H.R. 1013, H.R. 1371, AND OTHER PROPOSALS WHICH ADDRESS THE ISSUE OF AFFORDING PRIOR NOTICE OF COVERT ACTIONS TO THE CONGRESS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LEGISLATION

OF THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

APRIL 1, 8 AND JUNE 10, 1987

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H.R. 1013, H.R. 1371, AND OTHER PROPOSALS WHICH ADDRESS THE ISSUE OF AFFORDING PRIOR NOTICE OF COVERT ACTIONS TO THE CONGRESS

WEDNESDAY, APRIL 1, 1987

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

The Subcommittee met, pursuant to call, at 9:00 a.m., in Room 2247, Rayburn House Office Building, Hon. Matt McHugh (Chairman of the Subcommittee) presiding.

Present: Representatives McHugh [presiding], Stokes, Kastenmeier, Kennelly and Livingston.

Also Present: Representatives Beilenson and Hyde.

Staff Present: Michael J. O'Neil, Chief Counsel; Thomas R. Smeeton, Associate Counsel; Bernard Raimo, Jr., Counsel; Stephen D. Nelson, Counsel; Robert J. Surrette, Professional Staff Member; Jeanne M. McNally, Clerk; Sharon Curcio, Assistant Clerk; Merritt R. Clark, Chief, Registry/Security; Lawrence D. Covington, Assistant, Registry/Security.

Chairman MCHUGH. The Committee will please come to order.

Today the Subcommittee begins two days of hearings on the subject of congressional oversight of covert operations. More specifically, we will be examining whether existing procedures governing the President's authorization of covert operations, as well as his notification of and consultation with Congress, are adequate to assure meaningful congressional oversight of such operations.

Despite the fact that covert operations represent only a small fraction of the intelligence community's work, they tend to generate the most attention and controversy when publicly revealed. We would all agree that such operations are appropriate in certain cases. However, because of their sensitivity and potential for controversy at home, it is particularly important that covert operations be soundly conceived and be seen as advancing the legitimate interests of the United States if they become publicly known.

It is for this reason, as well as Congress' right to share in the establishment of U.S. foreign policy, that the intelligence committees are involved in the oversight of covert operations.

The primary legislation governing congressional oversight is the Hughes-Ryan amendment of 1974, as amended by the Intelligence Oversight Act of 1980.

The statute provides that the intelligence committees of the Congress must be kept "fully and currently informed of all intelligence activities * * * including any significant anticipated intelligence activity * * *." This provision establishes the general requirement that the intelligence committees must be given prior notice of any covert operation.

However, the Oversight Act then goes on to create two exceptions to the general rule. First, "if the President determines it is essential * * * to meet extraordinary circumstances affecting vital interests of the United States," the President may restrict prior notice to the House and Senate leadership and the chairman and ranking minority members of the two intelligence committees. This group of eight in the leadership is sometimes referred to as the "Gang of Eight".

Second, the Act recognizes that in some cases the President may not give prior notice to anyone, but in those cases the Act requires the President to "fully inform the intelligence committees in a timely fashion. * * *"

This second exception to the general rule requiring prior notice will be a main focus of these hearings. In the case of the President's decision to covertly sell military arms to Iran, he signed his Finding authorizing the operation in January of 1986. The President not only failed to provide anyone in Congress with notice of this operation prior to its inception, he never provided notice. It was not until November of 1986 that anyone in Congress learned of this covert operation, and then only because a magazine in the Middle East disclosed it.

Our purpose in these hearings will not be to revisit the entire Iran-contra episode. That is for other committees to do. However, inasmuch as the President may decide to initiate other covert operations, it is important for the intelligence committees to determine whether existing law contributed to the breakdown of congressional oversight in the case of the Iran arms sales.

Of course, many of us in Congress believe that the President should have given the intelligence committees prior notice of his intent to covertly sell arms to Iran. If he had done so, Members on both sides of the aisle surely would have expressed strong objections. While these objections would have been advisory only, they might have helped the President avoid embarking on a policy which was so deeply flawed in its conception and its implementation. This is a classic example of why prior notification and consultation with the intelligence committees are not only a benefit for the committees, but a benefit for the President as well.

However, as previously noted, current law does not require the President to give prior notice in all cases. He may defer notice until after the operation has begun, but in those cases he must provide notice "in a timely fashion." The problem here is that appropriate cases for deferring notice are not defined, nor is there a definition of what constitutes timely notice after the fact.

The Subcommittee has before it today two bills that have been introduced to deal with these questions. One is H.R. 1371, which was introduced by a former member of the Intelligence Committee, Mr. Mineta of California. It would require the President to provide prior notice of all covert activities. The other bill is H.R. 1013,

which was introduced by Mr. Stokes of Ohio, who is the Chairman of the House Intelligence Committee, and Mr. Boland of Massachusetts, its first Chairman. It has been cosponsored by all of the Majority Members of this Committee and by 49 of our colleagues in the House.

H.R. 1013 is designed to eliminate the ambiguities in current law. It would retain the general requirement that the two intelligence committees be given prior notice of all covert activities, as well as two exceptions to this general rule. The President would continue to have discretion to restrict prior notice to the so-called Gang of Eight where required by "extraordinary circumstance affecting vital interests of the United States." However, the President could withhold prior notice only where such extraordinary circumstances exist and where "time is of the essence"; and in such cases notice would have to be given not more than 48 hours after the President has signed his finding or the intelligence activity has begun.

Thus under this bill timely notice would be specifically defined. The bill would also strike the preambular clauses of the Oversight Act, which the authors maintain adds nothing to the statute's clarity.

H.R. 1013 would also require that findings by the President be in writing, and that copies be provided to the two intelligence committees, and to the Vice President, the Director of Central Intelligence, and the Secretaries of State and Defense.

The Committee has a very distinguished group of witnesses to address these issues. We are very appreciative that they have taken time to be with us. We look forward to the testimony.

Before calling our first distinguished witness, I would ask Mr. Livingston if he has any opening comments.

[The full statement of Mr. McHugh follows:]

OPENING STATEMENT OF HON. MATTHEW F. MCHUGH

Today the Subcommittee begins two days of hearings on the subject of Congressional oversight of covert operations. More specifically, we will be examining whether existing procedures governing the President's authorization of covert operations, as well as his notification of an consultation with Congress, are adequate to assure meaningful Congressional oversight of such operations.

Covert operations, or "special activities" as they are often referred to in the intelligence community, have traditionally included political, economic, propaganda and paramilitary activities designed to influence foreign governments, organizations or events. In the words of President Reagan's Executive Order of December 1981 relating to U.S. Intelligence Activities, covert operations are those "conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States is not approved or acknowledged publicly . . . but which are not intended to influence U.S. political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions."

Despite the fact that covert operations represent only a small fraction of the intelligence community's work, they tend to generate the most attention and controversy when publicly revealed. We would all agree that such operations are appropriate in certain cases. However, because of their sensitivity and potential for controversy at home, it is particularly important that covert operations be soundly conceived and be seen as advancing legitimate U.S. interests if they become publicly known. It is for this reason, as well as Congress' right to share in the establishment of U.S. foreign policy, that the intelligence committees are involved in the oversight of covert operations.

The primary legislation governing Congressional oversight is the Hughes-Ryan amendment of 1974, as amended by the Intelligence Oversight Act of 1980. The

Oversight Act begins with a preambular clause that notes that its requirements are imposed "to the extent consistent with all applicable authority and duties, including those conferred by the Constitution upon the executive and legislative branches of the government."

The statute then provides that the intelligence committees of the Congress must be kept "fully and currently informed of all intelligence activities . . . including any significant anticipated intelligence activity. . . ." This provision establishes the general requirement that the intelligence committees must be given prior notice of any covert operation.

However, the Oversight Act then goes on to create two exceptions to the general rule. First, "if the President determines it is essential . . . to meet extraordinary circumstances affecting vital interests of the United States," the President may restrict prior notice to the House and Senate leadership and the chairman and ranking minority members of the two intelligence committees (the so-called "Gang of Eight"). Second, the Act recognizes that in some cases the President may not give prior notice to anyone, but in those cases the Act requires the President to "fully inform the intelligence committees in a timely fashion. . . ."

This second exception to the general rule requiring prior notice will be a main focus of these hearings. In the case of the President's decision to covertly sell military arms to Iran, he signed his "finding" authorizing the operation in January 1986. The President not only failed to provide anyone in Congress with notice of this operation prior to its inception, he never provided notice. It was not until November of 1986 that anyone in Congress learned of this covert operation, and then only because a magazine in the Middle East disclosed it.

Our purpose in these hearings will not be to revisit the entire Iran-Contra episode. That is for other committees to do. However, inasmuch as the President may decide to initiate other covert operations, it is important for the intelligence committees to determine whether existing law contributed to the breakdown of Congressional oversight in the case of the Iran arms sales.

Of course, many of us in Congress believe that the President should have given the intelligence committees prior notice of his intent to covertly sell arms to Iran. If he had done so, members on both sides of the aisle surely would have expressed strong objections. While these objections would have been advisory only, they might have helped the President avoid embarking on a policy which was so deeply flawed in its conception and implementation. This is a classic example of why prior notification and consultation with the intelligence committees are not only a benefit for the committees, but a benefit for the President as well.

However, as previously noted, current law does not require the President to give prior notice in all cases. He may defer notice until after the operation has begun, but in those cases he must provide notice "in a timely fashion." The problem here is that appropriate cases for deferring notice are not defined, nor is there a definition of what constitutes timely notice after the fact.

When the Oversight Act was considered by the Senate in 1980, a number of Senators suggested that prior notice should be given in all cases except where emergency circumstances preclude the President from providing it. For example, Senator Inouye, the first Chairman of the Senate Select Committee on Intelligence, said the following during floor debate:

"I am of the firm belief that the only time the President would not consult with the Intelligence Committees in advance would be in matters of extreme exigency. In my experience as chairman of the Intelligence Committee and as a continuing member of that committee, I can conceive of almost no circumstance which would warrant withholding of prior notice, except in those very rare situations where the President does not have sufficient time to consult with Congress."

Similar statements were made by other Senators at the time. The legislative history is less clear about what should constitute timely notice after the fact if prior notice is not given. What is clear to most of us today is that the President utterly failed to give timely notice to the intelligence committees after authorizing the covert sale of U.S. arms to Iran.

The Subcommittee has before it today two bills that have been introduced to deal with these questions. One is H.R. 1371, which was introduced by a former member of the Intelligence Committee, Mr. Mineta of California. It would require the President to provide prior notice of all covert activities. The other bill is H.R. 1013, which was introduced by Mr. Stokes of Ohio, the Chairman of the House Intelligence Committee, and Mr. Boland of Massachusetts, its first Chairman. It has been cosponsored by all of the Majority Members of this Committee and by 49 of our colleagues in the House.

H.R. 1013 is designed to eliminate the ambiguities in existing law. It would retain the general requirement that the two intelligence committees be given prior notice of all covert activities, as well as two exceptions to this general rule. The President would continue to have discretion to restrict prior notice to the so-called Gang of Eight where required by "extraordinary circumstance affecting vital interests of the United States." However, the President could withhold prior notice only where such extraordinary circumstances exist and where "time is of the essence"; and in such cases notice would have to be given not more than 48 hours after the President has signed his finding or the intelligence activity has begun. Thus, timely notice would be specifically defined. The bill would also strike the preambular clauses of the Oversight Act, which the authors maintain adds nothing to the statute's clarity.

H.R. 1013 would also require that findings by the President be in writing, and that copies be provided to the two intelligence committees, and to the Vice President, the Director of Central Intelligence, and the Secretaries of State and Defense.

We have a very distinguished group of witnesses to address these proposals. We greatly appreciate their taking time to provide the Subcommittee with their views, and we look forward to their testimony.

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

I have no formal statement. While I sympathize with the motivations of the Members who have authored these bills that are before the Committee, and we agree that certain facts uncovered in recent months might prompt such legislation, I have grave reservations about the implementation of legislation of this sort, and its potential impact upon the powers of the President as Commander-in-Chief.

So I am looking forward to hearing the witnesses. I look forward to asking questions, and I hope that we will indeed unveil some facts which might broaden our perspective of what is a very serious matter. I appreciate your giving me this opportunity.

Chairman MCHUGH. Thank you.

I would also like to ask our Chairman, Mr. Stokes, who is the primary author of this bill, if he would like to make any opening remarks.

Mr. STOKES. Mr. Chairman, I do have an opening statement but I would yield if you would like to recognize the Speaker of the House, and I can yield my statement at this time.

Chairman MCHUGH. Without objection, that would be made part of the record.

[The statement of Mr. Stokes follows:]

OPENING STATEMENT OF HON. LOUIS STOKES

In a memorandum dated December 17, 1986, the Office of Legal Counsel at the Department of Justice, stated, referring to covert arms sales to Iran, that "The President was within his authority in maintaining the secrecy of this sensitive diplomatic initiative from Congress until such time as he believed that disclosure to Congress would not interfere with the success of the operation." The basis for this conclusion is that the President has "wide discretion" under the Intelligence Oversight Act to choose a "reasonable moment" for notifying Congress.

This discretion, according to the memo, is "rooted at least as firmly in the Presient's consititutional authority and duties as in the terms of any statute." The constitutional basis is article II, section 1 of the Constitution "The executive power shall be vested in a President of the United States of America." But, as the memo itself states, the President's authority under this clause is "subject only to limits specifically 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."

There is no quarrel between members of the committee and the President on who has the executive authority in this Government or who must conduct the foreign affairs of the United States. That is the President's responsibility and he does have wide discretion in conducting that activity. However, Congress also has wide powers.

It alone makes the laws of the United States. It alone appropriates money and may require an accounting of the same. Clearly inherent in the power to make laws is the need to obtain information necessary to ensure their proper execution. Thus, when Congress legislates to require information and ties this requirement to the appropriation of funds, it also stands on firm constitutional ground.

The trouble, of course, is that the Constitution does not clearly delineate where the authority of one branch of Government ends and the other begins. Indeed, it appears that the Founding Fathers fully intended that conflicts of authority be resolved principally by the counterbalancing of one branch against another. And, the third branch of Government, the judiciary, has been reluctant to settle disputes between the executive and legislative branch in areas where their interests and authorities contend one with the other.

In the case of the conduct of covert action operations by the executive branch which have been approved by the President, the administration claims some sort of constitutional privilege on the part of the President to withhold notice. That is not a new claim. It was made during the Carter administration as well. However, it is clear from the Department's memorandum that this administration relied as much on the language of the Intelligence Oversight Act as it did on constitutional authority to withhold notice of covert arms sales to Iran. The department tells us in very clear language that the phrase "in a timely manner" is vague and subject to liberal interpretation by the President. Under those circumstances, it seems clear that if Congress intended that phrase to mean something more specific, or if it intends that it should in the future, it behooves us to modify the statute.

I believe that the Congress thought it was writing into the statute an exception to the prior notification rule only in cases where time was of the essence. We didn't say that specifically in an excess of caution. That caution has betrayed us and may well in the future. We should return to the understanding that seems to have existed in 1980, namely, that prior notice should be withheld only in cases where the President is unable—because of the press of events—to notify Congress before covert action begins.

That is the principal purpose for which H.R. 1013 was introduced, to restate in clear terms the requirement for prior notification, except in cases where time is of the essence. The bill leaves in place those provisions in the act which permit notification to a smaller group than the two Intelligence Committees in cases where extreme sensitivity suggest to the President that knowledge of a particular covert action should be severely restricted.

Finally, the bill requires that a signed copy of every Presidential finding be provided to the Intelligence Committees to ensure that, as did not happen during the Iran affair, Congress knows exactly what the President did approve and when he approved it.

I believe that H.R. 1013 is firmly grounded in constitutional authority. I think that as long as Congress legislates in such a manner as to reasonably and responsibly obtain the information it needs to perform its duties, while at the same time leaving the President to make the decisions and retain flexibility to conduct covert operations as he directs, we can have that confidence.

I remind both witnesses and those who are present here today that the sensitivity of any particular piece of information—because that is all Congress is requiring, the provision of information—the sensitivity of that information offers no reasonable grounds for withholding that information from Congress. The executive branch ought to share such information with a co-equal branch of Government, the legislature. The terms of that sharing must be reasonable and include appropriate security arrangements, but security issues are insufficient grounds for a President to deny information to Congress when the procedures for receiving that information are set forth in the statute signed by the President. It is simply inappropriate for executive branch officials to argue that Congress should not be trusted with information. Their own track record at keeping secrets shows that this is an unbalanced view and one unfounded in reality.

Chairman McHUGH. At this time, we would ask the distinguished Speaker of the House, Jim Wright of Texas, to come to the table. The Speaker has been very interested in a capable intelligence capacity and in the oversight function which Congress must necessarily exercise.

As Majority Leader he served ex officio as a member of the Intelligence Committee and took part in many of our proceedings. So we are delighted, Mr. Speaker, that you are here with us this morning.

STATEMENT OF HON. JIM WRIGHT, SPEAKER OF THE HOUSE OF REPRESENTATIVES

Mr. WRIGHT. Thank you. I appreciate the invitation to come and talk with the committee in behalf of this legislation which I think is vitally necessary. As I have observed the operation of the National Security Act, Sections 501 and 502 it has become painfully apparent to me that certain ambiguities have been exploited permitting activity to occur which clearly was not intended in the original legislation.

The bill before you makes two very simple changes, both of them quite clearly consistent with the original intent of Congress, in creating this committee and this procedure for consultation.

I recall very clearly when the procedure was created in law. It was done so at the request of the Chief Executive who felt that representatives of the Executive Branch of government were being required to report to a proliferating number of committees and subcommittees in Congress. The President himself wanted one repository of this type of information.

The Speaker, Speaker O'Neill, very assiduously interviewed and selected Members to serve on this committee. One of the qualifications for service on this committee was that a person be capable of maintaining secrecy and silence, not of leaking information given to the committee by the Executive Branch of government with regard to classified activities.

At the same time, it was felt that the creation of the committee itself very clearly implied that the members of the committee should serve as one part of a two-way conduit with the Executive Branch and that we could know of things in advance in order that we might give our advice to the Executive Branch of government, advice and consent being part and parcel of the operation between the two branches.

Now, I am quite sure in my mind that if the provisions intended in the law—and I think unambiguously contained in the law—had been followed as Congress intended, most assuredly members of the Legislative Branch of government would have expressed our reservations to the Chief Executive about the appropriateness of this covert plan to sell arms to Iran, and quite possibly the entire embarrassment which has been visited upon our country might have been avoided.

It was that kind of thing that was anticipated in the requirement that there be reports to some limited number of people.

Now, this bill, the Stokes bill, would modify section 662 of the Foreign Assistance Act to require that all covert action findings be in writing. These written finding would have to be provided to the House and Senate Intelligence Committees, the Director of Central Intelligence, and the statutory members of the National Security Council prior to initiation of the proposed covert action.

The bill would retain a provision in existing law which in certain circumstances permits the required prior notice to be given to 8 specified leaders of Congress, a bipartisan group of people, rather than to the full membership of both intelligence committees.

I would contend from my reading of the law that what was expressly anticipated was no situation at all in which prior notice

could be withheld from any congressional person. I don't believe that the reading of section 501, or section 502 of our Act, anticipates any situation whatever in which all Members of Congress may be excluded from knowledge, prior knowledge, of what is going on. This is because section 501(b), in reference to the requirement that a select committee on intelligence of the Senate and the House be fully and currently informed, is modified only to the extent that if the President determines that it is essential to limit prior notice, not to exclude prior notice, but to limit prior notice, to meet extraordinary circumstances affecting vital interests of the United States, then such notice shall be limited to the Chairman and Ranking Minority Members of the Intelligence Committees, the Speaker and Minority Leader of the House of Representatives, and Majority and Minority Leaders of the Senate.

It shall be limited to those people. It shall not be excluded or withheld, but shall be limited to those people if these exigencies require it to be limited and time is such that members of the Committee cannot be notified.

Now, there have been situations, two of which I can recite to you, in which these leaders were informed in a prior way when it clearly was not possible nor perhaps advisable to notify the full Committee in advance.

One of them involved the invasion of Grenada, and on the eve of that action the President sent representatives to the Capitol and asked certain ones of us to follow certain procedures by which we assembled in the White House that evening rather late, and discussed with the President and the Secretary of Defense and Secretary of State and certain others what was about to happen. What did happen occurred at approximately 5 a.m. and we were learning of this about 10:00 p.m. when our conversations were going on. That was prior notice; it complied with the law.

Surely in a matter of that kind, prior notice could be and properly was limited. But it wasn't excluded, it wasn't withheld. It was given.

A second instance involved the bombing of Libya. I was out of town. I was in Ft. Worth when this occurred. I received a notification that I should find a secure telephone so that at 4 o'clock in the afternoon I might talk with people in the Central Intelligence Agency and representatives of the White House.

I did so. The only secure telephone which I could establish in my home community being at the FBI in one of the Federal buildings. I did so and completed the telephone call and was advised of what was getting ready to happen. It happened within 2 hours of my being notified, perhaps an hour-and-a-half.

But it did constitute prior notice. Prior notice was given.

So it seems to me that this timely notice then was given in each of those instances to the committee after the action had begun. That was in keeping with the statute.

