasons, the NSPG is required to review the situation every ten days. Other provisions of the NSDD have been praised by the sponsors of the Senate legislation. This is not surprising since we consulted with the Senators as we developed our guidelines. We believe the NSDD works well with the

current statutory framework governing intelligence activities.

However, I urge the members to consider the effect of provoking a Presidential veto on legislation governing the entire realm of intelligence activities. Will this really improve the situation, or will it simply add to the atmosphere of mistrust in an effort to be certain that never again will an admitted mistake be repeated? The failures of the Iran affair were human and managerial. No statute can prevent these mistakes. How much better it would be to have a procedural and statutory framework that heals the wounds, provides for reasonable safeguards and encourages an atmosphere of trust. If trust, candor and accountability are the remedy to the problems which brought about the Iran-Contra affair -- as I believe they are -- the Congress risks undermining all of those goals, and reintroducing instead an unhealthy adversarial basis to the oversight process for years to come, if it incorporates a fundamental Constitutional disagreement into the law.

I have dwelt on this one central issue because I hope to persuade the members that the position taken by President Reagan and his immediate predecessors is reasonable and correct. Appropriate action was taken as soon as the President became aware of the true nature of what had transpired in the Iran-Contra affair. A new National Security Advisor was brought in. Judge Webster was nominated as Director of Central Intelligence. President Reagan prohibited the National Security Council staff from participating in covert action, and he upgraded the position and authority of the NSC Legal Advisor.

The President directed that findings be set in writing prior to initiation of the covert action. He ordered a full review of ongoing covert actions, and revised or terminated any which were not seen to be necessary or effective. Under a "sunset" clause, Presidential authority for a covert action now expires after one year unless he revalidates it.

The Congress' Iran-Contra investigation led to the conclusion that "the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance." (p. 423) With specific reference to the existing "laws and procedures to control secret intelligence activities, including covert actions," the congressional report concluded that, "Experience has shown that these laws and procedures, if respected, are adequate to the task. In the Iran-Contra Affair, however, they often were disregarded." (p. 375)

I do not believe statutory change is necessary. If government is to function effectively as well as responsively, there must be a line where the statutory framework ends and the President's internal management responsibility begins. No two Presidents are alike in their management styles. No two Administrations have used identical procedures and mechanisms for recommending options to the President or implementing Presidential decisions. We must allow our Presidents to manage, and each President must be allowed to manage his Administration in the manner which suits him best.

I note that the Senate committee report on S. 1721 states that the definition of the term "special activity," as used in the bill, "is intended, as written, to reflect and incorporate existing law and mutually-agreed upon practice." (p. 38) If this Committee intends to change the accumulated body of mutual understandings on these very important definitional and jurisdictional matters, I believe it is important to spell out the rationale. As Judge Webster noted in his recent testimony before you, a deviation from the existing practice regarding what constitutes a special activity could result in Executive branch agencies having to obtain findings for categories of activities that do not require findings today. I support Judge Webster's position that the Congress should not change the existing practice within the Executive branch on which activities are governed by a Presidential finding.

As Secretary of Defense, I have a particular concern in this regard that tactical military activities continue to be understood as distinct from covert intelligence actions. This is not a question of what the Congress should be told, but rather a question of which activities should require a Presidential finding. For example, should a finding be required every time we attempt to deceive the Soviet Union on the movement of nuclear weapons or the capabilities of our own military forces? Clearly not, according to the current definition. In addition, should a finding be required whenever the CIA lends clandestine support to an overt military operation by providing communication assistance

or by convincing local officials to assist in the evacuation of Americans from a foreign country? Again, clearly not under current practice. I hope that the members will recognize the importance of preserving the body of mutually-agreed upon practice between the branches.

We will not put the mistrust which caused the Iran-Contra affair behind us until we trust each other again. I urge the Committee to consider the very real adverse consequences of attempting to impose a new and inflexible statutory framework on our Presidents and our intelligence community. Let us instead test each other's good faith and professionalism, and give responsible officials in both branches a chance to earn each other's respect by giving real meaning to the concept of consultation. Not only does such an approach have the advantage of bringing the best out of our public servants: it is the way the founding fathers intended the system to work.

Thank you, Mr. Chairman.

Mr. McHUGH. Thank you very much, Mr. Secretary.

As I said at the outset, you are very highly regarded here. And your testimony will certainly be considered very carefully.

Let me just make a few observations on behalf of myself at least, if not the other authors.

I think it is important to stress that we are not seeking to perpetuate an adversarial relationship. You're quite right in suggesting that the substance of our government process in many ways depends upon trust and confidence. And no legislation can mandate that.

So we do agree that whatever our differences in policy terms may turn out to be, it is important to try to foster, not impede, the growth of that trust and confidence.

What we're trying to do in terms of this legislation is together flesh out what is the proper balance in this Constitutional sharing of powers and this constitutional process, using as we must the experience that we have gained not only through the Iran-Contra episode, but in other ways.

I'll get to your Canadian case in just a minute, which I think is a tough case from the standpoint of those of us who propose this approach.

Try if you can to put yourself in the position of the Congress of the United States. We are faced with a real situation in the Iran-Contra case where the President made what I believe was not just a management decision, not just an implementing of policy decision, but basically decided to fundamentally change the policy of the United States of America with respect to Iran.

Our public policy was, as you know, not to deal with Iran but the President decided for reasons which I'm sure he sincerely believed were valid to covertly sell arms to Iran.

I think that was a fundamental policy decision.

The President decided not to tell anyone in the Congress of the United States of that decision. And, indeed, we didn't learn of it until a Middle East publication released the news some 10 months later.

The Justice Department and the administration witnesses generally have said that the President's action in that case was fully in conformity with law. The administration has not taken the position that people violated the law in that set of circumstances.

Indeed, the Justice Department is on record in these hearings and in the Senate taking the position that the President acted lawfully.

That means, regardless of what good intentions now may be—and I don't question for one moment the intentions of people like you and Director Webster and the National Security Advisor, or the President himself—that we are faced with a legal opinion which said that not only this administration, but any administration can on its own handle withhold fundamental policy decisions from the Congress of the United States.

And I think that's a major issue for us here in terms of our responsibilities for oversight.

I think you raised, as you say, a tough question with respect to the Canadian case, where lives clearly were in jeopardy, and where

I'm sure none of us, whether we're in the executive or legislative branches, would want to jeopardize those lives.

What our legislation would do, assuming it fully applies to that case—and I'm assuming that—would say to the President:

"You should share that very sensitive information with no more than eight people in the Congress."

You know who those people are. They include the Speaker of the House, the minority leader, the majority leader of the Senate, the minority leader there, and the two top people on the Intelligence Committees.

You said that trust is an important part of our Government. And I think it's reasonable to suggest that the President can trust these people even with the most sensitive kind of information.

Now, the argument is made, understandably, that the Canadians or other governments would say:

"We don't want you to notify the members of Congress because we're afraid that information might leak."

I think it's incumbent in a case like that for the administration representative—the CIA or whomever—to say to our Canadian friends:

"Well, look, we have a somewhat different form of government. In your parliamentary system, the executive and legislative branches overlap. In our form of government, we have two separate branches who share power. We believe we can trust, and you can trust these top leadership people, who number only eight. Therefore, we would urge you in your interest and ours to cooperate with us. This information will be kept secret."

I think that is a more reasonable position, granted the risks, granted the sensitivities, than the alternative position which under current law and current interpretation by the administration says:

"No one in Congress may be told about a fundamental policy decision for many, many months if the Administration in its discretion chooses to withhold that information unilaterally."

Those are the two alternatives we're dealing with. And those of us in Congress who are concerned with a real live case and a legal interpretation in the Iran arms sales situation believe that the legal interpretation which we're faced with can in fact deny us, if not in this Administration, again, sometime down the road, fundamental policy information.

And on balance, we don't think it's too much to ask the Administration, even in sensitive cases, to share sensitive information with these eight leaders, because we have confidence in the trust that would be put in those people.

So that's the problem that we face. And it is a common problem because the last thing we want is a confrontation and an adversarial circumstance.

Therefore, however this may turn out in Congress, if, in fact, the Senate and the House pass this bill, I would hope that before the President vetoes it, that he will consider carefully and openly the responsibilities that we in Congress have and perhaps will not veto so quickly this type of legislation, which I don't think is very dramatic. Indeed, your own Directive, the President's own Directive, reflects in many ways what we are proposing in this legislation.

The only difference then is that the law would be permanent as opposed to a directive which could be unilaterally changed by the President later on.

So I apologize for going on without really asking you a question. But I did want to reflect with you on the perspective that many of us have, taking into account not only the Iran-Contra problem, which is one tough case, as well as the Canadian-type situation, which I will concede is a tough situation for us to deal with.

But, given the two alternatives, on balance, many of us believe that trusting a small group of leaders of the people in Congress is a better approach than the other alternative, which could again lead to a situation where no one in Congress for a long period of time knows anything about fundamental policy decisions.

Secretary CARLUCCI. I would clearly agree with you, Mr. Chairman. We can trust the Congress. I'm not arguing that point. I think one of the more futile exercises that we engage in is a finger-pointing exercise between the Congress and the executive branch on who leaks what.

Unfortunately, we have leaks out of both branches. That's not the issue. And, certainly, we tried to persuade the Canadians that we could trust the Congress and this would be handled discreetly. But, other governments make their own judgments.

And if you can't persuade Canadians, who really understand more about our system of government than most other countries, how are you doing to persuade countries who don't have a system of government that anywhere near resembles our system of government?

How are you going to persuade dictatorships?

You may need the cooperation of a dictatorship in one of these operations. And I don't know how many times I had discussions with cooperating intelligence organizations—western intelligence organizations—on this very subject. It is next to impossible to convince them of this.

So the issue is not whether we trust you, it is whether we can persuade other countries in exceptional circumstances that they ought to put their own national efforts at risk, put their own national equities in the hands of our Congress; because that's the way the Canadians looked at it. They saw their embassy, their people as just as vulnerable as our people.

As far as the question of the President not telling the Congress of major policy decisions, I would respectfully submit that the procedure the President has set up in the NSDD, where he has to commit to writing any time the Congress is not informed, and then there is an NSC review every 10 days, is sufficient to deal with this.

There are lively NSC meetings and, as you know, there is considerable controversy even in the administration over a particular undertaking. I doubt whether this President or any President in the future would want to be here constantly every 10 days to ask members what they think about a particular operation.

Anyway, you're forcing them to focus on the details and implications of this operation on a periodic basis.

I can assure you that the President will reflect seriously on the relationship with Congress before he vetoes the legislation, but he

has a responsibility not just to himself. The President has said a number of times that he does not view himself as the owner of this office, the Oval Office. He is just a caretaker and he has to think in terms of his successors. And how he binds his successors in their relations with Congress is important; the precedent which he sets for his successors is equally important.

Mr. McHUGH. My time is expired. Thank you, Mr. Secretary.

Mr. Livingston.

Mr. LIVINGSTON. Thank you, Mr. Chairman. And thank you, Mr. Secretary, for making this appearance on what I believe to be a very important piece of legislation, if ill-advised.

I share with you—I'm not certain what the intent of the legislation is either with respect to the President's intent to move nuclear weapons. So I hope the redactors will make that clear before we take this thing any further.

Secondly, your testimony is very concise. And I appreciate your position. I share with you your appraisal of the Canadian Embassy situation. And, basically, doesn't that, in effect, say that, in today's complex and dangerous world, it is simply not realistic and workable to insist upon prior notification to Congress of all covert actions, no matter how dangerous or sensitive the circumstances may be surrounding the operation.

Secretary CARLUCCI. That is my view, Mr. Livingston, yes.

Mr. LIVINGSTON. And the timing of the notice to Congress of covert action should at least, in some cases, take into account the risk to human life involved in the operation, should it not?

Secretary CARLUCCI. Yes. And let me only point out that some covert action and operations, particularly where they're rescue operations, take a long time to set up before the event actually takes place.

So, if you notify a large number of people irrespective of who they are, whether they're in the executive branch or the Congress, while that operation is going on, you run the risk of compromise. It's axiomatic that the more people who know about an operation, the more likely chance there is of compromise.

So the actual implementation may be sometime away.

Mr. LIVINGSTON. Taking the third incident, for example, the bombing or the attack on Libya, obviously, if this legislation were in force, we wouldn't be talking about notifying Congress as late as the bombing itself. We'd be talking about notifying members of Congress weeks, or even months ahead of time, once the President committed the movement of any personal toward affecting the raid.

Is that right?

Secretary CARLUCCI. That would be correct, but I hope that this does not apply to military operations. That's under the jurisdiction of a different committee.

Mr. LIVINGSTON. That's not clear in this legislation.

Secretary CARLUCCI. I would hope that the committee could make that clear.

Mr. LIVINGSTON. Thank you. I think you've raised some serious questions. We haven't touched much on the constitutionality of this legislation, but expect to explore that later on with others.

But I certainly do appreciate your appearance.

Mr. McEWEN. Will the gentleman yield?

Mr. LIVINGSTON. I'll be happy to yield.

Mr. MCEWEN. On that point, even though it was a military operation, the Libyan raid was a secret operation, was it not?

Secretary CARLUCCI. Oh, yes.

Mr. MCEWEN. Did the Presdident brief the Members of Congress with the express stipulation that it not be discussed publicly? I believe, in that case, the point that the gentleman has chosen to raise, that those in attendance chose to hold a press conference on the driveway of the White House, did they not?

Secretary CARLUCCI. I wasn't in government at the time, so I'm not an authoritative person to answer that.

Mr. MCEWEN. Well, the answer is yes. The answer is that they did, at the pleading of the President that lives were at risk and the operation, that they were going to be flying at night, and a situation in which they would be vulnerable and could they please, in the interest of peace and in the interest of American lives, hold their fire for a matter of hours.

That proved to be too strong a request for them to accommodate. And I think that it's very appropriate for the gentleman from Louisiana to raise it.

Thank you.

Mr. LIVINGSTON. Thank you. I yield back my time.

Mr. MCHUGH. We don't have time to get into this issue that Mr. McEwen has raised, at least I don't. I think he's incorrect.

I would refer Mr. McEwen and others to the statement that Senator Inouye made during the Iran-Contra hearings in which I thought he rather forcefully and convincingly demonstrated that it was not the Senators or anyone in Congress who released that information. Indeed, Colonel North himself may well have been the source of this information.

Mr. MCEWEN. If the gentleman would yield on that point.

Mr. MCHUGH. I won't yield because we do have a very short amount of time.

Mr. MCEWEN. I admit that's right.

Mr. MCHUGH. The Secretary has to leave at 2:15. I'll be happy to take the gentleman on another time on this.

Mr. Stokes.

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

Mr. Secretary, let me express my appreciation for your appearance here today. I guess one of my concerns would be your mentioning the new NSDD that has been signed by the President as being evidence of the fact that a statute is unnecessary.

I have some very real concerns about that because, as a member of the Iran-Contra Committee, we learned that there was in existence what was known as NSDD No. 59. I'm sure you're familiar with that. It was in existence at the time of the Iran-Contra situation.

That NSDD, which had been signed by the President, required that all findings be in writing, and further required that there be notification to the Congress of all findings.

It further required that the NSC and its members make all recommendations related to covert findings to the President, and that they be kept fully informed.

The President never took the action to repeal NSDD No. 59. He just ignored his own NSDD.

So, when you say to us that you now have issued a new NSDD, what is there that would be different now with this NSDD from NSDD No. 59, which can be totally ignored by the President, since he is the one who initiates it. It has no validity of law.

Secretary CARLUCCI. I don't think there's anything in NSDD 59 that circumscribes the President's consitutional authority to determine what "in a timely fashion" means.

It does not require him to inform Congress of every event within a fixed time frame. So, within the confines of NSDD 59, he had the flexibility not to inform the Congress.

Now, the President himself, and he said this many times, was not fully informed of the facts in the Iran-Contra Affair. That's why the Iran-Contra report said that it was a failure of individuals rather than laws.

So, if an NSDD can be disregarded, so can a law be disregarded for that matter.

I don't want to prejudge what the Special Prosecutor might do. I'm not trying to try people up here in this forum. I'm just citing the Congress' own report.

Chairman STOKES. I guess one of our major concerns is in the same way at page two of your statement you make reference to the Iran-Contra report. You say that it was right when it says, "In a system of shared powers, decision-making requires mutual respect between the branches of government," and so forth.

But, also in that report at chapter 28 under Recommendations, we said:

> Congress cannot legislate good judgment, honesty or fidelity to law, but there are some changes in law, particularly relating to oversight of covert operations that would make our processes function better in the future. And they are set forth below.

One of the first things that was set forth are Findings and Timely Notice. I'm really concerned over how we are in any way taking away any powers from the President when we simply say to the President:

> You can make whatever finding you want to make, exercising your powers as President of the United States. It is just that you must notify the Congress within 48 hours.

And we're saying that to the President because under the current law he had the right to make any decision he wanted to make, it was just that the law said, if he opted for that particular option not to notify the intelligence committees, not to notify the gang of eight, that he must then give timely notice to the Congress, which, in this case, was not done.

So we say that, in its stead, in the stead of the timely notice, he must notify the Congress within 48 hours.

How do we take away from the President's power in that respect?

Secretary CARLUCCI. The Justice Department can better make a constitutional argument that I can, Chairman Stokes. I'm not a lawyer. But there is signficant difference between "in a timely

fashion", leaving that to the President's determination, and a fixed time requirement.

The latter clearly circumscribes the President's authority and flexibility to conduct foreign policy. As I say, I'm not equipped to make the legal argument.

Chairman STOKES. Thank you very much.

Thank you, Mr. Chairman.

Mr. MCHUGH. Thank you, Mr. Stokes.

Mr. Shuster.

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

Mr. Secretary, we certainly appreciate your being here today. It seems to me that a very important point, and I appreciate your agreement or disagreement on this, that hasn't been made yet is that the President has paid an enormous price for not infoming the Congress of a covert action, which I think Republicans and Democrats, liberals and conservatives alike can agree was a very, very bad policy.

On the other hand, for President Carter, there's no outcry at all for the Congress not having been informed on the Canadian operation because that's understandable. That's reasonable.

Yet, we lump both the reasonable and the unreasonable together. We catch them all in this dragnet, in this straitjacket. It's akin to the farmer going out on the south 40 with a blunderbuss to shoot a skunk, and he hits his prize bull in the process.

And that's what we're doing here.

Would you agree or disagree?

Secretary CARLUCCI. I would agree, Mr. Shuster. As you say, I worked on a daily basis with the President during the post-Iran-Contra Affair period. And while he suffered publicly, I can tell you that he suffered much more in private. He would agonize over this problem day after day and wonder why he wasn't fully informed by his own staff.

He was very frustrated by the process. So, yes, he suffered. But, may I also point to a certain irony here. And I don't want to open another debate, but I mention the analogy between what this legislation might do to relations between the executive and congressional branch and what the War Powers Act has done.

It's perpetuated a constitutional debate. The War Powers Act, had the administration subscribed totally to it, might well have prevented us from doing what we are doing in the Persian Gulf, which has restored our credibility in the region to an amazing degree.

I have been out there and I've seen how our relationships with the moderate Arab States have improved markedly as a result of what we have done in that area.

So it was a mistake, yes.

Mr. SHUSTER. Is it reasonable to say that, absent any law, as a result of the terrible price this administration has paid, any future President is going to think an awfully long time about the justification and the reasonableness of withholding information from the Congress?

Secretary CARLUCCI. I think that is clearly the case. And as I said in my earlier remarks, we have to allow the President some managerial flexibility.

Mr. SHUSTER. He will at least have the capability to withhold information if he can justify having done so to save American lives.

Secretary CARLUCCI. Absolutely. And he needs to have that capability. The Canadian case is one case, but I can think of any number of cases that could come up where the choices would be agonizing.

Most cases, I am sure that the President would opt in favor of informing the Congress. The bias is clearly in that direction. The track record is good. The oversight method is important and there is an atmosphere of trust evolving.

So I think future Presidents would choose to work cooperatively with the Congress.

Mr. SHUSTER. Thank you.

Mr. MCHUGH. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Secretary Carlucci, following up on Chairman Stokes' questions about the issuance of national security decision directives, ordinarily those directives are for internal use only and they're classified.

Secretary CARLUCCI. That's correct. It's correct that they are briefed in the appropriate oversight committees, certainly.

Mr. KASTENMEIER. They are?

Secretary CARLUCCI. Yes. We have briefed the appropriate oversight committees on NSDD's. We do not make them available en masse to any committee. But, in appropriate oversight committees, they are briefed.

Mr. KASTENMEIER. That is to say each time?

Secretary CARLUCCI. Not as a routine matter. But where something is germane to the oversight committee, the executive branch does brief them.

Mr. KASTENMEIER. And it does so routinely? That is to say, each and every directive?

Secretary CARLUCCI. I don't want to say that, no. There are directives. There are clearly directives that are not briefed. There are some that pertain only to the executive branch. But, as I say, where they're germane to the oversight process, they are briefed.

Mr. KASTENMEIER. With respect obviously to the one that you're referring to, when you, in fact, were the National Security Advisor, you did, in fact, of course, brief the Congress. And perhaps—and I'm not sure about this—perhaps you also, the White House made public the fact that it had voluntarily, through a new National Security Decision Directive, imposed—altered the guidelines for itself with respect to notification to Congress.

I think that was publicly shared.

Secretary CARLUCCI. It was publicly shared. But we did more than brief the Congress. We invited the Congress down to work with us. The Senate Committee accepted our invitation and we worked almost on a daily basis with them to develop the NSDD.

So they were fully aware of our rules as we went through them.

Mr. KASTENMEIER. I don't think that maybe applies to the House Committee.

Secretary CARLUCCI. The House Committee, I think your Chairman attended one meeting, if I'm not mistaken. But the House Committee chose to wait until the directive was finished. That was clearly their option.

The Senate Committee chose to work with us on a daily basis.

Mr. KASTENMEIER. Of course those National Security Decision Directives are mutable. That is to say, they can be changed by the President, amended, reissued at his discretion. He may or may not share those with the Congress.

That seems to me, I guess, the point of this. It places these directives in a different class in terms of what they achieve as opposed to a statute.

Secretary CARLUCCI. That's correct.

Mr. KASTENMEIER. Ten months from now, for example, we'll have a new administration. This is also a question to which you don't necessarily know the answer.

I assume a new President does not start with the old President's directive, will have to reissue, reexamine and reissue National Security Decision Directives?

Secretary CARLUCCI. That's his option. Most Presidents would review them and make a statement that they stand until he decides otherwise. I think it would be pretty difficult to revoke them—I think he would revoke them on a daily basis.

Mr. KASTENMEIER. This is something he's not required by law to reveal what he does in that connection to the Congress?

Secretary CARLUCCI. That's correct.

Mr. KASTENMEIER. So we still may have what you regard as trust. But the fact is that the Congress doesn't necessarily play a role with respect to those. And if a new President or this President alters those directives without informing the Congress, indeed, he may do so. And even what you've attempted, I think very appropriately, to do, to work at least with some of the Intelligence Committees and to make public the changes you recommended.

And I think they were salutary insofar as they went. Nonetheless, that is something which is also subject to change.