In the case of the Iran arms sales, however, there was no prior notice given to anybody. Nobody was advised. No consultation was held. No congressional party was notified. Nobody knew anything about it until, of course, it was printed some 10 months later in a Middle Eastern newspaper. And then at that point the so-called timely notice began to take place.

Obviously that is not what is intended by the statute, ten months later after people find out about it through a leak in the newspaper. That is not timely notice.

So I think it has become necessary that to avoid those ambiguities, or any contention on the part of anybody in the Executive Branch that timely notice is fulfilled by withholding all information until after a leak establishes public knowledge, we must define what constitutes timely notice. There has been a breach and I think this bill properly defines timely notice as not more than 48 hours. That would be reasonable and it seems to me that in the interests of maintaining the right and proper balance of powers between the Executive and Legislative Branches, we must take this kind of action.

Even in those instances in which the statute has permitted prior notice to be limited to a certain few, even then it is quite clear that the statute requires that timely notice be given and that it anticipates that timely notice would be maybe a couple days not months surely, not weeks, and most assuredly not months.

The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries for which prior notice was not given under subsection A, and shall provide a statement of the reasons for not giving prior notice. Well, this bill in my opinion should not have been necessary. Mr. Chairman, as someone who has served ex officio on this select committee for nearly 10 years, I can state from experience that when the present legislation was enacted the Congress intended it be notified before any covert actions took place.

When we use this term "timely fashion" in the law with regard to those extraordinary circumstances when time did not permit prior notification, the Congress meant a couple days, not months.

The colossal misjudgments made by some in the Administration in the arms deal with Iran confirm the need for legislation tightening this law.

It is my honest belief that had the President notified the Congress as to what was intended in Iran, he might have gained a clearer understanding of the risks involved. Had the Congress received prior notification, it is certain that some of us would have advised against that unfortunate policy. The United States government might well have been spared this embarrassing and costly episode which continues to undermine our foreign policy.

Mr. Chairman, I commend your leadership in holding these hearings on this important matter, and I know that you are planning the expeditious action which this issue warrants.

[The statement of Mr. Wright follows:]

STATEMENT OF HON. JIM WRIGHT

Thank you for this opportunity. I have come to support the Intelligence Oversight Amendments of 1987 introduced by Chairman Stokes.

The bill makes two very simple changes in the statutes. Both are clearly consistent with what Congress intended originally. If the language proposed today by Mr. Stokes had been in the law, it is quite probable that the national embarrassment of the entire "Irangate" episode would have been avoided.

The Stokes bill (H.R. 1013) modifies Section 662 of the Foreign Assistance Act to require that all covert action "findings" be in writing. These written findings would have to be provided to the House and Senate Intelligence Committees, the Director

of Central Intelligence, and the statutory members of the National Security Council prior to the initiation of the proposed covert action. The bill would retain a provision of existing law which, in certain circumstances, permits the required prior notice to be given to eight specified Congressional leaders, rather than to the full membership of both Intelligence Committees.

H.R. 1013 would also amend Section 501 of the National Security Act to tighten up the present language calling for notification in a "timely fashion" when prior notice is not given. Only in extraordinary circumstances affecting the vital interests of the United States, and only where time is of the essence, the bill would permit the Congressional notification to be deferred for "not more than 48 hours" after the initiation of the intelligence activity or the signing of the finding under Section 662.

Mr. Chairman, this is a bill that should not have been necessary. As someone who served ex-officio on the Select Committee on Intelligence for nearly ten years, I can state from experience that when the present legislation was enacted, the Congress intended that it be notified before any covert actions took place. When we used the term "timely fashion" in the law with regard to those extraordinary circumstances when time did not permit prior notification, the Congress meant a couple of days not more than ten months.

The colossal misjudgments made by the Administration in the arms deal with Iran confirm the need for this new legislation. Had the President notified the Congress as to what he was intending to do in Iran, he might have gained a clearer understanding of the risks involved. Had the Congress received prior notification, it is certain that some of us would have advised against that unfortunate policy. The U.S. government just might have been spared this embarrassing and costly episode which continues to undercut our foreign policy.

Mr. Chairman, I commend your leadership in holding prompt hearings on this important matter. I know that you are planning the expeditious action that this issue warrants.

Chairman McHUGH. Thank you very much, Mr. Speaker, for your testimony. We will proceed under the five-minute rule with questions.

Mr. Speaker, I think some will argue that in certain limited cases, particularly where life is at stake, that is where agents are asked to undertake especially risky operations, the President should have discretion not only to withhold prior notice, but also to withhold notice beyond 48 hours.

That is to give the President some flexibility beyond that limitation of time when he believes that there is an especially risky situation for agents conducting the operation.

Do you believe there is any justification for giving the President that flexibility in that type of situation; or, should the President be required as the bill suggests to provide this kind of notification to Congress, either through the intelligence committees or to the limited leadership group of eight?

Mr. WRIGHT. I don't believe the statute anticipates that the lives of our agents or any other people would have been adversely affected or endangered in any way by the President's carrying out the provisions in the statute giving prior notice to a limited number of people. I don't think there is any suggestion that the lives of United States intelligence agents would have been endangered by the President's giving notice, as the law required him to do, to the Chairman of this committee and the Ranking Minority Member of this committee, their counterparts in the Senate, the Speaker and the Minority Leader of the House and the majority and minority leaders of the Senate.

I cannot imagine anybody suggesting or thinking that the lives of American intelligence agents would be endangered by the President's giving that information to that limited number of people on a prior basis.

Chairman McHUGH. Let's assume that everyone agrees that in the case of the Iran arms sale, notice should have been given and that certainly the President could have provided notice on a prior basis or within 48 hours. But of course this legislation will apply to all cases, and the question is whether or not in other types of situations, let's say a hostage rescue situation which plays out over a period of some days, and in which covert activity is required and that covert activity places the agents involved in the rescue operation in jeopardy should the President in that situation be required to share that information with Members of Congress?

Mr. WRIGHT. Well, I think——

Chairman McHUGH. I think that is the hard case that we will be presented with.

Mr. WRIGHT. Let's look to the case of what happened with regard to our abortive attempt to rescue the hostages in Iran during President Carter's administration.

In that instance I am not aware of whether prior notice was or was not given to the Speaker and Minority Leader, or to the Chairmen and Ranking Members of the House. I suspect that it was not. I received a telephone call at approximately 2 o'clock in the morning from Secretary of State Vance telling me what had happened. At that moment the disaster had occurred. The debacle of our misfortune had just occurred and they were at that time striving to extricate themselves. Our Service personnel were attempting to return to safety of our ships.

I think in that particular instance prior notice probably wasn't given but timely notice surely was. It may have been that timely notice was given and had it not been given, we learned of it anyway in the most egregious manner. I cannot believe that if President Carter had followed the provisions explicit in section 501 of the Act, the lives of the rescuers would have been put in jeopardy. It is conceivable that in the secretive mind which is part and parcel of intelligence operatives—and I don't say that in a pejorative sense, or in the sense of being critical but rather I am trying to be analytical—that they would suppose that telling anybody in the Legislative Branch would put their plans in jeopardy.

That after all is the warp and woof of the makings of executive arrogance—the idea that certain actions are too precious, too risky, too important to be shared with the Congress. That isn't what was in the minds of the people who wrote the Constitution.

Chairman McHUGH. Thank you.

Mr. Livingston.

Mr. LIVINGSTON. Thank you, Mr. Chairman.

Mr. Speaker, I appreciate your remarks and frankly, with regard to your assessment of the current Iranian situation I really don't find much to quarrel with. But I am reminded of the old courtroom adage that bad facts make bad law, and I am really concerned that we are rushing to judgment here with a piece of legislation that is geared to prevent a reoccurrence of the circumstances surrounding the Iranian situation, and that we will ultimately cause great harm to unknown individuals in the future by virtue of our somewhat hasty action.

Specifically, I guess I am concerned about the 48 hour provision. I am reminded that—you recall the bombing of Libya, and I am re-

minded of the fact that Sam Donaldson minutes, perhaps as many as 30 minutes or so prior to the actual bombing, was on television talking about a projected strike in Libya, and in fact we are not the best keepers of secrets in the United States Congress.

That is not an indictment of any single individual, but when you deal with a body as large as ours with the Members, with the staffs, in fact we just don't keep secrets well. I am concerned that there would be or might be circumstances that might arise that might necessitate the Commander-in-Chief of the Armed Forces keeping the lid on an operation for much longer than 48 hours, and I use as an example the situation that involved the—again going back to the first Iranian hostage situation—the folks who were hiding in the Canadian Embassy.

In fact there were ongoing operations to try to free those people over a prolonged period of time, many months if my memory serves me correctly, and had it gotten out that those folks were in the Canadian Embassy, Lord knows what would have happened to them and to the Canadian people.

I think that—I just have grave concerns that we are seeking to remedy a single situation which may have far broader implications than our initial objectives. I will just invite your comments.

Mr. WRIGHT. First, with regard to your apprehension that we might be rushing to judgment, I would simply point out that it has been more than four months since we learned of what I believe to be a clear and unambiguous violation of the statute. Most certainly all of us would agree that this has been a violation of the intent of the statute, the spirit of the statute, and I believe, a violation of the letter of the statute.

I don't believe that is a question of ambiguity at all.

We learned of that four months ago. Those of us who have some responsibility to protect the integrity of the Legislative Branch in the constitutional scheme of things have felt quite strongly for these four months that something must be done. It is important for this committee in its deliberate way to study and ponder and take testimony, to learn everything that can be learned about what happened and why, and to examine the rationale of those who advised the President that he could and should do as he did and not advise the Congress in keeping with the statute.

Now, it seems to me that what is being done here is done in a very deliberate way. I don't believe it is rushing to judgment. I think this committee as an agent of the Congress is fulfilling its responsibility in attempting to guarantee for the benefit of the nation and for the protection of the Executive Branch as well that misjudgments of this kind shall not recur and that at least we will have some means of attempting to dissuade people from this kind of a misadventure in advance.

With regard to the contention that there may be circumstances in which it would be wise for Congress to be kept entirely in the dark, and I don't know for how long a period of time you think that is wise, but I believe the entire Constitution and the spirit of this law does not wish to leave that discretion entirely in the hands of the Executive Branch.

If you just leave it wide open and allow the Executive Branch to decide when the situation is sufficiently worthy that it warrants

violating this statute and not advising Congress, it is, in effect, to have no statute at all. You might as well not have an intelligence committee if the Executive Branch is simply expected to come when it wants to and when it is convenient to their purpose to consult with Congress.

So unless there is some clear criterion which the gentleman would establish, I don't think it would be wise for us just to anticipate that circumstances could arise and it is up to someone in the Executive Branch to decide if it wants under those circumstances to advise the Congress. In such case who is going to make the decision?

Is it going to be the President? The Secretary of State? Is it going to be the Chairman of the Joint Chiefs of Staff? Is it going to be the National Security Council? Is it going to be some Lieutenant Colonel?

If you leave it undefined you leave it up in the air and invite this kind of thing again it seems to me.

Mr. LIVINGSTON. My time is up. Thank you.

Chairman MCHUGH. Mr. Stokes.

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

Firstly, I would want to express my appreciation to the distinguished Speaker for his appearance here this morning, and for the excellent testimony he has given on behalf of the Stokes-Boland legislation.

Mr. Speaker, it appears to me that in this legislation we are attempting also to address a more grievous situation. The gravamen of the offense as I see it here, is that from everything that we know in the public domain at this point in time, the President of the United States decided either upon his own or upon advice of someone that this was an operation which could not be revealed to Congress because Congress could not be trusted with this information. And it is even broader than that; not only was Congress not trusted, members of his own Cabinet were not trusted. So he cannot just say it was his fear of leaks in the Congress. But it seems even more grievous that he trusted in this operation a foreign nation and principals in a foreign nation.

The ultimate leak came from the Iranians themselves who leaked the matter to a Beirut newspaper and as a consequence of it this matter became known publicly.

I would just like to have you address that broad principle in terms of any evidence that Congress in the case of this sort ought not to be trusted.

Mr. WRIGHT. Well, I think that comes to the heart of the balance of powers. Perhaps it is inherent in the Executive Branch to want to protect the prerogatives of that branch of government. If I were in that branch of government, perhaps I would see it that way.

But I am certain in my mind that the people who wrote the Constitution intended that Congress could be trusted. James Madison surely intended that the people themselves could be trusted. That was at the heart of the very central core philosophy of this government.

Now, if we were to assume that Congress cannot be trusted with information, then we betray a lack of confidence in this fundamen-

tal system of ours. It rests upon the assumption that Congress can be trusted.

With respect to the leak which found its way to Sam Donaldson—you know, I think I can certainly say to you that that didn't come from Congress. I don't believe anybody has suggested that it did. It must have come from some other source. I am quite absolutely sure in my mind that it did not come from Congress.

This committee has been privy to information which has not been leaked until much later and then—much, much later than the time when it was made available to this committee on several instances, and members of this committee will recall some of those instances.

Now, I should like to say as Speaker, that if it ever were to come to my attention that any Member or staff person of this committee had in violation of his or her oath leaked information, then I would ask that person to resign from the committee. This is not the kind of a committee that the Speaker has nothing to say about. This is the kind of committee on which the Speaker does have something to say as to personnel.

I think all of you would expect that. If there were any reason to believe that any member of this committee had violated the sacred oath which is concomitant with accepting membership on the committee, then that person should not expect to serve on this committee.

I just don't believe that has happened. I don't think the House Committee has leaked information. We need to be very careful about personnel, people whom we hire on both sides to serve on this committee. We owe that obligation, not to the Executive Branch per se but to the United States and to our oath of office.

I would recall an instance which Mr. Livingston may be as cognizant of as I am. I was not in the Congress at that time though I am sure some of you think I have been here that long. During World War II, knowledge of the atomic arrangements, the tests, and the experimentation was held by a very small number of people.

Sam Rayburn and the Chairman of the Appropriations Committee knew of it, and they asked for the money quite frankly saying to the committee, we cannot tell you what this is for, but we think it may end the war sooner. That is all they knew. They provided the money based upon that information.

I think Congress can keep confidences. If we cannot, we don't deserve to be here.

Mr. STOKES. Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman, and I have so much to ask and so little time it is an occupational hazard though. But apropos of your last remarks, Mr. Speaker, let me quote to you from November 14, 1985, Washington Post, an article by Daniel Shorr, "In 1975 the CIA support of the anti-communist faction in Angola, also a Kissinger Project, was disclosed after it became an issue in the House Foreign Affairs Committee. The late Representative Leo Ryan, a member of that committee, told me in an interview at that time that he could condone such a leak if it was the only way to block an ill-conceived operation."

Now, I suggest to you that was not unique with Mr. Ryan, and citing chapter and verse the other day we had a briefing and I don't, I won't tell you what the substance of the briefing was but March 23, immediately thereafter, page 7 of the Newsweek Magazine, covert help for Corey Aquino. The Agency will add about a dozen agents to its 115 member station in Manilla, et cetera, et cetera, et cetera.

Now, the instances of dangerous leaks—and I don't say they are from Congress but I say that this Congress has a problem that it ought to consider at least equal to the problem of inadequate dissemination of secret information, and that is the leak. We cannot keep a secret, and a democracy is indeed in peril in a dangerous world if we cannot keep a secret.

There are many instances here of enormous violations. Let me read to you from the Tower Commission report.

> The obsession with secrecy and preoccupation with leaks threaten to paralyze the government in its handling of covert operations. Unfortunately, the concern is not misplaced. The selective leak has become a principal means of waging bureaucratic warfare. Opponents of an operation kill it with a leak. Supporters seek to build support through the same means.
>
> We have witnessed over the past years a significant deterioration in the integrity of process. Rather than a means to obtain results more satisfactory than the position of any of the individual departments, it has frequently become something to be manipulated, to reach a specific outcome. The leak becomes a primary instrument in that process.

Et cetera, et cetera.

Now, I asked Richard Helms, a former Director of Central Intelligence, for comment on this bill. Let me read you one thing he says and then I will ask for your comment and beg your indulgence.

> This bill proposes to tighten up certain reporting requirements on new covert actions undertaken by the Central Intelligence Agency. In so doing it demands that Presidential findings be in writing and that a copy of the written finding be furnished to certain Members of Congress and to the Vice President, Secretaries of State and Defense, and the Director of Central Intelligence.
>
> At the rate written documents of the Executive Branch appear in the newspapers these days, I would have thought that this requirement almost constitutes a guarantee that no action would long remain covert. When a written finding is sent to a Senator, a Congressman or a Cabinet officer, how many individuals on their staffs actually see this document? Quite a few I would surmise. Put another way, this legislation would further insure that with the inability of the Executive and Legislative Branches to identify leakers, covert action as an option in support of U.S. foreign policy is doomed.
>
> This is not necessarily because future presidents and directors would be unwilling to take the chance but because the experienced officers who must carry out such operations would not wish to become involved in what they would inevitably regard as a no-win situation.

Then Mr. Speaker, he mentions a colleague of ours in the other body who shall be nameless, former chairman of the Senate Select Committee on Intelligence——

Mr. WRIGHT. I don't have the faintest idea who that would be. I appreciate your keeping his identity secret.

Mr. HYDE. Good, I think we have—we will try to keep that covert.

He was quoted in the Washington Post and many other media including the Jerusalem Post as having exposed during a speech in Florida an alleged American intelligence operation in Israel.

Now, sure, we have a problem. Congress is entitled to know. We cannot exercise oversight unless the Executive has confidence in us and unless we have confidence in them, and there is a problem.

I am not sure, in fact I am sure this is not the solution to the problem, but we ought to address ourselves to security, to punishing people who leak and devising ways to find out what the leaks are and who the leakers are.

I would ask for your comment.

Mr. WRIGHT. Mr. Hyde, I think you raise a very interesting question. There has to be a distinction between policy, on the one hand, and the means employed to carry out that policy, on the other hand. As to the precise and specific means of carrying out covert policy, I suppose Congress would be foolish to expect that we should be told such minutia and detail as the identity of each of our agents, whom he is contacting, when he is going to take a given course of action, and where it will occur. That would be ridiculous obviously.

But at the outset, at the inception of a policy creation, I believe the law anticipates—and I think the Constitution anticipates—that Congress needs to have a voice. I don't believe either the law or the Constitution has suggested that a monolithic decision made in the White House would get us into a war, rather the Congress should have the opportunity and does have the responsibility to make a judgment as to whether we get America into a war.

Now you make reference to an article by Daniel Shorr in the Washington Post in November of 1985 that involves what I would suppose to be a policy determination with respect to Angola.

Perhaps you and I might agree on that matter so far as policy is concerned. I don't know whether we do or not, but the point is that there is a right for Congress to know that a given policy is being carried out and the Congress should have the opportunity to consult.

Now as to how it is carried out obviously Congress has no reasonable expectation of being told that in detail. But let me offer a couple of other suggestions, times in which appointed people in the Executive Branch—not elected personnel, not people directly responsible to the American public—have made judgments and launched activities that would be unlawful, that would be contrary to our treaty agreements with other nations, and that quite probably would not have been supported by the Congress as a whole.

And in the mid-1950s, perhaps 1954, I am not certain what year, I think my recollection would tell me 1953 or 1954, the CIA conceived and carried out an assassination effort involving a man named Jacobo Arbenz Guzman in Guatemala. Jacobo Arbenz I guess was a Marxist, I don't know just how to define his political philosophy. He was not a great friend of the United States. It might have been in our best interests that someone else be elected rather than he. But an election was going on, as I recall, and we have no right to go into another country in my judgment and certainly no person in the Executive Branch has the unilateral right to decide who in another country should be allowed to live and who should be assassinated.

In 1971 if memory serves, in that time frame, in that era, a decision was made unilaterally in the covert sanctums of the CIA that

we should go into Chile where an elected president was serving peacefully and not attempting to consolidate his gain to my knowledge with the use of armed militia nor attempting to call off regular or free elections. He was I suppose a Marxist actually, I don't know that he was a Marxist, certainly he was a socialist——

Mr. HYDE. A liberal anyway.

Mr. WRIGHT. Well, I think that is a mild description.

Mr. HYDE. Yes.

Mr. WRIGHT. In any event he was probably not the person that the United States in general would have liked to see as President of Chile, but he had been elected President of Chile. Chileans had voted for him and I am persuaded by people who think they know what was going on down there that if left alone, he would have been rejected at the polls and someone more moderate would have been elected, if we would have let it alone.

The CIA conceived a plot to destabilize—destabilize—the government of Chile. Now there is a euphemism for you. We decided—or rather someone in the sanctums of the CIA decided that he had the right to go down and destabilize the government of an elected president in Chile. That has created bad will for our country. It has confused the clarity of our policy. It has contributed to criticism of the United States subsequently. And it ushered in a militaristic regime in Chile which still to this day prevails.

It wasn't necessary for us, in my judgment, to have undermined that elected government in Chile. Congress didn't decide to do that. Congress wasn't given any choice.

Mr. HYDE. Is your point, Mr. Speaker, we should leak some things and some we shouldn't?

Mr. WRIGHT. No, no.

Mr. HYDE. I am asking you how to deal with the problem of leaks.

Mr. WRIGHT. Henry, I think you know.