Secretary CARLUCCI. That is correct.

Mr. KASTENMEIER. It is for this reason that I join with the chairman in suggesting that there is a reason why a permanent statute with respect to these rules is important and why the President's exercise of discretion with respect to issuing National Security Decision Directives from time to time, and possibly amending it, and possibly not revealing it to anyone outside the executive branch is not an adequate procedure for our purposes.

Secretary CARLUCCI. Mr. Kastenmeier, if a future President sets out deliberately to deceive the Congress, I submit that no amount of statutes can stop him. A President that was going to think twice before doing that—and most Presidents come in wanting to develop a good relationship with Congress, developing that atmosphere of trust—now having seen this event, as was pointed out, having looked at an executive order which makes sense, I would be very surprised if some President would come in and throw it out and say,"No, no, I'm going to play games with the Congress," or "I don't want to tell the Congress anything."

Presidents look at the history of what has happened. They look at the relationships with the Congress. They have to get their programs through the Congress.

So I submit that Presidents don't come in with the kind of narrow focus that is implied.

Mr. KASTENMEIER. I agree that that would not be the original intention of such a President. I think they would find it necessary by events to justify, not necessarily a deception so much as secrecy. Silence.

I think we've seen it too often in the past.

Secretary CARLUCCI. Secrecy is an important ingredient of our national security apparatus. But that is what is so good about a Select Committee on Intelligence. You have upgraded your security requirements enormously in the past couple of years.

Presidents, by and large, are coming to trust your security. So that's not what really is at issue.

There are two things at issue. The constitutional question, which would provoke endless haggling over this issue, which puts you in a War Powers Act kind of situation; and the very exceptional event, such as the one we discussed with the Canadian Embassy rescue operation.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Mr. MCHUGH. Thank you.

Mr. Secretary, we have two more members to take questions. Can you bear with us for a moment?

Secretary CARLUCCI. Certainly.

Mr. MCHUGH. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

I gather from the discussion that has gone on that, in the Canadian situation, the President was left with about three options—break the law, go ahead and do it and save the lives, or tell Canada no can do, tough luck; or lie to the Canadians and follow our law.

But you just couldn't do it. So we really haven't solved that problem. What we have here is a constitutional issue. This is one struggle, one battle in the ongoing war between an Imperial Congress and an Imperial Presidency, both struggling for the primary power in foreign policy.

And so the President really has very little choice if this thing is unconstitutional. He really can't sign it, as much as he might want to to get along and stroke some fur.

Secretary CARLUCCI. That's right.

Mr. HYDE. If you will forgive my imposition, I'm going to read to you on the Constitution from a letter from an attorney, a constitutional scholar, Robert F. Turner, of the University of Virginia, on this very point. He says something interesting. He says:

> Aside from rather sloppy scholarship and even some indication of possible dishonesty, a major shortcoming of the majority Iran-Contra Committees report was its emphasis on "Foreign Policy as a Shared Power."

Now, when he talks about dishonesty, it's worth reading the footnote:

> For example, on page 415 of the Majority Report, a reference to the President having authority under the Constitution was mysteriously omitted from within a quotation of the statute without ellipses being inserted to indicate the omission. Since the dropped words would if present significantly undercut the point being argued by the Report, if this was simply a "clerical error", it was an especially convenient one.

But, in any event, since you've used the term "shared powers", and since the Iran-Contra Majority—not the Minority, I hasten to add—used the term "foreign policy as a shared power", I think it's

worth just taking a brief look at Mr. Turner's comments on that issue. He continues:

Certainly it is true that both the President and the Congress have constitutional powers that affect foreign affairs. The President is given the bulk of those "executive" powers through article II, section 1, and these are amplified by the enumeration of other powers, such as that of commander in chief. But, the Senate is given a veto over the ratification of treaties, and the full Congress is given a veto over the decision to launch a war against another State. Article I, section 8, also vests other important powers with foreign affairs implications in the Congress. But the suggestion that these are "shared" powers—while in some respects not technically inaccurate—invites imprecise analysis. To conclude that, because both the President and the Senate have a role in the treaty-making process, it is Constitutionally permissible for the Senate to assume the negotiation function or to transmit an approved agreement to the United Nations, is simply wrong. It would be akin to saying that, since both the President and the Senate have a role in the appointment process, the Senate could assume the function of nominating Cabinet officials and then appointing them over the President's objection.

A far more precise analysis, in both instances, is to recognize that the President, the Senate, and the Congress each have certain specific powers which influence United States relations with the external world.

In this regard, however, it is important to recognize that the constitutional grant of "executive power" to the President in article II, section 1, was in broad terms, conditioned only by specific constitutional grants to the Senate or Congress and the rights guaranteed to the people; while the grant to Congress in article I, section 1, was limited to, and I quote, " '(6) [a]ll legislative powers herein granted'."

That's important: "Herein granted."

As Jefferson, Hamilton, and Madison observed, the exceptions to the executive power that were vested in the Senate and Congress were intended to be construed strictly. Since the powers vested in the President by the Constitution may not be taken away by simple statute, a statute which pretends to compel the President to provide national security information to the Congress would not be a part of the Supreme Law of the Land.

And why is that important?

Because the Constitution says, quote:

This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, et cetera, shall be the Supreme Law of the Land. Since the President is required by the Constitution to take an oath to preserve, protect and defend the Constitution of the United States, and since the Constitution is the preeminent law that the President is required by the Constitution to "take care" that it be faithfully executed, even a cooperative President would not have the legal option of acquiescing in such an unconstitutional procedure.

Now we're talking about the law, the constitutional authority, not the policy. Policy is another matter entirely. Presidents can waive these things. They can act differently. I couldn't agree more that as a policy comity is required. We'd better not just notify, we'd better consult, get some input, take Congress in as a partner, as a matter of comity and common sense and policy.

But not as a matter of constitutional law.

Now, what's going to happen?

And I'm nearly through, Mr. Chairman, but this is important. This bill is going to pass like it sailed through the Senate. The President is going to veto it. We'll have a big constitutional debate.

He may or may not be overridden, depending upon how the railroad is going. And I don't know how we'd get a court case on these things, except the President has to break the law, has to engage in a covert activity—deliberately break the law and get excoriated and impeached and everything else, to get a court decision.

But, finally, we'll get a court to decide that Congress just can't overreach. It just can't tell the President how he must exercise his executive authority given him without limit by the Constitution.

And we give him, we not only tell him he's got to tell us, but within 48 hours. That's a problem. And I don't see any way around it.

And I am somewhat relieved to have had the opportunity to at least state it.

Thank you.

Secretary CARLUCCI. Mr. Hyde, I hope I didn't say that the foreign policy is a shared responsibility. If I did, I stand corrected.

Mr. HYDE. You quoted from the Iran-Contra report, which made that mistake, in my judgment.

Secretary CARLUCCI. That's not directly attributed to me. I appreciate that because I quite agree, we have different constitutional roles.

You're exactly right in what is going to happen, at least in my view. And in the War Powers case, we've been unable to get any standing, to find anybody to get standing to bring the issue to a head in the courts.

I suspect we'll have the same problem here if this law is passed. So it will go on and on and on.

Mr. HYDE. Or take these things because they're political questions in their judgment and they'd like not to be involved.

Secretary CARLUCCI. That's what one Judge has said on the War Powers Act. Look at the haggling we had over our Persian Gulf policy on this issue. We went through agony, not so much on the House side, but on the Senate side. And we'll go through the same kind of agony on this.

Mr. HYDE. Exactly.

Mr. MCHUGH. Mr. McEwen.

Mr. MCEWEN. Thank you, Mr. Chairman. I think my point's already been made. Thank you.

Mr. MCHUGH. Thank you, Mr. Secretary, not only for being with us, but for your patience in extending your time.

Secretary CARLUCCI. I appreciate the opportunity, Mr. Chairman. Thank you very much.

[Pause.]

Mr. MCHUGH. We welcome our witnesses. As I understand from staff, and as I observe, we're going to have, in effect, a panel of distinguished witnesses. And I appreciate you gentlemen being here for that purpose.

Our first witness will be Gen. Brent Scowcroft, who has had a very distinguished career in the U.S. Air Force. Before he joined other parts of our executive branch, he rose to the rank of lieutenant general in the Air Force. He also served most notably here as National Security Adviser under President Ford.

He's currently vice president of Kissinger Associates.

Our second witness, following General Scowcroft, will be George A. Carver, Jr. He is the John M. Olin Senior Fellow at The Center for Strategic and International Studies here in Washington.

Dr. Carver retired from the Central Intelligence Agency in 1979 after a 26-year career in which he served in several overseas posts as an Operations Officer.

From 1966 to 1973, he held the position of Special Assistant to the Director of Central Intelligence for Vietnamese Affairs.

From 1973 to 1976, he served as Deputy DCI for National Intelligence.

Our third witness will be Dr. Gregory Treverton, currently a Senior Fellow at the Council on Foreign Relations. He previously served for 6 years on the faculty of the John F. Kennedy Center for Government at Harvard, and also has served on the staffs of the National Security Council and the Church committee.

He's recently authored a book called "Covert Action—Limits of Intervention in the Postwar World."

We're delighted to have you, gentlemen.

STATEMENT OF LT. GEN. BRENT SCOWCROFT, USAF (RETIRED), NATIONAL SECURITY ADVISER TO PRESIDENT FORD

Lieutenant General SCOWCROFT. Thank you, Mr. Chairman. It's a pleasure to be here to comment on this important legislation. I have submitted a statement which speaks for itself. Unless you prefer, I see no reason to read it, or even to summarize it at length.

Mr. MCHUGH. We will be happy to include it fully in the record, General, if you would like to make some comments.

Lieutenant General SCOWCROFT. Let me just make two very general introductory comments, Mr. Chairman.

The first one is I believe it very important not to let the Iran-Contra Affair color the entirety of the intelligence relationship between the Intelligence Committee and between the Congress and the executive branch.

The Iran-Contra Affair was a serious mistake. It was a mistake for which the President paid a very high political price. There are lessons in that affair, not only for the President and future Presidents, but for all his National Security associates.

Those lessons, it seems to me, are far more effective than attempts to tie the President down with a variety of small ropes so he's unable to commit error.

I think, as Secretary Carlucci so eloquently said, our system can work effectively only on the basis of mutual trust and cooperation. It was not designed by the founders necessarily to work efficiently, but to protect the rights of the individual against an overweaning government. It does that very well.

But we have to fill the gaps between the branches with cooperation and mutual trust if we're to turn our system into an effective system. It is my judgment that, since the time I was in the White House, cooperation on intelligence matters between the Intelligence Committees and the executive branch is really proceeding very, very well.

Indeed, I would suspect that access to material for you all is probably more efficient than it is for the White House on a day to day basis.

The second point I would make is that I think it is very important to preserve the capability for covert action by the U.S. Government, even though it is a very difficult thing to conduct effectively in the present climate.

There are two things we have learned about covert action resulting from the Iran-Contra Affair which should have been apparent before, but certainly are the case at the present time.

The first one is that covert action should never be used counter to public foreign policy, to go in contradiction to it. That is a mistake in every sense of the word. And I think that the one who realizes it now more than anyone else is the President of the United States. And I hope, every Presidential candidate.

The second one is that, in this day and age, covert action is very difficult to conduct if it does not represent a general consensus within the body politic, within the Congress and the executive branch.

I would point out the difference between covert action in Central America and covert action in Afghanistan. Covert action in Afghanistan has gone flawlessly—no leaks, no problems, no controversy—because it has been generally accepted that it's a worthwhile thing for the United States to do.

In Central America, it's been quite the opposite because there is no agreement on what the underlying policy ought to be.

The executive branch has to be conscious of those practical limitations now in our present climate about the use of covert action. But, if we are to preserve covert action, and I think it vitally important that we preserve that ability, then we want not only to be able to use it effectively, but to have the people involved in conducting it confident that they are being provided all the protection that the U.S. Government can give them.

I think that this legislation does not serve us well on either of those points.

Thank you.

[The complete statement follows:]

STATEMENT OF BRENT SCOWCROFT ON H.R. 3822

I have been asked to comment on H.R. 3822, dealing with Congressional oversight of intelligence activities. I am happy to do so. You have already received copious comments on every aspect of the bill, so I will be brief and to the point.

The principal thrust of this bill, to tighten the requirements for notification of covert action, is an understandable reaction to Congressional frustrations arising from the Iran-Contra affair. But while the reaction is understandable, I do not believe it is wise.

The whole subject of intelligence activities is a particularly difficult part of the generally troublesome issue of executive-legislative cooperation on the formulation and conduct of U.S. foreign policy. The conflict between the need for consultation and the requirement for secrecy to ensure an effective intelligence system is not easily reconciled. The problem becomes especially acute over the matter of covert action.

Covert action, in my opinion, is a valuable instrument of foreign policy, one which it is important for the country to have available for certain highly selective situations and circumstances. But I want to underscore that covert action is a tool of policy. It should not—it must not—become the policy itself. That said, it is important to recognize that, as an instrument, covert action can be useful only to the degree that it remains secret. The Executive Branch deals with the extraordinary requirements for secrecy in handling covert actions through the device of "need to know." In its simplest terms, that phrase means that no one is entitled, solely by virtue of his position, to be informed on any particular intelligence activity. With respect to the Intelligence Committees of the Congress, the device of "need to know" is not so easily administered.

The Constitutional scholar Edwin Corwin has said that in the area of foreign policy, the Constitution is an invitation to struggle between the Executive and the Congress. But however the respective roles may be defined at any particular histori-

cal period, it is generally conceded at present by the Executive Branch that the Congress has a role to play with respect to the formulation of foreign policy and to oversight of the execution of those policies, including the employment of covert actions. The question with respect to application of the "need to know" principle in these circumstances is what precisely does the Congress need to know and when, in order to be able to exercise its responsibilities. The proposed bill, in my judgment, takes a rigid view of those needs, with insufficient regard to the principle of "need to know" and the requirement for secrecy.

While there are several troubling elements in H.R. 3822, my principal concern is the requirement in Section 503 which mandates notification of covert action "in no event later than forty-eight hours after the special activity has been authorized." This requirement could in some rare circumstances pose unacceptable risks to the conduct of a covert action. There could be cases where Presidential authorization might be required considerably in advance of the execution of the activity in order that adequate preparatory measures could be taken. Notification upon authorization could risk exposure of the project and put the lives of Americans or others assisting the country in jeopardy.

This clause is designed to close the "loophole" in current law which permitted the President to avoid notification of the Iranian arms shipments for many months. Concern over this particular event is understandable and warranted, but the excessively restrictive language proposed seems a case of throwing out the baby with the bath. It is not possible to eliminate every opportunity for abuse by the Executive without at the same time paralyzing the ability to act.

The rigid notification requirement apparently stems from the belief that if the Intelligence Committees had been notified of the Iranian arms proposals, the members would have reacted negatively and the President would on that account not have proceeded with his plans. There is no evidence to support this assumption. Indeed, as it was, the President was confronted, by his principal advisors, with views strongly in opposition to the Iranian arms sales.

Another operation having the unique characteristics of the Iranian arms for hostages affair is not likely. In the Iranian case, every senior U.S. official involved made serious mistakes. That, I think we can be confident, will remain a rare phenomenon. The cause of this particular foreign policy failure must be attributed to people, not process. In addition, and even more important, the Iranian affair is certain to be a graphic object lesson for future Administrations. The political costs to the President of the Iran/Contra affair have been severe. The President has been demonstrated to be accountable, in the most real sense, for the actions of the Executive Branch and, very directly, for the NSC and its staff. If there is a political message in this unfortunate matter it is that the President, in his own interest, ought to seek consultation with appropriate elements of the Congress, especially where important policy issues are at stake, He simply cannot go it alone, not over the longer run, on issues of significance.

Problems of governance, in our system of shared powers, cannot effectively be resolved by each branch pressing its extreme position. If the system is to avoid paralysis and to perform well in the interests of the American people, it can only be through a cooperative, not a confrontational, approach, While the Constitution may be an invitation to struggle over foreign policy, we do not have to accept that invitation. We can instead try comity.

There are great lessons in the Iran/Contra mess, beyond the political costs of trying to bypass the Congress. Many of them, for the Executive Branch, were set out in the Tower Board report. Additionally, it should be clear that covert action should be undertaken only in support of our foreign policies, not in contradiction to them. In the Iranian case, in particular, the exception to policy had the practical effect, albeit unintended, of undermining seriously the strongly supported public policy. We may also have to recognize, regrettably, that in the present climate covert action should be undertaken only when there is broad consensus on the underlying policy it is designed to promote. That is unfortunate, because covert action can frequently be most useful when problems are incipient, when modest efforts can be more effective than the massive involvement which may subsequently be required if issues are allowed to fester until their implications become apparent to all and there is a consensus on action.

But while there are many lessons for the Executive—most if not all of which are recognized and being dealt with by the President—the Congress has responsibilities as well. Leaks, for example, which are at the heart of this issue, are a shared problem. It is even possible that the situation may be worse in the Executive Branch than on Capitol Hill. However, justified or not, a President understandably is reluctant to share fully the most secret of matters with people some of whom may have

sharp policy differences with him and over whom he can exercise no authority or discipline whatever, Congress must accept some responsibility for the satisfactory resolution of these matters. It should accept that it is an integral part of the process, not simply a judge and jury of the mistakes it perceives being made by the Executive Branch.

The Tower Board recommended against legislation to deal with the problems revealed in the Iran/Contra affair. I support that recommendation. In my opinion, H.R. 3822 is a step toward paralysis, not effective Government.

Mr. McHUGH. Thank you very much, General.

We'll now hear from Dr. Carver.

STATEMENT OF DR. GEORGE A. CARVER, JR., OLIN SENIOR FELLOW AT THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES

Dr. CARVER. Mr. Chairman, esteemed members, I'm honored by your invitation to be here today to comment not only on the specific bill you are considering, but also on the larger issues addressed in that legislation.

These larger issues impinge directly on our Nation's security and even its chances of survival in this strife-ridden and now thermonuclear world.

As we all know, it is not easy for an open democracy, such as ours, to have the kind of effective intelligence structure our nation needs, one that is capable of protecting our democratic freedoms, but does not curtail, or even worse, subvert them.

These are issues to which I devoted the first 26 years of my professional life, and in which, as a citizen, I have an abiding interest.

It is a pleasure as well as a privilege to discuss them with this Subcommittee I feel confident that, as fellow citizens, we have common goals and objectives, for the issues here involved transcend personal, political, parochial or partisan considerations.

Our differences and your differences among yourselves will be over the optimum means of achieving these common goals, and the best way of resolving the complex, thorny questions these issues, in a democracy, inevitably pose.

The matters addressed in H.R. 3822 are of enormous importance, as well as complexity. The time you have available in this hearing for considering them, particularly the time you can allocate to any single witness, is necessarily constrained.

I have had separately submitted in writing for the record and for your consideration at your convenience my detailed comments on H.R. 3822 and the issues with which it deals.

I would ask, Mr. Chairman, that you enter that full submission with the record.

Mr. McHUGH. Without objection, certainly.

Mr. LIVINGSTON. Excuse me, Dr. Carver, if I can interrupt. I just want to make sure that General Scowcroft and Dr. Treverton's statements likewise get in the record, as well as Professor Rostow's.

Mr. McHUGH. That's been taken care of.

Go ahead, Doctor.

Dr. CARVER. In this orally presented summary, I will draw on that full submission to highlight some points to which I particularly want to direct your attention.

But, Mr. Chairman, here I must ask your guidance. I timed my summary this morning and it takes me 21 minutes. I can cut it short if you would prefer.

Mr. McHUGH. I would prefer that you do so. [Laughter.]

Dr. CARVER. I will skip a great deal, but I would like to turn to one of the conditions that are imposed on the finding. That is the fourth condition in section 503(a)(4) because that involves some things that I think we ought to be willing to take about 8 minutes to discuss.

Mr. McHUGH. Go right ahead.

Dr. CARVER. This fourth condition is that "each finding shall specify whether it is contemplated that any third party which is not an element of or a contractor or contract agent of, the U.S. Government, or is not otherwise the subject to the U.S. Government policies and regulations, will be used to fund or otherwise participate in any significant way in the special activity concerned, or be used to undertake the special activity concerned on behalf of the United States."

As do the other conditions, this one has a clear, eminently understandable Iran-Contra inspiration; but, no matter how reasonable and defensible this condition's intent may be, its language contains the potential for more problems, of greater severity, than those engendered by all of the other conditions combined.

As it stands, this fourth condition's language can be construed as being either trivial or as being extraordinarily dangerous, on security grounds.

Virtually no foreign intelligence operation, certainly no covert action operation or "special activity," can be successfully conducted without the cooperation and utilization of foreigners—including individuals, entities or organizations, such as intelligence services, governments, or some combination of any or all of these.

No sensible U.S. intelligence officer or service could plan a "special activity" without, at a minimum, "contemplating" that one or more foreign individuals, organizations, services, or governments might be used "to fund or otherwise participate", in some significant way, "in the special activity concerned on behalf of the United States".

In this whole matter, indeed, H.R. 3822 attempts to draw a distinction which may sound very simple, neat and tidy in a proposed statute, but which in the real world is very difficult to draw, and often does not exist.

In the actual conduct of intelligence activities abroad, the cooperating institutional and individual assets—agents if you will—used in special activities, and those used in normal, albeit sensitive, intelligence collection activities are often the same—the same institutions, the same organizations, and the same people.

Given the real world's exigencies and complexities, consequently there is often no way you can meaningfully distinguish—for purposes of reporting to Congress—between foreign institutions and individuals who assist in the conduct of "special activities" and those who assist in the conduct of intelligence activities in general.

This is significant, Mr. Chairman, because there was one point that I made in my opening remarks that I would like to direct your attention to, and skipped in my summary abridgement.

Covert action is an important intelligence community and, specifically, CIA responsibility, but it is an ancillary one. Extreme care should be taken to ensure that any "fixing" you do of covert action does not unintentionally hamper the agency's and the intelligence community's ability to perform their primary mission, for example, by putting sensitive intelligence sources at risk.

This is particularly important when arms limitation treaties, especially ones involving strategic arms, are being considered and negotiated, for our compliance monitoring capabilities in this critical sphere hinge on the U.S. intelligence community's overall effectiveness.

Now, back to proposed subsection 503(a)(4). If this fourth condition is construed as requiring only a general statement, than it is virtually meaningless; for if so construed, it can be satisfied by a standard, boilerplate sentence mechanically incorporated in every finding and saying something along the lines of "The special activity herein described of course contemplates the use and participation of one or more non-U.S. individuals, persons, organizations, or entities."

If subsection (4) is supposed to mean more than that, however, particularly if it is intended to require giving some specific indication of what types of non-U.S. Government "third parties" will be participating, and in what ways, in the special activity covered by a particular finding, then that condition lays down a security minefield impossible to traverse unscathed.

The language of the final sentence of H.R. 3822's proposed subsection 503(e) could easily be read as supporting a broad construction of this fourth condition of subsection 503(a). That sentence says, in language evoking Gertrude Stein:

> A request by any agency or department of the United States to a foreign country or private citizen to conduct a special activity on behalf of the United States shall be deemed to be a special activity.