Mr. HYDE. Not a listing of alleged sins which I say are very much in dispute, of the CIA. How do we deal with congressional leaks was really my question. I should have put it more directly.

Mr. WRIGHT. Henry, I think you know the answer to that. Of course you know the answer is not that we who are privy to this classified information should presume any right to leak it. Did I not just say that we have no right to do that? Of course I said that.

Mr. HYDE. Right.

Mr. WRIGHT. Of course we don't.

Mr. HYDE. We have no right to leak, but the question is what are we going to do about it and are there any legislative suggestions that perhaps you have that would——

Mr. WRIGHT. Henry, what I am suggesting is that the Congress does have a right and a responsibility through the exercise of its orderly procedures to know what is going on.

Mr. HYDE. I stipulate that. I agree with that.

Chairman MCHUGH. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I would like to congratulate the Speaker on his presentation as well, and his response to questions.

I must say myself that as far as the House Committee on Intelligence is concerned, I am not sure that there is any example we

know of where the Committee has been proven to be the source of leaks. We have enormous numbers of leaks nationally and as a matter of fact, the Acting Director of Central Intelligence recently suggested to us that the principal source of leaks is not the Congress—not the Congress—but Mr. Speaker, I would like to talk about a different question, and it is a larger question that is perhaps I think aggravated by the tension that has existed between the Administration and the Congress in the last few years. Particularly, although it could happen anytime, and it is a situation which you have related as producing a situation where the President in his own mind can elect to comply with the law or not comply with the law.

As a matter of fact, I think whether it is under the War Powers Act or the Oversight Act, the two cases you cite did not involve any prior consultation, maybe minimal notice but certainly not consultation. There has been an erosion of the relationship between the Executive Branch and the Congress in terms of more serious activities done in this nation's name.

Would you not agree that what is recommended here is indeed modest? Ten years ago, for example, when some of the actions you have just referred to were reviewed, there were those who asked whether we ought to permit covert action, whether we ought to forbid it or whether we ought to have some mechanism for congressional approval or much more stringent prior notification. So what this is, is it not merely a restatement of existing law to make it more efficacious and remove ambiguities so that we can proceed with a sort of new understanding of the relationship between the Congress and the White House?

Mr. WRIGHT. I have that feeling, of course, Mr. Kastenmeier. I do believe that what is proposed in this legislation is simply a tightening up of the statute in order to carry out its original intent. I am aware of the apprehension that may have been expressed about putting it in writing, putting in writing the finding. Conceivably you may want to think in terms of how broadly that is to be interpreted or how widely disseminated any such written finding should be. But I think it is within the scope of this committee to handle that kind of determination.

I can find nothing in this proposed amendment to the statute that violates the initial purpose of the statute. It seems to me that it clarifies and carries it out. That is my interpretation of it.

Mr. KASTENMEIER. Thank you, Mr. Speaker.

Chairman MCHUGH. Mr. Beilenson?

Mr. BEILENSON. I don't really have any questions of our esteemed Speaker. As one of the co-sponsors of this legislation, I, too, along with many of our colleagues, found his comments very cogent, very compelling.

First of all, all of us agree with a couple of points that our friend from Illinois, Mr. Hyde, made. We have got to improve our security and do our very best to find out who leaks information, and to punish those people.

But coming back to the bill which is before us, its intention basically is to carry out the intention of the existing law. If you are worried about leaks, then you have that exact problem, of course, as Mr. Hyde pointed out.

You have that exact problem to a certain extent under existing law. A recent study by the Intelligence Committee of the other House found out that in 147 recent occasions of information having been leaked, the attributable sources in all but 12 of those cases was the Administration, someone in the Administration rather than someone in the Congress.

There clearly is a problem, and the larger problem clearly has to do with the Executive Branch of the Government, for all kinds of obvious reasons, most obvious is there are very few individuals, both staff and members, Senate and House, who know these secrets, and in most instances, there are many dozens, hundreds, sometimes thousands of people who know these self-same secrets which some of our colleagues are urging us to deny to even eight of the most trusted Members of the Congress, and there is a lot of competition between these Executive Branch Departments, some of whom don't believe that the CIA should be tasked with some particular operation or not.

Often, people within the CIA itself think that they have been asked to do something foolish or dangerous, or counterproductive potentially, and if you ask any good media person, if that person told you the truth, he would tell you in virtually every instance that his source was somebody from the Executive Branch, not from the Congress of the United States.

Mr. HYDE. Would the gentleman yield for just a brief question?

You mentioned a study by the Senate Intelligence Committee that found 100-some leaks came from the Administration.

Mr. BEILENSON. In the articles themselves, the information was attributed to someone in the Executive Branch of the Government.

Mr. HYDE. Who is the chairman of that Senate Select Committee?

Mr. BEILENSON. I can't remember his name, but he was a former chairman. It may have even been the person that the gentleman was speaking of earlier, I am not sure.

We are concerned about possible risks, loss of life. All of the members of this committee are aware of certain operations that are carried out that we cannot even speak of, where there is continual potential risk to people's lives.

Let me just say one more thing, if I may, Mr. Chairman, there is a particular question which perhaps we could speak at some greater length about. The hardest questions of all were those which were raised by Mr. Hyde, Admiral Turner and others, and hostage rescue situations, where you are trying to save lives. Those are situations which tend to be short-lived, you can't afford any kind of talking about it whatsoever.

And at the same time, if I may be frank, from this member's point of view, those may be the kinds of operations where some of us feel that we don't really need to know. They are not policy undertakings, covert operation in a larger term, and it seems to me that in such kinds of cases, perhaps there is no need for the Congress to know, even if it has a right to know.

It may well be that we might perhaps think of making some exception for those kinds of rescue operations. I do not know as a policy matter that we need to know. At least beforehand, anyway,

and that might solve a lot of people's problems with the most risky of these potential kinds of situations.

It might not offend some of us to find out about those things until after they are over, but they may be a useful avenue for us to explore, Mr. Chairman.

Chairman McHUGH. Thank you.

Mrs. Kennelly?

Mrs. KENNELLY. Thank you, Mr. Speaker, for being with us this morning, and for your statements. I want to make my comments as a new member, and thank you, Mr. Speaker, for appointing me.

I found in my life that sometimes you say things so often they become a truism. Members can't keep secrets, Congress can't keep secrets. I see people who can keep secrets to my left. Because this was said so many times, it seems to me that now we have private individuals, retired military members, unelected officials, and Lieutenant Colonels running many things.

I appreciate your being here, because it shows the support you have for this committee, for the oversight charge of this Congress.

Mr. Speaker, do you think individual Congressmen and women can keep secrets?

Mr. WRIGHT. Women, of course, surely Congressmen and Congresswomen can keep secrets. Perhaps some of us cannot. We are like people. Those who cannot keep secrets have no business on this committee.

Mrs. KENNELLY. As a new member, I am in a wonderful position of a new beginning, and hopefully this bill will be a new beginning.

Chairman McHUGH. Mr. Speaker, we all appreciate your being with us this morning.

Our next witness is the distinguished Minority Leader of the House of Representatives, Robert Michel of Illinois.

Mr. Michel, like the Speaker before him, has been an ex officio member of the Intelligence Committee and has added considerably to our deliberations, and functions, and we are very grateful for his presence here this morning.

STATEMENT OF HON. ROBERT H. MICHEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. MICHEL. Well, thank you, Mr. Chairman, and my colleagues on the committee, as you indicated, I have been very privileged to serve as an ex officio member of the committee. My only regret is, because of our duties otherwise, we are limited in our attendance; but I would like to address myself, if I might, to the bill, H.R. 1013, introduced by the chairman, which would amend the National Security Act of 1947, and section 662 of the Foreign Assistance Act of 1961—the Hughes-Ryan amendment.

When the chairman introduced his bill on February 4th of this year, he said, and I think it bears well to have it read here:

> With these amendments, the scheme for covert action reporting will be quite clear. First, in almost all cases, prior notice must be given to the Intelligence Committees; second, in rare cases, where the President believes there is an unusual degree of sensitivity, prior notice must be given, but it may be given to the leadership group set out in section 501; and third, in even rarer cases, where the President must react with speed because of an immediate threat to our national security, notice must be deferred for a maximum of 48 hours.

I am not a constitutional scholar. But I have been a Member of the Congress for over 30 years. I have seen the Legislative Branch and the Executive Branch come to loggerheads on constitutional prerogatives over and over again.

But nowhere has the issue been more forcefully joined than in the language of the amendment I have just read. And nowhere has the issue been more serious. What we are dealing with here is a fundamental question of foreign policy.

If I may judge from the remarks made by the chairman during that same Floor speech in February, his amendment has its origins in the controversy surrounding the Iran-contra arms affair and the notification issue.

I will not comment on the facts of the Iran-contra affair because we already have two Congressional committees working full time to uncover those facts. And while I have read with interest varying interpretations of the President's decision not to notify Congress, my appearance here today is not concerned with the legal and historical questions of that issue.

I would rather talk about the future than the past, about the dangers I see to our Nation if the chairman's amendment ever becomes law. Legislation proposed in the heat of political passions, with long-range questions of national security overshadowed by short-term response to current controversies, is not Congress acting at its best.

I fully understand the motivation that led to this proposed legislation. I understand the frustration that supporters of the legislation might feel given their perceptions of the events surrounding the Iran-contra affair. But a sense of frustration, justified or unjustified, is not a sufficient cause to create legislation like this.

In dealing with intelligence oversight, the Congress has never intended to confront an American President with language that is the functional equivalent of a foreign policy strait-jacket.

There is an old rule of thumb about problem-solving. It says that we should never try to seek more accuracy in our answers than the facts of the question permit. In short, we should never sacrifice the good to the best. We should never try to find a perfect formula for states of affairs that do not, by their very nature, allow perfection.

James Madison, in Federalist Paper No. 48, described the possibility of the Legislative Branch encroaching on the legitimate functions of the other Branches. Speaking of the Legislative Branch, he wrote:

> Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate Departments.

To put the matter in the less eloquent but perhaps more emphatic language of our own time, Congress can pass legislation whose stated aim is doing good for all concerned, but whose effect will be encroachment on the rights of the other branches of government.

The Constitution of the United States made it clear from the beginning that there could be no clear-cut, easy-answer, ready-made formulation to do away with the inherent tension between two Branches of Government, each with legitimate powers.

They knew that sometimes we would have to live in that gray, fog-shrouded area of the political landscape between the Executive and the Legislative powers, where clarity isn't always possible.

If you feel, Mr. Chairman, as you said in your statement, that "the bond of mutual respect between the committee and the CIA has been broken," the worst way to reestablish that old bond of trust is by forging new chains of legislative language.

We should not fool ourselves that we can solve these complex problems simply by writing new language. I wish it were that simple. But it is not. Under a system of government like ours, we have to take risks. Democracy itself is a risk. There are no guarantees.

But one risk we cannot take: We cannot risk having our adversaries—and indeed, our friends—perceive an American President as not being able to move quickly and decisively because Congress has restricted his flexibility.

I stress the word "perceive." There are learned counselors and expert witnesses on both sides of this issue. We who are not constitutional lawyers or experts can only listen and try to make judgments.

But whatever the constitutional issues involved, if this legislation became law, the perception of a weakened Presidency would be universal. No amount of convoluted arguments about what the legislation means could erase the impression that the Congress intends to limit a President's flexibility.

This may not be your intention. But it will be the perception. And in politics, including geopolitics, perception is all-important.

I can think of no worse scenario than one in which a Soviet leader meets with an American President—any American President—believing that our President has been stripped of the freedom to act swiftly and with flexibility.

Again, I don't question the motivation behind this proposal. What I question is the wisdom of Congress, acting in the emotion of this Iran-contra affair, placing restrictions upon the very institution of the Presidency itself, restrictions that are, in my view, constitutionally dubious and strategically dangerous.

Let me turn for a moment to another aspect of the issue. It may seem peripheral, but I believe it is important in the overall context of the debate over Congressional oversight.

There are those who say no Administration can afford to trust the Congress with secret information for fear it will be leaked. The Tower Commission report addressed this point among its recommendations. What the report had to say about the problem of possible "leaks" is worth quoting in full:

> There is a natural tension between the desire for secrecy and the need to consult Congress on covert operations. Presidents seem to become increasingly concerned about leaks of classified information as their Administrations progress. They blame Congress disproportionately. Various Cabinet officials from prior Administrations indicated to the Board that they believe Congress bears no more blame than the Executive Branch.
>
> However, the numbers of Members and staff involved in reviewing covert activities is large; it provides cause for concern and a convenient excuse for Presidents to avoid Congressional consultation.
>
> We recommend that Congress consider replacing the existing Intelligence Committees of the respective Houses with a new joint committee with a restricted staff

to oversee the intelligence community, patterned after the Joint Committee on Atomic Energy that existed until the mid-1970s.

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I think it is a very fair and accurate assessment of the situation.

Our distinguished colleague, Mr. Hyde, has proposed legislation that there be one joint Congressional Intelligence Committee, a proposal I support. I think that we should embrace Mr. Hyde's proposal since it reflects the concerns of many, including the members of the Tower Commission.

In conclusion, my view is that intelligence oversight can work, as it has in the past, when there is the give-and-take of debate, the freedom for a President to maneuver, along with the acknowledgment, in deed as well as word, of the legitimate right of Congress to be properly informed in order to perform its oversight functions.

I think the legislation we already have on the books reflects a wise, prudent compromise to a complex problem. The legislation ain't broke. So let's not fix it.

Very briefly, on that 48-hour limitation, I am thinking of the difficulty involved there, depending upon who those members are that we want to be notifying, and how many. Congress is away on weekends all so frequently, and then when we are on break, whether it is Lincoln's birthday, the Fourth of July, or in August or whenever, the Congress adjourns, and we are spread to the four winds all around the globe, and you are going to require within 48 hours notification of individual members on a secure basis?

We could be in Timbuktu. Even today, we are recognizing in the Soviet Union, we have a real serious problem for the Secretary of State getting back to his government.

Now, that has got to be a very serious problem for us. Then, the very fact of all that has developed by way of communication intercepts. Yes, I have tried to be very, very careful about some of the sensitive information that I received, to make absolutely sure that I am on some secure line, but how accessible are those secure lines to those of us who may not be right in our offices where the facilities are there for us to use?

Finally, there is the deletion of part of the existing law which has to do specifically, Mr. Chairman, with other than activities intended solely for obtaining necessary intelligence. There is not even an exception for intelligence-gathering.

Now, let's suppose we have an agent or a couple or whatever, someplace abroad, and the President says now, we would like to plant a seed someplace, if you are given the opportunity. I am not altogether sure under the language of the chairman's bill, whether or not the President at that point is supposed to be advising Members of Congress, this is what he is proposing out there, and when is the time?

The agent may be behind the screen that we are all too familiar with today. He is given a commission to do a certain thing prospectively, depending upon some other act out there, and it is certainly

within the President's right, to maintain the security of our country, to have those eyes and ears out there, to do certain things for intelligence-gathering, I just don't see—you know, when you wipe out that exception again in your legislation, we have got a problem.

I am reminded in this growing controversy here, you know, I remember, and no reflection at all upon our own individual Members of Congress, with respect to how we are given to leaking information, but I can remember several Speakers of the past who refrained from appointing certain members of the House of Representatives to certain committees because of those Speakers' doubts about those members' abilities, whatever, to serve on those committees.

Now, they may very well, when we take the oath of office, support and defend the Constitution, but I will tell you, there is nothing in that oath under those circumstances that forecloses possible leaks of very sensitive information, and then this issue of covert versus overt operations, I dare say there are some members of the House of Representatives of the Congress who frankly have a personal bias against covert operations, period.

I happen to think they are absolutely essential, even in a free society, and in my own responsibility as leader, would never, never appoint a member to this committee who frankly had that personal bias against covert operations, because I don't think that would serve the system well, or the House of Representatives well, so those are the thoughts I have.

I would be happy to subject myself to questions.

[The statement of Mr. Michel follows:]

STATEMENT OF CONGRESSMAN BOB MICHEL

Mr. Chairman, I thank you for this opportunity to appear before the House Permanent Select Committee on Intelligence. For 7 years I have been an Ex-Officio member of the Committee. During that time I have had the chance to see at first hand the professionalism of the staff and the dedication of the members. I want to take this opportunity to pay public tribute to the fine work you have done and continue to do.

I appear before you today to discuss some aspects of the Bill H.R. 1013, introduced by the Chairman, which would amend the National Security Act of 1947 and Section 662 of the Foreign Assistance Act of 1961—the Hughes-Ryan amendment.

Let me quote from the Chairman's own remarks when he introduced the Bill on February 4th of this year:

"With these amendments, the scheme for covert action reporting will be quite clear. First, in almost all cases, prior notice must be given to the intelligence committees; second, in rare cases, where the President believes there is an unusual degree of sensitivity, prior notice must be given, but it may be given to the leadership group set out in section 501; and third, in even rarer cases, where the President must react with speed because of an immediate threat to our national security, notice may be deferred for a maximum of 48 hours."

I am not a constitutional scholar. But I have been a member of the Congress for over 30 years. I have seen the Legislative Branch and the Executive Branch come to loggerheads on constitutional prerogatives over and over again. But nowhere has the issue been more forcefully joined than in the language of the amendment I have just read. And nowhere has the issue been more serious. What we are dealing with here is a fundamental question of foreign policy.

If I may judge from the remarks made by the Chairman during that same floor speech in February, his amendment has its origins in the controversy surrounding the Iran-Contra arms affair and the notification issue.

I will not comment on the facts of Iran-Contra affair because we already have 2 Congressional committees working full time to uncover those facts. And while I have read with interest varying interpretations of the President's decision not to

notify Congress, my appearance here today is not concerned with the legal and historical questions of that issue.

I would rather talk about the future than the past, about the dangers I see to our nation if the Chairman's amendment ever becomes law. Legislation proposed in the heat of political passions, with long-range questions of national security overshadowed by short-term responses to current controversies, is not Congress acting at its best.

I fully understand the motivation that led to this proposed legislation. I understand the frustration that supporters of the legislation might feel given their perception of the events surrounding the Iran-Contra affair.

But a sense of frustration, justified or unjustified, is not a sufficient cause to create legislation like this.

In dealing with intelligence oversight, the Congress has never intended to confront an American president with language that is the functional equivalent of a foreign policy strait-jacket.

There is an old rule of thumb about problem-solving. It says that we should never try to seek more accuracy in our answers than the facts of the question permit.

In short, we should never sacrifice the good to the best. We should never try to find a perfect formula for states of affairs that do not, by their very nature, allow perfection.

James Madison, in Federalist Paper No. 48, described the possibility of the legislative branch encroaching on the legitimate functions of the other branches. Speaking of the legislative branch, he wrote:

"Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."

To put the matter in the less eloquent, but perhaps more emphatic language of our own time, Congress can pass legislation whose stated aim is doing good for all concerned, but whose effect will be encroachment on the rights of the other branches of government.

The Constitution of the United States made it clear from the beginning that there could be no clear-cut, easy-answer, ready-made formulation to do away with the inherent tension between 2 branches of government, each with legitimate powers.

They knew that sometimes we would have to live in that gray, fog-shrouded area of the political landscape between the Executive and the Legislative powers, where clarity isn't always possible.

If you feel, Mr. Chairman, as you said in your statement, that ". . . the bond of mutual respect between the committee and the CIA . . . has been broken . . .," the worst way to re-establish that old bond of trust is by forging new chains of legislative language.

We should not fool ourselves that we can solve these complex problems simply by writing new language.

I wish it were that simple. But it is not. Under a system of government like ours, we have to take risks. Democracy itself is a risk. There are no guarantees.

But one risk we cannot take: We cannot risk having our adversaries—and, indeed, our friends—perceive an American president as not being able to move quickly and decisively because Congress has restricted his flexibility.

I stress the word "perceive". There are learned counselors and expert witnesses on both sides of this issue. We who are not constitutional lawyers or experts can only listen and try to make judgments.

But whatever the constitutional issues involved, if this legislation became law, the perception of a weakened presidency would be universal. No amount of convoluted arguments about what the legislation means could erase the impression that the Congress intends to limit a president's flexibility. This may not be your intention. But it will be the perception. And in politics—including geopolitics—perception is all important.

I can think of no worse scenario than one in which a Soviet leader meets with an American president—any American president—believing that our president has been stripped of the freedom to act swiftly and with flexibility.

Again, I don't question the motivation behind this proposal. What I question is the wisdom of Congress, acting in the emotion of this Iran-Contra affair, placing restrictions upon the very institution of the presidency itself, restrictions that are in my view, constitutionally dubious and strategically dangerous.

Let me turn for a moment to another aspect of the issue. It may seem peripheral, but I believe it is important in the over-all context of the debate over Congressional oversight.

There are those who say no administration can afford to trust the Congress with secret information for fear it will be leaked.

The Tower Commission Report addressed this point among its recommendations. What the Report had to say about the problem of possible "leaks" is worth quoting in full:

"There is a natural tension between the desire for secrecy and the need to consult Congress on covert operations. Presidents seem to become increasingly concerned about leaks of classified information as their administrations progress. They blame Congress disproportionately. Various cabinet officials from prior administations indicated to the Board that they believe Congress bears no more blame than the Executive Branch.

"However, the numbers of Members and staff involved in reviewing covert activities is large; it provides cause for concern and a convenient excuse for presidents to avoid Congressional-consultation.

"We recommend that Congress consider replacing the existing Intelligence Committees of the respective Houses with a new joint committee with a restricted staff to oversee the intelligence community, patterned after the Joint Committee on Atomic Energy that existed until the mid-1970's."

I am glad to see that the Tower Commission did not engage in "Congress-bashing" when it came to discussing leaks of classified information.

But it is worth repeating that the Report did say the "number of Members and staff involved in reviewing covert activities is large; it provides cause for concern . . ."

I think that it is a very fair and accurate assessment of the situation.

Our distinguished colleague, Mr. Hyde, has proposed legislation that there be one joint Congressional Intelligence Committee, a proposal I support. I think that we should embrace Mr. Hyde's proposal since it reflects the concerns of many, including the members of the Tower Commission.

In conclusion, my view is that intelligence oversight can work—as it has in the past—when there is the give-and-take of debate, the freedom for a president to maneuver, along with the acknowledgment, in deed as well as word, of the legitimate right of Congress to be properly informed in order to perform its oversight functions.

I think the legislation we already have on the books reflects a wise, prudent compromise to a complex problem. The legislation ain't broke. So let's not fix it.

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

First, I think it is important to stress, as you did, that we should look at this issue dispassionately and not in any sense of frustration, and I hope that is the manner in which the committee will proceed.

Secondly, it is important to distinguish between collection of intelligence on the one hand, and covert operations on the other, and I think that this bill clearly is directed to covert operations.

I would point out that in President Reagan's Executive Order of December 1981, he defined covert operations as those "conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States is not approved or acknowledged publicly, but which are not intended to influence U.S. political processes, public opinion, policies or media," and this is the part that is important, "and do not include diplomatic activity or the collection and production of intelligence or related support functions."

Covert operations to which this bill is directed does not cover the collection of intelligence, which we all agree should not be subject to prior notification to Congress.

Mr. MICHEL. If perchance, this legislation should get to the House Floor, and then in the legislative history, that would be a very, very important point that would have to be discussed because

the language deleted, automatically wipes out that exception that we at this day have in the law specifically.

Chairman McHUGH. Well, I don't think that is correct, but we can certainly make it clear in the legislative history that we are not intending to influence or affect collection of intelligence.

You indicated that you would like to look forward in terms of this proposal, and its impact. That is an important thing for us to do, but it is not irrelevant for us to consider the Iran arms transaction, because that is a real-life case.

It reflected not just what happened in that particular instance, but it reflects what we perceive to be an attitude with this particular Administration with respect to Congressional oversight generally.

We may be wrong, but nonetheless, the perception is there. As others will testify, there is an argument that you should not try to write something into law to cover Congressional oversight and notification, but rather, it should be based on trust and comity, and I agree with that so long as the trust exists, but as the Iran case demonstrates, at least to some of us, there is a perception in the Administration, on the part of some, that Congress can't be trusted, or it is an inconvenience or an obstacle rather than a help.

And I would ask you with respect to that case, whether or not the President complied with existing law, which requires in the case where prior notice is not given, that the President shall notify the Intelligence Committees in a timely fashion.

The President signed his finding authorizing this operation on January 17, 1986. We did not learn of this at any time from the White House or from anyone else in the Administration, as was mentioned earlier; we learned about it because it was disclosed in a Middle East magazine.

Well, does that comply with existing law, never mind the proposal which is being made here today?

Mr. MICHEL. I am personally offended by the fact that I was left out of the loop for so long, and I am certainly not going to apologize for my own Administration for having taken that tact, because as you indicate, there are those of us who know how to keep a secret, can be trusted with this country's security. There is an obligation for a shared role and responsibility between the Executive and Legislative Branches, and so on, but what I am saying, and I am not altogether sure the system is wrong, some of the individuals involved are victims of their own individual body chemistry, what their feelings were vis-a-vis an Executive Branch versus Legislative.

And so, I have a real reluctance to put that kind of, a straitjacket on some future President.

I would like to think no matter who he or she may be, and those around them, that they will have learned certainly from this experience that that was not the appropriate way in which to conduct that operation, certainly.

Chairman McHUGH. I presume that if the President had notified you of his plans to sell arms to Iran controversy, that you would have expressed some reservation or objection to that?

Mr. MICHEL. There would certainly have been those of us who would have reminded whomever at that time of some of the other

commitments which were made to us for which we went out on the line as a matter of principle with respect to our absolute prohibition of dealing with terrorists, period, you know.

And I must confess, that I had a very hard time assimilating what had gone on.

Chairman McHUGH. Don't you think the Iran case in this connection is a good example of why prior notification in most cases is a benefit to the President as well as a right of the Congress?

Mr. MICHEL. I know we have left this rather ambiguous in the past, by way of timely notification, and we have argued that point on the Floor of the House any number of times, and it is going to be open to various interpretations, depending upon who the individual is, I guess.

And I would just—I am very reluctant to deny a President of the future that kind of flexibility, trusting hopefully that whoever he or she might be will have learned from this experience that that was not in the spirit of the law, to have that long a gap between the act and the notification of those of us who deserved some heads-up on what was going on, because those of us who are really active on that political cutting edge out there on a day-to-day basis do have some good things to volunteer once in a while.

Chairman McHUGH. Thank you very much.

Mr. Livingston?

Mr. LIVINGSTON. I want to commend you on an outstanding statement, and thank you for your input. I just want to concentrate on your point about the amendment to section B of existing law.

In reading that specific exception, the words "other than activities intended solely for obtaining necessary intelligence" would be struck, as I have pointed out, which would require that even the most mundane obtaining of necessarily intelligence, and all of the covert activities inherent in that activity, would be required to be shared by the President and the Executive Department with various Members of Congress, and in most cases, in advance rather than 48 hours after the fact.

Is that your understanding, Mr. Michel?

Mr. MICHEL. Well, I always considered this to be a very important exception that we had currently written into the law, and that when we are about to wipe out very important exceptions, then I have to ask why.

What is the reason for it?

Mr. LIVINGSTON. I totally agree with you. Even if it were the most significant intelligence-gathering activities, it would seem that this is not the type of thing that should be shared, and could very well totally close down our capability to gather intelligence around the world.

Mr. MICHEL. I am not the specialist here. We got a few behind us here, Admiral Turner and Bill Colby, and there may be others that can probably speak more directly to that, but I have a real problem with that.

Mr. LIVINGSTON. Well, I thank you for your statement. I have no further questions.

Chairman McHUGH. Thank you.

Mr. Stokes?

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

Let me also commend our distinguished Minority Leader for his appearance here this morning, and the excellent statement he has given in support of his views.

On the statement that you made with reference to putting the President in a foreign policy strait-jacket, as the distinguished Minority Leader knows, the law already requires timely notice to the Congress, so we are not saying that the President has to do something he is not already required to do under law.

Does the distinguished Minority Leader by any stretch of the imagination say to us that notice after 14 months—it was August of 1985 when the President first gave approval for the sale of the arms by the Israelis to Iran—by any stretch of the imagination, would the distinguished Minority Leader say that was timely notice to the Congress?

Mr. MICHEL. That was not.

Mr. STOKES. I can say to you that in crafting this legislation, I don't think either I or Ed Boland, the distinguished former chairman of this committee, one of the most distinguished members of the House, and a gentleman who distinguished himself by chairing this committee for six years, co-sponsor of this legislation, intends in any way to tie the President's hands.

We respect the fact that the President has to make certain exigent decisions, and must have latitude for that, but Ed Boland has stated on several occasions that when they entered into the original language on timely notice, that it was based upon mutual trust between the Congress and the President, and it seems to me here now that you would probably agree with me that we are confronted with a situation where, because the President made a unilateral decision on his part without the involvement of the Congress, we are now in a situation where the President himself, as a consequence of this action, has requested an Independent Prosecutor to conduct a criminal investigation of this action.

He has requested both Houses of the Congress to investigate the consequences of this action, and I think that the distinguished Minority Leader would agree with me that had he complied with the law, say timely notice being somewhere within a 48-hour period, or if the law as proposed had been enacted, say 48 hours, and he had come over to the Congress and said to our committee which you have sat on now for 10 years, that he planned to do what he planned to do; isn't it conceivable that some of us on that committee would have had enough common sense to say to him, "Mr. President, this is bad. Go back to the drawing board and think about this one again, Mr. President."

Don't you think that would have happened?

Mr. MICHEL. I am not altogether sure it would have been the President himself who would have come up, but at least someone speaking on his behalf personally responsible, and there would have been a significant reaction on our part, I think, maybe from both sides of the aisle.

It would vary in degree. As I said and indicated, timely fashion is open to interpretation. From my point of view, I felt offended that it took that long before we were notified. Bearing in mind, I guess, it was an operation that was somewhat far removed from the kind of normal things we think of here. This whole hostage issue is one

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in more recent years that has come to the fore that we, a number of years ago, when I first came to the Congress, I don't think anyone gave any serious thought to what the problem might be for us in respect to the hostage issue.

But in more recent years, the Carter Administration, and this one, we have been caught up in things, and new developments probably require a reassessment of how to deal with it. That was part of the reason for the lengthy delay in notification, because it took so long through intermediates to get the kind of contacts that eventually were supposed to bear fruit, but as I said, I am troubled by that long delay.

Mr. STOKES. Thank you, Mr. Chairman.

Chairman MCHUGH. Thank you.

Mr. Hyde?

Mr. HYDE. I want to congratulate you for a superb statement and analysis of a very thorny problem, and I want to associate myself with your sharp criticism of the Administration in not timely notifying Congress.

The law is clear, and 14 months is not timely, and I think the law in that sense was not observed, and I think that the Administration is paying a political price for that, as every Administration will when they do not observe the letter or the spirit of the law. I would personally like to see timely fashion stay in there, and we will define timely fashion, as we are doing now, by saying this surely wasn't, and the Administration is paying a price for that.

In addition, by notifying Congress, you get some risk insurance when something is high-risk, and doesn't go right, but that said, and I firmly believe that, and I agree with the spirit of this legislation, but I sure don't agree with how it handles it. You all, except Mrs. Kennelly, who was not on the committee, remember perfectly well when the Secretary of State came into our committee and told us of a very sensitive operation, and those were his words, and the next day, it was in The Washington Post in detail.

There are people who say a life was probably lost on that disclosure. Now, I can understand the White House and Mr. Casey being concerned that the leaks come from his own agency, from the State Department, from Capitol Hill where we are besieged by media after every meeting, just for background, confirm what I have heard from somebody else, I can understand the paranoia. The leaks are legion, and I have so many of them here, and I don't like to talk about them, because you give some legitimacy to the disclosure, but the 48 hours is hog-tying a President in matters where we ought to leave it at timely notice, and if they don't observe it, force that political price to be paid.

Two more things. We are besieged by spy scandals: the Kampiles case where this employee sold a manual about a very highly sensitive satellite, the Morrison case, the Walker case, the three Marines, et cetera, et cetera, and we are spending our energies trying to disseminate more classified information instead of trying to address, at least in tandem with our concerns about notification, some of these serious problems.

Permit me to digress to answer something that the Speaker said that really deserves an answer, and in all fairness, he assailed the CIA for conduct on two matters, one of which was Chile, and I just

want to indulge the chairman by reading two paragraphs from a book written by Mr. Colby, that is an excellent book on the CIA. "Honorable Men, My Life in the CIA," by William Colby; and he discusses that Chilean myth that we have heard for time immemorial, how dirty the CIA was, and how we overthrew this democratically-elected leftist Allende.

> Two points need to be made about the CIA's assistance during this period after 1970, and both are a contrast to the general impressions abroad about it.
>
> The first is that CIA's help was to center political groups, not the right-wing extremists. Of the millions of dollars spent in Chile by CIA, the most prominent right-wing group received some 38,000 during the track-two effort in 1970, and about 7,000 more during 1971 and none thereafter.
>
> The second is that the 1973 coup was carried out by the Chilean military with no participation by CIA. In fact, CIA sent clear instructions to its station in Santiago in May and June 1973 to separate itself from any contact with the Chilean military, so that it would not be misunderstood to have been involved in any coup action the military might undertake.
>
> The real thrust of CIA's program was to support the center political forces so they could win the next elections and thus remove Allende through peaceful means.

This is going out over C-SPAN, and the record ought to be clear that the CIA performed adequately in Chile. They made mistakes, being human, but they are not to be assigned guilt for overthrowing the great democrat Allende, because they didn't.

I thank the chairman for that time.

Chairman McHUGH. Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I am glad to greet the Minority Leader here. On the point of 48 hours, I would think the committee would want to look at the time in terms of whether 48 hours has some peculiar validity as a time frame or something else.

I think that and other issues were appropriately raised by Mr. Michel. I do take issue with him with the implication that somehow those appointed to the committee should be predisposed to support covert action.

I think that that is a basic fundamental difference I perhaps have with the gentleman from Illinois. There are many who feel, in the CIA and elsewhere, that, frankly, covert action has been sort of the bane, the thing that has damaged the CIA over the years.

Granted, there have been effective, useful covert action programs historically, and some that have been an embarrassment to this country. Furthermore, the Intelligence Committee is concerned with intelligence-gathering, and analysis, much of it highly technical, in terms of, let's say, 96, 98 percent of our budget, and our efforts are in intelligence, intelligence-gathering, and covert action is a small portion.

I would think that this is where we need critical review that is a sort of dispassionate view, a second-guess, if you will, on the part of the Congress, and that should not imply, as my friend, Mr. Hyde, suggests, that those who might oppose certain initiatives are disposed to leak those initiatives.

I don't think the connection is there. If I am disposed to oppose a program, I feel I must be purer than Caesar's wife on that with respect to possibly leaking anything about it.

Mr. HYDE. Would the gentleman yield?

I hope I did not imply that opposition predisposed someone to leaking. I don't believe that at all. I simply say there are isolated instances where people really think it is a higher duty to leak a program or a policy if they are against it, and I quoted one former member, whom we all knew and admired, as having said that was his duty, to leak a program, and there are others who feel that way, and we know who they are.

Mr. KASTENMEIER. Those are members on other committees, but I accept the Speaker's premise that those appointed to this committee, above all, are absolutely bound to confidence, whether we like activities, support them or not.

I hope that we can be effective in ensuring that the confidence in the committee is justified by the House.

Chairman MCHUGH. Mr. Beilenson?

Mr. BEILENSON. Thank you, Mr. Chairman. I, too, enjoyed having our good friend from Illinois, Mr. Michel, here with us today. He has made some very useful points, and among them, the point you made with respect to where one of these eight folks might be when time for notification came around.

That is something we should perhaps take a look at. We might, for example, limit it to require the notification only amongst those eight members who are in the country or even in Washington, D.C., or there can be somebody else you might notify in their stead, or when you don't have access to a secure line.

The gentleman brings up some valid points. Maybe the Leader might take some of his friends from Illinois overseas sometime, and being called a month from now, calling him up and trying to inform him of something the Soviet Union should not know about, well, perhaps we could address that more carefully.

Mr. MICHEL. One other point, Tony. Our adversaries know who the members are on this committee, and they know who the leaders are, and when, at one given time, all these members are given a simultaneous notification that something is up, that in itself is a key and a tip-off to your adversary. That is another element in this thing, and I just think, from a point of being extraordinarily careful about how we tip our hand, that that ought to also be taken into account.

Mr. BEILENSON. Thank you.

Let me go on for a moment, Mr. Chairman, and respond to a few things that Mr. Michel said. If you believe, and I think you used the word that legislation on the books that we have now is wise legislation, then one would have to ask what is wrong with spelling out the requirements a little bit, because as you and Mr. Hyde and everybody quite properly feel, the timely notice requirements didn't work in this particular case. Perhaps 48 hours is not the cure-all, but somehow what we have got now is not quite adequate, although we all believe that it is wise legislation in general; so, let's struggle to find some way——

Mr. HYDE. Would my friend yield to me on that point?

Mr. BEILENSON. Of course.

Mr. HYDE. The observation of the law was inadequate, not the law. Every time the law is not obeyed, we don't need to change the law, but better observance of the law.

These hearings are moving us in that direction, but when you start putting time limits on it, it gets to be micromanagement.

Mr. MICHEL. It is a bit embarrassing, frankly, for Henry and myself, because it is our Administration that did not do what we would have thought they should have been doing, but even with that, we would take the strong position, not knowing who ongoing Presidents might be, we want to be very careful.

Mr. BEILENSON. You want to lay down some explicit guidelines as to what is timely for them. It is not enough to hope that some future Administrations will remember, or will have learned, because in fact, we learned through history that people forget, and the folks who are carrying out the policy, they may be in their thirties, forties, and may not have been even around at the time of the next crisis.

You talk to folks at home about the Second World War. The kids in high school were not even around when the Vietnam War was here. You have to keep reminding people, and to the extent that you can usefully put something in legislation, you should do so.

With respect to a weakened Presidency, I don't think anybody is suggesting we strip the President of his ability to act. We are concentrating on our right to be informed, as a coordinating branch of the government.

In speaking about espionage cases, those in fact are cases which are far more costly, far more destructive and damaging to our national interests probably than anything we are talking about.

We are talking not about those sorts of things or even intelligence-gathering, but we are talking about policy matters, covert actions, and part of the problem—and I have probably exceeded my five minutes—part of the problem one must say frankly is that the main foreign policy initiatives of this particular Administration, the so-called Reagan Doctrine, are initiatives that are designed in such ways which are often funded or done through the Intelligence Committees which cannot be openly debated on the Floor.

It leaves us all in a very difficult situation. The Congress has to be part of this in one respect or another, but we can't debate it on the Floor, talking about how much money we are spending, because it has all been given to us in this other form of covert action, not because the President or the Administration wants to avoid this kind of debate, but because he believes in these kinds of covert actions.

It makes it difficult for us, because we have a part to play, and it is difficult for us to play that part, because we are not allowed to talk about any of these things, and they are in the paper, but we can't talk about them.

Chairman MCHUGH. Mrs. Kennelly?

Mrs. KENNELLY. Mr. Michel, I am just curious I know some of the things that were set up for the Speaker. Are you satisfied, with the statute as written now, that you could be adequately notified, that at all times contact would be made with you.

Is that mechanism set up presently under the statute as written now?

Mr. MICHEL. There has to be a certain measure of trust. We are in that time when both parties are picking candidates to run for President, a long, long tortuous trail to that at the end of the line,

we have to give a certain measure of trust and confidence to whomever the American people at that time have chosen to be their Commander-in-Chief, and I have to trust in that judgment of the people.

It may be against my best wishes.

Mrs. KENNELLY. Since we do live in a time of possible terrorism within this country, which is considered a real possibility, are you always available to know, does the White House know where you are?

Mr. MICHEL. I don't know that they have had any real problem ever running me down personally.

Mr. BEILENSON. They knew where you were on the override.

Mr. MICHEL. Oh, yes, and I make a special point of letting them know where we are going to be at any given time.

Mrs. KENNELLY. Are you satisfied that the White House could contact you, if in fact this legislation passed, within the 48-hour notice?

Mr. MICHEL. There may be—sometimes I might be inaccessible for some limited period of time. But I tell you, I guess my concern is, when you are doing it simultaneously. A signal that is tipped on that, because that can be, people can be aware of that, simultaneous notification. There are ways and means by which that is determined, and then the further away from this capital city of Washington you are, the more of a problem that becomes.

Mrs. KENNELLY. Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Hyde?

Mr. HYDE. One more brief question.

What do you do, Mr. Michel, when another country that you are dealing with in tandem on an operation conditions their participation on non-disclosure? They have got their citizens involved, their agents, their people, and they read the papers, and they will help you, and we may desperately need their help, but they condition their participation on non-disclosure.

What do you do then, if you are trapped into a 48-hour notification?

Mr. MICHEL. That is an interesting question. The very raising of the question by the distinguished gentleman begs some kind of answer from the committee eventually.

Chairman MCHUGH. Thank you very much, Mr. Michel. I want to reassure you again on the question of whether or not what we are proposing here would affect the collection of intelligence, and I would point out that under section 662 of the Foreign Assistance Act, which is the Hughes-Ryan amendment, which is still in effect and would be after this bill were enacted, covert operations and notice requirements are not intended to affect intelligence-gathering, so your understandable concern about that would be taken care of by this particular language.

Mr. STOKES. Just one question.

Since you agree that 14 months is not timely notification under the statute, and since he feels that 48 hours severely constricts the President, does the gentleman care to offer a time limit that he is agreeable to?

Mr. HYDE. Split the difference.

Mr. MICHEL. Well, I can tell by the gentleman's demeanor that he was about to pop that question, and I guess I have to say, it must be someplace in between. But as I said, I have a real problem when we get to finally delineating and specifically tying that down. That is a difficult one to call. I think the committee has been made aware of the real serious problem, in that type of frame, and I will leave it go at that.

Mr. STOKES. Thank you very much.

Chairman MCHUGH. Thank you very much, Mr. Michel.

Our next scheduled witness was to be Senator Moynihan of New York, but he is the Floor leader on the question of the highway bill override in the Senate, so he has submitted his statement, and will not be with us.