If H.R. 3822 is enacted, as currently drafted, this sentence could easily be construed as meaning that the Executive Branch is required to write and submit a separate finding on each and every request to a foreign government and each and every recruitment pitch to a foreign national for assistance in a U.S. covert action operation.

Should proposed section 503(a)(4) ever be given this type of broad construction, now or in the future, satisfying its requirements would inevitably involve security risks so grave that no prudent U.S. President, administration, or Director of Central Intelligence—not to mention foreign individual, entity, or government—would want to run them.

In this context, harking back to an example that has been discussed before, please remember that less than one year ago, on April 8, 1987—in testifying before the full House oversight committee—Representative Mineta, a staunch proponent of strict congressional intelligence oversight, confirmed and acknowledged, as we have discussed, that the Canadian Government did not want its 1980 role in hiding, protecting, and safely exfiltrating American hostages from Iran to be reported to Congress by President Carter, at least while the operation was in train.

I know from my own experience as Chairman of the U.S. Intelligence Coordinating Committee in Germany, from 1976 to 1979, how skittish my West German, Israeli, and other friendly foreign service counterparts were about sharing sensitive information, especially operational information, on common concerns and targets—such as terrorism—because of their worries about how such information, after I reported it, would be handled back in Washington, particularly if it was passed to Congress.

The strong, almost universal perception of my foreign counterparts was that in the United States, we were manifestly incapable of protecting even our own secrets; hence, we could hardly be relied on to protect theirs.

We may consider such foreign perceptions unwarranted and inaccurate, but their widespread existence and their force are facts that American intelligence professionals cannot ignore or brush aside when planning operations—of any nature—in which cooperative foreign participation is essential.

Such foreign perceptions and concerns would be inflamed and exponentially increased if H.R. 3822's proposed subsection 503(a)(4) should ever be enacted into law and then broadly construed.

Should it ever come to be widely believed abroad that U.S. law required—or even if there was a serious risk that U.S. law might require—the identification in a written document, of which at least two copies would be sent to Congress, of all non-U.S. individuals and entities, including governments, cooperatively participating in any U.S. special activity, our pool of essential foreign assistance and support would swiftly evaporate. The extent and speed of that pool's evaporation, furthermore, would be increased by the fact that few foreigners would note and even fewer would pay attention to any American legal distinctions between special activities and other intelligence activities.

In this sphere, foreign perceptions and beliefs, not our assessment of their accuracy and validity, would be controlling.

From the perspective of 26 years experience in the profession of intelligence, I can state flatly that should H.R. 3822's proposed subsection 503(a)(4), or anything like it, ever be enacted into law, few foreign individuals or entities, governments again included, whose cooperation and assistance we would need to conduct "special activities"—or, for that matter, any intelligence activities of any consequence—would be willing to put their fortunes, reputations, or, in the case of individuals, their freedom and even their lives hostage to the discretion and secret-keeping capability of the Congress of the United States.

Quite apart from the nature and format of findings is the point that Secretary Carlucci took up, where there is a distinct contradiction between the flexibility that is given to the President with respect to authorization and is then taken away with respect to initiation. The flexibility given in 503(c)(2), "in circumstances where time is of the essence," is taken away by 503(c)(3), because frequently, as Secretary Carlucci said, a period of not just 48 hours but many months can lapse between the initiation and authorization of a special activity.

This again gets right back to the Canadian situation, where the Canadians for their own security protection made their essential

cooperation contingent on Congress' not being told what was in train or what the Canadians were doing until after the operation was concluded. In that instance the period between authorization and implementation was measured in weeks and not in hours. That was a special activity under the terms of the legislation we are considering because it involved the CIA operation for purposes other than the collection of intelligence.

But that is the net the drafters would have caught the Canadians and the U.S. Government in.

Had H.R. 3822, as presently phrased, been on the statute books in 1980, President Carter, not President Reagan, would have been impaled on the horns of a dilemma. He would have had to either ignore the law or tell the Canadians that he could not lawfully meet the conditions that they imposed on their essential assistance and that as a sovereign government they had the right to insist on, even though declining that assistance clearly put American lives at risk.

As you yourself indicated, Mr. Chairman, I can not believe that any member of this subcommittee or of the full House oversight committee or, for that matter, of Congress would want to put any American President, of whatever party, in such a situation. This is far from the least of the reasons why I respectfully urge that the subcommittee reconsider the language of H.R. 3822, and all of that language's implications, before recommending that this proposed bill as it now stands be enacted into law.

In its conduct of Iran-Contra, the Reagan administration clearly abused the discretionary latitude afforded any administration of any party, in conducting covert operations, by the flexibility and ambiguity of some of the language in the current statutes dealing with these matters.

H.R. 3822 would remove the ambiguity and virtually eradicate the flexibility of the relevant statutes. Doing that, however, could easily prove procrustean and generate serious problems in future contingencies or situations not now foreseen.

By reducing the permissible exceptions to a bare minimum, not always in consistent ways, H.R. 3822 would also push Congress far deeper into the prior notification thicket. In the light of Iran-Contra, this might seem desirable, but it is a punitive move that would probably be rued by future Congresses, as well as future Presidents—regardless of party.

As President Carter's, not President Reagan's, Deputy Assistant for National Security Affairs, David Aaron, put the matter quite neatly when testifying before the House Intelligence Oversight Committee in September 1983 in connection with the "special activities" legislation that would also have altered the National Security Act of 1947's current section 501:

> It was the purpose of [current] Sec. 501 to ensure that the Congress had sufficient access to information, in a timely way, to be able to exercise [its proper] functions in the field of intelligence activities. It was not [one of] the goals of Sec. 501 to make the Congress a codecisionmaker on covert action operations.

Drafted in the immediate aftermath of the Iran-Contra Report's preparation, H.R. 3822's language, at least to this reader's eyes, reflects an eminently understandable desire to rap Ronald Reagan's knuckles and tie his hands. But Ronald Reagan leaves the Oval

Office permanently in January 1989—less than a year hence—and none of his successors, of whatever party, is likely to forget or ignore the lessons of Iran-Contra.

Furthermore, if H.R. 3822 or any similar bill gets enacted, there is no way of telling what future President's hands that law may tie, under what particular circumstances, with what adverse impact on U.S. interests.

Legislation affecting congressional oversight of intelligence activities, particularly "special activities," is invariably complicated, for it inevitably involves the judicious weighing and balancing of a myriad of important, complex, and often conflicting considerations and equities. Such legislation should not be drafted or enacted in haste or under the influence of strong emotions, including pique. Nor is it wise to draft, debate, and enact such legislation amid the distractions and pressures of a Presidential election year, including an election year's temptations to adopt or endorse positions, on controversial issues, that are poll or popularity-enhancing in the short run, but not necessarily in the long-term best interests of the United States.

Such considerations apply with particular force to issues involving reforms; for reforms drafted and adopted under such circumstances and conditions almost invariably prove to have unintended, undesired consequences.

During my own career in Government, I was privileged to develop a close association with the Honorable Birch Bayh, the Senate Select Committee on Intelligence's second chairman. We differed on many issues, as we still do, but became and remain good friends.

He visited me in Germany, as a guest in my home—where he was a great favorite with my children—while I had overall responsibility for the U.S. intelligence community there and he was chairman of the Senate Oversight Committee.

On one evening during that visit, I assembled a representative, cross-sectional group of my abler young officers who were deeply and personally involved in our efforts to combat terrorism and other threats to the security of the United States. We sat up all night, literally, having a frank, suitably lubricated, no-holds-barred, give-and-take discussion.

During that discussion, my frontline colleagues endeavored to explain, by citing a succession of concrete examples, how difficult it was to apply on the banks of the Rhine—and of other rivers around the world—the sweeping, "thou shalt not, ever, under any circumstances" reform restrictions of the mid-1970's, which sounded so splendid when proclaimed, passed, issued, or endorsed along the banks of the Potomac.

As my young colleagues kept recounting their frustrating first-hand experiences with the results or consequences of these "reforms," the good Senator kept repeating, like an antiphonal response in a High Church Anglican service, "But this was never the intent of Congress!"

My equally antiphonal response was that in the field, we did not have the luxury of trying to divine congressional intent. Instead, we had to be guided and were circumscribed by what the government's lawyers, incluidng the CIA's, construed to be the meaning of the language in statutes Congress enacted, such as the Foreign

Intelligence Surveillance Act, or in executive orders and internal CIA regulations strongly influenced by congressional attitudes.

No sensible person would contend—and I certainly do not—that our current laws dealing with covert action and its oversight cannot be improved. This subcommittee and its staff are to be commended on the thought, care, and effort that have clearly gone into the consideration and discussions of H.R. 3822.

For reasons I have tried to explain, however, I do not believe that the end results this distinguished subcommittee or its full parent committee wants to achieve, in the discharge of Congress' constitutionally mandated responsibilities, are most likely to be attained by moving forward with H.R. 3822 or any similar legislation, unavoidably drafted in some haste in the wake of the issuance of the Iran-Contra Report and under the influence of emotions which that unhappy affair inevitably engendered on Capitol Hill, particularly when any such legislation would have to be debated and enacted amidst the mounting, divisive and partisan pressures of a Presidential election year.

In my opinion, which I offer with diffident respect, our nation's interests would be far better served if, instead, a small group of knowledgeable senior administration officials, past or present, could be convened to meet quietly with a corresponding, and correspondingly small, bipartisan group of appropriate congressional leaders from both houses; and then, over the course of several months' frank, private discussion, this joint body, working together, could develop a set of agreed principles regarding covert action, work out a viable system for resolving executive/legislative branch disputes, and supervise the measured, careful drafting of any new legislation thought to be warranted—for formal introduction, debate, consideration, and enactment after the 1988 electoral season, with its attendant demands and pressures, has passed.

This may be a utopian dream, but as a concerned citizen who has devoted over a quarter century to serving our Nation as an intelligence professional, I would relish seeing this dream become a reality.

Thank you very much for your time and attention.

[The complete statement follows:]

SUBMISSION OF

GEORGE A. CARVER, JR.

JOHN M. OLIN SENIOR FELLOW

CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES

ON

H.R. 3822

TO THE

SUBCOMMITTEE ON LEGISLATION
OF THE
PERMANENT SELECT COMMITTEE
ON INTELLIGENCE

U.S. HOUSE OF REPRESENTATIVES

March 10, 1988

Declassified and Approved For Release 2012/08/06 :
CIA-RDP89G01321R001002630001-0

CONTENTS

Mr. Chairman and Distinguished Members:

I am honored by your invitation to appear today to comment not only on the specific bill you are considering, H.R. 3822, but also on the larger issues addressed in that proposed legislation and in the parallel, very similar Senate bill, S. 1721.

These larger issues impinge directly on our nation's security and even its chances of survival in this strife-ridden and now thermonuclear world. As we all know, it is not easy for an open democracy, such as ours, to have the kind of effective intelligence structure our nation needs -- one that is capable of protecting our democratic freedoms but does not curtail or, even worse, subvert them. These are issues to which I devoted the first twenty-six years of my professional life and in which, as a citizen, I have an abiding interest. It is a pleasure, as well as a privilege, to discuss them with this sub-committee. I feel confident that as fellow citizens we have common goals and objectives; for the issues here involved transcend personal, parochial or partisan considerations. Our differences, and your differences among yourselves, will be over the optimum means of achieving these common goals, and the best way of resolving the complex, thorny questions these issues, in a democracy, inevitably pose.

To supplement my orally presented summary comments, I am submitting this fuller statement for the record. To this statement, I am also appending an essay entitled "A Needed Capability Jeapordized: Covert Action in the Wake of the Iran-Contra Hearings", which I wrote soon after the hearings ended and was published in The San Diego Union (on 16 August 1987), in The Washington Times (on 17 August 1987), and in various other newspapers around the country.

This statement begins with a conceptual analysis of covert action, its complexities, and the problems its employment poses for an open, democratic society such as ours. I then touch on the Constitution's division of authority and responsibility in the fields of foreign affairs and, particularly, intelligence, and the resultant need for our government's executive and legislative branches to recognize each other's Constitutional roles and to work harmoniously together, if our nation's interests are to be protected and well served.

Within that context, an analysis is made of H.R. 3822's provisions and, especially, the language in which they are phrased, to assess the impact of these provisions, and this language, on a number of topics germane to the conduct of covert action and of intelligence operations in general. In sequence, this statement examines certain security concerns, reporting requirements and flexibility, the matter of "findings", and some

of that complex issue's various ramifications. A look is then taken at questions involved in the timing of congressional notification and, in particular, "prior notification". My submission concludes by noting some of the risks inherent in emotion-impelled "reforms", especially ones drafted in haste, and then respectfully offering, for this sub-committee's consideration, a few of my own thoughts on what ought to be done, in light of our total national interests, with regard to the important matters you are addressing.

COVERT ACTION: ITS IMPORTANCE, COMPLEXITIES AND OVERSIGHT RAMIFICATIONS

The primary focus of the specific legislation this sub-committee is considering, H.R. 3822, and of current congressional concerns with respect to intelligence is, quite understandably, covert action. Here, however, I most respectfully ask you to be careful, and not allow justified concerns to skew an essential sense of proportion.

The primary function of the U.S. intelligence community is to collect information, distill it into intelligence by analysis, and then disseminate the fruits of this collection and analysis to those in our government's executive and legislative branches whom that intelligence will aid in the discharge of their Constitutionally-mandated responsibilities. The CIA is charged with all of these roles, plus that of being the U.S. intelligence

community's central coordinating linch-pin -- a role highlighted by the fact that there is no Director of the CIA (alone). Its administrative head, the Director of Central Intelligence, is also -- concurrently -- the President's senior intelligence advisor and head of the U.S. intelligence community.

Covert action is an important CIA responsibility but an ancillary one. Extreme care should be taken to ensure that any "fixing" of covert action does not unintentionally hamper the Agency's and the intelligence community's ability to perform their primary mission -- for example, by putting sensitive intelligence sources and methods at risk. This is particularly important when arms limitation treaties, especially ones involving strategic arms, are being considered and negotiated; for our compliance-monitoring capabilities, in this critical sphere, hinge on the U.S. intelligence community's overall effectiveness.

"Covert action" is a term with such a broad scope that it is impossible to define with any degree of precision. It encompasses everything from encouraging a foreign journalist to write a story or editorial which that journalist might well have written anyway to supporting, even guiding, fairly large-scale military activities in foreign lands. Covert action's purpose is to influence the behavior or policies of key foreign individuals, groups and nations, and the course of events in key foreign areas, in ways that further the interests of the nation mounting

the covert action in question, but also in ways that mask that nation's hand and enables its involvement to be denied or, at least, officially disavowed. Perhaps the best way to understand covert action is to think of it as a form of international lobbying that is, ideally, discreet and unadvertised.

The usual euphemism for covert action, employed in the legislation you are considering, is "special activities" -- defined in Executive Order 12333 (and elsewhere) as:

> "activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities...."

As the report of the Iran-Contra Congressional Investigating Committees notes, on page 375,

> "This definition excludes diplomatic activities, the collection and production of intelligence, or related support functions."

Intelligence activities, generally, are not easy for an open, democratic society to conduct effectively, especially in peacetime. For a plethora of reasons, covert action is particularly difficult, for a society such as ours, and raises particularly difficult questions -- ones that have no universally satisfactory resolutions, let alone any simple answers.

To begin with, there is a consideration that is not polite to acknowledge or discuss, but which has to be faced. In most cases, conducting covert action involves contravening, infringing upon or directly violating the laws of some other nation or

nations, with which we are not in a state of war and with which, indeed, we may have treaty relations whose spirit, if not letter, such covert actions may also contravene. (The same is also true of espionage, but that is another matter.) This does not mean we should pass a self-denying ordinance; for covert action is a fact of international life. It is something that virtually every nation in the world essays, frequently targeted at us; and some of our closest allies, such as Israel, are among its most indefatigible practitioners. Such considerations do mean, however, that covert action should be used very circumspectly, far more circumspectly than it sometimes has been -- as Iran-Contra demonstrates all too clearly. When astutely employed, covert action can be a very useful, effective adjunct to policy; but it can never be a substitute for policy -- or for thought.

In this context, there is a salient feature of our political system whose consequences are frequently ignored or brushed aside. Our Constitution combines in one individual, our President, two distinct offices and functions that most other nations divide: the government's chief executive and administrative officer, and the nation's Chief of State. The former is a partisan political figure chosen (in America) by election; the latter, a symbolic focus of national unity supposedly, in that capacity, above the fray of political partisanship. As chief executive officer, a President should certainly be accountable for his and his administration's

actions. Nonetheless, it is by no means necessarily in our national interest for our Chief of State to sign "findings" or any other documents directing agencies or officers of the U.S. Government to infringe upon or violate the laws of other nations with which we are not in a state of declared war. NSC staff members, national security advisors, cabinet officers and Directors of Central Intelligence are all expendable; but in our government, Presidents are not. As Chief of State, an American President should be able to distance himself or herself from, even disavow, a covert action that he or she approved, even ordered, as chief executive. This may sound complicated, but so is the real world and, hence, effective diplomacy that runs with the grain of its complex reality.

Such messy complexities, and the troublesome issues they raise, lead some to argue that the United States should eschew or abandon covert action altogether. In a perfect world, this might be desirable; but in the world in which we have no choice but to live, it would be folly. One point on which members of the Congressional Committees investigating the Iran-Contra Affair were agreed is that, to use their Report's words (on page 383), "Covert operations are a necessary component of our Nation's foreign policy". The real question before Congress, and the American people, is not whether our nation should conduct covert action but, instead, how such operations should be handled, controlled and reviewed to ensure that they are soundly

conceived, efficiently executed and effective, but do not do injury to any of our democratic polity's fundamental interests or basic values.

Congress was quite understandably distressed by the kinds of covert operations mounted during what we now term "Iran-Contra", by these operations' execution and, particularly, by the way in which Congress was handled with respect to them. No matter how admirable or defensible the administration's motives and objectives may have been, the way in which these operations were developed and run violated every canon and precept of sound professionalism, not to mention common sense. Furthermore, all other considerations apart, the administration's manner of dealing with Congress during this episode was both inept and politically tone-deaf.

Congress has ample reason to be irritated at the administration, and concerned about the way it handled that specific covert action. In dealing with important issues, however, particularly ones as complex as these, all prudent humans -- including distinguished members of Congress, and of both of its intelligence oversight committees -- should avoid acting hastily, with punitive intent, under the stimulus of irritation.

In its 24th Chapter of their Report -- "Covert Action in a Democratic Society" -- the Congressional Committees investigating Iran-Contra posed the fundamental question:

> "Is it possible for an open society such as the United States to conduct such secret activities effectively? And if so, by what means can these operations be controlled so as to meet the requirements of accountability in a democratic society?"

In answering that question, the report noted the laws and procedures adopted after the investigations and debates of the mid-1970s, and then went on to observe (also on page 375) that

> "Experience has shown that these laws and procedures, if respected, are adequate to the task."

Amplifying this theme, the Iran-Contra Report's "Recommendations" chapter (28) opens with two paragraphs which read:

> It is the conclusion of these Committees that the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance. This is an important lesson to be learned from these investigations because it points to the fundamental soundness of our constitutional processes.
>
> Thus, the principal recommendations emerging from the investigation are not for new laws but for a renewal of the commitment to constitutional government and sound processes of decisionmaking.

That chapter does go on to recommend "some changes in law, particularly relating to oversight of covert operations", and some of those recommended changes are reflected in the bill this hearing was convened to address. Most respectfully, however, I hope that this Subcommittee's -- and the entire Congress' --

discussion and decision about the details of such suggested changes will be framed within the judicious context set by the two paragraphs just quoted.

The reference in the second quoted paragraph's concluding sentence to "the commitment to constitutional government and sound decisionmaking" raises a whole new set of important, complex issues.

FOREIGN AFFAIRS AND INTELLIGENCE: THE CONSTITUTION'S DIVISION OF RESPONSIBILITY AND AUTHORITY

Our Constitution does not explicitly mention intelligence, let alone covert action, nor does it use the terms "foreign policy" or "foreign affairs". By design, nonetheless, the Constitution divides authority and responsibility in this sphere as well as in others.

For example, the Constitution gives Congress the "Power...to regulate Commerce with foreign Nations" and "To declare War"; In addition to being named "Commander in Chief", however, the President is given "Power, by and with the Advice and Consent of the Senate, to make Treaties."

Most of our nation's Founding Fathers did not regard the Constitution's division of authority over foreign affairs quite so extensive, or ambiguous, as many would now argue. At the time

the Constitution was adopted, the general view was that Congressional authorities in the foreign policy sphere were exceptions to the stipulation in the first sentence of Section 1 of the Constitution's Article II: "The executive Power shall be vested in a President of the United States of America". One of the few things on which Jefferson, Hamilton and Madison were all in agreement was that these exceptions should be construed "strictly".

As Jefferson put the matter, in 1790:

> "The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly."

Hamilton expressed almost identical thoughts in his first Pacificus letter, published three years later:

> "It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution."

Indeed, Jefferson -- with Madison in general concurrence -- extended this line of reasoning to cover the executive's obligation, which he considered quite limited, to account for the expenditure of funds appropriated by Congress for the conduct of foreign affairs. Jefferson, as President, put his thoughts on this matter quite succinctly in an 1804 letter to his Treasury secretary, Albert Gallatin:

> "The Constitution has made the Executive the organ for managing our intercourse with foreign nations.... The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties....[I]t has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the president."

Legislative-executive branch debates over roles, and primacy, in the general field of foreign policy are as old as, or even ante-date, our republic. Parallel debates with specific respect to intelligence, however, are of considerably more recent vintage.

Though the word "intelligence" does not appear in the Constitution, how those who framed it viewed the intelligence function is quite forcefully and clearly expounded by John Jay -- who as a co-author of the Federalist Papers and then, under the new Constitution, our nation's first Chief Justice is certainly a reliable, authoritative source regarding "original intent".

In Federalist 64, discussing foreign affairs generally and treaty negotiations specifically, Jay wrote:

> "It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in

> that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest." (emphasis in original)

John Jay clearly regarded "the business of intelligence" as being primarily a presidential or executive branch function, not a legislative branch responsibility -- a view shared by all serving presidents from Washington onward.

With regard to what is now called covert action, Senator Cohen -- in a 25 September 1987 statement introducing S.1721 -- has contended that his bill and hence, by extension, H.R. 3822 as well: "would, for the first time, provide explicit statutory authority for the President to authorize covert actions, or 'special activities', in support of U.S. foreign policy objectives, provided they are authorized in accordance with the requirements set forth in the bill."

Oval Office incumbents and many others would argue strongly, however, that a President's authority to conduct covert action is not a gift from Congress and requires no Congressionally-enacted statute. Instead, they would contend, it derives directly from Article II of the Constitution itself, specifically, from the previously quoted first sentence of that article's Section 1 -- "The executive power shall be vested in a President of the United States of America." -- and from the first sentence of that

article's Section 2, which explicitly names the President "Commander in Chief". In appropriating funds for covert activities, furthermore, Congress has certainly acknowledged -- by its own actions -- the right of sucessive Presidents to initiate, or commission, the specific covert activities for which such funds have been appropriated.