There is one comment in his statement which I would like to read at this point, because it gets to the heart of the question of whether Congress can be trusted, and Mr. Hyde has suggested that in certain cases, the intelligence community should be able to share information with the intelligence agencies of other countries, and not be burdened with telling Congress.

Mr. Moynihan says,

> There is a notion that the Congress cannot be trusted. That the Congress is a national security risk. Wrong. Committees here take matters with great care. You treat matters before your committee with great care. We are not to be held responsible for the revelation of public belligerent acts such as the mining of Nicaraguan harbors, or revelations by adversaries such as happened in the Beirut newspaper, Al Shiraa.
>
> When you get to the point where you trust a Ghorbanifar, a man the career intelligence service did not trust, before you trust the Speaker of the House; or when you decide to pass on intelligence information to the Ayatollah but will not inform the Chairman of the Intelligence Committee of a Presidential finding, then matters are confused. And it is time to add some order with amendments such as these.

[The statement of Senator Moynihan follows:]

STATEMENT BY SENATOR DANIEL PATRICK MOYNIHAN

Mr. Chairman, I should like to thank you for inviting me before your committee to discuss a vital subject—our intelligence oversight process. Indeed this process, so necessary in a democracy, is near unique; only the Bundestag has anything quite like it. Oversight is a delicate matter involving Constitutional principle, national security, and freedom of information. While I can not overemphasize the need for sensitivity, a concern for secrecy and leaks is no excuse for abandoning sound process or notification.

To start, then, I should make it clear that I support H.R. 1013, "the Intelligence Oversight Amendments of 1987." Iranamok (or whatever) has again demonstrated the need to resolve ambiguities involving the timely reporting of covert actions as established by the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961, and the Intelligence Oversight Act of 1980.

The Senate tried to do this following the mining of Nicaraguan harbors in 1984. That was the first breach of faith between the intelligence Communities, the Executive and the intelligence community. In its aftermath, we thought we had reached an understanding with the executive branch on just what "fully and currently informed," "significant anticipated activities," and "timely fashion" meant. This understanding came to be known as "the Casey Accords." We now know those Accords were honored in the breach—we failed. And I think it might shed some light on your current deliberations to briefly review the history of those Accords.

As you know, the Intelligence Oversight Act of 1980 established the principle that the Intelligence Committee would be informed of all covert action "other than activities solely for obtaining necessary intelligence." And there was the provision that if something of great urgency and sensitivity was involved, the President could inform the Congress in a "timely fashion," and he need only inform the Chairman and Vice Chairman of the Intelligence Committees, the Speaker, House Minority

Leader and Majority and Minority Leaders of the Senate, the so-called "Gang of Eight."

This worked well until the spring of 1984 when it emerged that the Intelligence Committees had not been told of the mining of Nicaraguan harbors. There were indications. A one sentence cryptic allusion in an 84 page hearing transcript. But by all counts the Administration was not observing the spirit of the law.

The Chairman, Senator Goldwater, was outraged, and let Mr. Casey know so, complete with expletives deleted. To the contrary, the National Security Advisor said at the Naval Academy on April 12, "Every important detail (of the mining operation) was shared in full by the proper Congressional Oversight Committees." In other words, Senator Goldwater had lied. He had not. Mr. McFarlane was misled. Three days later I resigned in protest as Vice Chairman of the Committee, coming back on only after Mr. Casey apologized to the Committee. Clearly, we needed to clarify covert action reporting procedures, and we did.

On June 6, 1984, Senator Goldwater, myself, and William Casey—with the President's explicit agreement—negotiated and signed "the Accords." Simply put, the understanding provided that the DCI would notify the Committee of all covert action activities for which higher authority or Presidential approval was required (a working definition of "significant") and that this notification would occur prior to implementation of the actual activity subject to the possible exceptional circumstances allowed for by the Intelligence Oversight Act. The agreement also called for a joint review the following year.

The review declared: "Notification of the Committee prior to implementation will be accomplished in the following situations, even if there is no requirement for separate higher authority or Presidential approval or notification:

"Significant military equipment actually is to be supplied for the first time. . . ."

In this same addendum Mr. Casey, Chairman Durenberger, and Vice Chairman Leahy "agreed that the procedures have worked well and that they have aided the Committee and the DCI in the fulfillment of their respective responsibilities." But this appraisal came five months after the President's Intelligence Finding of January 17, 1986.

The fact is that 14 months after the "Casey Accords" were signed almost the same persons chose not to abide by the agreements, or its addendum signed in June 1986. The aftermath was almost predictable; and this time they almost brought a presidency down. The contempt once expressed for the Congress was transferred as well to the principal national security advisors and agencies. The normal covert-operations mechanism was bypassed. Career officers forced out. The definition of timely remained ambiguous, or perhaps only the Administration's interest in adhering to the sprit of the agreement was ambiguous. There should be no such problem if "the Intelligence Amendments of 1987" become law.

That is why it is so important, Mr. Chairman, that your bill makes effort to remove those ambiguities inherent in the compromise legislation of 1980 and subsequent understandings with the Overesight Committees. Findings are to be provided in writing; no lapse in memory permitted. The Tower Commission Report tells us something of this problem in discussing those first Israeli shipments of arms to the Iranians in 1985.

"Under the National Security Act, it is not clear that mere oral approval by the President would qualify as a Presidential finding that the initiative was vital to the national security interests of the United States. The approval was never reduced in writing. It appears to have been conveyed to only one person (Mr. McFarlane). The President himself has no memory of it."

Point made. Your bill would do away with this sort of ambiguity.

What's more, it requires by law that the Vice President, Secretary of State, Secretary of Defense and Director of Central Intelligence, in other words, all the members of the National Security Council and DCI, also be provided copies of Presidential Intelligence Findings, in writing. This is sound. The January 17, 1986 finding—*The Finding*—was not shown to key policy makers including Secretary of State Shultz. Only a single copy of the Finding was kept at the White House. The Tower Commission reports the reaction of the Secretary of State when the finding was eventually revealed by Vice Admiral Poindexter at the White House on November 10, 1986:

"I might say that when he read out that finding, I said that's the first I heard of that. Cap, who was sitting across the room from me, said, 'I have never heard of it either.'"

The Commission concluded, "With the exception of the NSC staff and, after January 17, 1986, a handful of CIA officials, the rest of the executive departments and agencies were largely excluded." Regardless of management style, that is no way to

run a cabinet or an agency. I say that with some background, having served in the cabinet or subcabinet of four Presidents: Kennedy, Johnson, Nixon and Ford.

I am less certain that 48 hours shall prove an absolute qualifier of "timely." Mind, 10 months is not. But as Mr. Turner has pointed out there are specific operations of considerable sensitivity and limited scope which may warrant more flexibility. Indeed, Mr. Gates during testimony in February, said he could imagine scenarios where he would support a Presidential decision not to notify Congress of a significant intelligence event for 4–6 days. But that is a matter for the committee to take up and hearings to resolve. I would only suggest you consider all positions on this.

A closing thought. There is a notion that the Congress can not be trusted. That the Congress is a national security risk. Wrong. Committees here take matters with great care. You treat matters before your committee with great care. We are not to be held responsible for the revelation of public belligerent acts such as the mining of Nicaraguan harbors, or revelations by adversaries such as happened in the Beirut newspaper Al Shiraa.

When you get to the point where you trust a Ghorbanifer, a man the career intelligence service did not trust, before you trust the Speaker of the House; or when you decide to pass on intelligence information to the Ayatollah but will not inform the Chairman of the Intelligence Committee of a Presidential finding; then matters are confused. And it is time to add some order with amendments such as these.

Procedures Governing Reporting
to the Senate Select Committee on Intelligence (SSCI)
on Covert Action

The DCI and the SSCI agree that a planned intelligence activity may constitute a "significant anticipated intelligence activity" under section 501 of the National Security Act of 1947 (the "Intelligence Oversight Act of 1980") even if the planned activity is part of an ongoing covert action operation within the scope of an existing Presidential Finding pursuant to the Hughes-Ryan Amendment (22 U.S.C. 2422). The DCI and the SSCI further agree that they may better discharge their respective responsibilities under the Oversight Act by reaching a clearer understanding concerning reporting of covert action activity. To this end the DCI and the SSCI make the following representations and undertakings, subject to the possible exceptional circumstances contemplated in the Intelligence Oversight Act:

1. In addition to providing the SSCI with the text of new Presidential Findings concerning covert action, the DCI will provide the SSCI with the contents of the accompanying scope paper following approval of the Finding. The contents of the scope paper will be provided in writing unless the SSCI and the DCI agree that an oral presentation would be preferable. Any subsequent modification to the scope paper will be provided to the SSCI.

2. The DCI also will inform the SSCI of any other planned covert action activities for which higher authority or Presidential approval has been provided, including, but not limited to, approvals of any activity which would substantially change the scope of an ongoing covert action operation.

3. Notification of the above decisions will be provided to the SSCI as soon as practicable and prior to implementation of the actual activity.

4. The DCI and the SSCI recognize that an activity planned to be carried out in connection with an ongoing covert action operation may be of such a nature that the Committee will desire notification of the activity prior to implementation, even if the activity does not require separate higher authority or Presidential approval. The SSCI will, in connection with each ongoing covert action operation, communicate to the DCI the kinds of activities (in addition to those described in Paragraphs 1 and 2) that it would consider to fall in this category. The DCI will independently take steps to ensure that the SSCI is also advised of activities that the DCI reasonably believes fall in this category.

5. When briefing the SSCI on a new Presidential Finding or on any activity described in paragraphs 2 or 4, the presentation should include a discussion of all important elements of the activity, including operational and political risks, possible repercussions under treaty obligations or agreements, and any special issues raised under U.S. law.

6. To keep the SSCI fully and currently informed on the progress and status of each covert action operation, the DCI will provide to the SSCI: (A) a comprehensive annual briefing on all covert action operations: and (B) regular information on implementation of each ongoing operation, with emphasis on aspects in which the SSCI has indicated particular interest.

7. The DCI and the SSCI agree that the above procedures reflect the fact that covert action activities are of particular sensitivity, and it is imperative that every effort be made to prevent their unauthorized disclosure. The SSCI will protect the information provided pursuant to these notification procedures in accordance with the procedures set forth in S.Res. 400, and with special regard for the extreme sensitivity of these activities. It is further recognized that public reference to covert action activities raises serious problems for the United States abroad, and, therefore, such references by either the Executive or Legislative Branches are inappropriate. It is also recognized that the compromise of classified information concerning covert activities does not automatically declassify such information. The appearance of references to such activities in the public media does not constitute authorization to discuss such activities. The DCI and the SSCI recognize that the long established policy of the U.S. Government is not to comment publicly on classified intelligence activities.

8. The DCI will establish mechanisms to assure that the SSCI is informed of planned activities as provided by paragraphs 1 through 4, and that the Committee is fully and currently informed as provided by paragraph 6. The DCI will describe these mechanisms to the SSCI.

9. The SSCI, in consultation with the DCI when appropriate, will review and, if necessary, refine the mechanisms which enable it to carry out its responsibilities under the Intelligence Oversight Act.

10. The DCI and the SSCI will jointly review these procedures no later than one year after they become operative, in order to assess their effectiveness and their impact on the ability of the DCI and the Committee to fulfill their respective responsibilities.

Chairman, SSCI

06 JUN 1984

Date

DCI

06 JUN 1984

Date

Vice Chairman, SSCI

06 JUN 1984

Date

ADDENDUM TO PROCEDURES GOVERNING REPORTING TO THE SENATE SELECT COMMITTEE ON INTELLIGENCE ON COVERT ACTION

1. In accordance with Paragraph 10 of the Procedures Governing Reporting to the SSCI on Covert Action, executed on June 6, 1984, the SSCI and the DCI have jointly reviewed the Procedures in order to assess their effectiveness and their impact on the ability of the Committee and the DCI to fulfill their respective responsibilities under section 501 of the National Security Act of 1947.

2. The Committee and the DCI agree that the Procedures have worked well and that they have aided the Committee and the DCI in the fulfillment of their respective responsibilities. The Committee and the DCI also agree to add the following Procedures set forth below:

-- In accordance with the covert action approval and coordination mechanisms set forth in NSDD 159, the "advisory" format will be used to convey to to the SSCI the substance of Presidential Findings, scope papers, and memoranda of notification.

-- Advisories will specifically take note of any instance in which substantial nonroutine support for a covert action operation is to be provided by an agency or element of the U.S. Government other than the agency tasked with carrying out the operation, or by a foreign government or element thereof. It is further agreed that advisories will describe the nature and scope of such support.

-- In any case in which the limited prior notice provisions of section 501(a)(1)(B) of the National Security Act are invoked, the advisory or oral notification will affirm that the President has determined that it is essential to limit prior notice. It is further agreed that in any section 501(a)(1)(B) situation, substantive notification will be provided to the Chairman and Vice Chairman of the SSCI at the earliest practicable moment, and that the Chairman and Vice Chairman will assist to the best of their abilities in facilitating secure

notification of the Majority and Minority leaders of the Senate if they have not already been notified. It is understood that responsibility for accomplishment of the required notification rests with the Executive Branch.

-- It is understood that paragraph 6 of the Procedures, which requires that the SSCI shall be kept fully and currently informed of each covert action operation, shall include significant developments in or related to covert action operations.

-- The DCI will make every reasonable effort to inform the Committee of Presidential Findings and significant covert action activities and developments as soon as practicable.

3. In accordance with paragraph 4 of the Procedures, the DCI recognizes that significant implementing activities in military or paramilitary covert action operations are matters of special interest and concern to the Committee. It is agreed, therefore, that notification of the Committee prior to implementation will be accomplished in the following situations, even if there is no requirement for separate higher authority or Presidential approval or notification:

-- Significant military equipment actually is to be supplied for the first time in an ongoing operation, or there is a significant change in the quantity or quality of equipment provided;

-- Equipment of identifiable U.S. Government origin is initially made available in addition to or in lieu of nonattributable equipment;

-- There is any significant change involving the participation of U.S. military or civilian staff, or contractor or agent personnel, in military or paramilitary activities.

4. The DCI understands that when a covert action operation includes the provision of material assistance or training to a foreign government, element, or entity that simultaneously is receiving the same kind of U.S. material assistance or training overtly, the DCI will explain the rationale for the covert component.

5. The DCI understands that the Committee wishes to be informed if the President ever decides to waive, change, or rescind any Executive Order provision applicable to the conduct of covert action operations.

6. The Committee and the DCI recognize that the understandings and undertakings set forth in this document are subject to the possible exceptional circumstances contemplated in section 501 of the National Security Act.

7. The Procedures Governing Reporting to the SSCI on covert action, as modified by this agreement, will remain in force until modified by mutual agreement.

Chairman, SSCI

June 10, 1986
Date

DCI

June 17, 1986
Date

Vice Chairman, SSCI

June 5, 1986
Date

Chairman McHUGH. I would like to invite our next witnesses to join us in a panel in an effort to save your time and ours.

We are very grateful for your patience, as well as your presence here today.

Our first panelist will be Admiral Stansfield Turner, who served as Director of the Central Intelligence Agency during the Carter Administration, graduated from the Naval Academy in 1946, and spent two years at Oxford as a Rhodes scholar. His naval experience included two years as Commander of the NATO Southern Command.

Our second panelist will be Mr. William Colby, who also served as Director of Central Intelligence, and had a very long and distinguished career in the intelligence business before that. He has appeared before our committee, as Admiral Turner has, many times, and they have always contributed significantly to our discussion.

Our third panelist will be Ray Cline. Dr. Cline is presently Chairman of the U.S. Global Strategy Council, and is Young Professor of International Law at Georgetown University School of Foreign Service, and previously served as a Deputy Director for Intelligence, CIA, as the Director of the Bureau of Intelligence and Research at the Department of State, and Senior Advisor at the Center of Strategic International Studies.

We appreciate all of you being here, and Admiral Turner, if we may start with you, please?

STATEMENTS OF ADM. STANSFIELD TURNER, U.S. NAVY (RET.), FORMER DIRECTOR OF CENTRAL INTELLIGENCE; WILLIAM E. COLBY, ESQ., FORMER DIRECTOR OF CENTRAL INTELLIGENCE; AND RAY CLINE, CHAIRMAN, U.S. GLOBAL STRATEGY COUNCIL AND FORMER DEPUTY DIRECTOR FOR INTELLIGENCE, CIA

STATEMENT OF ADM. STANSFIELD TURNER

Admiral TURNER. Thank you, Mr. Chairman.

In view of the time, while I sat here I have cut my presentation in half. I believe you have a written copy of it as well as a classified addendum to it.

Chairman McHUGH. Without objection, we will include that in the record.

Admiral TURNER. Let me hit the highlights as quickly as I can for you, sir.

With one exception which I will note below, I believe it is very desirable that the intelligence oversight committees of the Congress be informed of all covert activity within the 48 hour limit proposed by the bill. The question is is this provision of law the best way to ensure that the Congress will in fact be informed within 48 hours of the signing of a covert action finding by the President.

We have recently had an unfortunate example of the Finding of January 17, 1986 regarding CIA support in facilitating the delivery of arms to Iran. The fact the notification was not given to Congress of that Finding stands starkly in contrast with the written agreement made between the Director of Central Intelligence and the Senate Select Committee on Intelligence in the spring of 1984 in

the wake of the controversy over whether the Congress was adequately informed about the mining of the Nicaraguan harbors.

The Director of Central Intelligence purportedly pledged in a written document that had the approval of the President to ensure that the Congress was informed in the future of all significant intelligence activities. It would appear reasonable to consider that the CIA support for the sale of arms to Iran was a significant intelligence activity. In short, the written pledge of the Director in the spring of 1984 was not sufficient to ensure that the Congress was informed in January of 1986.

I would suggest then, Mr. Chairman, that the establishment of good will and cooperation between the Executive Branch and the two congressional committees on intelligence may be more important than written agreements or provisions of law. The essential question is how to restore mutual trust and confidence. We are very fortunate on the 4th of March that the President, in his address to the Nation on TV, stated unequivocally that his Administration had come to a new view that there must be congressional oversight.

I quote,

> I am also determined to make the congressional oversight process work. Proper procedures for consultation with the Congress will be followed not only in the letter, but the spirit.

Let me suggest that there might then be some advantage in allowing the Executive to prove itself in this regard without the Congress first tightening the legal screws. I am suggesting at this particular moment discretion on the part of Congress may be the better part of valor. When the intelligence community is adjusting to the new Presidential Directive, it may be best not to sound any more alarms than are necessary. Especially not with the provision of law that may well not be effective anyway if there is not good will in addition.

Mr. Chairman, I cannot speak for the Administration, of course, but I do raise the specter that the Administration may find it necessary to veto this bill if it comes before it. I know that when a similar provision was discussed in 1980 in connection with the Intelligence Oversight Act of that year, I recommended to President Carter that he veto such a bill if it did pass the Congress. I believe the President was inclined to do so at that time.

I would hate to see at this particular juncture that kind of adversarial relationship develop between the committees and the Administration.

Now, as I mentioned at the beginning, I would suggest there is one case in which notification to the Congress in 48 hours poses a genuine concern to the intelligence professionals. That is when a chief of intelligence finds that it is desirable to ask an American employee, or a foreign agent, to put his or her life on the line in some covert activity. I did this on three occasions.

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 even half a dozen people in the CIA who did not absolutely have to know, that is, who were not necessarily and intimately involved in supporting this activity.

Let me describe very briefly the three instances to which I referred, all are efforts in connection with the attempt to release our hostages from Tehran in 1979 to 1980.

I will only sketch them briefly. There are more details in the classified appendix to my comments.

First, as you will recall, and as has been mentioned earlier this morning, six Americans escaped from the Embassy compound when it was seized on November 4th, 1979. They eventually took refuge in the residence of the Canadian Ambassador. We in the CIA assumed responsibility for obtaining the release of those six Americans. We did that in part by sending in a CIA covert action professional into Tehran to engineer the departure of these six.

Now, for this person voluntarily to step into that hostile environment at that time was an act of bravery and self-sacrifice. Only a bare handful of people in the CIA were privy to what was going on, and in my conscience I could not have informed anyone else who was not essential to the operation. We did proceed without informing the Congress. As you know, it was a highly successful undertaking.

The second instance concerned what has come to be known as the Desert One operation. The military needed to refuel helicopters as they flew from an aircraft carrier in the Arabian Sea to Tehran. They were having great difficulty in finding any way to do this without risk of revealing that a rescue effort was in progress. I asked the CIA covert action experts to turn their minds loose on this problem. They came back to me in about a week with the thought that the desert floor in Eastern Iran might be sufficiently firm to take the fixed-wing aircraft carrying the fuel for the helicopters.

What is more, they actually flew a light plane into the desert by the light of a full moon. They took core samples and proved that the desert floor was sufficiently firm.

Here again I was asking people to insert themselves into a hostile country at high risk. Only a handful of CIA people knew of this venture and we did not inform the Congress.

The third example concerned providing support for the rescue force once it reached the environs of Tehran by helicopter. CIA personnel went repeatedly into hostile Tehran to survey what the rescue force would find on its arrival, and to acquire trucks to transport the men from where the helicopters would drop them to the walls of the Embassy.