While in office, our early presidents -- who had been directly and personally involved in the formulation and adoption of our Constitution -- certainly did not act as if they felt that what we would now term covert action required Congressional involvement or, even less, prior Congressional knowledge. Indeed, if Jefferson, the drafter of the Declaration of Independence, or Madison, the principal architect of our Constitution had shown, as President, the diffident deference to Congress that many now claim a President is constitutionally obligated to show, in conducting foreign affairs, our republic would not now have its present territorial extent and probably would not have survived its perilous initial decades.

In these areas -- where the Constitution delibertely divides authority -- our national interests are certainly not furthered by executive-legislative branch squabbles over turf, or attempted raids on each other's prerogatives. At both ends of Pennsylvania Avenue there needs to be a greater recognition than has been notable in recent months of the fact that, especially in the field of foreign affairs, our Constitution yokes the legislative

and executive branches in a single harness, and unless they can pull together, in tandem, the nation suffers.

In this context, I commend to all members of this sub-committee -- and to all citizens interested in these vitally important subjects -- an essay co-authored by the Chairman of the Senate Intelligence Committee, Senator David Boren, and his colleague Senator John Danforth. Their perceptive analysis was published in the 1 December 1987 edition of The Washington Post, under the headline title: "Why This Country Can't Lead". All of it is germane to the matters this sub-committee is addressing, but the following comments of these two distinguished senators are particularly relevant:

> Since we arrived in the Senate about a decade ago, partisanship within the institution has increased alarmingly. Some partisan one-upmanship may be expected in domestic matters, but it has spilled over into foreign affairs. In consequence, the stable and resolute foreign policy one should expect from the leader of the free world has been undermined by ongoing antagonism and turmoil between Congress and the executive branch of our government.
>
> On one hand, Congress is alarmed at the freebooting adventurism of a go-it-alone executive, as exemplified by the Iran-contra affair. On the other hand, the executive branch complains that Congress consists of 535 secretaries of state who cannot resist any opportunity to interfere with arms negotiations and to micromanage foreign relations. The result is that mutual suspicion and a state of flux have supplanted the predictability and sense of purpose which characterize a leadership position in world affairs.
>
> Unlike parliamentary systems, our Constitution divides foreign policy responsibility between two independent branches of government. The president is

> the commander in chief, but Congress gives its advice and consent to treaties and to the appointment of ambassadors. In recent times, Congress has confused this shared responsibility for foreign affairs with incessant and irresponsible tinkering.

Though Senator Boren would doubtless not consider a bill of which he is a co-sponsor, S.1721, or its House counterpart, H.R. 3822, to be an example of the Congressional tinkering he and Senator Danforth decry, I would respectfully suggest that a major defect in both bills, particularly H.R. 3822, is too little acknowledgment of the fact that the President and the Congress do indeed share responsibility for foreign affairs and, by extension, intelligence, and that particularly with respect to intelligence, as John Jay argues in Federalist 64, the Constitution confers some powers directly on the President, not on Congress.

Involved here is one of our Constitution's many delicate balances, a balance carefully and properly acknowledged in the National Security Act of 1947's current Section 501, which both S.1721 and H.R.3822 propose to strike and replace with new language.

As this Committee well knows, that 1947 Act contains what is still the basic charter of the CIA, the Director of Central Intelligence and, indeed, the U.S. intelligence community. Section 501 of that Act deals with Congressional oversight. It was added to the 1947 Act by Sec. 407(b)(1) of the Intelligence

Authorization Act for Fiscal Year 1981 (P.L. 96-450), known informally as the Intelligence Oversight Act of 1980. As it now stands, Sec. 501's sub-section (a) -- before spelling out what, and how, the DCI and all intelligence community component heads are required to report to the Congress -- begins with a preambular clause that reads:

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --

Then follows the list of reporting requirements (which, together with the full text of the current Sec. 501, are appended to this statement).

Both S. 1721 and H.R. 3822, as mentioned above, would strike the current Sec. 501, including sub-section 501(a), in its entirety, substituting new language for some of the text so stricken and repeating some of the former text in various places in several of the proposed new sections. The carefully crafted lead or "preambular" clause of current Sec. 501(a), quoted above, would disappear, though some of it is echoed in parts of S. 1721.

Speaking of intelligence activities, for example, S. 1721's proposed new Sec. 501(a) says "that nothing contained herein

shall be construed as a limitation on the power of the President to initiate such activities in a manner consistent with his powers conferred by the Constitution." H.R. 3822, however, makes no reference to any Presidential powers of any description, let alone any conferred by the Constitution -- either in H.R.3822's proposed new Sec. 501(a) or anywhere else. The bill this sub-committee is now considering, instead, speaks only of restrictions and requirements levied on the President, the DCI and the intelligence community, and of the obligations and responsibilities of all three with respect to reporting to Congress on current and anticipated intelligence activities.

This approach inevitably gets into very murky Constitutional waters, for the Constitution can not be ammended or abrogated by a simple statute. The fact that one or more Members of Congress, if any of them were President, might not exercise Constitutionally-conferred discretionary latitude in the same way as it was exercised by some particular President -- including Ronald Reagan -- does not of itself mean that the Presidency, as an institution, does not not have the discretionary powers in question.

The "preambular" clause of the National Security Act of 1947's current Sec. 501(a) is considerably more forthright than S.1721 about what the Chairman of the Senate Select Committee on Intelligence has himself termed the executive and legislative branches' "shared responsibility"; but S.1721's passing mention

of the powers that the Constitution confers on the President, and of the fact that Congress should not attempt to limit or curtail them, is better than no mention at all of this Constitutionally weighty consideration -- about which, H.R. 3822 is deafeningly silent.

Before this sub-committee or the full oversight committee recommends that the House, and the Congress, jettison the carefully crafted preambular language of the National Security Act of 1947's current Sec. 501(a), I respectfully urge that renewed, careful consideration be given to the cogent arguments presented to this very Committee in September 1983, when it was also considering legislation on "special activities", by two highly knowledgeable witnesses -- neither of whom is an opponent of strict congressional oversight of all intelligence activities or, for that matter, a Reagan administration supporter.

In those September 1983 hearings, Mr. David Aaron -- a member of the Church Committee's staff and then, from 1977-81, President Carter's Deputy Assistant for National Security Affairs -- remarked in his statement:

> "I start from the premise that the delicate balance struck in Sec. 501 most appropriately reflects the Constitutional ambiguity and tension in the relationship between the Congress and the Executive Branch, resulting from their differing responsibilities.... It was the purpose of Sec. 501 to ensure that the Congress had sufficient access to information, in a timely way, to be able to exercise these [oversight and foreign policy] functions in the field of intelligence activities. It was not the

> intended goals of Sec. 501 to make the Congress a co-decision-maker on covert action operations."

Similar ground was covered, in those same hearings, by Mr. William Miller, who had previously served as the Staff Director of the Church Committee and then of the Senate's intelligence oversight committee. In his statement, Mr. Miller observed:

> "What is now the law of the land in Sec. 501 is the result of the several years experience of both intelligence oversight committees, and that of other House and the Senate Committees that have had responsibilities for intelligence activities since the Second World War. The existing law is the result of discussions, negotiations and give and take with two administrations, including the direct involvement of two Presidents, two Vice Presidents, four Directors of Central Intelligence, three Attorneys-General and a host of other Cabinet officials, Department heads, Senators, Congressmen, Chiefs of Staff, constitutional experts and lawyers and other interested citizens. It is not suprising that many urge caution about amending existing law, given the delicate issues involved and the broad spectrum of perspectives that Sec. 501 had to encompass."

SECURITY CONCERNS

Striking current Sec. 501 and, hence, 501(a)'s opening clause would not only strike that clause's carefully drafted reference to the need to keep Congressional oversight authorities and executive branch reporting requirements consistent with the constitutional and "balance" issues here involved. It would also strike the general, tone-setting reference to the need to keep them consistent "with due regard for the protection from unauthorized disclosure of classified information and information

relating to intelligence sources and methods".

Similar "due regard" language does twice appear somewhat later in H.R. 3822, in proposed Sections 502(a) and 503(b), but with a very significant modification. There is also a statement in proposed 501(d) that

> "The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this title."

Not having these security concerns reflected at the outset, however, attenuates their importance. Furthermore, neither the current Sec. 501 nor H.R. 3822, nor S.1721, makes any mention -- in the oversight context -- of the fact that another passage in the National Security Act of 1947, Sec. 102(d)(3), imposes a statutory obligation on the Director of Central Intelligence, with respect to security, by stipulating that the DCI "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

In addition, H.R. 3822's treatment of these critically important matters is inconsistent, in a way perhaps overlooked by H.R. 3822's drafters but which is of enormous potential significance.

The just-quoted final clause of the National Security Act's Sec. 102(d)(3) provides:

> "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

This language is repeated, and slightly broadened, in the "due regard" text of current Sec. 501(a)'s preambular clause -- which H.R. 3822 would strike:

> "To the extent consistent ... with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods ...". (emphasis added)

H.R. 3822's proposed Sec. 501(d), quoted above, echoes this language and broadens it a bit further by calling for procedures:

> "to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this title."

On this singularly important topic, however, the proposed (and identical) "due regard" passages of H.R. 3822's Sec.502(a) and 503(a) reverse field sharply, in a confusingly inconsistent way.

H.R. 3822's proposed Sec. 502 deals with "Reporting Intelligence Activities other than Special Activities"; proposed Sec. 503 deals with "Presidential Approval and Reporting of Special Activities". With respect to the activities covered in each section, both proposed 502(a) and proposed 503(b), in

identical language, require the DCI et. al. "to keep the intelligence committees fully and currently informed",

> "To the extent consistent with due regard for the protection against unauthorized disclosure of classified information relating to sensitive intelligence sources and methods..." (emphasis added)

Involved here are two semantic shifts, one is minor; the other, decidedly not.

In the minor shift, all other variations on the "due regard" and "protection" theme speak of protecting intelligence sources and methods, or information relating to them, or classified information from unauthorized disclosure. Proposed Sec. 502(a) and 503(b), instead, speak of protection against unauthorized disclosure. This inconsistency is slightly confusing but of no great consequence.

The other, important shift is a very different matter. In Sec. 102(d)(3), which H.R. 3822 would not alter, what is to be protected from unauthorized disclosure is "intelligence sources and methods". In current Sec. 501(a), it is "classified information and information relating to intelligence sources and methods" (emphasis added). In H.R. 3822's proposed Sec. 501(d), it is "all classified information and all information relating to intelligence sources and methods" (emphasis added). H.R. 3822's proposed Sec. 502(a) and 503(b), however, speak only of

> "due regard for the protection against unauthorized disclosure of classified information relating to sensitive

intelligence sources and methods" (emphasis added).

"Sensitive" is an adjective whose definition, or applicability in any concrete situation, is both imprecise and subjective. H.R. 3822 makes "sensitive" a hallmark characteristic restricting what needs to be protected, but nowhere does H.R. 3822 give this key, limiting adjective a definition governing its use in that particular context. Nor does H.R. 3822 specify who is to decide in any particular case, involving particular intelligence sources and methods, whether those sources and methods, in that case, are "sensitive". Is this determination to be made by the President, by the DCI, by the Congress as a whole, by either or both intelligence oversight committees -- or by whom? These may seem to be pedantic quibbles; but such inconsistencies and ambiguities could easily become enormously important in a complex, real-life situation -- particularly one involving decisions at both ends of Pennsylvania Avenue on what needs to be told to, or can legitimately be divulged by, the Congress, and when.

These potential pitfalls are deepened if proposed Sec. 502(a) and 503(b) are read in conjunction with proposed Sec. 501(e):

"Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods".

Taken in tandem, these three proposed sections of H.R. 3822 set the stage for and, indeed, make almost inevitable future legislative-executive branch cat fights which ill-serve our national interests. In tandem, these three proposed sections give Congressional oversight committees a virtually unrestricted fishing license -- particularly if the Committees deem themselves the arbiters of what information is, or is not, "sensitive" -- that future administrations, of whatever party, are bound to balk at, for very good reasons, if these administrations or their DCIs define "sensitive" in a different fashion.

Though the executive branch is not, and never has been, any paragon of perfection with respect to discretion, it is worth noting that concerns about Congressional security are not only as old as our republic but, in fact, antedate our Constitution. Speaking of France's willingness to provide essential covert assistance to the revolutionary cause, Benjamin Franklin and Robert Morris -- in their capacity as Members of the Committee of Secret Correspondence of the Continental Congress, America's first intelligence organization -- noted, on 1 October 1776:

> "We agree in opinion that it is our indespensable duty to keep [this important intelligence] a secret, even from Congress ... We find, by fatal experience, the Congress consists of too many members to keep secrets."

As the Iran-Contra Affairs Minority Report mentions, on page 469, when Joel Poinsett (for whom the flower is named) was

conducting covert action missions in South America for then-President James Madison -- our Constitution's principal architect -- Poinsett was under instructions to communicate in code, and all his important communications were witheld from Congress.

Much more recent events unfortunately demonstrate a continuing justification for the kind of concerns that troubled Franklin and Madison. In March 1987, the former Chairman of the Senate Select Committee on Intelligence -- who had relinquished his chairmanship only two months earlier -- spoke to a group of potential supporters convened, in Florida, by the America Israel Public Affairs Committee. In the wake and in the context of the Pollard affair, the former Chairman alleged to that audience that the Pollard case had been preceded, in 1982, by a similar U.S. intelligence operation targeted against Israel -- an allegation that both the U.S. and the Israeli governments immediately and emphatically denied. If there was any such operation, the former Chairman committed a serious security breach. If no such operation existed, his indiscretion was still grossly irresponsible particularly since many -- in Israel, America, and elsewhere -- would presume that the former Chairman's comments, on such subjects, must be authoritative.

In the intelligence field -- to American professionals and, even more, to foreign individuals and services co-operating with U.S. intelligence -- these public remarks of the former Chairman

of the Senate's intelligence oversight committee sent a shock wave around the world. They doubtless caused acute private distress to many of the former Chairman's Congressional colleagues, and to many Hill staffers; but the former Chairman is not likely to be called to account for his actions by anyone save, perhaps, the voters of Minnesota -- something else the intelligence world has not failed to notice.

REPORTING REQUIREMENTS AND FLEXIBILITY

H.R. 3822 would repeal Sec. 662 of the Foreign Assistance Act of 1961 -- the so-called "Hughes-Ryan Amendment" -- and strike the National Security Act of 1947's current Sec. 501. H.R. 3822 would replace the latter with a new 501 ("General Provisions"), a new 502 ("Reporting Intelligence Activities Other than Special Activities"), and a new 503 ("Presidential Approval and Reporting of Special Activities"). The 1947 Act's current Sec. 502 would be re-designated Sec. 504, and amended to include the essence of "Hughes-Ryan" -- whose original (1974) language on reporting covert action operations "in a timely fashion" was shifted in 1980 to current Sec. 501(b) and would now be eliminated. Current Sec. 503 would be slightly amended and re-designated Sec. 505. The companion Senate bill, S.1721 would effect the same section shifts in the National Security Act of 1947 with, in certain places, a few differences in proposed alternate language. Some of these differences are significant, but I will not take the time to address them here.

For reasons previously discussed, I believe the consequences of striking the current Sec. 501(a)'s lead or "preambular" clause altogether, and not replacing it, would be unfortunate. Also, H.R. 3822's alternate language -- in its proposed new Sections 501, 502 and 503 -- makes changes in current Sec. 501's tone and content that I respectfully urge this sub-committee to consider carefully before endorsing them for enactment into law.

Current Sec. 501 places on "the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities" the responsibility for keeping the intelligence oversight committees in both Houses of Congress "fully and currently informed" of all U.S. intelligence activities "including any significant anticipated intelligence activity" -- among other things, a euphemism for "special activity" or covert action. As spelled out in current Sec. 501(a)'s sub-paragraphs (2) and (3), this includes the responsibility for furnishing information requested by either intelligence committee and for reporting "in a timely fashion", to these committees, any "illegal intelligence activity or significant intelligence failure" -- plus "any corrective action" taken.

Prompted, I suspect, by quite understandable, legitimate Iran-Contra-fueled irritation at President Reagan, H.R. 3822's

proposed new language would divide this reporting responsibility and fix part of it on the President, by requiring him -- in new Sec. 501 -- to "ensure" that this reporting is done. In H.R. 3822's text, however, this change is effected in language that in places is redundant, and hence confusing. New Sec. 501(a) assigns "ensuring" responsibility to the President; but new Sec. 502(a) and new Sec. 503(b) -- the former with respect to "intelligence activities other than special activities", the latter with specific reference to "special activities" -- both pick up and repeat, with only minor changes, the language of old Sec. 501(a), which assigns the reporting responsibility to the DCI and other intelligence community component heads.

Since the actual reporting requirement and responsibility is clearly fixed in law, as it has been since 1980, there seems little reason to burden the President, formally, with "ensuring" that his intelligence community subordinates discharge their statutory responsibilities, in this regard. This is doubly so if one acknowledges any force or merit in the argument that a President's -- i.e. Chief of State's -- public connection with covert action should be minimized, not enhanced. In any event, the redundancy of H.R. 3822's language on this point produces a measure of inelegant confusion that strongly suggests hasty drafting. For obvious reasons, intelligence oversight legislation should not be prompted by pique, or punitive intent. Nor should it be drafted in haste, or with anything but

consummate, considered care and dispassionate craftmanship.

Present Sec. 501's language has a measure of flexibility and creative ambiguity that may offend the tidy-minded, legalistic purist, but is enormously useful in any statute dealing with a subject as complex and important as intelligence, especially covert action, conducted by an open, democratic society. Unquestionably, the administration abused this flexibility throughout the Iran-Contra imbroglio. In current Sec. 501, for example, the denotation of "timely" may be a bit imprecise, by design, but it is clearly not intended to denote an interval measured in months. One can readily understand why some in Congress, both members and staff -- prompted by Iran-Contra irritation -- would want to curtail this flexible ambiguity. In any delicate sphere, however, people impelled by understandable emotions and admirable motives should be very careful of over-reaction.

Current Sec. 501 requires the DCI and his intelligence community colleagues to keep the Congressional intelligence committees "fully and currently informed" of all manner of intelligence activities and information, especially "significant anticipated activities," but it is fairly delphic about whether this need be done before or after the fact. In addition, current Sec. 501 gives the President considerable discretionary latitude with respect to "prior notice" -- latitude that was also clearly

abused during Iran-Contra. In erecting unambiguous barriers against any recurrence of that particular abuse, however, H.R. 3822's proposed alternative for current Sec. 501 sets the stage -- perhaps inadvertently -- for other, future problems of equal if not greater magnitude.

THE MATTER OF "FINDINGS" -- PERTINENT CONSIDERATIONS, INCLUDING SECURITY AND GERMANE FOREIGN ATTITUDES

Presidents since Washington, certainly since Jefferson, have conducted covert actions or "special activities," or directed that they be conducted, whenever they felt the interests of the United States would be served by, or required, such activities -- without feeling any particular need for Congressional involvement or, often, knowledge, let alone Congressional direction or legislatively-conferred authority. H.R. 3822's proposed Sec. 503(a), would seem to break new Constitutional ground by stipulating, in a statute, that a President

> "may authorize the conduct of a special activity by departments, agencies, or entities of the United States Government only when he determines such an activity is necessary to support the foreign policy objectives of the United States and is important to the national security of the United States"

Proposed Sec. 503(a) then goes on to add "which determination shall be set forth in a finding that shall meet each of the following conditions," of which there are five.

The National Security Act of 1947's current Sec. 501(a) requires the Director of Central Intelligence (et al.) to keep

the intelligence committees "fully and currently informed of all intelligence activities .... including any significant anticipated special activity" -- i.e. covert action -- but does not stipulate how this is to be done. Current Sec. 501(a)(1)(B) adds that:

> "if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;" (the so-called Gang of Eight)

How this notice is to be given, however, is not specified. Current Sec. 501(b) says:

> "The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice."

But once again, current Sec. 501 does not prescribe any particular form or manner for doing this, though the phrase "provide a statement" certainly suggests something in writing.

Section 662 of the Foreign Assistance Act of 1961, the "Hughes-Ryan Amendment" -- which H.R. 3822 would repeal, then incorporate in that bill with slightly modified language -- stipulates that:

> "No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operations is important to

the national security of the United States."[1]

Hughes-Ryan, however, does not specifically say that the President's finding, itself, must be given to Congress, nor does it specify how the "description and scope" of each such operation is to be reported.[2]

H.R. 3822 would change all that. The first of its proposed Section 503(a)'s five conditions is that:

> "(1) Each finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in

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[1] As mentioned above, "Hughes-Ryan" orginally continued "and reports, in timely fashion, a description, and scope of each operation to the appropriate committees of Congress"; but this thought, and most of this language, was shifted in 1980 to the National Security Act of 1947's current subsection 501(b). The 1980 change also pared the number of committees to whom these reports must be made from "Hughes-Ryan's" eight to the two intelligence committees specified in current Sec. 501(b).

[2] Hughes-Ryan was originally added to the 1961 Foreign Assistance Act, as Section 662, in 1974. Section 654 of that Act, added in 1971 -- "Presidential Findings and Determinations" -- does say that:

> "In any case in which the President is required to make a report to the Congress, or to any committee or officer of either House of Congress, concerning any finding or determination under any provision of this Act, the Foreign Military Sales Act, or the Foreign Assistance and Related Programs Appropriation Act for each fiscal year, that finding or determination shall be reduced to writing and signed by the President."

Section 654, however, deals primarily with unclassified "findings and determinations", to be published in the Federal Register. It was part of a package of provisions directed at controlling re-programming (prompted by irritation at the way aid to Cambodia had been handled). Prior to Iran-Contra, no one ever thought of applying Section 654 to Section 662 intelligence findings, or to the informing and reporting required by the National Security Act of 1947's current section 501.

> which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision is made."

I will pass over the fact that a written, permanent record account of a decision that may have been taken in a complex, fluid situation and that affects a range of significant U.S. interests is not a document that should be slapped together in haste. Care and thought should go into any such permanent document's drafting, a degree of internal coordination within the executive branch may be required, and properly preparing such a document for the President's approval and signature within 48 hours or, indeed, within two working days -- even if the President and the Congress are in Washington -- may simply not be possible. I would like the sub-committee to focus, instead, on considerations more important than operational details.

While an internal, written record of such decisions -- showing precisely who was directed or authorized to do what, and why -- should be made and kept, at least within the executive branch, whether the official accounts of such decisions, i.e. "findings", should be personally signed by the President of the United States is far more debatable than some who participated in the drafting of H.R. 3822 might be willing to acknowledge.

Particularly in the wake of Iran-Contra, the desire of many members of Congress, including members of this Committee, to hold

a President personally accountable for all covert action operations which that President directs or authorizes is eminently understandable; but germane here are two considerations previously mentioned -- one, of extraordinary delicacy.