Each such trip into Tehran was a highly risky venture and any hint we were doing such a thing right through Mehrbad airport would certainly have roused suspicions and raised the possibility that our people would have been caught in an Iranian noose.

Again, very few individuals in the CIA knew of this activity and we did not notify the Congress.

I believe instances like these three will be infrequent. I also believe the odds are high that these would be the kinds of operations with which the Congress would agree were they informed. There is no guarantee of that.

Here though we come back to the question of mutual trust and confidence. I would hope that a President who endorsed congressional oversight as President Reagan has just done, would not un-

dertake even a life threatening covert action that was also a major change in foreign policy without informing the Congress.

One other recent development will minimize the risk that there will not be such notification in cases like that. That is another new policy which President Reagan also enunciated in his speech on March 4th. He said,

> I have also directed that any covert activity be in support of clear policy objectives and in compliance with American values. I expect a covert policy that if Americans saw it on the front page of the newspaper they would say "That makes sense."

That pledge not only makes sense, I believe it gives greater assurance that almost all covert actions conceived by the Executive will be acceptable to the Congress.

Finally, Mr. Chairman, let me offer one final suggestion. Oversight of intelligence has broken down but the fault is not entirely with the Executive. The Congress, the media, the public were all aware in August of 1985 that Lt. Colonel Oliver North was engaged in activities in support of the contras. Whether or not these were legal or illegal activities was unclear, but there was little question in any of our minds that Colonel North was deliberately attempting to circumvent the spirit of the law governing support to the contras.

Thus the oversight process did not work at the time the President needed the advice of the Congress. Why he did not get that advice is something that you know far more better than I. I would only suggest that it is not adequate to say that Mr. McFarlane or others misled the Congress. If that is a sufficient excuse the very oversight process that we are working on so hard is not worth the attention we are giving it.

There is, then, some danger in my view that the public and the Congress might look on this bill as all of the action necessary by the Congress to correct the recently disclosed shortcomings in the oversight process.

I would hope that Congress would concentrate instead on measures to improve its own conduct of oversight, to make it more rigorous and on steps to improve the relations between the intelligence community and the Congress. We need, Mr. Chairman, to return to conditions where we can conduct oversight in a cooperative and constructive manner.

Thank you, sir.

[The statement of Admiral Turner follows:]

STATEMENT OF ADM. STANSFIELD TURNER, USN, (RET.)

Mr. Chairman: You have asked me to comment on a draft bill HR 1013 which concerns strengthening the system of congressional oversight intelligence activities. I am happy to do that. I approach the question with three key points in mind.

First, the bill is known as the Stokes-Boland bill. These are two men with whom I've had the privilege of working closely in connection with congressional oversight of intelligence. I have a deep respect for the constructive way in which they each have consistently approached the question of oversight. Any bill which they sponsor has to be taken with great seriousness.

Second, I work from the premise that rigorous congressional oversight of intelligence activities is an essential strength of our intelligence system. We simply can not have any element of our government that is not held accountable to someone. So much of our intelligence activities absolutely must be kept secret, that only the Congress can safely provide that accountability.

Thirdly, I believe that the intelligence oversight process has not functioned adequately over the past six years. The introduction of this bill alone would appear to substantiate that premise. It is my observation from the outside, that the cause of the breakdown in oversight has been a strong fear that the Executive Branch that oversight had, or would become, dangerously intrusive.

The challenge today is how to restore a level of oversight adequate to provide accountability without endangering the vital secrecy of the intelligence process. The proposed bill would be a step in that direction by ensuring that the Congress had an immediate role in overseeing any covert activities undertaken by the Intelligence Community. With an exception I will note below, I believe it is highly desirable that the intelligence oversight committees of the Congress be informed of such activities within the 48 hour limit proposed by the bill. The question is, is such as provision of law the best way to ensure that the Congrss will be informed within at least 48 hours of the signing of a "finding" by the President?

We have recently had the unfortunate example of the finding of January 17, 1986 regarding CIA support in facilitating the sale of arms in Iran. The fact that notification was not given to the Congress of that finding stands starkly against a written agreement made between the Director of Central Intelligence and the Senate Select Committee in the spring of 1984. In the wake of a controversy over whether the Congress was adequately informed about the mining of the harbors of Nicaragua, the Director of Central Intelligence purportedly pledged in a written document that had the approval of the President to ensure that the Congress was informed of all significant future intelligence activities. It would appear reasonable to consider the CIA's support for the sale of arms to Iran to be a significant activity. In short, the written pledge of the Director in the spring of 1984 was not sufficient to ensure that the Congress was informed in January of 1986.

I would suggest, then, that the establishment and maintenance of an attitude of cooperation and goodwill between the executive branch and the two congressional committees on intelligence may be more important than written agreements or provisions of law. The essential question is how to restore mutual trust and confidence. We are very fortunate that on March 4th in his address to the nation on television, President Reagan stated unequivocally that his administration has come to a new view that there must be congressional oversight. I quote, "I am also determined to make the congressional oversight process work. Proper procedures for consultation with the Congress will be followed, not only in the letter, but in the spirit." I am sure that this committee, as well as all of us who appreciate the vital importance of oversight, are delighted with this new Presidential instruction to the leaders of our intelligence agencies. The proof of the pudding, of course, remains in the eating; that is, the actual cooperation of those agencies in the oversight process.

Let me suggest that there might be some advantage in allowing the executive to prove itself in this regard without the Congress first tightening the legal screws. The professionals in the world of intelligence have come a long way in the last eleven years in adapting to the idea of sharing secrets with the Congress. Still, they are understandably alarmed at what they fear may be progressively greater and greater intrusion into their secrets, to the point where some very high price may be paid if there is an inadvertent disclosure. I am suggesting that at this particular moment, discretion on the part of the Congress may be the better part of valor. While the intelligence community is adjusting to the new Presidential directive, it may be best not to sound any more alarm than necessary, especially not with a provision of law that may well not be effective anyway if there is not goodwill in addition.

In particular, I would suggest that there is one case in which notification to the Congress within 48 hours poses a genuine concern to the intelligence professionals. This is when a Chief of Intelligence finds it desirable to ask an American employee of the Intelligence Community or a foreign agent to put his or her life at risk in some covert activity. I did this on three occasions. 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 even half a dozen people in the CIA, who did not absolutely have to know, that is people who were not necessarily involved in supporting the activity. It would be especially difficult to tell people of this type that you are informing others purely for the sake of checking on whether you yourself are doing the right thing or not. People who are willing to lay their lives on the line want to believe they are working for someone who knows what he is doing, not someone who may change his mind at some critical point in the operation because of what his advisors tell him.

Let me describe the three instances to which I referred. All concern our efforts in 1979-1980 to obtain the release of the Americans being held hostage in Teheran.

First, in 1980 the CIA facilitated the successful escape from Teheran of the six Americans who were hidden in the Canadian embassy. This involved sending a CIA person into Teheran at high risk to his life to engineer the departure.

Second, when our military was searching for a way to refuel the helicopters that were to fly to Teheran to rescue our hostages there, CIA personnel flew a light aircraft into the Iranian desert. They landed there by the light of the full moon and took core samples of the soil to prove that it was a suitable landing strip for conducting the necessary refueling operation.

Third, CIA personnel went repeatedly into hostile Teheran to survey what the rescue force would find on its arrival and to purchase the trucks to transport the men from their helicopters to the embassy. Each such trip was a highly risky adventure and any hint that we were doing such a thing right through Mehrabad airport would almost certainly have caught one of our people in the Iranian noose.

I sincerely believe there will be more instances in the future when Directors of Central Intelligence will want to commission acts similar to the three I have just described. It would be a great struggle of conscience for a DCI in deciding whether he or she could make the kind of requests that I did of these individuals and also comply with a 48 hour rule for notifying the intelligence committees of Congress. I believe instances like these three will be infrequent. I also think the odds are high than there will be operations with which the Congress would agree if it knew. There is no guarantee of that, however.

Here, though, we come back to the question of trust and confidence. I would hope that a President who endorsed Congressional oversight, as President Reagan has now done, would not undertake a life-threatening covert action that was also a major change in foreign policy without informing the Congress. The balance between risking human life by telling even one person who does not need to know, on the one hand, and not following democratic procedures for accountability, on the other, is a delicate one. In no instance is it ever going to be an absolutely cut and dried case that there can be no notification of Congress without undue risk to an individual's life. I have said many times that I have confidence in the ability of the Congress to keep secrets, but as I have mentioned already, it is not just a question of notifying members of Congress. It is a question of notifying anyone who is not necessarily involved. It also will never be black and white that having accountability through informing the Congress in advance, or within 48 hours, is absolutely essential to preserving our democratic procedures. I believe accountability is, indeed, important, but there has to be some room for flexibility to notify the Congress promptly in most instances, but not in all. I recommend leaving the laws sufficiently flexible to provide for that.

One other recent development will minimize the risks of delayed notification to the Congress. That is another new policy which President Reagan enunciated in his speech of March 4th. He said: "I've also directed that any covert activity be in support of clear policy objectives and in compliance with American values. I expect a covert policy that if Americans saw it on the front page of their newspaper, they'd say, " 'That makes sense.' "

That pledge not only makes sense, I believe it gives greater assurance that almost all covert actions conceived by the executive will be acceptable to the Congress.

Finally, let me offer one other constructive suggestion. Oversight of intelligence has broken down, but that is not entirely the fault of the executive. The Congress, the media, and the public were well aware in August 1985 that Lieutenant Colonel Oliver North was engaged in activities in support of the contras. Whether or not they were legal activities was unclear, but there was little question in anyone's mind that Colonel North was deliberately attempting to circumvent the spirit of the law governing support to the contras. Thus, the oversight process did not work at a time the President needed the advice of the Congress. Why he did not get that advice, despite the warning signals we all saw, you know far better than I. I would only suggest that it is not adequate to say that Mr. McFarlane or others misled the Congress. If that were sufficient excuse, the very oversight process would not be worth the attention we are giving to it.

There is, then, some danger in my view that the public and the Congress may look on HR 1013 as all the action necessary by the Congress to correct the recently disclosed shortcomings in the oversight process. I would hope Congress would concentrate instead on measures to make its conduct over oversight more rigorous and on steps to improve relations between the Intelligence Community and the Congress. We need to return to conditions where we can conduct oversight in a cooperative and constructive manner.

Thank you, Mr. Chairman.

Chairman McHUGH. Thank you very much, Admiral.
Mr. Colby.

STATEMENT OF WILLIAM E. COLBY

Mr. COLBY. Mr. Chairman, thank you for the invitation. I have read over this proposed bill, Mr. Chairman, and I think it is perfectly understandable why the bill has come to be.

The long delay in complying with the timely notice requirement obviously was a violation of the concept of the law. I think in that situation one should first look to the proper execution of the law rather than necessarily changing it; every time we have a murder we don't necessarily change the laws against murder.

We try to execute them better and more effectively.

You have a situation where the Administration was dealing with a rag tag bunch of Middle East arms merchants and was not willing to share the same information with the responsible leadership of the Congress. Obviously there is a contradiction there, a total contradiction.

Even an estimate as to whether that operation would have remained secret is really highly obvious. It couldn't possibly remain secret considering the people that the Administration was dealing with.

The fact is that the law as it existed was not followed. We all know that. The problem of leaks is a very serious one and it is a very serious problem to share sensitive information with the Congress. We all know from our personal lives that if we have a secret we have a secret, but if we share it with someone, we have half a secret and if you apply the same proportionality to the kinds of secrets we have now, I think many of our very serious national secrets are in the category of a .00001 of a secret rather than any kind of a real secret, this is the problem we are wrestling with.

I have great respect for the Congress in its role of oversight. I think it is an essential part of our constitutional system. It is not a happenstance that this is a select committee. It was set up as a select committee so that the Speaker and the Minority Leader could be selective about who appears on this committee and they can keep the people that they do not have faith in off the committee.

They will have a difference of opinion certainly, but they will have a faith that those people will be responsible in their activities.

Should the Congress know everything? The fact is the answer to that is obviously no. There are things that the Congress does not need to know. When we got into our first set of investigations of the Agency, I called upon the Chairman of the various committees that were investigating me and I said, look, I am not going to contest your constitutional right to know everything because that is a dead issue. I will never win that.

We have decided that we have a constitutional separation of powers.

But I want to convince you of the same rule that we apply to ourselves in the intelligence community. It is called need to know. Do I need to know some item of information? Because if I don't I shouldn't know it. I said, I as Director do not need to know the

names of individuals serving for us secretly in, for instance, Eastern Europe. I arrange my affairs so I don't know their names. I know there are people there, I know roughly how good the information is, all the rest of it, but I don't need to know their names.

Today I don't know their names and I am glad I don't. I had one effort by somebody to be nice to one of these fellows and send him a letter with my signature at the bottom congratulating him on what a good job he had done, I was quite willing to send my name, no problem, but it had his name there and I almost blew the roof off the place.

The idea of putting his name and my name on the same piece of paper was a death warrant for that individual, no question about it.

The two chairmen I am delighted to say did agree with me that we would conduct that massive investigation into American intelligence without the names. I think that is the kind of arrangement that can be made. Leave the constitutional issue aside, make the arrangement based on sense.

The law says that the Congress will be informed in a timely fashion and if the action is already taken it shall provide a statement of the reasons for not giving prior notice.

I think Admiral Turner has just given us three reasons for not giving prior notice, and I don't think anybody in the Congress would take issue with the fact that that information was not passed to the Congress before or during that sensitive operation.

The fact is the machinery is there. Now, the Congress can go ahead and counter a somewhat imaginative bit of legalese that a finding could be oral and not in writing. But this is a kind of micromanagement of the President's office and I think we really have to let the President pretty well be responsible for how he runs his office.

Even this bill, I might add, has some loopholes in it.

For instance, it says at the very top, to the extent consistent with due regard for the protection from unauthorized disclosure of classified information. Due regard in Admiral Turner's cases I think would say, well, I had due regard for the importance of the protection of these sources, these individuals and thereafter I didn't follow the rest of the provision requiring that the information be used.

Below, the act says that nothing in the Act shall be construed as authority to withhold information from the intelligence committees on grounds that providing it to the committees would constitute unauthorized disclosure.

But we are not talking about whether giving it to the committee would be an unauthorized disclosure, we are resting upon the risk with due regard for protection of our intelligence sources.

So there is a loophole here. The Congress can pass this law and if some President doesn't want to follow the sensible rules of getting along with Congress, we are going to have another meeting just like this two, three, five years from now at which somebody will say well, he is not allowed to have due regard for that, he's got to tell everything.

Then that won't pass because it really doesn't make too much sense.

So my conclusion, Mr. Chairman, is fairly simple, I think it does depend upon the relationship between the committee and the Administration, that in this case there was a failure of that relationship and that this should be improved. To borrow a phrase from my neighbor the Admiral here, I think the mere submission of this bill and holding these hearings is a shot across the bow or perhaps across the stern of the Administration in this case, and that this will certainly be taken due note of.

I am a great believer in the case law system in which we don't try to define every last detail of relationships, but let developments determine how the law is to be interpreted and applied over the years. That is how our judicial system works, and I think it applies to this.

If I may on one point, Mr. Chairman, just take a moment, I think the Speaker did misspeak himself a bit on a couple of details and I deeply appreciate Mr. Hyde's correcting the record on the Allende decision. There was a CIA operation there long before the coup, that was not a secret CIA operation alone. It was directed by the President of the United States, very, very precisely, to the then Director of Central Intelligence. It was a legal order at that time.

It would not meet the Hughes-Ryan requirement at this time but that requirement came long after this incident.

Secondly, the Speaker referred to the plan to destabilize Chile. I must take a point of personal privilege on that because that word was put in my mouth by a former Member of the Congress and it was proved to the satisfaction of the committee at that time that I had never used that word. I would not use that word because that was not our policy.

So that word has been improperly assigned to the CIA's activities, as Mr. Hyde points out.

And thirdly, the Arbenz case that the Speaker mentioned, the CIA did not have a plan to assassinate Mr. Arbenz, it had a plan to overthrow him. I think this is a difference and I would just like to clarify that for the record. With great respect to the Speaker, I am afraid he was somewhat misinformed on that.

Chairman McHUGH. Thank you very much, Mr. Colby.

Dr. Cline.

STATEMENT OF RAY CLINE

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

I can be fairly brief because I want to begin by associating myself with the views of my two former colleagues at the table with me. It gives me special pleasure because I have been worrying about intelligence operations and congressional oversight for more than 40 years, and I was chief of the current intelligence staff for Bill Donovan in OSS when we dropped Bill Colby in France and he has been doing well ever since.

And of course I was at Oxford almost ten years before Stan Turner, so I have links with these gentlemen for a long time, and I agree with everything they said today.

My familiarity with the congressional oversight problem is particularly related to the earlier period of congressional oversight

before these committees were established, when there were a variety of committees trying to observe what CIA was doing.

I often briefed them, the then-committees in the 1960s when Senator Richard Russell and Representative Carl Vinson were the principal congressional representatives, and I can assure you they ran their committees with a very firm hand and the briefings were very thorough, and as far as I know they learned everything that they needed in the way of understanding of covert operations and sensitive operations of all kinds, and I am happy to say in those days I am not aware of any leaks from congressional committees.

It is a happy day in some ways compared to our present controversial position.

It is for that reason, recalling those days, that I want to say that I feel obliged to make a single comment on H.R. 1013 much along the lines that Mr. Michel and Congressman Hyde have already made, so I can be brief about that.

In my view these new amendments prescribe an unwarranted rigidity with respect to timing of notification. That is essentially what the critics have been saying. Forty-eight hours or 14 months or whatever is a rigidity however you define it.

They also are counterproductive in the micromanagerial congressional intrusion into the executive authority of the President to conduct sensitive national security operations.

I am sure that that is not the intention, but my belief based on running clandestine and covert operations, is that there would be a chilling effect from such close supervision by the Congress, and Stan Turner has given you an example of how that might be, and how the present law allows exceptions to be made.

I think the key is that Mr. Stokes and Mr. Boland are right in saying that, and I quote Mr. Stokes, "a congressional committee's oversight efforts are largely dependent on the willingness of the Executive Branch to provide information." And Boland said, "there exists a serious and fundamental disagreement between the Executive Branch and the Congress over the requirements of the existing law." He is referring of course to this concept of notification in a timely fashion.

I submit that the answer to that as has been suggested by many people, is not a dictate from the Congress. It is an attempt to work out a reasonable cooperative relationship between the Executive Branch and these committees on the question of what the best meaning of prior notice and timely fashion is from the point of view of both of the interested parties, and an understanding that there may be an area of ambiguity and flexibility in the interpretation of that reasonable law.

I believe this legislation departs from that principle. It smacks a little bit of an attempt at a congressional political coup to nail down its point of view which clearly will be opposed by the Executive Branch and I think correctly so.

It is certainly true and this is a footnote in the previous discussion, I can easily imagine operations where the President makes a finding and initiates a chain of events which may well not have any precise impact for many hours, many days or even many months. It was not totally, it is not totally impossible that there

should be a very long lapse before the necessity of timing notification to Congress exists.

That is a complex and often controversial subject. But I believe you should approach it with a view to the problems of the Executive Branch and particularly the intelligence officers in carrying out what you want to be carried out if there is such an operation to be taking place and, an efficient secret operation.

Regrettably as has been pointed out, the likelihood that controversial covert action proposals on sensitive operations will leak to the press and the public in one way or another if prior notice is rigidly required means the Executive Branch will be hesitant, to be forthcoming, and may forego very important operations that would be useful to the United States. I think that is something the Congress ought to be concerned about.

The worst outcome of course would be a prolonged dispute in adversarial climate between the Executive and Legislative Branches after notification is given. The damage will be as great from this as from the rather exceptional cases in which delaying notification more than 48 hours might occur.

The President certainly ought to have the opportunity to conduct high risk, high win activity in the foreign policy and national security field.

He should have the right to determine when there is a good reason to delay notification because of extreme sensitivity to leakage and failure. Timely fashion—that carefully wrought phrase, seems to me to be the best phrase you can use in the circumstances.

So I would say rather than passing H.R. 1013, the House committee would be well advised to promote a way of improving security of information, provided by the oversight committees and their staffs, and to reassure the Executive Branch of their ability to do this and to invite a more cooperative and informative attitude on that basis.

I would like just in passing to endorse the House Joint Resolution 48 providing for an establishment of a joint committee on intelligence sponsored by Congressman Hyde, because that would be a move to soothe executive-congressional relations, a step in the right direction rather than one to exacerbate them.

In summary then, Mr. Chairman, I would just like to say that I believe the Congressmen have the duty to represent the views of their constituents in giving broad strategic guidance to shape U.S. legislation and policy. There is no question about that. With respect to foreign policy and national security, the Chief Executive also is mainly responsible for decisionmaking and execution of laws and policies. The Congress should not try to legislate the specific modalities of the execution of policies in the foreign policy and national security field, particularly when the element of secrecy is involved.

It does seem to me therefore that it is likely to reduce rather than increase the effectiveness and cooperative relationship between the Congress and the Chief Executive in dealing with covert operations if H.R. 1013 is passed, and therefore I would respectfully submit that discussion of this issue is better than passing a piece of legislation on this item.

Thank you.