First, under our Constitution and governmental system, our President is not only the chief executive, a political figure chosen in an inevitably partisan, contested election. Our President is also our nation's ceremonial, symbolic Chief of State -- all of whose actions, particularly with respect to foreign affairs, are hence our nation's, in a very important symbolic sense. In most parliamentary governments, partly for this very reason, chiefs of state -- whether put in office by heredity or some other form of selection -- are supposedly apolitical, "above politics". Chiefs of state can disavow or even, at least technically, depose prime ministers and confer their office on others, but not vice versa. In our system, conversely, a single individual, during that individual's presidential term, simultaneously plays both roles.

Secondly, covert action is a very delicate tool of statecraft, though one that all other nations employ -- many of them, against us -- and we hence should feel no compunction about using it, judiciously and deftly, to protect or further our own national interests. Covert action's delicacy derives in no small measure from the awkward but inescapable fact that its employment almost invariably involves infringing upon, or directly

violating, the laws of some other nation or nations, usually those of the nation at which a specific covert action operation is targeted.

A covert action "finding", as that term is employed in H.R. 3822, thus easily can be a document authorizing or directing some component of the U.S. intelligence community to ignore the laws of a nation with which we are not in a state of war and with which, indeed, we may have treaty relations whose spirit, at least, the "special activity" in question unarguably violates.

In my opinion, it is highly debatable whether it is in our national interest for any such document to be personally signed by our symbolic, ceremonial Chief of State -- the President of the United States -- thus laying an undeniable paper trail that runs directly into the Oval Office. Though all other nations, including our closest allies, frequently engage in covert action, few -- if any -- are imprudent enough to make covert action authorizations or directives a matter of written record, and none would ever consider having any such authorization or directive carry the personal signature of its ceremonial chief of state.

In any event, such a document -- particularly one signed by the President -- is clearly a document of the highest delicacy and sensitivity. Particularly in this age of Xerox machines, having more than one record copy of such a document -- let alone circulating plural copies, to anyone -- is an enormous security

risk. H.R. 3822, however, would require not only that such a document be prepared, in writing, for every special activity, and personally signed by the President, it would also require -- in its proposed Section 503(c), which I will address in a moment -- that in every instance, two copies of each "finding", signed by the President, be provided to Congress, one to the Chairman of each intelligence oversight committee.

I am not for a moment defending all that was done, or not done, during the course of Iran-Contra -- when the spirit of current Section 501 was clearly ignored by the administration, and its letter arguably violated. Furthermore, I am not denying that in the complex, highly delicate sphere of covert action, close -- though discreet -- cooperation between <u>any</u> administration and at least the leadership in Congress is essential if our national interests are to be well served. Nonetheless, I do most respectfully urge this Committee to weigh and ponder the considerations I have just discussed before moving forward with proposed sub-section 503(a)(1) of H.R. 3822, as that proposed sub-section is currently phrased.

The fifth condition which H.R. 3822 stipulates that every finding "shall meet" (Sub-section 503(a)(5)) is:

> "A finding may not authorize any action that would violate any statute of the United States."

This relates to the extraordinarily delicate considerations just discussed in connection with the first condition (503(a)(1)). A treaty is not a statute, but H.R. 3822 is here skating where the

legal ice gets very thin; for some findings are going to direct or authorize actions that certainly impinge on treaty relationships. Whether all this should be spelled out in open legislation is, to my mind, a very debatable question.

H.R. 3822's second condition (Sec. 503(a)(2)) is:

"A finding may not authorize or sanction special activities, or any aspect of such activities, which have already occurred."

This has an obvious Iran-Contra impetus, and Congressional distaste for retroactive findings is quite understandable. This condition's phrasing, implications and consequences, however, merit further consideration; for as it stands, this condition could easily be construed as a King Canute-like directive. Actions that have already taken place can not be undone, any more than waves can be rolled back, by decree. Also, this condition, proposed Sec. 503(a)(2), is not entirely consistent with the immediately preceding one, proposed Sec. 503(a)(1), which explicitly addresses situations in which "immediate action by the United States is required and time does not permit the preparation of a written finding". A later finding, even one only 48 hours later, is still retroactive.

This particular inconsistency is not serious, but it is yet another indication of hasty drafting -- something that should not mark intelligence oversight legislation, especially such legislation dealing with the complex, complicated subject of covert action. All in all, proposed Sec. 503(a)(2) might perhaps

best be dropped..

The third of H.R. 3822's five necessary conditions for a valid finding (Sec. 503(a)(3)) is:

> "Each finding shall specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such activities: Provided, That any employee, contractor, or contract agent of a department, agency, or entity of the United States Government other than the Central Intelligence Agency directed to participate in any way in a special activity shall be subject either to the policies and regulations of the Central Intelligence Agency, or to written policies or regulations adopted by such department, agency or entity, in consultation with the Director of Central Intelligence, to govern such participation;" (emphasis in original)

This is obviously another Iran-Contra inspired ratchet-tightener, intended to prevent covert action free-wheeling by U.S. Government groups or entities, such as Lt. Colonel North's NSC staff office, which are not under the CIA's direction, or under guidance in which the DCI has formally concurred, and thus potentially outside the oversight jurisdiction of the Congressional intelligence committees.

The fourth of H.R. 3822's five conditions for a valid finding (Sec. 503(a)(4)) is that:

> "Each finding shall specify whether it is contemplated that any third party which is not an element of, or a contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the special activity concerned, or be used to undertake the special activity concerned on behalf of the United States;"

This also has a clear, eminently understandable Iran-Contra

inspiration; but no matter how reasonable and defensible this condition's intent may be, its language contains the potential for more problems, of greater severity, than those engendered by all of the other conditions combined. As it stands, this fourth condition's language can be construed as being either trivial or extraordinarily dangerous, on security grounds, or both.

Virtually no foreign intelligence operation, certainly no covert action operation or "special activity", can be successfully conducted without the cooperation, and utilization, of foreigners -- including individuals, entities or organizations, such as intelligence services, governments, or some combination of any or all of these. No sensible U.S. intelligence officer or service could plan a "special activity" without, at a minimum, "contemplating" that one or more foreign individuals, organizations, services or governments might be used "to fund or otherwise participate", in some significant way, "in the special activity concerned on behalf of the United States".

Foreign individuals or organizations who cooperate with a U.S. intelligence service might be styled "agents" of the United States or even, if there is some compensation agreement for providing that cooperation, as "contract agents". Also, by forcing language a bit, it might be argued that such "contract agents" are, to some extent -- under their "contracts" -- "subject to United States Government policies and regulations." But these are exercises in irrelevant casuistry. Few if any of

the foreign individuals or entities -- "third parties" -- bound to be participating in some "significant way" in any given "special activity" could be meaningfully or accurately described as "an element of, or a contractor or contract agent of, the United States Government... subject to United States Government policies".

If sub-section (4) is construed as requiring only a general statement, then it is virtually meaningless; for if it is so construed, it can be satisfied by a standard, boiler plate sentence mechanically incorporated in every finding and saying something along the lines of "The special activity herein described of course contemplates the use and participation of one or more non-U.S. individuals, persons, organizations or entities." If sub-section (4) is supposed to mean more than that, however, particularly if it is intended to require giving some specific indication of what types of non U.S. government "third parties" will be participating, and in what ways, in the "special activity" covered by a particular finding, then that condition lays down a security minefield impossible to traverse unscathed.

The language of the final sentence of H.R. 3822's proposed sub-section 503(e) could easily be read as supporting a broad construction of this fourth condition of sub-section 503(a). That sentence says (in language evoking Gertrude Stein):

> "A request by any agency or department of the United States to a foreign country or a private citizen to

> conduct a special activity on behalf of the United States shall be deemed to be a special activity."

If H.R. 3822 is enacted, as currently drafted, this sentence could certainly be construed as meaning that the executive branch is required to write and submit a separate finding on each and every request to a foreign government, and each and every recruitment pitch to a foreign national, for assistance in a U.S. covert action operation.[3]

Should proposed Sec. 503(a)(4) ever be given this type of broad construction, now or in the future, satisfying its requirements would inevitably involve security risks so grave that no prudent U.S. President, administration, or Director of Central Intelligence -- not to mention foreign individual, entity or government -- would want to run them.

Consider, for a moment, the position in which a broadly-construed Sec. 503(a)(4) would place any Director of Central Intelligence. The National Security Act of 1947's Sec. 102(d)(3), as mentioned earlier, makes the DCI "responsible for protecting intelligence sources and methods from unauthorized

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[3] A broad construction of proposed sub-section 503(a)(4) of the National Security Act of 1947 goes directly against the grain of the clause in section 6 of the CIA Act of 1949 which reads:

> the Agency [i.e., CIA] shall be exempted from ... the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency. (emphasis added)

This, however, is a complication that may have escaped the drafters of proposed 503(a)(4).

disclosure". H.R. 3822's proposed Section 501(e), repeating the language of current 501(e), stipulates that:

> "Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods."

In addition to engendering difficulties already discussed, however, this sentence does not solve the problem a broadly construed 503(a)(4), as proposed, would create; because subtle but very important semantic distinctions here come into play.

The National Security Act's Sec. 102(d)(3) makes the DCI "responsible for protecting intelligence sources and methods from unauthorized disclosure" (emphasis added). Note that Sec. 102(d)(3), furthermore, is quite specific. It makes the DCI responsible for protecting intelligence sources and methods themselves -- not just "information relating to intelligence sources and methods" -- from unauthorized disclosure.

Section 501(e), both current and proposed, does not absolve a DCI of this responsibility. It only denies a DCI the authority to withhold information "on the grounds that providing the information to the intelligence committees would" -- i.e., of itself -- "constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods." (Again, emphasis added.)

If broadly construed, proposed Sec. 503(a)(4) would require a DCI, in the case of each "special activity", to approve or, at a minimum, concur in a written "finding", to be signed by the President, specifying the fact and nature of all non-U.S. participation in that "special activity", with a minimum of two copies of that document being sent to Congress for permanent retention on Capitol Hill. Such a written reporting requirement could easily put a conscientious DCI in an impossible position. In a given case or in connection with any particular covert action operation, a DCI might feel that the very existence of the document required under a broad construction of Sec. 503(a)(4) would put specific, sensitive intelligence sources and methods at unacceptable risk. In such an instance, the DCI would have no authority to block the preparation or transmission of that particular document, even if that DCI felt his or her responsibility for protecting the intelligence sources or methods in question made it mandatory for that DCI to do so.

In this whole context, I respectfully urge this Committee to consider over two centuries of relevant American reflection, experience and precedents.

As John Jay observed in the previously quoted passage in Federalist 64:

> "There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would

> rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly."

Just over a half century later, President James Polk, in refusing to disclose confidential intelligence expenditures to Congress, forcefully argued in a letter to the House of Representatives:

> "In no nation is the application of such sums ever made public. In time of war or impending danger the situation of the country may make it necessary to employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they entertained the least apprehension that their names or their agency would in any contingency be divulged."

Only a year ago, on 8 April 1987, in testifying before this very committee, Representative Norman Y. Mineta -- a staunch proponent of strict Congressional intelligence oversight -- confirmed and acknowledged that the Canadian government did not want its 1980 role in hiding, protecting and safely exfiltrating American hostages from Iran to be reported to Congress by President Carter in a finding -- at least while that operation was in train.

In this whole matter, furthermore, H.R. 3822 attempts to draw a distinction which may sound very simple, neat and tidy in a proposed statute; but which in the real world is very difficult to draw, and often does not exist. In the actual conduct of intelligence activities abroad, the cooperating institutional and individual assets ("agents", if you will) used in "special activities" and those used in normal, albeit sensitive,

intelligence collection activities are often the same -- the same institutions, the same organizations, and the same people. Given the real world's exigencies and complexities, consequently, there is often no way you can meaningfully distinguish -- for purposes of reporting to Congress -- betweeen foreign institutions and individuals who assist in the conduct of "special activities" and those who assist in the conduct of intelligence activities in general.

I know from my own experience as Chairman of the U.S. Intelligence Co-ordinating Committee in Germany, from 1976-1979, how skittish my West German, Israeli, and other friendly foreign service counterparts were about sharing sensitive information, especially operational information, on common concerns and targets -- such as terrorism -- because of their worries about how such information, after I reported it, would be handled back in Washington, particularly if it was passed to Congress. The strong, almost universal perception of my foreign counterparts was that in the United States, we were manifestly incapable of protecting even our own secrets, hence we could hardly be relied on to protect theirs. We may consider such foreign perceptions unwarranted and inaccurate, but their widespread existence and their force are facts that American intelligence professionals can not ignore or brush aside when planning operations -- of any nature -- in which cooperative foreign participation is essential.

Such foreign perceptions and concerns would be inflamed and exponentially increased if H.R. 3822's proposed sub-section 503(a)(4) should ever be enacted into law, and then broadly construed. Should it ever come to be widely believed abroad that U.S. law required -- or even that there was a serious risk that U.S. law might require -- the identification in a written document, of which at least two copies would be sent to Congress, of all non-U.S. individuals and entities, including governments, cooperatively participating in any U.S. "special activity", our pool of essential foreign assistance and support would swiftly evaporate. The extent and speed of that pool's evaporation, furthermore, would be increased by the fact that few foreigners would note, and even fewer would pay attention to, any American legal distractions between "special activities" and other intelligence activities. In this sphere, foreign perceptions and beliefs -- not our assessment of their accuracy or validity -- would be controlling.

From the perspective of 26 years' experience in the profession of intelligence, I can state flatly that should H.R. 3822's proposed sub-section 503(a)(4), or anything like it, ever be enacted into law, few foreign individuals or entities, governments again included, whose cooperation and assistance we would need to conduct "special activities" -- or, for that matter, any intelligence activities of any consequence -- would be willing to put their fortunes, reputations or, in the case of individuals, their freedom and even their lives hostage to the

discretion or secret-keeping capability of the Congress of the United States.

NOTIFICATION TIMING; PERTINENT ISSUES AND PROBLEMS

In H.R. 3822, "findings" are the official mechanisms by which Congress, through its intelligence oversight committees, is apprised of "special activities" -- i.e., covert action operations -- conducted by the executive branch, the intelligence community generally and, specifically, the CIA. Let us now put aside the mechanics of notification and turn back to the matter of precisely who in Congress must be notified, and when: At what point in a covert action operation's planning, development or execution must that operation's existence, nature and scope be reported, must a "finding" about it be submitted, and to whom?

As mentioned earlier, these are matters about which there is a measure of flexibility and creative ambiguity in current practice and legislation, including "Hughes-Ryan" and the National Security Act of 1947's current section 501. During Iran-Contra, the administration patently abused this flexibility and ambiguity, provoking amply justified ire in Congress generally and in the intelligence oversight committees, including -- specifically -- this sub-committee's parent committee. To prevent these particular abuses from recurring, H.R. 3822 would curtail that flexibility and clarify the relevant ambiguities; but as also mentioned earlier, H.R. 3822's proposed solutions to

what are perceived as current problems would create new ones of at least equal gravity.

H.R. 3822 would repeal "Hughes-Ryan" and strike current 501, thus eliminating the "in a timely fashion" flexibility, of which the administration took such politically inept advantage during Iran-Contra. That done, H.R. 3822's proposed language would nail shut all such "loopholes" and move briskly, purposefully and rigidly in the direction of "prior notification."

H.R. 3822's proposed subsection 503(c)(1) begins:

> "The President shall ensure that any finding approved pursuant to subsection (a) shall be reported to the intelligence committees as soon as possible after such approval and prior to the initiation of the special activity authorized by the finding." (Emphasis added.)

This is somewhat attenuated, in the next sentence, by the proviso:

> "That if the President determines it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, such finding may be reported to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate." (The so-called Gang of Eight.)

This proviso is immediately followed, however, by a sentence stipulating:

> "In either case, a copy of the finding, signed by the President, shall be provided to the chairman of each intelligence committee." (Emphasis added.)

Thus are mandated the two Capitol Hill copies, of each finding, referred to and discussed above. 503(c)(1) then concludes:

> "Where access to a finding is limited to the Members of Congress identified above, a statement of the reasons for limiting such access shall also be provided."

Section 503 continues:

(c)(2) "In circumstances where time is of the essence and the President determines that it is important to the national security interests of the United States to initiate a special activity before the notice required by paragraph (1) can be given, such activity may be initiated without such notice.

(c)(3) "The President shall ensure that notice of a special activity undertaken pursuant to paragraph (2) is provided to the intelligence committees, or to the Members of Congress identified in paragraph (1), as soon as possible, but in no event later than forty-eight hours after the special activity has been authorized pursuant to subsection (a). Such notice shall be accompanied by a statement of the President setting forth why time was of the essence and why proceeding pursuant to paragraph (2) is important to the national security interests of the United States. (emphasis added)

(d) "The President shall ensure that the intelligence committees, or, if applicable, the Members of Congress specified in subsection (c), are notified of any significant change in a previously-approved special activity, or any significant undertaking pursuant to a previously approved funding, in the same manner as findings are reported pursuant to subsection (c).

(e) "As used in this section, the term 'special activity' means, with respect to the Central Intelligence Agency, operations in foreign countries other than activities intended solely for obtaining necessary intelligence, and, with respect to any other department or agency of the United States, any activity conducted in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, and does not include activities to collect necessary intelligence, or diplomatic activities carried out by the Department of State or persons otherwise acting pursuant to the authority of the President. A request by any agency or department of the United States to a foreign country or a private citizen to conduct a special activity on behalf of the United States shall be deemed to be a special activity.

(f) "No special activity may be conducted if it is intended to influence United States political processes, public opinion, policies, or media."

All of these stipulations merit some comment, starting with the last one. On quick reading, proposed Sec. 503(f) might seem only to repeat, in almost identical language, a thought inherent in sub-section 3.4(h) of Executive Order 12333:

"but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions." (emphasis added)

Actually, however, an easily overlooked shift in mood -- from declarative to imperative -- produces a potentially very significant shift in meaning between H.R. 3822's proposed 503(f) and E.O. 12333's 3.4(h).

Executive Order 12333's Section 3.4 is titled "Definitions", its sub-section 3.4(h) is a definition of "special activities", and the words following "but which are not intended to" are simply part of that definition.

H.R. 3822's proposed Sec. 503(f), conversely, is a prohibition -- not part of a definition. It says, as quoted above,

"No special activity may be conducted if it is intended to influence United States political processes, public opinion, policies or media." (emphasis added)

This mood shift makes the intent of the special activity in question a threshold test of permissibility in H.R. 3822's

proposed Sec. 503(f), not simply one defining characteristic of "special activities" as is the case in sub-section 3.4(h) of E.O. 12333.

A properly conceived, soundly managed and effectively run covert action operation or "special activity" -- by definition -- will attempt to influence the course or evolution of events, in some important foreign region, in a manner beneficial to U.S. interests. If that operation is successful, its results are bound to be widely reported in the media -- even if the U.S. hand or the full extent of U.S. involvement in helping bring about those results can be concealed. If such concealment proves impossible -- as, in time, will usually prove to be the case -- the fact of U.S. involvement will become a major part of the story or, indeed, the major story itself. If a covert action operation is successful, furthermore, its success is bound to be politically advantageous to the U.S. administration then in office -- and even more so if that administration's role in that success becomes a matter of public knowledge (something any such administration, of any party, would be strongly tempted to ensure). If the operation in question is a failure, conversely, or publicity about the U.S. hand in it becomes an embarrassment, this is bound to have at least some adverse impact on the political fortunes of the administration which planned and launched that operation.

Whether a success or a failure, in sum, a covert action operation or "special activity" of any consequence -- even if it was planned, approved and run with only foreign objectives in mind -- is bound to have some degree of effect or influence on "United States political processes, public opinion, policies, or media". This being the case, in real world life, proposed sub-section 503(f) -- as presently drafted, (without any legal penalties for its violation) -- would be very hard to construe and apply (or enforce) in concrete situations, and could be employed by opponents of covert action in an effort to block "special activities" altogether. This was doubtless not the drafters' purpose. Indeed, their objective seems reasonably clear; but when this passage is couched in the imperative mood, as a prohibition, the verb "intend" has to carry more weight than it may prove capable of bearing.

Where definitions are concerned, there is also a serious problem in proposed Sec. 503(e) -- one addressed and discussed in some detail by DCI William Webster in his testimony before this sub-committee, and its parent full Committee, on 24 February (1988). Proposed Sec. 503(e) defines "special activity" in one way with respect to Central Intelligence Agency "operations in foreign countries" and a different way with respect to the activities of "any other department or agency of the United States". This produces precisely the confusion and difficulties that the DCI forcefully and accurately described.

There is another semantic problem, also an important one, a bit earlier in proposed section 503. Proposed Sec. 503(c)(2) says that:

> "In circumstances where time is of the essence and the President determines that it is important to the national security interests of the United States to initiate a special activity before the notice required by paragraph (1) can be given, such activity may be initiated without such notice."

Proposed Sec. 503(c)(3), however, says:

> "The President shall ensure that notice of a special activity undertaken pursuant to paragraph (2) is provided to the intelligence committees, or to the Members of Congress identified in paragraph (1), as soon as possible, but in no event later than forty-eight hours after the special activity has been authorized pursuant to subsection (a)."
>
> (emphasis added in both of the above quotations.)

There is a latent contradiction between (2) and (3) which could become very important in certain situations. In the real world, there is frequently a delay of at least 48 hours, often longer, between the authorization -- in Washington -- of a complex covert action operation or "special activity", and its initiation half a world away. In such a situation, the short-term tactical flexibility given the President by proposed 503(c)(2), "in circumstances where time is of the essence", is taken away by proposed 503(c)(3).

This is by no means a purely hypothetical problem. The previously mentioned 1980 exfiltration from Tehran of six American Embassy personnel, who hid for several weeks in the

Canadian Embassy there, provides a perfect illustration of a real world situation that would put a President directly in the cross-fire between proposed 503(c)(2) and proposed 503(c)(3).

Exfiltrating American citizens -- in this case, U.S. government employees who had escaped from a U.S. Embassy seized by hostile local elements who were holding, as prisoners, the other U.S. personnel in that embassy -- might not be what the term "covert action" would normally suggest or denote to most people. Nonetheless, at least for the CIA, this would clearly be a "special activity" within the definition given in proposed 503(e); for such an operation would patently be something "other than" an activity "intended solely for obtaining necessary intelligence".

In the 1980 Tehran situation, however -- as mentioned earlier and as Representative Mineta explained to this very sub-committee's parent committee on 8 April 1987 -- the Canadians, for their own security and protection, made their essential cooperation contingent on Congress' <u>not</u> being told about what was in train, or what the Canadians were doing, until after the operation was concluded. In the 1980 Tehran situation, furthermore, the period between the "authorization" and the "initiation" of the "special activity" in question -- exfiltrating the endangered Americans -- was measured in weeks, not hours.

Had H.R. 3822, as presently phrased, been on the statute books in 1980, President Carter -- not President Reagan -- would have been directly impaled on the horns of a very difficult dilemma. He would have had to either:

(a) ignore the law, or

(b) tell the Canadians that he could not lawfully meet the conditions they imposed on their essential assistance, even though declining that assistance clearly put American lives at risk.

I can not believe that any member of this sub-committee, or of the full House oversight committee, would want to put any American President, of whatever party, in such a situation. This is far from the least of the reasons why I respectfully urge this sub-committee to reconsider the language of H.R. 3822, and all of that language's implications, before recommending that this proposed bill, as it now stands, be enacted into law.