[The statement of Mr. Cline follows:]

STATEMENT OF RAY S. CLINE, CHAIRMAN, U.S. GLOBAL STRATEGY COUNCIL

It is my privilege to have an opportunity to give you my views on intelligence oversight by the Congress of the United States in the context of the amendments proposed in H.R. 1013.

My familiarity with the issues involved goes back in time many years to include a period when oversight was exercised by a number of committees mostly under the firm and competent leadership of Senator Richard Russell and Representative Carl Vinson. I had the duty of briefing these gentleman and their colleagues when I was CIA's Deputy Director for Intelligence, 1962-1966. I do not believe that CIA ever withheld any information from them and tried very diligently to provide them with outlines of future operations that might be construed as coming within their legislative provenance.

I am not aware that any secret or sensitive intelligence data provided to the oversight committees of that day or to the companion legislation committee, the Joint Committee on Atomic Energy, ever leaked out from Capitol Hill after those briefings.

This reminiscence is related to the single comment I feel obliged to make on H.R. 1013. In my view, the new amendments prescribe an unwarranted rigidity with respect to timing of notification. They also are counterproductive in micromanagerial congressional intrusion into the executive authority of the President to conduct sensitive national security operations.

Mr. Stokes and Mr. Boland are right in saying, as they did in the House on February 4, 1987, "a congressional committee's oversight efforts are largely dependent on the willingness of the executive branch to provide information" (Stokes), and "there exists a serious and fundamental disagreement between the executive branch and the Congress over the requirements of the existing law" (Boland)—referring of course to the requirement of notification in "a timely fashion."

It is now proposed this disagreement be resolved by Congressional dictate. I think that is the wrong solution. In view of the long debates over "prior notice" and "timely fashion," this complex and controversial issue ought to be left as it is in legislation until a more cooperative relationship between executive and legislative oversight bodies can be established in practice. Now is not the time for a congressional coup attempt if the objects is more cooperation and better information.

Regrettably, the likelihood that controversial covert action proposals on very sensitive operations will leak to the press and the public in one way or another, if prior notice is rigidly required, means that the executive branch will be less forthcoming.

In fact, I think the record of controversial covert actions about which the congressional oversight committees were informed in the last few years shows that all have become matters of public knowledge. The public discussion of contra operations in minute detail is a self-defeating process that makes successful covert action virtually impossible. It is this lack of confidence in security that causes the hestitation of the executive agencies to give prior notice of high-risk undertakings and, indeed, to pass information before the operation has had a chance to get off the ground.

The worst outcome is a prolonged dispute and an adversarial climate between the executive and legislative branches after notification is given. The damage will be as as great as from the rather exceptional cases in which delaying notification more than 48 hours might occur.

In some cases, certainly, the 48-hour-requirement may be unreasonable if absolute secrecy is to be protected while a covert operation is testing itself against reality. While the concepts of notification and consultation are sound, the President always should have the constitutional prerogative to take certain risks in the foreign policy and national security field.

The President ought to have the opportunity to conduct high-risk, high-win activities, and he should have the right to determine when there is a good reason to delay notification because of extreme sensitivity to leakage and failure. "Timely fashion" seems to me the best phrase in the complicated circumstances.

Rather the passing H.R. 1013, the House committee would be well advised to promote a way of improving security of information provided the oversight committees and their staffs. A step in the right direction would be endorsement of House Joint Resolution 48 providing for establishing a Joint Committee on Intelligence similar to the hold Joint Atomic Energy Committee. A move to exacerbate executive-congressional relations to a step in the wrong direction.

In summary I believe that Congressmen have to duty to represent the views of their constituents in giving broad strategic guidance to shape U.S. legislative and policy. With respect to foreign policy an national security, the Chief Executive is plainly responsible for decision-making and execution of laws and policies. The Congress should not try to legislate the specific modalities of execution of policies in the foreign policy and national security field. It will be likely to reduce rather than increase the cooperative relationship between the Congress and the Chief Executive. Hence I oppose H.R. 1013.

Chairman McHUGH. Thank you very much, Dr. Cline.

You all represent a very significant amount of experience and that is something we should take into account in our consideration of these bills, and so we appreciate your testimony.

Admiral Turner, I would start with you. You mentioned in your statement that the oversight process broke down in part because the congressional committees didn't exercise sufficient aggression, I suppose, in pursuing the reports which were in the press about Oliver North's activities in the White House.

That may be true, but I think it is important to state for the record that when we read those reports, we invited Mr. McFarlane to visit with us in the committee room. We all had an opportunity to ask him questions specifically about those reports to determine whether or not indeed the White House was engaged in this type of activity.

Mr. McFarlane assured us that he had investigated this thoroughly and that there was nothing to these reports whatsoever.

On a subsequent occasion, we visited Mr. North himself in the Situation Room in the White House and we inquired of him very specifically whether or not he was involved in any of these activities which were reported. Mr. North assured us that that was not the case.

Now, it is quite possible that we should have not taken them at their word, but frankly we were relying upon the kind of trust and comity which you gentlemen are suggesting we rely upon in these cases. And we have learned from bitter experience that we were lied to.

Indeed our congressional oversight responsibility which is a serious one, was compromised and in some respects, we feel as you have suggested, some responsibility for that breakdown.

Now the question of course is how to deal with it. Hopefully, people will tell us the truth in the future. But the question here is whether or not we should rely upon that hope or whether or not there is some other framework which will give further encouragement to the White House in future cases.

So I want to make that statement, because while I think it is fair to say that we might have been more aggressive and not accepted the word of Mr. McFarlane and Colonel North, the fact is we did try and we did rely upon those representations to us and we learned in hindsight that we were foolish to do so.

Now, I think Admiral, you have presented us with hard cases. The ones you have outlined are difficult cases because, as you say, people's lives are in jeopardy, and you as the director have to send people out to risk their lives for the country in these cases.

So I think those cases that you have described pose one set of examples which are important for us to consider, and the Iran case

poses the other example, and they are both legitimate cases it seems to me.

On the one hand, in your situations there were a handful of people in the Executive Branch who necessarily had to know. You say a handful and I am not sure how many that would be, but presumably there were at least a few others beside yourself who knew about this.

The question for us is whether or not the key leaders of the Congress would not be as trust worthy to know that information as the handful in the Central Intelligence Agency or the Executive Branch. Naturally we are inclined to think that the Speaker of the House, the Minority Leader, the Chairman of the Intelligence Committee and the Ranking Member of the Intelligence Committee and their counterparts in the Senate are trustworthy people and can hold that kind of very sensitive information carefully.

On the other hand, in the Iran case, to the extent that it is an example and we have to consider it as one here, the fact that the President did not notify or consult with anyone in Congress in part at least contributed to not just the fact that Congress wasn't notified, but contributed to what I think most of us would consider a very substantial amount of damage to American interests. Our counterterrorism policy is in shreds as a result of this foolish policy of selling arms to Iran, and the Minority Leader and Speaker have both said they would have objected strongly if the President had shared this notion with them in advance.

Presumably it might have helped avoid not just a failure to notify Congress, but would have avoided this very substantial damage. So these two cases, yours on the one hand which are compelling cases I admit, but the Iran situation on the other, pose these conflicting interests for us. The real question for us I think is whether or not, first in limited situations where there is a sensitivity such as you have described, the leadership, this handful of eight people, can be trusted with sensitive information and I guess my question is do you have anything in your experience to indicate that these leadership people cannot be trusted even with the most sensitive information?

Admiral TURNER. No, sir. I certainly do not.

Let me say though that I would not have told eight people in the CIA who were not involved in it. It is not a question of are they Members of Congress, it is a question of looking a person in the eye and saying I am going to tell even one person who isn't involved in this in a way that is necessary to support your activities.

I would also point out that it can get much more complicated, as it was in the three cases I cited. First of all, I didn't have the option of informing only eight people at that time because the Intelligence Oversight Act of 1980 had not been passed. So I would have taken my chances if I had gone to the Chairman and Ranking Minority Members of the two intelligence committees. Would they have agreed that only they would have responsibility for knowing that?

But in that case, we had another curious connection because the President under the War Powers Act had not informed the Armed Services Committees or the Foreign Relations Committees that there was a rescue operation contemplated. We were a subsidiary

supporting part of it. Had we come to the intelligence committees or the eight leaders of the Congress to inform them that the intelligence committee was participating in supporting a military action, surely the other committees would have had to have been included too. The number of people informed would have ballooned to at least 16 at that point.

Again they are the 16 top people in these areas of the Congress. They are reliable. We are foolish if we say the Congress cannot be trusted at all, it always leaks. We are equally foolish if we say that the Congress never leaks. Even though I think the Congress has a better record than the Executive Branch as far as leaks is concerned, the Congress does leak. The Executive Branch leaks more. But it isn't a question of a better record here when a man or woman's life is at stake. Even if you are 10 times as reliable as the Executive Branch, if the leak did happen to come from one of the people notified in the Congress, somebody may have lost his life unnecessarily.

Mr. LIVINGSTON. There has been some discussion about the time limits and I think Mr. Hyde said split the difference between 14 months and 48 hours. I know you have said it facetiously.

Is this legislation any more palatable if you extend the deadline for notice and actually set an arbitrary time limit, be it 48 hours, a month, two months, six months, 10 months, a year, what have you? Does it become more palatable or do your objections still lie?

Admiral TURNER. My objection still lies. I don't think 14 months is illegal or unreasonable. I think taking that loophole was wrong in the first place, but if the President's reasons for not notifying the Congress in an instantaneous manner were correct, 14 months is not to me untimely. The timeliness is not measured by a clock. Timeliness should be measured by the risk. I waited three months in one of the 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 continuing. That would be the point at which that the Executive should come to Congress. When that risk to human life is diminished sufficiently is when it is timely to notify the Congress in my opinion, sir.

Mr. LIVINGSTON. Mr. Colby.

Mr. COLBY. I would basically concur. I would not limit it only to the human life problem. There are many other things. People take risks with their lives for various reasons and don't get very upset about it, but there are other things that are of more importance than the human life of some of our people. They understand that when they go into the business. They know that.

I do think that the one answer to the question is that the timely fashion is obviously a general word requiring a judgment, but to respond to the Chairman's example of the discussions with Colonel North and Mr. McFarlane and others about that, there is a statute that makes it a criminal offense not to fully inform the Congress.

This has been very rarely used but in the case of a direct contradiction of the truth I think that is something that the independent

counsels will be looking into. In other words the question is, is there a remedy? The answer is yes, there is a remedy. It is for a violation of the law and there it is.

Mr. LIVINGSTON. Mr. Cline.

Mr. CLINE. I simply concur in the view that defining timely fashion in a number of hours or days or months is a Solomon's exercise, a paradox. It cannot be resolved by this committee or by anybody else. It depends on these complex factors that my colleagues have mentioned.

I think discussing it is wise. I think trying to cut the Gordian knot with a slice of the sword is not a wise decision and I can definitely visualize operations where the success factor is prolonged.

You don't know. It will be a long time to get blocks in place before you get the final result, and the risk might be very great for many, many months.

So I don't even agree with the 14 months. There would be cases in which that time was not the objectionable feature, and I think the objection to the handling of the Iran issue is not over the timeliness, it is over the fact that there was a difference of view about the operation itself.

Mr. COLBY. Frankly I think in some cases you might get a situation where if you have the timely fashion requirement to inform the eight individuals listed, that if the thing began to get at the edge of the timely, I could envisage a President talking to the Speaker and the Ranking Minority Member only and trying to get their acceptance of not going any further with it. I don't think you can write that into the law, but it is clearly what Admiral Turner was referring to that he didn't feel he could do at that early time.

Mr. LIVINGSTON. Mr. Colby, you mentioned you saw situations that might mandate the withholding of information from Congress in other than life-threatening situations. Could you elaborate on that. Could you give us a couple of examples?

Mr. COLBY. You could have a highly sensitive penetration into some terribly important situation which took you months and months to set up and which could have a major effect on the political direction of another country, an adversary country possibly, and you just couldn't take any risk at all with that operation. It would be a high stakes operation. If it didn't work you would lose a great opportunity, but if it were revealed you would suffer a great deal and your nation could suffer a great deal.

You might have a cause for war on your hands for all you know.

Mr. LIVINGSTON. Does the gentleman share that view?

Mr. CLINE. Yes, I do. Could I add another refinement which—since we are really discussing this issue philosophically in an attempt to understand it rather than coming to a solution, a covert intelligence operation may well begin as an intelligence collection effort of penetration. If you get a source in a foreign country who will give you a lot of information and then you find out he can do something politically, that is terribly important to your country, he becomes a covert action source at that point and the exact time when you lay on an operation becomes rather ambiguous.

So I feel we are trying to deal with a very fluid situation here as if it were constitutional law. And it is not. It is a matter of executive judgment when a covert action begins.

So I think we are just saying it is a very complicated thing, and there may well be good grounds to reserve judgment on when to notify the Congress.

Mr. LIVINGSTON. If this legislation were passed as is, would any of you or all of you anticipate any instances in which you might refrain from undertaking some dangerous but very important intelligence activities because of concerns about participants' safety or for the other reasons you have cited?

Mr. CLINE. I wanted to suggest there might be a chilling effect on planners and decisionmakers thinking perhaps that they had a perfectly legitimate intelligence objective which might turn into a very great covert action opportunity but, say, oh, my God, if we go down and explain this today it will be washed out or it will be blown, we shouldn't do it.

Yes, I would think you might well miss opportunities with that kind of thinking. It is not so much the language you are putting across, but the attitude that, the watchdogging of the sensitive and difficult operations might cause people to refrain.

Mr. COLBY. We would once again have to go around and hold the hands of our agents, of our liaisons, as they say, well, now, wait a minute, the Congress is going to demand knowing everything you do within 48 hours, are you kidding? We are not going to get involved in that with you. Not a chance.

We had quite a problem with that when the first congressional review came up, and we sort of wobbled our way through it, but it is still there with some countries. Some countries still have a reservation because some of them don't have the same high respect for the membership of the committees that we do.

Admiral TURNER. The problem will be that we won't know which covert actions are not proposed by the professionals, because they have this concern inside. The people at the top won't hear about them I am afraid.

Mr. LIVINGSTON. Thank you.

Chairman MCHUGH. Mr. Stokes.

Mr. STOKES. Thank you, Mr. Chairman. Let me at the outset express my appreciation to all three of our panelists, three very distinguished gentlemen who appear here this morning.

Mr. Colby, let me ask you, you made the statement that there are things that Congress does not need to know. You do not include in that category, do you, illegal or criminal activity.

Mr. COLBY. No. That provision I think is clear that if anything illegal or improper comes up the requirement is to report it and there are no if's, and's or but's about that one.

Mr. STOKES. In terms of Iran, and the Iran situation, how would you classify that? Something that Congress needed to know or should not have known?

Mr. COLBY. I think that I would go back to the point that what Congress doesn't need to know is the details of a policy program, a policy operation. It should know about a general policy and I think the general policy of selling arms to the Iranians is something that the Congress should know about. They don't have to know who the intermediary is. That is really a detail that is beyond them.

Mr. STOKES. Sources and methods you mean?

Mr. COLBY. Yes.

Mr. STOKES. But the general policy they should be aware of.

Mr. COLBY. The general policy that you are going to go right against your overtly expressed policy I would certainly say, you better check that one out. We have had covert actions in the past which have contradicted the impression we have given to different countries, but those you can explain to Congress and if they make sense, the Congress will buy it.

If it doesn't make sense the Congress will object to it.

Mr. STOKES. Well, basically I think that is what we are trying to keep intact and that is what all of you have addressed and that is the special relationship between the Executive Branch and the Congress, based upon some degree of mutual trust and forthrightness and candidness, and it is difficult for us to conceive of a situation where, when we talk about the Gang of Eight for instance, we are talking about the Speaker of the House, the Majority and Minority Leaders of the House, the Chairmen of the Intelligence Committees and similar officials on the other side.

It would seem to us that these are highly responsible positions, people obviously concerned about the national security of the United States, not irresponsible people. It would just seem that if the President, because of the high risk of some type of adventure, or high risk of human life, felt that he could not tell both intelligence committees that at least the Gang of Eight so to speak would be given this information, and I would think we would all look at them as being responsible individuals who would not be leaking highly sensitive information or data that would possibly cause the loss of human life.

Let me ask you this, Admiral Turner. In your opinion in those three cases you cite—and they are three very classic cases, very difficult to argue with—as has been stated by Chairman McHugh, but what in your opinion would have been reasonable knowledge assuming we had timely notice in the law at that time. What in your opinion would have been timely in reference to those matters?

Admiral TURNER. When my agents, came out of Iran, [who went in to support the Canadians six], were aboard the airplane and on their way home, for instance.

Mr. STOKES. The Canadian six matter you were able to accomplish within about 48 hours, weren't you?

Admiral TURNER. No, the agent who went in stayed in Tehran about a week, but we were three months or three-and-a-half months before that preparing it, working with the Canadians, preparing the documentation, the cover, the new personalities, new jobs, new identities for these individuals, and getting that training done so the six knew who they were and why they were in Iran, so they could answer questions when they came out.

You know about the one who got quizzed on his passport, Mr. Stokes. A Custom inspector said, "I notice your middle initial is H, and you are on a West German passport, and I have never seen a West German passport in which the middle name wasn't spelled out." And this State Department employee with great resourcefulness looked up and said, "Yes, you will notice I was born in 1935. I am ashamed of my middle name—Hitler."

That is a true story.

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Mr. STOKES. That is a good one. My last question to the three of you would be this: I am reluctant in terms of the criteria or standard of risk to human life to accept that as sole criteria. What we are talking about is a subjective evaluation made by the President, and it is very difficult, if we set that up as the criteria to be sure that that criteria is always used because it is subjective, because the President could very well substitute for it political risk, as I am sure probably the decision was made in terms of Iran more than in any terms of any risk to human life.

It was more the political risk. How do you see that?

Admiral TURNER. Oh, it is a danger. The present Administration when first justifying not notifying the Congress about the CIA role in the Iran affair, did claim human life. They claimed that the lives of the hostages held in Beirut might be jeopardized if it came out the United States was collaborating with Israel to get the hostages out. There is undeniably a shred of argumentation there, but I think it is not more than a shred, sir. So, yes, I think we are all three trying to say, that there is no way to legislate these boundary lines without the risk of pushing yourself up against an unreasonable position.

You have to have reasonable men there as well as here to interpret them.

Mr. COLBY. As I said, I think the risk to human life is not the only judge, should not be, but the Congress' control on this is the requirement that the President explain why he delayed. Either that explanation will be accepted when it is given or you will have a challenge to it. It will be an after-the-fact challenge but it is nonetheless a requirement that he justify to the Congress the fact that he did not pass over that information.

And that is why I suggest that a president will probably seek some middle ground between informing all 8 and yet not telling anybody. I think that the pressures on him will be, well, eight people is a lot of people; and that you learn in the Executive Branch when you find out how many people are in on a secret it becomes such a small secret in the in-group despite the loyalty of all the people in the group, it becomes a general conversation among them and it begins to slip out to secretaries and assistants and all that sort of thing.

Just inevitably that happens. So the attempt would be made to limit it to those eight.

Mr. STOKES. Mr. Cline.

Mr. CLINE. I would add two comments. I think the very valuable role of these two committees is to keep the Executive Branch advised of what seems sensible from a point of view of strategic coherence and continuity. You should be advising on broad issues, not exactly whether someone's life is at risk or not because those are very professional and subjective judgments.

I hope that there will be a greater receptivity to advise back and forth on these matters. I believe it can happen as I say. In earlier days I think we had a better understanding between the Congress and the Executive people and the intelligence people, and it worked pretty well.

The second thing though relates to the later comments. With all respect I want to tell you that the Congress is a tremendous target

for the release of unauthorized information. Everybody in this city is trying to get you Members who have secrets to disclose them, and the more your heads are full of details about operations that should not be disclosed, the more in hazard you and your staff members and people who, even though invited to speak as guests on some of the subjects discussed, are likely to be tripped up or trapped, not only by foreign intelligence agents of which there are hundreds wandering around Capitol Hill all the time, but by the most expert espionage group in town, the U.S. Press.

Journalists do everything that intelligence agencies do to try to elicit and if necessary, in somewhat unusual irregular fashion, get someone to disclose things off the record that they should not disclose.

So you are an important target and I think you ought not to look at suggestions that the congressional committees leak as a kind of moral and personal issue. That is certainly true of the eight men you were talking about.

Everyone assumes they are extremely conscientious and patriotic and all that. But they probably should not have in their heads information that as my colleague suggested, that they don't really need to know to do this broader job, advise the President in a proper congressional role on the broad issues of our national policy.

Mr. STOKES. Thank you very much.

Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

I think we can agree, too, that disclosure by Congress or Executive people sometimes is innocent. It cannot be, needn't be malicious but inadvertent. If you know something—once, I confess I made a statement on the floor about a specific matter that was secret and I didn't realize what I had said or done until the press called me and asked me if I really meant what I said, and it suddenly dawned on me that I used a number, it would cost so much to accomplish a certain thing, and that was classified.

So that is part of the problem.

The Canadian Embassy, I dare say would just as soon this never got disclosed in many ways, at least the people that still have to be over there inside Iran.