SOME RAMIFICATIONS OF "PRIOR NOTIFICATION"

In its conduct of Iran-Contra, as previously stressed, the Reagan administration clearly abused the discretionary latitude afforded any administration of any party, in conducting covert operations, by the flexibility and ambiguity of some of the language in current statutes dealing with these matters. As the legislative history of the pertinent statutes quite clearly demonstrates, however, much of this flexibility and ambiguity was

deliberately inserted into the statutes in question, for excellent reasons. Particularly where matters as complex as covert action are involved, even the most astute, discerning legislators and staff drafters of legislation can not possibly foresee, or codify in advance, all the concrete contingencies and difficult real life dilemmas that are bound to arise. Sound legislation in such spheres, consequently, has to give both the executive and the legislative branches of our government some measure of wiggle-room.

For reasons that are quite understandable but nonetheless, I respectfully submit, seem focussed on an event (Iran-Contra) unlikely to re-occur, H.R. 3822 would remove the ambiguity and virtually eradicate the flexibility of the relevant current statutes. Doing that, however, could easily prove procrustean and generate serious problems in future contingencies or situations not now forseen.

By reducing the permissible exceptions to a bare minimum, not always in consistent ways, H.R. 3822 would also push Congress far deeper into the "prior notification" thicket. In the light of Iran-Contra, this might seem desirable; but it is a punitive move that would probably be rued by future Congresses, as well as by future Presidents -- regardless of party.

For one thing, making "prior notification" the required norm for all but the most time-urgent "special activities", and then adding an inflexible 48 hour notification strait jacket for them, would exponentially increase the difficulty of keeping covert actions covert. As the witting circle on Capitol Hill widens, with respect to staffers as well as actual members of Congress, there would be a concomitant increase in any given "special activity's" vulnerability to being torpedoed by a pre-emptive leak, even if a majority of both oversight committees endorsed the "special activity" in question.

In the preceding sentence, the verb "endorse" was used advisedly, for here involved is an irony to which I respectfully direct this Committee's attention. The risk in question -- of a pre-emptive leak torpedo -- is increased, not diminished, by the last sentence proviso in H.R. 3822's proposed 501(a), which repeats, in slightly altered language, the thought of current 501(a)(1)(A):

> "Provided, That nothing contained in this title shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities." (emphasis in original)

The clear intent of this proviso is Constitutionally admirable; but its practical effect, in the real world, is likely to be complex.

Most "special activities" will be controversial. The more

important or significant those activities potentially are, and ditto the regions of the world on which they focus, the more controversial they are likely to be. In any given instance -- particularly with respect to an activity that, for any reason, is highly controversial -- no matter how many members, or staffers, of either or both intelligence oversight committees may think the operation in question is wise, even necessary, there are bound to be some members, and staffers, who have reservations about it or oppose it strongly.

As we all know, in real world situations -- personal, professional and political -- informed silence is frequently construed, by others, as tacit assent. If a given, controversial "special activity" goes sour or retrospectively becomes politically unpopular, the argument that "Yes, I knew about it and yes, I kept silent about it, but I really didn't approve of it -- honest!" is not likely to carry much weight in debates with opponents or (perhaps even less) with friends, in the voting booth, or in some cases, with the individual consciences of certain members or staffers of an oversight committee.

Even if legally impeccable, the language of proposed Sec. 501(a)'s last sentence <u>proviso</u> is pragmatically ambiguous. It purports to buttress executive branch authority, or at least to refrain, explicitly, from derogating that authority; but what it actually -- or also -- tries to do is absolve Congress of

responsibility.

As is unfortunately the case with all of us, however, members of Congress, and of Congressional staffs, simply can not have it both ways. They can not insist on prior knowledge of, in this instance, special activities but disclaim responsibility for the consequences of activities, or of actions, that they knew about in advance and did not demonstrably try to prevent. Particularly in a charged, partisan atmosphere such as that now prevailing with respect to many important issues (e.g. Central American policy), this is a consideration that members of Congress or staffers, strongly opposed to any given proposed "special activity", would be disinclined to brush aside. It would always provide a handy, conscience-salving rationale for breaking discipline, ignoring secrecy pledges and attempting to sandbag, by a leak, a contemplated, reported special activity that Congress or an intelligence oversight committee, institutionally, was not inclined or willing to oppose.

By insisting on almost universal prior knowledge of projected "special activities", in short, Congress inevitably assumes responsibilities it may not wish to assume -- including a responsibility for increased security hazards. While it may disclaim responsibility for the consequences of special activities it did not explicitly approve, furthermore, Congress can not altogether avoid or deny that responsibility and must

assume at least some of it if Congress is going to insist on being informed, in writing, of virtually all such activities in advance of their initiation. All of this, in turn takes Congress into constitutionally murky waters, getting it deeply involved in tasks it is not structured to perform and can ill-spare the time to undertake, particularly when Congress has demonstrable difficulty in discharging some of the responsibilities that the Constitution clearly does assign to it -- such as passing appropriations bills.

Once again, as President Carter's, not President Reagan's, Deputy Assistant for National Security Affairs, David Aaron, put the matter quite neatly when testifying before the House intelligence oversight committee in September 1983 in connection with "special activities" legislation:

> "It was the purpose of [current] Sec. 501 to ensure that the Congress had sufficient access to information, in a timely way, to be able to exercise [its proper] functions in the field of intelligence activities. It was not [one of] the goals of Sec. 501 to make the Congress a co-decision-maker on covert action operations."

THE DANGERS OF HASTY, EMOTION-IMPELLED REFORMS

Drafted in the immediate aftermath of the Iran-Contra Report's preparation, H.R. 3822's language, at least to this reader's eye, reflects an eminently understandable desire to rap Ronald Reagan's knuckles and tie his hands. But Ronald Reagan leaves the Oval Office, permanently, in January 1989 -- less than

a year hence -- and none of his successors, of whatever party, is likely to forget or ignore the lessons of Iran-Contra. Furthermore, if H.R. 3822 or any similar bill gets enacted, there is no way of telling what future President's hands that law may tie, under what particular circumstances, with what adverse impact on U.S. interests.

Legislation affecting Congressional oversight of intelligence activities, particularly "special activities", is invariably complicated; for it inevitably involves the judicious weighing and balancing of a myriad important, complex and often conflicting considerations and equities. Such legislation should not be drafted or enacted in haste or under the influence of strong emotions, including pique. Nor is it wise to draft, debate and enact such legislation amid the distractions and pressures of an election year, including an election year's temptations to adopt or endorse positions, on controversial issues, that are poll or popularity-enhancing in the short run, but not necessarily in the long-term best interests of the United States.

Such considerations apply with particular force to issues involving "reforms"; for reforms drafted and adopted under such conditions almost invariably prove to have unintended, undesired consequences. Also, they frequently get those who implement the reforms in question, or supervise their implementation, emeshed

in the micro-management of others' responsibilities -- such as the Presidency's.

During my own career in government, I was privileged to develop a close association with the Honorable Birch Bayh, the Senate Select Committee on Intelligence's second Chairman. We differed on many issues, as we still do, but became and remain good friends. He visited me in Germany, as a guest in my home -- where he was a great favorite with my children -- while I had overall responsibility for the U.S. intelligence community there and he was Chairman of the Senate oversight committee. On one evening during that visit, I assembled a representative, cross-sectioned group of my abler young officers who were deeply and personally involved in our efforts to combat terrorism and other threats to the security of the United States. We sat up all night (literally) having a frank, suitably lubricated, no-holds-barred, give-and-take discussion. During that discussion, my front-line colleagues endeavored to explain, by citing a succession of concrete examples, how difficult it was to apply on the banks of the Rhine -- and of other rivers around the world -- the sweeping, "thou shalt not, ever, under any circumstances" reform restrictions of the mid-1970, which sounded so splendid when proclaimed, passed, issued or endorsed along the banks of the Potomac.

As my young colleagues kept recounting their frustrating first-hand experiences with the results or consequences of these "reforms", the good Senator kept repeating, like an antiphonal response in a High Church Anglican service, "But this was never the intent of Congress!" My equally antiphonal response was that in the field, we did not have the luxury of trying to divine Congressional intent. Instead, we had to be guided, and were circumscribed, by what the government's lawyers, including the CIA's, construed to be the meaning of the language in statutes Congress enacted, such as the Foreign Intelligence Surveillance Act, or in Executive Orders and internal CIA regulations strongly influenced by Congressional attitudes.

WHAT OUGHT TO BE DONE

Despite their often vexing complexity, Mr. Chairman, and the inordinate difficulty of conducting them effectively, let alone securely, in an open, democratic society such as ours, I doubt if any member of this sub-committee, or its parent, would want to take serious issue with the conclusion of the Congressional Committees investigating the Iran-Contra Affair that "Covert operations are a necessary component of our nation's foreign policy".

In this regard, let me also redirect your attention to the lead paragraphs in the "Recommendations" chapter (28) of those

Committees' Report:

> "It is the conclusion of these Committees that the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance. This is an important lesson to be learned from these investigations because it points to the fundamental soundness of our constitutional processes.
>
> Thus, the principal recommendations emerging from the investigation are not for new laws but for a renewal of the commitment to constitutional government and sound processes of decisionmaking."

No sensible person would contend, and I certainly do not, that our current laws dealing with covert action, and its oversight, can not be improved. This sub-committee and its staff are to be commended on the thought, care and effort that have clearly gone into the consideration and discussions of H.R. 3822. For reasons I have tried to explain, however, I do not believe that the end results this distinguished sub-committee or its full parent Committee wants to achieve, in the discharge of its Constitutionally-mandated responsibilities, are most likely to be attained by moving forward with H.R. 3822 or any similar legislation, unavoidably drafted in some haste in the wake of the issuance of the Iran-Contra Report and under the influence of emotions which that unhappy affair inevitably engendered on Capitol Hill -- particularly when any such legislation would have to be debated and enacted amidst the mounting, divisive and partisan pressures of an election year.

Most respectfully, I commend an alternative course of action to your consideration -- one suggested by the distinguished Chairman of the Senate's oversight committee, even though he is a co-sponsor of H.R. 3822's Senate counterpart, S. 1721.

In the thoughtful, previously mentioned 1 December 1987 Washington Post essay, co-authored with Senator Danforth, Senator Boren addresses foreign policy, generally, but his and his co-author's comments and suggestions have an obvious, direct applicability to the specific matter of covert action as well. To underscore this point "covert action" is substituted for the orginal's "foreign policy" in the lines from that essay quoted below.

> "What is needed is both a general statement of covert action principles in the manner of the Vandenberg Resolution and an ongoing process for working out specific differences as they arise, but before they are ripe for legislative action.
>
> "If the views we have expressed make sense, then the question remains: Where do we go from here? The answer depends on what response, if any, we evoke from the administration and members of Congress. We would hope for an informal meeting of no more than a handful of administration representatives and interested members of Congress for the purposes of 1) drafting a statement of agreed covert action principles, and 2) exploring a system for resolving covert action disputes. If the call is for volunteers to convene such a meeting, then count us in."[4]

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[4] "Foreign policy" is used in the original in the three places where "covert action" appears in these two quoted paragraphs.

With respect to covert action, as well as foreign policy in general, I hope the Reagan administration, in its final months, has the wit and vision to take up the distinguished Senators' admirable suggestion. If it does, I hope you and other members of this Committee will also be willing to be "counted in".

The nation's essential covert action capabilities, along with their proper oversight, will stand a far better chance of being lastingly improved by some procedure such as these two Senators suggest than by any legislation quickly drafted in the Iran-Contra Report's immediate aftermath, then considered and debated amidst the steadily mounting pressures and distractions of an election year.

The nation's interests would be far better served if, instead, a small group of knowledgeable, senior administration officials, past or present, could be convened to meet quietly with a corresponding, and correspondingly small, bi-partisan group of appropriate Congressional leaders, from both Houses; and then, over the course of several months' frank, private discussion, this joint body, working together, could not only draft "a statement of agreed principals" regarding covert action and explore "a system for resolving disputes", but also supervise the measured, careful drafting of any new legislation thought to be warranted -- for formal introduction, debate, consideration and enactment after the 1988 electoral season, with its attendant

demands and pressures, has passed. This may be a utopian dream, but as a concerned citizen who has devoted a quarter century to serving our nation as an intelligence professional, I would relish seeing this dream become a reality.

Thank you very much for your time and attention.

Mr. McHUGH. Dr. Treverton.

STATEMENT OF DR. GREGORY TREVERTON, SENIOR FELLOW, COUNCIL ON FOREIGN RELATIONS

Dr. TREVERTON. Thank you, Mr. Chairman. It is a pleasure to be here this afternoon.

I, too, have submitted a statement. I will pick several points that have been touched on by the previous speakers.

I believe that from time to time the United States should engage in covert activity. It can be important for our national security.

At the same time, I respectfully disagree with the previous speakers in that I strongly support the principles contained in the reporting requirements of H.R. 3822. I do so not as to the constitutional argument; that is not my terrain. Instead, let me speak to what seems to me to be the important practical implications of those reporting requirements.

As I look over the history of American covert action in the postwar period, it does seem to me important that the Congress be notified as a matter of law in a timely way, not as a matter of executive discretion. There are two reasons why that reporting is important.

One is, as elsewhere, getting Congress into the loop imposes—or at least pushes in the direction of imposing a clearer process on the executive branch. We saw in the 1960's, and we have seen again here in the Iran-Contra affair how easy it is for officials in the executive branch—the CIA in the first case, White House staffers in the second—to protect the President through some mistaken notion of plausible denial. It is tempting for him to interpret his winks and nods, and so "protect" him by keeping him in relative ignorance of what is going on. Requiring a finding to Congress puts the President on the line and so makes the administration think and think again.

The second reason why it is important for Congress to be in the loop as a matter of right, not of executive discretion, is that Congress ought to be an important source of counsel to Presidents, a source of advice about what the broad mass of American people would find acceptable in the realm of covert action if they could but know about it.

As Mr. Reagan himself said, the criterion for covert action ought to be that if it were disclosed, the American people would say "that makes sense." We have seen over and over again, with the Iranian arms sales most recently, how if Congress is cut out, the executive loses that source of counsel, it loses that judgment about what the American people would support if they could but know about what is proposed.

That takes me to a final issue, which is the one that has been raised often this afternoon: what to do about the hardest cases, the cases like Canada. Now, I, like Mr. Carver, would not want the executive branch to have to make a finding to Congress every time it approaches a foreigner to involve that foreigner in a covert action. I doubt that is the intent of the committee.

But it does seem to me that loopholes in the reporting requirements, either letting the executive have an unlimited amount of

time at its discretion to report or otherwise leaving a big loophole, that loophole will always arise in the hardest cases. And those hardest cases, it seems to me, tend to be precisely the most important ones in which to apply some judgment about what the American people would find acceptable if they could know about what was planned.

The loophole will arise in cases like the arms sale to Iran, a case that derived from the President's passionate feeling that they ought to get the U.S. hostages released. That seems to me exactly the case where you most want the Congress to be involved. For that reason, the principles embodied in H.R. 3822 are important. Giving the designated oversight committees of Congress access to information about covert action in a very timely way as a matter of right, not of executive discretion, is critical.

Thank you, Mr. Chairman.

[The prepared statement of Dr. Treverton follows:]

Statement by

Dr. Gregory F. Treverton
Senior Fellow
Council on Foreign Relations

House Permanent Select Committee on Intelligence
Hearing on H.R. 3822

March 10, 1988

Mr. Chairman: It is a pleasure for me to have this opportunity to appear before the Committee. I will confine myself to the requirements for reporting to the intelligence committees of Congress about covert action that are embodied in H.R. 3822. I strongly support the principles reflected in those requirements. They seem to me to provide the president with enough flexibility to respond quickly if need be to changing circumstances while assuring that Congress will have a serious role in the process through its designated committees. That role is consistent with our government of separated institutions sharing power, in Richard Neustadt's famous phrase. It also has proven to be a matter of simple prudence, as shown most recently in the negative by the arms sales to Iran.

Conducting secret operations in a democratic society is a paradox. I first came to think about it seriously when I worked for the first Senate Select Committee on Intelligence, chaired by by the late Sen. Frank Church, where I spent much of my time examining American covert actions in Chile, 1963-1973; I then had the opportunity to reflect on covert operations from another vantage point while serving the National Security Council during 1977-79. These experiences led me to want to step back while in academic life and assess the sweep of American covert action in the postwar period; the result of

that project is a book, published last year, Covert Action: The Limits of American intervention in the Postwar World.

For me, the security interests of the United States in a world that often is not as we Americans would have it mean that we cannot unilaterally foreswear covert action. That conclusion, however, brings the paradox of managing those operations in a democratic society to center stage. I would like the standard for employing covert action to be set high -- when vital interests of the United States are at stake and no other instrument will suffice. Bringing Congress into the process is important both in principle, given our democracy, and in practice if administrations are to be pressed to think and think again before resorting to covert action.

When the Church Committee began its intestigations in 1974, it did so in the aftermath of Watergate and accusations of improprieties by intelligence agencies. At one point, Senator Church likened the CIA to "a rogue elephant on the rampage." In the event we did not find many "rogue elephants," at least not at the CIA. What we did find was a practice of "plausible denial" that created a troubling looseness in the executive's review and control of covert action, even as in a pinch it seldom protected administrations in power. In the early days, the Congressional role amounted to the "buddy system" -- informal conversations between the CIA Director and a few senior members of Congress.

Plausible denial and the buddy system did not emerge because the

CIA had broken free of its political masters. They emerged because that was how both administrations and Congress wanted it at the time.[12]

The perils of that practice of plausible denial were graphic in the instances of the plots to kill Fidel Castro. As Richard Helms, the CIA's Deputy Director for Plans and later DCI, testified before the Church Committee in 1975, he was almost plaintive in drawing implications of that practice:

> ...it was made abundantly clear...to everybody involved in the operation that the desire was to get rid of the Castro regime and to get rid of Castro...the point is that no limitations were put on this injunction...[but] one...grows up in [the] tradition of the times and I think that any of us would have found it very difficult to discuss assassinations with a President of the U.S. I just think we all had the feeling that we're hired out to keep those things out of the Oval Office.

If he had ever thought he would later have to testify before Congress about what he had done, Helms reflected, he would have made sure that his orders were clearly in writing.

Accordingly, the Church Commitee and its parallel body in the House, chaired by Rep. Otis Pike, set about building on the earlier Hughes-Ryan act. The committees worked to two broad purposes. One, reflected in Hughes-Ryan, was to put an end to the dangerous way plausible denial had come to be practiced on occasion. The president would be required to sign a "finding," thus putting his name, and his reputation on the line. There would be no future wrangles such as those over assassinations: covert actions, wise or stupid, would reflect presidential decision; there would be no doubt that someone was in charge.

Or such was the hope.

The other purpose was to attach Congress to the process in a way more systematic than the buddy system and at the same to create focal points for Congressional consideration of covert action. Congress would thus acquire information and responsibility to match; less often would its members be able to speechify in professed ignorance of covert action. That degree of responsibility was not, and is not always confortable; members of Congress have little incentive to take the responsibility, much reason not to. But it seemed imperative if the review process within the executive were to be held to a high standard of accountability and if the entire process were to reflect the sharing of power.

We even hoped that in time presidents might come to see the oversight committees as a source of counsel. Perhaps that was naive. The constitution does not exactly prevent that sort of comity between executive and Congress, and it has occurred from time to time -- Truman and Vandenberg, or Johnson and Dirksen. But it is not easy. Still, simple prudence, we thought, would dictate that presidents would pay close attention to the views of the oversight committees as surrogates for the American people, as advice about what Americans would think about a covert action could they know of it. As President Reagan put it, the standard should be such that if a covert action is disclosed the American people will deem "that makes sense." Including the oversight committees in

the process is a way to find out something about what those Americans would say without having to disclose the covert action. It would serve as a check on any "can-do" attitude within the executive or on the temptations of White House staffers.

The process is hardly perfect or tidy. But most of the time the process seems to have worked as it was intended. The congressional overseers have been informed of covert action and recorded their views; sometimes those views have prevailed. In others, they have expressed their concerns but then let the program go ahead despite their doubts. Most of the time, in either case, the process has remained secret. The Reagan Administration wanted to make use of covert action much more frequently than its predecessor, and the oversight committees, reflecting the mood of Congress and probably of the American people as well, assented to that expansion of covert action.

The exceptions -- aspects of aid to the Contras and the arms sales to Iran -- are graphic demonstration of the dangers of excluding Congress. That role is no guarantee of wiser policy; perhaps the committees would have been seduced down the road from hostages to arms sales just as the Administration was. But at least then the aftermath would have been a joint exploration of policy failure, not recriminations. And I suspect that Congress would have pressed the Administration to judge the operation again in light of the President's "makes sense" criterion.

The principal argument against requiring that every major covert action be reported to the committees within 48 hours seems to be the fear of leaks. Surely it is appropriate to take that concern seriously, for lives can be at stake. However, as I read the history, the intelligence committees have not been leaky, quite the contrary. From the beginning, they have known that any leaks from them would only give the administration in power, never mind is party, justification for excluding the committees as "leaky." They have been scrupulous about leaks, careful in their compartmentation; the numbers of people in Congress who know about any operation are few by comparison to those in the executive.

In a curious sense, Senator Leahy's unfortunate case illustates the special concern of the oversight committees. He resigned, appropriately in my view, after leaking prematurely an unclassified report that was not yet released. Applying the same standard to the executive would, in my experience, decimate the top ranks of any administration.

Concern over leaks, while appropriate, should not override the reasons -- of both prudence and principle -- for including Congress in the process of reviewing covert action. What is important is that the inclusion be a matter of right, not of executive discretion, and that the views of the oversight committees be heard in time to permit an adminstration to re-think its intentions.

Mr. McHUGH. Thank you very much.

As it happens, you three gentlemen are the last witnesses we will hear from in this series of hearings. I think it is appropriate for me to say that we have been very fortunate, I think, to have people of the background and experience and thoughtfulness that you gentlemen represent and the others we have heard from represent. It has been a very informative and interesting series of hearings for me, and it is probably hard to focus on anything that is novel or new at this point as well.

So if I repeat myself, please excuse me.

Let me pose a number of questions to you, General Scowcroft and Dr. Carver, because as a proponent of this legislation I do have some differences, or at least questions.

First of all, I think, as I have indicated earlier, the intent of this legislation is to clarify what we believe to be existing law. Therefore, I would like to begin by asking whether there is any quarrel on your part with existing law.

As you know, under current law the President is generally required to provide prior notice to the intelligence committees or, in particularly sensitive cases, to the small leadership group when he authorizes a covert operation. This is, he is required to give us notice before he begins implementing a covert operation. That is the general rule.

Do either of you have a quarrel with that general rule, which is now part of the law?

Lieutenant General SCOWCROFT. Well, Mr. Chairman, I think it is of questionable constitutionality, but I don't have a quarrel with it as long as the President reserves the discretion to decide when and under what circumstances he has to do it.

I am relaxed about the statute as it exists, but we have taken an unfortunate step forward with this particular bill.

Dr. CARVER. Mr. Chairman, let me plug a couple of things—which we could talk about all day but obviously won't.

First, I know that the intent of the proposed law was simply to clarify what exists. But I do submit—and this I tried to take up both in this statement, and in the portions that I didn't cover (in my full statement)—with all due respect to its drafters, that this bill displays the evidence of hasty draftsmanship. There are internal contradictions in it. There are things that would raise major new uncertainties.

For example, it drops the preambular clause of section 501(a) in a way that has riple effects which are quite confusing. It sets up a new criterion for protection of intelligence sources, limiting that protection to "sensitive intelligence sources," but in no way defines the limiting adjective "sensitive."

There are a number of other difficulties throughout this bill. Hence, I think that whatever be its intent, this bill needs a very good clean drafting scrub by people looking for inconsistencies.

On the other, larger question of law, there are certain battles that have been fought. I am just a private citizen, now retired and not a lawyer. I don't like some aspects of the present law, but I am not sure that change would necessarily be an improvement.

One thing that I don't like about the present law involing an area where the present law is a little bit vague, and the way the

bill you are considering would eliminate that vagueness I get very skittish about Presidents signing findings, which are written documents, partly because in our system of government, our President performs two functions, which most other governments divide: He is the chief political officer, a partisan political figure. He is also the ceremonial chief of state, the focus of national interest, who speaks for the United States.

Most covert action, Mr. Chairman, involves violating some other country's laws, and I think the wisdom of having our chief of state's signature on a written document directing agents or agencies of the U.S Government to violate some other nations' laws, including nations with which we are not in a state of war, is a very debatable proposition, more debatable than many people would acknowledge.

I am also very skeptical about the advisability of insisting that all findings, even on the most sensitive matters, be reduced to writing. I am not at all opposed to folding Congress in more carefully than it has been folded. Certainly no one is defending Iran-Contra and what was done there; but what is written can be xeroxed, and when you start circulating, out of the Oval Office documents of that nature, you are asking for trouble.

So, no, I am not uncritically supportive of everything in present law, but I would be extraordinarily skittish about changing it, particularly in the wake of Iran-Contra, and doubly so amidst the pressures of an election year.

Mr. McHUGH. In the interest of time, if we have differences on current law, our differences are broader than I would expect and therefore we might not be able to bridge them all.

But from the perspective of the authors, assuming that current law is generally acceptable and current practices generally acceptable, what we are doing here really is trying to define what we mean by timely notice, where the President in his discretion withholds prior notice; that is to say, where he chooses not to notify Congress before the implementation of a covert operation.

The current law requires that he provide notice in that case "in a timely fashion," after the implementation begins.

Now, what does that mean?

In the case of the Iran arms sales, the administration interpreted it to allow no notice, at least for a period of 10 months. There was never any notice given to the Congress about this fundamental policy decision.

Now, administration witnesses, reflecting upon those circumstances, have admitted here to a person that that was unwise. Congress should have been notified.

But the problem we face is that the legal opinion of the administration is that that was fully authorized within the law, and that means, it seems to me, at least theoretically, that any administration in the future could do the same thing and not be in contradiction of the law, and that is not acceptable to those of us who think that congressional oversight is something to be taken seriously.

I am not questioning the integrity or sincerity of the people who are not testifying from the administration, but I am questioning whether or not that legal opinion that we are facing is something

which would provide for meaningful congressional oversight as intended by current law, as at least it has been read until now.

Dr. CARVER. Mr. Chairman, I am not a lawyer. I am not going to defend what the administration did. It was silly.

"Timely" has a certain amount of creative ambiguity. It clearly does not mean time denoted in months, but I think any attempt to specify a time, particularly a near-term time—I mean 48 hours, even 2 days is ill advised. A finding is a very complicated document. It is going to take internal preparation. It is going to take internal coordination. It shouldn't be slapped together. Putting one together in 48 hours, particularly if the President happens to be out of town, and getting it disseminated is going to be extraordinarily difficult.

I think in any attempt to specify 48 hours, 36 hours, 72 hours—or whatever—you are going to find a hard case that straddles the specification.

I would much rather Congress put a clear shot across this administration and its successor's bow by indicating "one more step out of line and we will tie your hands in ways that you really won't like," rather than by jumping in and trying to specify what you can't quantify.

Mr. MCHUGH. My time is about up. I will ask just one more question.

What we are really down to in a worst case situation, from the administration's perspective and yours, is requiring the President within a 48-hour period to tell eight people in the leadership of the Congress of the United States. That is what we are talking about.

Lieutenant General SCOWCROFT. Mr. Chairman, it is not quite that simple because the bill says those eight people, if you limit it to those eight people, it can be done only to meet "extraordinary circumstances affecting vital interests of the United States."

Now, I don't know how many vital interests we have, but it certainly would not extend to the Canadian Embassy people. That is not a vital interest of the United States. It is to the people involved, not to the United States.

We probably don't have a half dozen vital interests. Vital means we cannot survive unless we protect them. That is an extreme restriction on alternative notification.

Dr. CARVER. It is probably more extreme than the drafters intended, Mr. Chairman, but once again the drafters use a lot of language whose full implications I don't think they quite know.

Mr. MCHUGH. Dr. Carver, this is current law. What we are talking about now is current law.

Dr. CARVER. That is right, but those drafters were equally——

Lieutenant General SCOWCROFT. That does not much help the situation if one takes it seriously.

Mr. MCHUGH. I think as a practical matter that definition is left indeed in fact to the President's discretion, and it has never been questioned by either the Executive Branch or the Congress, and if the President chooses to limit his notification to those eight leadership people, it has never been a matter of controversy between the two branches.

Mr. Hyde is shaking his head.

Mr. HYDE. I just think it is a sloppy way to legislate. The words have got to mean what they say.

Mr. MCHUGH. Look, the bottom line—I will defer to my colleagues because I have taken more than my allotted 10 minutes—I think it is important to remember in this debate what the alternative is to doing what we are exploring here; that is, to try to make clear what we think is important by way of notification—and it is not a veto power we are talking about here. It is simply notification to the Congress—the alternative to that is what we in fact got in the Iran case.

Now, hopefully, that is an aberration and it is an exception and it won't happen again; but we are faced with a legal opinion and a position by this Administration and many others who are distinguished witnesses that that is the law and that we cannot expect, legally at least, anything more from an administration than whatever the administration chooses on its own discretion to decide to give to the Congress, even when it is a fundamental policy decision such as selling arms to Iran.

Now, that is not, for some of us at least, an acceptable arrangement and a reasonable balance between the two branches on matters of fundamental importance to the country.

Lieutenant General SCOWCROFT. But, Mr. Chairman, what you are trying to do is to say the President can't go it alone, and I think if there is anything that has demonstrated that in his own self-interest, it is the Iran-Contra affair. He cannot conduct any serious foreign policy on his own. Sooner or later, he has to come back to you.

Now, if you know within 48 hours, 72 hours, does that really seriously affect your oversight power?

The implication seems to be that somehow if President Reagan had come up here and told you about the Iran affair you would have objected and he would have said, oh, my goodness, I didn't know that, well, I certainly won't do it. I think there is no reason to assume that he would have changed his mind had he gone through with notification as would be considered timely.

He heard objections, serious objections, from members of his Cabinet, from his principal advisers. This is something about which he felt strongly, and it seems to me—and I am not a constitutional lawyer—that he was within his rights to do it.

Mr. MCHUGH. He was within his rights to do it. The question is whether or not he should have.

Lieutenant General SCOWCROFT. He should not have. We all agree.

Mr. MCHUGH. He should have notified at least a certain number of people in Congress under the law.

Mr. HYDE. If the gentleman will yield.

Mr. MCHUGH. I'll be happy to yield to you, Mr. Hyde, and then to Mr. Livingston.

Mr. HYDE. The question is, as a matter of law, do we, the Congress, have the constitutional authority to invade the executive function which is given to him by the Constitution in broad terms and tell him legally, not as a matter of policy—but legally—that he must exercise that Executive power in a certain way, within a certain time frame?

I submit to you that we don't have the constitutional power, but we really don't need it. As a matter of policy, as a matter of common sense, any President who doesn't—and it should be more than notify, he should consult. He should talk to us and get our input. Not just say, "Here it is, boys," but in any event, we don't have the constitutional power to tell him how he must execute what is clearly his constitutional authority.

We do have every justification in the world for suggesting it's stupid. He'll pay a fearful price politically, and President Reagan is still paying that price.

And some candidates for President are going to pay a price, or are paying a price. And he's not getting away scot-free. We don't have to tighten up the laws. We have to tighten up enforcement. And they're going to be penalized.

But, to tell the President he has to exercise what is essentially his authority within 48 hours is clearly unconstitutional, in my humble opinion. And I think we just have to realize that. Desirable as some may feel it is.

Mr. McHUGH. Well, Henry.

Mr. HYDE. That's just my strong feeling.

Lieutenant General SCOWCROFT. I certainly agree with that.

Mr. McHUGH. Let me just say for the record that we do have constitutional experts who take a different view, Henry. This is not a self-evident issue.

Mr. HYDE. I understand.

Mr. McHUGH. And as a matter of record, we have people who have given us statements to the effect that the Congress does have the constitutional authority to ask the President in cases like this to share with members of the Intelligence Committee.

Mr. HYDE. You said ask. We're telling him what he has to do. That's a big difference.

May I just make a couple more comments? And then I'm through.

Mr. McHUGH. Mr. Livingston has the time.

Are you willing?

Mr. LIVINGSTON. Go ahead.

Mr. HYDE. All right. Just very briefly. I think this has been marvelous testimony from all three of you.

Dr. Carver, you have written a book here and it's not going to be wasted; I can assure you, I'll read every word of it. And I know my colleagues will, too.

General Scowcroft and Dr. Treverton, you have made an immense contribution. Let me just say this to you though, Dr. Treverton.

You are much more benign than I would be when you say, as I read the history of the Intelligence Committees they have not been leaking. Quite the contrary.

Oh, Doctor, you know more than I, I'll tell you. And I serve on the committees.

Page 26 of Dr. Carver's statement, and I wouldn't mention this he does, says:

> Much more recent events here in March 1987, a former Chairman of the Senate Select Committee on Intelligence relinquished his chairmanship only 2 months ear-

lier and spoke to a group of potential supporters convened in Florida in the wake and in the context of the Pollard affair.

The former chairman, just 2 months away from his post, alleged to that audience that the Pollard case had been preceded in 1982 by a similar U.S. intelligence operation targeted against Israel.

An allegation that both the United States and the Israeli Governments immediately and emphatically denied with some embarrassment—and haste, I might add.

The Chairman of the Senate Committee, who still has problems with that disclosure, the Vice Chairman left under circumstances you mentioned, which you say were benign.

OK. You mentioned the Pike Committee. You know the report was taken by Daniel Schorr, and he lost his job with CBS over it.

We have leaks. I have a book of leaks this thick that I don't know who leaked them all. If my life depended on it, I could make some educated guesses—not as to the name, but as to the source.

So I don't think you can say that the Intelligence Committee doesn't leak. We have yet to have a real good investigation of a couple of them that I think demand it.

Dr. TREVERTON. Could I say a word about that?

It's certainly true that there have been leaks from the Intelligence Committee. But, as a comparative matter, looking at the time period since the committees were established, that they have been on the whole not more and probably a good deal less leaky than the upper echelons of administrations.

Mr. HYDE. We made a study of that. And if you take the number of people in the Executive that have clearances and people in Congress that have clearance, and then you look at the leaks pound for pound, Congress, it seems to me, is 60 times more likely to leak. And we've got some figures on that.

Dr. TREVERTON. But they have been leaks from other than the Intelligence Committees.

Mr. HYDE. Of course. And we all remember Leo Ryan's famous interview with Daniel Schorr, when he said:

I have a duty to leak. If I don't like a policy, I think it's not in the best interests of our country, I have a moral duty to leak.

I presume, when you're confronted with that, let me just say—my last words, and I appreciate your indulgence—we are spending our time and our energy and our fervor and our zeal and our outrage on extracting better disclosures from the government, from the administration. OK?

But we're spending no time on doing something about the leaks. We're not criminalizing the unauthorized disclosure. We don't bother with that.

I've got a bill to have a joint committee of the Intelligence, fewer people within the loop, can't get hearings. I've had it since 1984.

That problem we're not looking at. But we are looking at this problem, which I think doesn't need to be fixed, at least legally, in a way that I think squeezes the Constitution out of shape.

Dr. TREVERTON. What would seem to me important, though, is confronting the argument that is made against these reporting requirements on the grounds that the Intelligence Committees are leaky. That seems to me to be a red herring. There may be good

reasons to be against those reporting requirements, but leaks are not one of them.

Mr. HYDE. I think, if we prosecuted the leaks and if we criminalized the leaks, you know, human nature is not going to change. We have to be consulted as a matter of policy.

But my problem is with mandating the President to do something within 48 hours. We just can't do it. I'm sorry.

Lieutenant General SCOWCROFT. If I could just comment very briefly on this, I would agree with Gregg. I'm not sure that the Executive is not, in general, as leaky or more leaky than the Congress. But that does not apply to covert action.

The procedures in the executive branch on covert action and the seriousness with which they're taken, I think prevent leaks on covert action. They just don't happen.

And the President does not have that kind of control over the Congress. Therefore, he's bound to be reluctant to share the kinds of things where people's lives—not only the policy against disclosure, but people's lives are at stake—to a body over which he does not exercise any control.

Mr. HYDE. Thank you very much.

Mr. LIVINGSTON. Just a few loose ends I want to tie up.

General Scowcroft has indicated very clearly that current law really is sufficient to cover the problem. What we have is not a legal problem, we have a political problem.

If the President and the Administration made political mistakes, they have paid dearly for them. I would certainly hope that any future Administration would learn from those mistakes.

Not to leave you alone, Dr. Treverton, you said——[Laughter.]

You said that we don't need to leave loopholes, that the current law leaves loopholes.

Well, the propsoed bill does more than plug loopholes. It puts unreasonable restrictions on the President by saying that he must consult with Congress in advance of any proposed covert action in all but the most exceptional circumstances.

And as General Scowcroft says, in all circumstances except those which deal with vital security interests. Yet, President Carter took three months under then existing law.

Now, you're essentially saying for two reasons. First of all, even if that were a vital instance of national security, the saving of the lives of some six people—even if that were vital—he was still long overdue by almost 3 months, less 2 days.

And then, if you can accept the argument of General Scowcroft that that isn't even a vital security interest, to save the lives of six Americans, then he was wrong from the day that he committed the covert activity.

Are you foreclosing that option? Are you saying to American citizens who might be abroad, who might be jeopardized under similar circumstances, as they were under the Carter administration, when they were captured by Teheran, "Check off, folks, because you're not vital and you don't count, because if we saved you, that would be a loophole"?

Dr. TREVERTON. I share your nicely old-fashioned sense that we ought to be careful about words. I would like us to do so as well.

But, as a practical matter, we all know that covert action, like other matters of policy, is a tussle. It's going to be a struggle between the executive and Congress.

What seems to be important is to impose the burden on the President to make him think, and think again. If Presidents are determined to go ahead if they feel it's very important to go ahead, they'll do it. We all know that,

But the burden should been the President to ask himself why he isn't going to consult with Congress on a proposed covert action.

Mr. LIVINGSTON. Dr. Treverton, we're mandating it in law. It's not just a legal burden. It's not just a legal discourse, the discussion. What you're talking about is placing the lives of American citizens in jeopardy.

You know, for us to sit across the table going back and forth here and talking about that potential is academic. For the people who might be placed in jeopardy, it may be the end of existence.

Now, are you telling me that for the sake of proposing that all future administrations conform to legal niceties, that future lives of American citizens don't matter?

Dr. TREVERTON. No, of course not. But, we can all imagine particular cases that fit our purposes. But imagine that Mr. Carter had to go through the 1980 episode again under this law. Then it seems to me he would have had several options.

He would have had one option to go back to Canada and say, Listen, under my law, I've got to tell at least eight Members of Congress. I'll tell them under the utmost secrecy. They'll sympathize with the operation. Can I do that?

If Canada still said no, then he would have had the option of either not doing it or of going ahead and——

Mr. HYDE. Getting impeached.

Dr. TREVERTON. In those circumstances, he would have risked what people would say, OK, he broke the law but in exceptional circumstances. He was justified in doing so. I dare say no one in Congress would have moved to impeach Mr. Carter for getting six Americans out.

Mr. LIVINGSTON. They might impeach Mr. Reagan.

Dr. TREVERTON. No one wanted to in the Iran-Contras case, and I can understand why.

Mr. LIVINGSTON. For Dr. Carver and General Scowcroft, do you see any redeeming qualities in the proposed bill, H.R. 3822? Or any of the proposed changes contained therein which really need to be made?

Lieutenant General SCOWCROFT. I guess what I would say briefly is that I think that President Reagan has gone to extreme lengths to correct the problems within the executive branch, which let this unfortunate thing happen. That they are more than adequate.

If I were in the Government and this bill came to the President's desk, I would strongly urge that he veto it on grounds that the legislation demonstrates that it was not possible to cooperate with the Congress. And, therefore, he had to insist on his constitutional rights.

Mr. LIVINGSTON. Dr. Carver.

Dr. CARVER. The present law was written by humans and can certainly be improved, as any human artifact can. But the short answer to your question, Mr. Livingston, is no. I really don't see any material advantage that could be gained by H.R. 3822 or S. 1721.

I can see a lot of disadvantages, some of them the unintended results, I think, of hasty drafting. And I certainly would much prefer that any changes in the law be made in a more leisured way, free from some of the pressures that are attendant on the current legislation, which I think would be regretted even by those who drafted and enacted it within a matter of years, if not months.

Mr. LIVINGSTON. Thank you.

Dr. Carver, perhaps this is best addressed to you. Any of the others may feel free to comment.

How difficult do you believe it will be for us to assure those foreign participants that including a number of Members of Congress in the circle of knowledge in advance of covert actions does not significantly increase the risk of harm to those participants; that is, under circumstances such as Canada.

How easy would it be to persuade them, as Dr. Treverton pointed out, that law compels us to advise the Congress. And it's really not so bad, just go along with us.

Dr. CARVER. It depends, of course, on the particular case and the particular foreigners. The short answer is I think it would be extraordinarily difficult to persuade other foreigners, who are skittish enough about America's ability to keep secrets, to persuade them to go along with increasing the witting circle, particularly increasing it up on Capitol Hill.

Fair or not, the perception exists of closed door hearings being held during the Iran-Contra with General Scowcroft and his colleagues and then people falling all over themselves to get to the microphones to tell what was going on in the closed door hearings.

I don't mean to be indelicate, but things like the Durenberger episode sent a shock wave through the professional intelligence community around the world. And I think, as a matter of practical reality, that there is enough nervousness already about the American ability to keep secrets, and that nervousness would be materially increased at any intimation of passing further information to Congress, even if that increased nervousness were unwarranted or unjustified, particularly with regard to specific individuals.

But the specific individuals can change. A given set of eight leaders might be perfectly secure. But you can easily imagine a situation where of those eight, there might be one or two, on particular issues, about which particular governments would have certain concerns that might not be entirely unwarranted.

Mr. LIVINGSTON. By the Durenberger episode, you are referring to the chairman of the Senate Intelligence Committee?

Dr. CARVER. Yes, sir, coming out 2 months after this chairmanship and talking about a covert operation.

Mr. LIVINGSTON. And he would have been one of the designated people?

Dr. CARVER. He would have been one of the designated eight because he was chairman of the Senate Intelligence Committee.

Mr. LIVINGSTON. Thank you very much.

Mr. McHUGH. Mr. Stokes.

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

Let me greet this very distinguished panel. It's a pleasure to have your appear before the subcommittee. I would just like to have some reaction from the panel regarding the Canadian situation.

I think that we are forgetting here to acknowledge the fact that the currently existing law was not the law at the time that the Canadian situation arose, at the time that President Carter was confronted with the Canadian situation.

The Hughes-Ryan law was in effect, which would have required him, the President, to notify eight committees in the Congress. That is a lot different from having to notify the two Intelligence Committees of the Congress, or in the alternative, notify the so-called gang of eight.

And a part of the consideration in the enactment of the 1980 law was to alleviate that situation. It was a cut-down from eight committees of the Congress to two committees in the Congress, and then a further cutdown to eight members of the entire Congress.

So it would seem that we are not really confronted with the same situation any more that President Carter was confronted with in the Canadian situation.

I would appreciate any comments that any of you might have in that regard.

Lieutenant General SCOWCROFT. Mr. Chairman, it seems to me that we are dealing with what is likely to be, in any case, only a very small handful of proposed covert operations, a very small proportion.

Really, those where people's lives are seriously at stake and where an operation may involve substantial advanced planning, maybe the implacement of agents in foreign countries, and so on.

In those circumstances, it seems to me that it's important to leave it to the discretion of the President to have the authority to protect those lives. I think we all agree that timely notification was violated in the Iran-Contra Affair. There's no question about it.

But, to be so rigid as to require notification, regardless of the circumstances, within 48 hours, not of executive but of the President's decision to go ahead, it seems to me does not leave him the flexibility to do what's required in some cases.

Dr. CARVER. Mr. Chairman, may I follow up?

I don't have the text of section 662 committed to memory, but I believe, sir, that that language of Hughes-Ryan did give him the "in timely fashion" wiggle room within which he didn't have to notify anybody.

Certainly, I think that's the way he behaved. I believe that the curtailment of notification from eight committees to two—although again Appropriations and, to some extent, Armed Services, deal themselves into the act a little bit, as you know—that was a step forward.

But the wiggle room, the ambiguity, the elasticity, the loophole, whatever you want to call it, of the "in timely fashion" enabled President Carter to get through that situation without violating the law.

If there had been a 48-hour notice requirement, even on notifying the Gang of Eight, I don't think you would have been able to do so. And I think he would have been impaled on the dilemma we have discussed.

I think, with all due respect, Mr. Chairman, that requiring a President, without exeception, to notify—even if he's dealing in a situation as he was then, where a foreign government—and it's they who are providing the embassy, they don't have to help us—is a mistake, the proponents may easily say, "I'm terribly sorry. Don't give me a lecture on your Constitution. I'm telling you the terms and conditions under which we will provide this assistance. Meet it or not meet it. If you want the assistance, meet it. If you don't, that's your problem, not ours."

That's the kind of real life situation the President has to deal with, sir. And I think that, in that case, the flexibility of "in timely fashion" overrode—the advantage of the flexibility overrode the disadvantage of not having to inform the committees.

Dr. TREVERTON. Mr. Chairman, I disagree with both the previous comments. I think the circumstances have changed since 1980. And I think the bill as proposed would provide the President enough flexibility to meet extraordinary circumstances.

It's certainly true that other governments always worry about us being leaky, unable to keep secrets. If they had their druthers, they'd all like us to be very different, a very different kind of system then we are.

But it does seem to me that the proposal, particularly the option of letting the President notify only eight Members of Congress in extraordinary circumstances, which hasn't been used to my understanding very often, does provide enough flexibility for a President.

I think it would have provided enough flexibility for Mr. Carter in 1980; we can't know for sure but the existing state of the legislation and the proposals you have made are really quite different from what was in effect in 1980. And that is on important fact to bear in mind.

Mr. STOKES. Thank you very much.

Thank you, Mr. Chairman.

Mr. MCHUGH. Thank you, Mr. Stokes.

Let me, in closing, first reassure you, Dr. Carver, that the intent of the bill—and I believe the terms of the bill—would not require the President to tell us specifically which countries, or which agents were involved in the covert operation, but only whether, generically, other countries were asked.

And I share your concern about that. If there's any ambiguity or question about it, we should make that clear; because I can see that if other countries became convinced that we were providing specific names, that would be a problem.

I don't think our bill does that. But we'll go back and look to be sure. And if there's a question, we should make it clear that that's not the case.

Secondly, I want to reassure you also that we're not pursuing this in great haste. The first bill, which was the bill Mr. Stokes and Mr. Boland introduced, is over a year old—we began these hearings back in April of last year. And we have held five of them.

And I think it was discussed on both sides rather dispassionately, so I hope that we're not pursuing that in haste. Any my hope is that we do go forward, that we'll do it objectively without the partisan type of debate we sometimes experience in Congress.

General, I think I'm not quite as sanguine as you about future administrations of whatever party not repeating mistakes. We've had administrations repeat mistakes all too often. It's the human factor.

The Oversight Act of 1980, as you know, was initially developed because of some fundamental abuses, or mistakes, if you wish, and I'm not so sure that a future administration might not, for whatever reasons, make mistakes.

What we're trying to do here is avoid the ambiguity which perhaps contributed to this mistake in the Reagan administration. And I've said earlier, we really feel strongly, some of us, that unless we make clear what we think reasonable consultation and notice is, it increases the prospects for misunderstanding our mistake later.

And it's possible that if the Congress, if members of Congress were notified, I think members on both sides would have objected to arms sales to Iran. It's possible that the President would have gone ahead anyway. But it's possible that he might have thought it through a little more carefully. And it's possible that he would have chosen not to proceed, in which event he would have spared himself a great political embarrassment. But, more importantly, he would have spared the country some real damage, at least in the short term, in foreign policy.

And I think it's in that spirit that we're offering this suggestion. I'm not sure that 48 hours is magic here and I'm not sure that any specific time period can be defended as absolute truth.

But I do think it's important in the face of a legal opinion that not notifying Congress for 10 months is OK, that we try to do something to clarify the existing law, or I think we're likely to see at some future time an administration misunderstanding what we mean.

Maybe it will look back at the history of this event and say, "Well, the Administration in those days took the position that 10 months was timely notice, and it has taken that position legally. Therefore, in this case, some years later, it is okay to withhold notice for that period of time again."

And we think that, in light of these circumstances, it is important for us at least to address the issue in a nonpartisan objective way in an effort to clarify what we think the law is or should be.

And so I hope it's seen in that spirit and in that context.

We do appreciate, as we said earlier, your participation. You have given us food for thought on both sides and I'm sure the committee members will think very carefully about this before we proceed to mark up.

Again, thank you for being with us.

Mr. Livingston.

Mr. LIVINGSTON. Thank you, Mr. Chairman. I just wanted to thank the witnesses for their testimony. That was great input. And I want to thank you for your courtesy throughout these hearings.

This is the last hearing we're going to have on this subject, and I think it should be the last thing we'll have anything to do with on this subject. [Laughter.]

But I doubt that will be the case.

But, I think it's appropriate just as a finale to quote a September 4, 1985, comment in the Congressional Record from former Chairman of the Intelligence Committee, Lee Hamilton, who noted that, ". . . leaks are inevitable when so many people handle secrets . . ."

I think it's a very appropriate line and I hope that we remember it as we go forward on this legislation.

Mr. McHUGH. I'm sure we will. Thank you.

Mr. Stokes.

Mr. STOKES. If I may, Mr. Chairman, I, too, want to join with my colleagues in expressing our appreciation to each of you gentlemen for your appearance here and for the contributions you've made to these hearings.

Mr. McHUGH. Thank you, Mr. Chairman. Thank you for your leadership as well.

Gentlemen, again, thank you.

We are now adjourned.

[Whereupon, at 3:45 p.m., the hearing concluded.]

APPENDIX A

I

100TH CONGRESS
1ST SESSION

H. R. 3822

To strengthen the system of congressional oversight of the intelligence activities of the United States.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 18, 1987

Mr. STOKES (for himself, Mr. BOLAND, and Mr. MCHUGH) introduced the following bill; which was referred jointly to the Committees on Permanent Select Committee on Intelligence and Foreign Affairs

A BILL

To strengthen the system of congressional oversight of the intelligence activities of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Intelligence Oversight Act of 1987".

SEC. 2. Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is hereby repealed.

SEC. 3. Section 501 of title V of the National Security Act of 1947 (50 U.S.C. 413) is amended by striking the lan-

guage contained therein, and substituting the following new sections:

"GENERAL PROVISIONS

"SEC. 501. (a) The President shall ensure that the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this title referred to as the 'intelligence committees') are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activities, as required by this title: *Provided,* That nothing contained in this title shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities.

"(b) The President shall ensure that any illegal intelligence activity is reported to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.

"(c) The President and the intelligence committees shall establish such procedures as may be necessary to carry out the provisions of this title.

"(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence

sources and methods furnished to the intelligence committees or to Members of Congress under this title. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

"(e) Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.

"(f) As used in this section, the term 'intelligence activities' includes, but is not limited to, 'special activity' as defined in subsection 503(e).

"REPORTING INTELLIGENCE ACTIVITIES OTHER THAN SPECIAL ACTIVITIES

"SEC. 502. (a) To the extent consistent with due regard for the protection against unauthorized disclosure of classified information relating to sensitive intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall keep the intelligence committees fully and currently informed

of all intelligence activities, other than a special activity as defined in subsection 503(e), which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and any significant intelligence failure.

"(b) The Director of Central Intelligence and the heads of all departments and agencies and other entities of the United States Government involved in intelligence activities shall furnish the intelligence committees any information or material concerning intelligence activities, other than special activities, which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

"PRESIDENTIAL APPROVAL AND REPORTING OF SPECIAL ACTIVITIES

"SEC. 503. (a) The President may authorize the conduct of a special activity by departments, agencies, or entities of the United States Government only when he determines such an activity is necessary to support the foreign policy objectives of the United States and is important to the national security of the United States, which determination shall be set forth in a finding that shall meet each of the following conditions:

"(1) Each finding shall be in writing, unless immediate action by the United States is required and

time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision is made;

"(2) A finding may not authorize or sanction special activities, or any aspect of such activities, which have already occurred;

"(3) Each finding shall specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such activities: *Provided,* That any employee, contractor, or contract agent of a department, agency, or entity of the United States Government other than the Central Intelligence Agency directed to participate in any way in a special activity shall be subject either to the policies and regulations of the Central Intelligence Agency, or to written policies or regulations adopted by such department, agency or entity, in consultation with the Director of Central Intelligence, to govern such participation;

"(4) Each finding shall specify whether it is contemplated that any third party which is not an element of, or a contractor or contract agent of, the United

States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the special activity concerned, or be used to undertake the special activity concerned on behalf of the United States;

"(5) A finding may not authorize any action that would violate any statute of the United States.

"(b) To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a special activity shall keep the intelligence committees fully and currently informed of all special activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, and shall furnish to the intelligence committees any information or material concerning special activities which is in the possession, custody or control of any department, agency, or entity of the United States Government and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

"(c)(1) The President shall ensure that any finding approved pursuant to subsection (a) shall be reported to the intelligence committees as soon as possible after such approval and prior to the initiation of the special activity authorized by the finding: *Provided,* That if the President determines it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, such finding may be reported to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. In either case, a copy of the finding, signed by the President, shall be provided to the chairman of each intelligence committee. Where access to a finding is limited to the Members of Congress identified above, a statement of the reasons for limiting such access shall also be provided.

"(2) In circumstances where time is of the essence and the President determines that it is important to the national security interests of the United States to initiate a special activity before the notice required by paragraph (1) can be given, such activity may be initiated without such notice.

"(3) The President shall ensure that notice of a special activity undertaken pursuant to paragraph (2) is provided to the intelligence committees, or to the Members of Congress identified in paragraph (1), as soon as possible, but in no

event later than forty-eight hours after the special activity has been authorized pursuant to subsection (a). Such notice shall be accompanied by a statement of the President setting forth why time was of the essence and why proceeding pursuant to paragraph (2) is important to the national security interests of the United States.

"(d) The President shall ensure that the intelligence committees, or, if applicable, the Members of Congress specified in subsection (c), are notified of any significant change in a previously-approved special activity, or any significant undertaking pursuant to a previously approved funding, in the same manner as findings are reported pursuant to subsection (c).

"(e) As used in this section, the term 'special activity' means, with respect to the Central Intelligence Agency, operations in foreign countries other than activities intended solely for obtaining necessary intelligence, and, with respect to any other department or agency of the United States, any activity conducted in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, and does not include activities to collect necessary intelligence, or diplomatic activities carried out by the Department of State or persons otherwise acting pursuant to the authority of the

President. A request by any agency or department of the United States to a foreign country or a private citizen to conduct a special activity on behalf of the United States shall be deemed to be a special activity.

"(f) No special activity may be conducted if it is intended to influence United States political processes, public opinion, policies, or media.".

SEC. 4. Section 502 of title V of the National Security Act of 1947 (50 U.S.C. 414) is redesignated as section 504 of such Act, and is amended by deleting "501" in subsection (a)(2) of such section and inserting in lieu thereof "503", by striking "Appropriated funds" at the beginning of such section and inserting in lieu thereof "Funds", and by adding the following new subsection (d):

"(d) No funds appropriated for, or otherwise available to, any department, agency, or entity of the United States Government, may be expended, or may be directed to be expended, for any special activity, as defined in subsection 503(e), unless and until a Presidential finding required by subsection 503(a) has been signed or otherwise issued in accordance with that subsection.".

SEC. 5. Section 503 of title V of the National Security Act of 1947 (50 U.S.C. 415) is redesignated as section 505 of such Act, and subsection (a)(1) of such section is amended

by adding, "or any aggregation of defense articles or defense services," after "service".

O

APPENDIX B

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Clifford & Warnke
Attorneys and Counsellors at Law
815 Connecticut Avenue
Washington, D.C. 20006

February 24, 1988

BY HAND

The Honorable Louis Stokes
The Honorable Matthew F. McHugh
Permanent Select Committee on Intelligence
U.S. House of Representatives
H-405 Capitol Building
Washington, D.C.

Dear Chairman Stokes and Chairman McHugh:

I want to thank you for the warm reception that you and the members of the Committee extended during my testimony regarding H.R. 3822.

In addition, I would like to expand on my response to two questions that arose during my testimony concerning my proposal for criminal penalties:

-- First, Mr. Richardson asked whether the criminal penalties that I proposed would hinder the undertaking of covert activities. As I responded, criminal penalties, in my view, would not be a hindrance -- indeed, such penalties would help to keep covert activities on their proper, narrow course. Under my proposal, members of the intelligence community -- acting in good faith as nearly all do -- could rely on the risk of criminal penalties to insist on compliance with laws that the expedient few might wish to ignore. The threat of criminality would bolster the resolve of subordinate and superior officials alike in resisting directives that evaded the reasonable provisions for notifying the intelligence committees of covert activities.

-- Second, Mr. Glickman asked whether the termination of funding for covert activities about which the President had failed properly to inform the committees might endanger U.S. interests or lives. As I stated, in my view, this would not occur. If a covert activity was underway and the President

and the intelligence committees felt that it should continue to be funded to avoid risk to U.S. interests or lives, the President simply could sign a finding authorizing continued funding and provide it to the committees according to the law. This finding of course would not retroactively authorize the past activity or absolve any officials of liability for that past activity. But such a belated finding and notice to the committees should be necessary to restore the covert activity to its proper course.

Finally, I enclose a copy of my resume, as requested by the Committee.

Permit me to express my appreciation for the courteous reception that I received this morning.

Sincerely,

Clark M. Clifford

Enclosure

BIOGRAPHICAL SKETCH OF CLARK M. CLIFFORD

Born in Fort Scott, Kansas on December 25, 1906, the son of Frank Andrew Clifford and Georgia (McAdams) Clifford. Shortly thereafter the family moved to St. Louis, Missouri.

Attended public schools and then went to college and law school at Washington University in St. Louis, graduating in 1928.

Entered the practice of law in St. Louis in 1928 in association with Jacob M. Lashly.

Volunteered for service in the United States Naval Reserve in 1943, and received commission of Lieutenant (j.g.). Served as special assistant to the Commander, Western Sea Frontier, later as assistant Naval Aide to the President, and as Naval Aide to the President.

Separated from the service in 1946 with the permanent rank of Captain.

Appointed Special Counsel to the President of the United States in June, 1946 by President Harry S. Truman. Served in that capacity until February 1, 1950.

In 1945, President Truman assigned him the task of conducting a study in depth of the unification of the Armed Services. He worked with the War Department, the Department of the Navy, other departments and agencies involved, and the Congress for two years thereafter. There finally resulted the passage of legislation in 1947 entitled "The National Security Act." He was one of the principal architects of this legislation.

Thereafter, he served as liaison between the White House and the new Secretary of Defense.

Again in 1949, he worked with the Secretary of Defense, other departments and the Congress to obtain passage of the "National Security Act Amendments of 1949", which greatly strengthened the authority of the Secretary of Defense and changed the national military establishment into a regular executive Department of Defense.

On February 1, 1950, he resigned as Counsel to the President and established a law firm in Washington, D.C. under the firm name of Clifford and Miller.

In 1960, he served as a member of the Committee on the Defense Establishment, appointed by Senator John F. Kennedy to survey the organization, management and administration of the Defense Department. This committee was chaired by Senator Stuart Symington.

Between November, 1960 and January, 1961 he represented President-elect Kennedy in the transition period involving the takeover of the Executive Branch of Government from the Eisenhower Administration.

In May, 1961 President Kennedy appointed Mr. Clifford a member of the President's Foreign Intelligence Advisory Board. In April, 1962 Dr. James Killian of M.I.T. resigned as Chairman of the Board because of ill health, and Mr. Clifford was appointed Chairman by President Kennedy.

In 1965, Mr. Clifford made a trip to the Far East and visited certain countries in his capacity as Chairman of the Intelligence Board.

In 1966, he served as an advisor to President Johnson at the Manila Conference.

In 1967, Mr. Clifford and General Maxwell Taylor visited a number of Southeast Asian and Pacific countries as personal emissaries of President Lyndon Johnson.

On January 19, 1968, President Johnson nominated him to be Secretary of Defense. On January 30, 1968 he was unanimously confirmed by the United States Senate. On March 1, 1968 he was sworn in as Secretary of Defense of the United States.

Mr. Clifford served as Secretary of Defense until January 20, 1969, after which he returned to the practice of law in Washington, D.C. as senior partner of the firm of Clifford & Warnke, with offices at 815 Connecticut Avenue, Washington, D.C.

In April, 1982 he became Chairman of the Board of First American Bankshares, a bank holding company headquartered in Washington, D.C. He has also served for many years as a Director of Knight-Ridder Newspapers.

January, 1969	Awarded Medal of Freedom with Distinction by President Johnson - highest award given to civilians
April, 1976	Received Distinguished Alumnus Award from the Washington University School of Law, St. Louis, Missouri
May, 1976	Received Honorary Doctor of Law Degree from Washington University, St. Louis, Missouri
February, 1977	Appointed by President Carter to be his Special Emissary to Greece, Turkey and Cyprus
May, 1978	Received Honorary Doctor of Law Degree from Loyola College, Baltimore, Maryland
December, 1978	Received Lawyer of the Year Award from the Bar Association of the District of Columbia, Washington, D.C.
January, 1980	Appointed by President Carter to be his Special Emissary to India
May, 1980	Recipient of the Harry S. Truman Public Service Award

APPENDIX C

GEORGETOWN UNIVERSITY

The Graduate Division
School of Foreign Service
Associate Dean

15 March 1988

The Hon. Bob Livingston
U.S. House of Representatives
House Permanent Select Committee on Intelligence
Washington, DC 20515-6415

Dear Congressman Livingston:

I have now had a chance to review (as you requested) the testimony of Judge Webster before your committee on 24 February 1988 and also the unclassified text of NSDD 286. In his testimony, Judge Webster states that "any concerns about excessive delay in Congressional notification of a special activity have already been addressed by NSDD 286 (pp. 6-7)." I do not share this view and think legislation, and specifically H.R. 3822, is still required to assure that Congress will be kept properly informed about covert actions and will be notified before they are undertaken.

As I read it, NSDD 286 clearly recognizes the need for Congress to be consulted about covert action operations. This appears to be the rationale behind the statement in the "policy context" section of the document that such operations "should be conducted only when we are confident that, if they are revealed, the American public would find them sensible." Only Congress can really provide this insight; yet, it cannot do so if it is not given prior notice.

Such insight is especially important in circumstances which might pose such grave risks to the United States that they require virtually immediate action. I use the word "virtually" here because I can forsee of no circumstance in which covert action would be employed without some prior planning being required and such planning (which is essential from an operational viewpoint) would allow time at least to notify the senior leadership of Congress. However, were such a circumstance to exist in which a covert action by the U.S. government had to be launched immediately, I find the allowance of a grace period of two working days before the Intelligence Committees had to be notified anomalous to say the least. This grace period could in practice be extended to three days in the case of federal holidays or even longer if these holidays happen to coincide with Washington snowstorms.

I also find it troublesome that while NSDD 286 permits notice as well as information about some covert action operations to be withheld from Congress, it widens the circle of those in the know in the executive branch and gives the Chief of Staff to the president a key role. This position has not been filled with persons who have had extensive foreign affairs or intelligence experience nor should it be. And I am uncomfortable with the prospect that a chief of staff without such experience might because of close personal relations influence the president's decisions about covert action. Without the check and balance of congressional oversight, under NSDD 286 the president could really be left blind about the costs and risks of a covert action.

In sum, Judge Webster's testimony has not changed my view that the intelligence community as well as the country would benefit from passage of H.R. 3822.

Yours sincerely,

Allan E. Goodman

AEG:jrb
cc: The Hon. Matthew McHugh

APPENDIX D

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW

435 West 116th Street

28 January 1988

Dear Mr. Stokes,

I have your letter of January 14 inviting my views on H.R. 3822.

My schedule makes it difficult for me to appear before the Subcommittee on Legislation on February 4. However, my letter to you of 31 March 1987 in relation to H.1013, published as Appendix H to the Hearings on that bill, is relevant also for H.R. 3822, and your Subcommittee may wish to take account of it.

As you requested, I attach brief comments on the testimony on the same subject by Assistant Attorney General Cooper before the Senate Committee on Intelligence on S.1721,

Sincerely,

Louis Henkin

Louis Henkin

Mr. Louis Stokes, Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515-6415

Comment on Testimony of Charles J. Cooper
Assistant Attorney General
before
Senate Select Committee on Intelligence
December 11, 1987

Mr. Cooper's testimony deals with a number of issues. For convenience and clarity, I address what appear to be the large constitutional positions that underlie Mr. Cooper's testimony, and indicate where he and I may differ.

1. Invoking the Executive Power clause (Article II, section 1), Mr. Cooper's memorandum states: "This clause has long been understood to confer on the President a plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject of course to the limits set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers."

It has long been understood that the President has "plenary authority to represent the United States"; it has not been accepted that he has "plenary authority.. to pursue its interests outside its borders." Whether inside or outside the borders of the United States, there are many things the President cannot do even "to pursue [U.S.] interests."

2. Mr. Cooper's memorandum seems to equate "plenary" power with "exclusive" power. Some powers of the President are perhaps exclusive and not subject to comprehensive regulation by Congress. There are other powers that the President may exercise when Congress is silent but as to

which the power of Congress is concurrent, and Congress can regulate and control Presidential action.

3. Mr. Cooper's memorandum does not distinguish among "intelligence activities." It appears to treat intelligence-gathering and other covert activities as constitutionally identical.

In my view, they are different in critical respects. As I indicated in my letter to your Committee last Spring, covert activities are subject to regulation by Congress; some means for gathering intelligence -- notably through the diplomatic process -- may not be subject to comprehensive regulation by Congress (though they, too, may be effectively subject to the war powers of Congress, and to its power to regulate the Executive Branch under powers granted to Congress by Article II and the "necessary and proper" clause).

It is accepted that, in John Marshall's phrase, the President is the "sole organ of the nation in its external relations". As sole organ, the President has exclusive power over "communication" and "relations" with foreign states and over what is related to or implied in the diplomatic process. The gathering of intelligence by some means is plausibly part of that process. As to such activities, the President can claim authority exclusive of Congress.

Covert activities, in my view, are not part of the "sole organ" function. If the President has authority to authorize such activities without authorization by Congress, it can only be under some general

"executive power", the scope of which is uncertain. There is no basis -- in Marshall, in Hamilton, in Curtiss-Wright, or anywhere else -- for suggesting that such power is exclusive and not subject to regulation by Congress.

The power of Congress to regulate covert activities is clear. Covert activities are elements of "commerce" with foreign nations within the meaning of Article I, section 8 of the Constitution. Covert activities may be sufficiently related to war and peace to come within the enumerated war powers of Congress. They are within the unenumerated "power of Congress to deal with foreign relations," See Perez v. Brownell, 356 U.S. 44, 59 (1958).

4. The memorandum confuses the legislative request to be informed of covert activities with the centuries-old issue between President and Congress as to executive privilege. The Nixon case cited by Mr. Cooper confirmed that the President has an executive privilege. The Court held that in relation to the administration of justice the privilege is not absolute; the Supreme Court may have implied that, in relation to the administration of justice, the privilege might perhaps be absolute where diplomatic or military matters are concerned. The Court did not consider at all the existence, character or scope of executive privilege in relation to Congress.

I do not express here any views on the large issue of executive privilege. Except where the request for information may impinge on private rights of individuals, the power of Congress to obtain information

may know few limits, but the President may have some executive privilege even vis-a-vis Congress.

As Mr. Cooper indicates, Congress has long respected the confidentiality of the diplomatic process. Whether it has done so out of courtesy or from a sense of constitutional propriety is uncertain . One can argue that to the extent that the process is within the exclusive power of the President, he is entitled to withhold information if he reasonably thinks that to communicate the information to Congress, even under injunction of secrecy, would jeopardize the activity. But the internal confidentiality of the Executive Branch apart, the claims for Congress's right to know are strong. I agree with Mr. Cooper that where the President has constitutional authority to withhold information from Congress, Congress may not properly use its Power of the Purse to compel disclosure.

The request for information as to covert activities is a wholly different matter. Mr Cooper suggests that Congress "in the performance of its legislative function does not require notification of virtually all intelligence activities within a fixed period of time." But the Congressional directive that its Committees be informed when covert action is undertaken is not a request for information for legislative purposes only. It is a form of regulation. In my view, Congress could prohibit such activities; a fortiori, it can declare that they may take place only if Congressional Committees are informed of them.

FROM	OIR/PPB/DCU
	GE47 HQ
TO	DCI
	7D60 HQ

 ND REUSE ENVELOPE