Mr. CLINE. That is right.

Mr. HYDE. Although the people who are heroic I am sure had mixed feelings about having their heroism kept under a bushel. But I can understand where sometimes these things just as soon never get disclosed and everybody is the happier.

Also on the Iran thing, Admiral, I would think that in addition to the lives or maybe it was you, Mr. Colby, the lives that the Administration used as justification were those of the hostages. The involvement of a third country participating might have been another reason for keeping this quiet.

I think we can agree we need mutual trust between the Executive and the Hill. There is a lack of mutual trust between the Executive and the Hill. We have some justification for questioning the forthrightness of some of the things we have heard from the Administration as well as some of the things we have not heard from

the Administration. But the Executive, too, has a lot of justification for being skeptical about our ability to keep a secret.

Once more, I sound like I am promoting your book, Mr. Colby, and I am——

Mr. COLBY. Thank you.

Mr. HYDE. Page 423,

> Thus by mid-1975 appearances on the Hill had become a pervasive aspect of my job as DCI. I was going up there to report on every new step taken in the Angolan issue, Kurdish issue and other current operations underway as well as testifying on practically everything the CIA had ever done during the last three decades to the select committees investigating intelligence.

Here is the important part,

> Sadly the experience demonstrated that secrets if they are to remain secret cannot be given to more than a few Congressmen. Every new project subjected to this procedure during 1975 leaked and the covert part of CIA covert action seemed almost gone.

I have been unfair somewhat, unintentionally, to Admiral Turner because you too have a great book, "Secrecy and Democracy."

Admiral TURNER. Thank you, sir.

Mr. HYDE. I am chagrined that I don't have it with me today. I will have it next week.

Mr. CLINE. Point of order, Mr. Congressman, I have several books and you haven't mentioned any of them.

Mr. HYDE. The reason yours are not here, Ray, is they are too heavy to carry.

But I would like to ask—I want to thank you, Admiral Turner, for your great testimony and I am sorry you left out the parts you did because I thought they were excellent as well and I hope every member of this subcommittee will read the classified annex as well.

I thank you for your letter to me of January 27th last year supporting the concept of a joint intelligence committee and I would like to offer this letter in the record if I may to be a part of this record from Admiral Turner supporting that.

Chairman MCHUGH. Without objection.

[The letter referred to appears in Appendix I.]

Mr. HYDE. I have another letter from Richard Helms, commenting on H.R. 1013, and also supporting the joint committee concept rather strongly. I would like to offer that for the record.

Chairman MCHUGH. Without objection.

[The letter referred to appears in Appendix J.]

Mr. HYDE. And I would like to ask you, Mr. Colby, if you also support the notion of a single select committee on intelligence, made up of Senators and House Members, smaller staff, smaller membership, select people, if that might not facilitate this development of mutual trust and confidence and disclosure that we all recognize we need.

Mr. COLBY. I fully support it and I very much applaud you for the effort to launch it. Thank you.

Mr. HYDE. Thank you. And Ray Cline, you have already fortunately initiated mentioning it, and I take it you have not changed your mind in the last few minutes.

Mr. CLINE. No, you have not dissuaded me. I think it is a good idea. I would also like to add this, though, I think the two separate

committees can do a good job and that is why I feel it is so important to develop that better spirit of cooperation on the intelligence planning that we all spoke about.

Mr. HYDE, Thank you.

I thank you, Mr. Chairman. You have been most kind and indulgent. I am not a member of this subcommittee and you have permitted me to be here. I appreciate that.

Chairman MCHUGH. It is always a pleasure to have you, Mr. Hyde, although I sense a campaign under way here for a joint committee.

Mr. HYDE. Two years now. This is the third year.

Chairman MCHUGH. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman. You have all three been coopted by Mr. Hyde, I don't know what we can say other than to say this about the joint committee. It might be thinkable at some particular point in time, but I suggest that it is not now thinkable. If two separate committees cannot render proper oversight, one surely won't. That has been the problem throughout, as a matter of fact. A joint committee is one step away from extinguishing all committees of the Congress from intelligence oversight and I understand that as well as anybody else.

But to the extent that we still do exercise statutory or constitutional authority with respect to these matters, I am a little discouraged by your opposition or such highly qualified acceptance of any statutory change that I see very little grounds to pursue the matter. But I do think in the light of what has been said and noting that Admiral Turner suggested he was interested in what steps to make oversight more vigorous and effective, and as the Chairman has pointed out far more sharply than the gentleman from Illinois, we have had a couple of real instances, major instances in which we have been lied to. And let us assume that these are not unique in the last year or two. Let's assume that.

What Admiral Turner, is our alternative here?

I suggest to seek some sort of mutual trust is not effective. What action can we take to prevent that sort of destructive relationship in which we know we are lied to and have presumably no recourse. What recourse should we have other than to change this particular statute?

Admiral TURNER. Mr. Kastenmeier, with all respect I think, and I used the word in my testimony, the committee can be more rigorous in pursuing whether the Executive Branch is telling them all and telling them honestly.

In this instance, long before August 1985 when it came out that Colonel North was doing something in support of the contras, it seems to me there was evidence that it was not a spirit of cooperation on the Executive Branch side with respect to oversight of intelligence. Therefore you had cause to be suspicious when the President's own right hand men denied something that was obvious. What they were telling you is that they were doing this within the law but it was obvious they were doing it against the spirit of the Congress of the United States, against the spirit of what the people of the United States through the Congress had mandated, that is, no governmental support for the contras.

Was there any question in anybody's mind that Colonel North was doing that? I don't think so. I remember being incensed at the time that nothing was being done in the media or in the Congress to stop this. And I am sorry, Mr. Chairman, there is an old athletic saying that I learned one time when we fought Notre Dame to a 6-6 tie. We ended up with a goal line stand that we thought was heroic, we charged into the locker room very enthusiastic about our performance. The coach looked at us and said, "Gentlemen, long after the deeds have been forgotten, the score will be remembered; you men tied. And with respect, sir, the answer was did you get to the bottom of the case and you didn't.

The score is what we remember, and I think you have to be more rigorous. I would say with all candor that in my four years when I think we had a very cooperative relationship, I believe the committees of the Congress could have been more rigorous with me. I would have appreciated it in many ways. Rigorous in paying less attention to the details of my budget, and $50 here and $100 there, and more in asking "Turner are you going in the right direction? What are your plans for the future? What is your track record on how you used your resources over the last ten years, let's say in developing your recommendations on Iran."

After the debacle on Iran, somebody from the Congress should have said, "Let's go back 10 years, Turner, and trace what you said to people about this, what the whole Community said and trace whether your sources were good, that you were relying on ten years ago. What are you relying on now?"

I think there is a lot more that you can do if you will take a longer range look at what our intelligence needs, sir, and it would be helpful if you are probing and rigorous.

Mr. KASTENMEIER. I gather you wouldn't suggest a tighter reign with respect to the budget in the process?

Admiral TURNER. No, I would suggest a looser reign in many ways, particularly in the R&D field where I think they need more freedom to go out and invent the U2 again which was done in a skunk works with nobody looking over their shoulder. And I am worried today whether we have the inventiveness needed to keep us one step ahead of the opposition in the technical field.

Mr. KASTENMEIER. Mr. Colby, what would you recommend?

Mr. COLBY. I have already mentioned one, if you find a case where somebody actually lies to you there are provisions of law by which that person can be prosecuted. There are ways to do it. I think it is a matter for the committee to take a look at and see whether there is a recommendation that action be submitted to the Justice Department to follow up on such a case.

Second, traditionally this is the house which has control of the purse and while I agree fully with Admiral Turner that fooling around with $50 here or there is not the point, the fact is that a Congressman once asked me exactly this question. You come up and tell us one of these things, what do we do about it? I said well, you have everything you can do about it. You can express opposition individually, you can get a majority vote of the committee against it, if necessary you can do as Chairman Boland I think so brilliantly did, develop a resolution of the Congress which circum-

scribes without revealing the specifics, circumscribes the ability of the agency to conduct the activity.

That was done to me on Angola and it was done to Casey on Nicaragua. If you find people getting around that, I always thought that there was a way you could catch the attention of the Director's mind fairly quickly. Just say, well, Mr. Director, you just keep on going on that but you take your little notebook out and put the figure $10 million down on it because $10 million is coming out of next year's budget, and I don't care where you distribute it but it is coming out. That will catch his attention.

That is the power of the purse. It is part of the constitutional arrangement. The Congress is not helpless. It has power.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Beilenson.

Mr. BEILENSON. Thank you, Mr. Chairman.

There has been a lot of comment about the 48 hour requirement, whether or not that is proper or adequate or useful, but let me go back to basics for just a moment. I am not sure at this point about the feelings of each of our three witnesses with respect to the current requirement of the law that the Congress or portions of the Congress be notified.

Are you supportive of that, of the existing law or are you arguing against extending it or making the requirement more specific than it is, the 48 hours?

Mr. COLBY. I support the current one, yes, sir.

Admiral TURNER. Yes.

Mr. CLINE. I do, too, and specifically because it has a certain flexibility.

Mr. BEILENSON. What are you all so exercized about? Is it the 48 hours? Is that all we are talking about, 48 hours instead of timely fashion?

Mr. COLBY. It is making the whole process rigid rather than reflective of the real world.

Mr. CLINE. Right.

Mr. BEILENSON. But when you start talking, and I am talking not to you so much, Mr. Colby, but to the other two, you don't want timely fashion or 48 hours or anything else. I am not sure we are focusing on something that is useful.

Mr. CLINE. The present law gives certain grounds we have established for withholding either permanently or temporarily notice. All intelligence operations for the purpose of collection of information are excluded. You pointed that out. So this is not a cut and dried proposition. The present law takes into account exceptions to notification, it mandates timely notification on covert action operations. It doesn't define timely.

Mr. BEILENSON. I think it is the posture of the authors of the bill they are not proposing anything terribly radical. They are in effect trying to require that the requirements of existing law are complied with by saying, all right, you folks don't seem to know what timely means, so we will tell you. It is 48 hours. We can agree maybe it is something other than 48 hours. I am trying to get a feel for if you are offended by the requirements of the existing law or whether it is the 48 hours?

Mr. COLBY. It is the 48 hours because there are situations where we both mentioned which would be far beyond 48 hours.

Mr. BEILENSON. Let me go on if I may, Mr. Chairman, I am just trying to—since this is the legislative subcommittee and like Mr. Hyde I apologize I am not a member of this distinguished subcommittee—I wish I were—I think the question for us and for the full committee eventually, is whether we should be changing the law and if so, how we should change it.

We have had useful suggestions, witnesses have tried to give us helpful suggestions. Admiral Turner spoke about this risk of life criteria and putting one's life on the line. Some have suggested that may not be a terribly useful criteria and certainly not the sole criterion.

As I mentioned earlier, and I think perhaps others have, we are aware now of a number of intelligence operations which we cannot even describe in which people's lives are on the line right now. We all know about them. All of you on this committee. So that cannot be the sole criterion.

We have discussed that it does not include under existing law intelligence gathering operations. If we were to be parachuting Mr. Colby into the Soviet Union perhaps instead of France——

Mr. COLBY. I would rather not.

Mr. BEILENSON. I understand. We are not really talking about that either.

Mr. Colby suggested something, a criteria which I personally found more useful and that is the need to know. It is not even so much need to know but I guess should we know, should Congress know about these sorts of things just in terms of the common sense approach to it.

We go back to the examples that the Admiral gave, all of which were hostage rescue related, things that I again personally suggested earlier I don't think we need to know, don't particularly need to know or care about knowing, but you can say under Mr. Colby's criteria should we know, no, we don't need to know.

This is a bigger thing; we are not talking about sending people into the desert and rescuing hostages, and it will be all done in 48 hours. We are talking about big policy changes. Everybody has agreed to that. Under Mr. Colby's suggested criteria, should we know or need to know, I would agree in terms of applying it to the three examples, the only three the Admiral gave to us, we don't need to know. You guys don't need to tell us. Go ahead, good luck, we hope it turns out all right.

But you get to other things, especially policy-related things, and I think we are talking about something else. What worries me, Mr. Colby, my friend, is the example you started giving that made me a little uneasy because you started talking about penetration for political purposes. Mr. Cline was talking about various opportunities which might be lost if the folks in CIA and elsewhere knew a certain number of folks had to be told.

Now you are raising some warning flags it seems to me. Are you talking about getting someone involved in somebody's government who may have something to do with eventually overthrowing that government? Why shouldn't those policy-related things not be told to the eight Members under the existing law?

Mr. COLBY. Mr. Beilenson, I think your points are well taken. I fully supported the effort by this committee some years ago to try to write a new charter for the Intelligence Committee and I think we all kind of gave up on it. It was so complicated and so difficult that the thing just kind of disappeared and it has been replaced by these individual actions, all of which I fully agree, of amendments to the existing law correcting problems that have arisen from time to time.

I think you get the same thing when you try to explain a need to know. If you try to define a need to know you get a very great difference of opinion by different onlookers as to what he needs to know and what he doesn't. And it immediately gets transferred into do you have faith in me, which is not the question. The question is does he have a need to know. Then how can you define that?

Clearly one side of it is a clear policy change. The other side of it is the identity of the agent. Now, sometimes the mere insertion of an agent can create a policy problem. I went to Henry Kissinger one time and said that I knew he was engaged in a very delicate negotiation with a foreign country, at the same time we had hopes of recruiting an officer of that country, and I just wanted to make sure that if it blew up in our face as you have to anticipate, that he, that it wouldn't upset his thing. He said go ahead. You do your business, fine.

But at least I was sensitive to the fact that he did need to know that there was a very substantial risk to his policy being adopted in the actions I was taking. That was a mere agent recruitment issue and if you try to define it in words, I think you would have a very difficult time with it.

Mr. BEILENSON. The more you talk about these things, the more you come to agreement even though one might start from a different side, pretty much exactly you come to what it is we ought to be told about.

On the particular instance about which you were speaking, of course we shouldn't know. On the hostage issue, I would say to my friend, Mr. Hyde, that we are talking about a vast change in policy, not only with respect to supplying arms for hostages but quite different from the problems Admiral Turner faced where we had some Americans who were posted over there by their government who were serving us and as to whom we had every responsibility to do what we possibly could to help them out or get them out, even if it had to be by rescuing them.

From was a whole different policy, and the Congress should have been consulted and was not.

With respect to the more recent Lebanon situation where you have private American people who had, to be blunt about it, no business being over there and the President of this country had no business holding hostage the foreign policy of this great country of 230 million people because of Americans not sent by us, not serving us in the CIA or State Department who decided they wanted to go to Beirut for their own good purposes—which is fine and good. We should help them if we possibly can. But it is a totally different situation than the one the Admiral faced in my opinion.

Mr. HYDE. Would you yield.

Chairman MCHUGH. Mr. Beilenson's time is about up. Go ahead.

Mr. HYDE. Can I make a point for the record. The book that has been admirably prepared by your staff and given to all of us to discuss this suggested new bill has an interesting paragraph on page 9, Executive Branch practice:

> 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 since enactment of the Oversight Act 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.

So I think that sets the context, the environment for this hearing that we are talking about one aberrational, and I concede aberrational act by the Administration, the Executive, and I just wonder if we are not overreacting.

That is the point I wanted to make. Thank you.

Chairman MCHUGH. Thank you.

I think this has been a very helpful discussion and I think the dialogue between the panel and Mr. Beilenson has been especially interesting. I assume, based on what has been said that all of you agree that the intelligence committees of the Congress, or in some limited cases the Gang of Eight should be advised about any policy change, albeit in covert form, when that is decided upon by the President.

Mr. COLBY. Yes.

Admiral TURNER. Yes.

Mr. CLINE. Yes.

Chairman MCHUGH. All of you agree with that. All of us would agree, Mr. Cline, that we don't have to have our heads full of all the details of every single covert operation. That is the other extreme.

As Mr. Beilenson has said, we don't need to know all of that. It is the policy formulation that really is the critical area. The frustration some of us feel in this particular case at least, and I think that some of the Senators felt on both sides of the aisle in the case of the mining of the harbors of Nicaragua, is that when you have an Administration some of whose members are prepared not to tell the truth on policy issues, you have an Administration that will read timely notice in a very liberal way to say the least.

Now as you said, Mr. Colby, you can punish people who lie to you about policy matters but there is not much resource available to us, as Mr. Kastenmeier said, where a President and his Administration chooses to disregard timely notice, because as you said, Mr. Cline, it is a very flexible term and therefore the remedy for us is very difficult. It is out of that concern that this bill is before us.

I think you have all raised some interesting points and I think have helped us to wander through this difficult issue. I am sure I speak for all the members of the committee in thanking you for being with us.

Mr. HYDE. Thank you.

Chairman MCHUGH. I would like before we adjourn to ask unanimous consent to insert in the hearing record letters concerning H.R. 1013 that the committee received from Cyrus Vance,

McGeorge Bundy and Admiral Turner, two memoranda concerning the constitutionality of a prior reporting requirement prepared by Mr. Ray Celada, Senior Specialist in the American Law at the Library of Congress, and letters to the committee from Professor William Van Alstyne, Duke University Law School and Professor Laurence Tribe of the Harvard Law School.

[The documents referred to are in the Appendix.]

Chairman McHUGH. Again thank you to all the witnesses from our colleagues on the Committee. The Committee will adjourn now and convene its hearings next week at this same time.

[Whereupon, at 12:30 p.m., the Subcommittee was adjourned, subject to the call of the Chair.]

H.R. 1013, H.R. 1371, AND OTHER PROPOSALS WHICH ADDRESS THE ISSUE OF AFFORDING PRIOR NOTICE OF COVERT ACTIONS TO THE CONGRESS

WEDNESDAY, APRIL 8, 1987

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

The Subcommittee met, pursuant to call, at 9:07 a.m., in Room 2203, Rayburn House Office Building, Hon. Matt McHugh (Chairman of the Subcommittee) presiding.

Present: Representatives McHugh [presiding], Stokes, Kastenmeier, Livingston, Shuster and Lungren.

Also Present: Representatives Beilenson, Hyde and McEwen.

Staff Present: Michael J. O'Neil, Chief Counsel; Thomas R. Smeeton, Associate Counsel; Jeanne M. McNally, Clerk; Bernard Raimo, Jr. and Stephen Nelson, Counsel; Martin C. Faga, Richard H. Giza and Diane S. Dornan, Professional Staff Members.

Chairman MCHUGH. The Committee will please come to order.

Today is the second day of hearings on the issue of whether existing law is adequate to assure meaningful congressional oversight of covert operations and more particularly, whether amendments to the law are necessary to clarify congressional intent with respect to presidential notifications to Congress of covert operations.

Under current law, the President is required, as a general rule, to notify the Intelligence Committees of the House and Senate prior to undertaking a covert operation that he has authorized. However, the law recognizes two limited exceptions to this general requirement. The first permits the President to restrict prior notice to a leadership group of eight Members of the House and Senate where the President determines that such restricted notice is essential to meet "extraordinary circumstances affecting vital interests of the United States."

The second exception recognizes that in certain undefined cases the President may withhold prior notification, but in such cases the law requires the President to provide the Intelligence Committees with notice "in a timely fashion" and with a statement explaining why prior notice was not given.

The Subcommittee has before it two bills that would amend current law, both of which were introduced in the wake of disclosures that the President had authorized the covert sale of military weap-

ons to Iran. In that case the President conducted his covert policy for as long as 14 months without providing any notice to the Intelligence Committees or to the leadership group of eight.

Many of us in Congress believe that in this respect the President utterly failed to comply with existing law, the effects of which included depriving Congress of its right and responsibility to exercise oversight of a significant intelligence activity. It also deprived the President of informed advice that might have helped him avoid a policy which has caused substantial damage to U.S. interests.

One bill before the Subcommittee, introduced by Mr. Mineta of California, would require prior notice of all covert operations. The second bill, introduced by Mr. Stokes of Ohio and others, would require prior notice in virtually all cases, but would permit the President to withhold such notice in situations where time is of the essence and there are extraordinary circumstances affecting the vital interests of the United States.

However, even in those limited circumstances, the President would be required to notify the Intelligence Committees within 48 hours after the covert action has begun. Both bills would preserve the President's right to restrict prior notice to the leadership group if there are extraordinary circumstances affecting vital interests of the United States.

At our first hearing last week the Subcommittee heard from five distinguished witnesses on this subject. They were the Speaker of the House, Jim Wright; and House Minority Leader, Bob Michel; two former Directors of the Central Intelligence Agency, William Colby and Stansfield Turner; and Ray Cline, a former Deputy Director for Intelligence at CIA. Speaker Wright strongly endorsed the Stokes bill, claiming that the Iran case demonstrated that current law should be amended to make clear that withholding prior notice can be justified only in extraordinary circumstances where time is of the essence, and that timely notice after the fact would permit a delay of no longer than 48 hours.

The other witnesses, while conceding that President Reagan failed to give timely notice in the Iran case, urged that current law be retained so as to afford the President necessary flexibility, particularly under circumstances involving a risk to human life.

The Subcommittee is fortunate today in having another group of very distinguished witnesses. We appreciate their taking the time to be with us to share their views, and we look forward to their testimony.

Before calling our first witnesses, however, I would like to ask Mr. Livingston, the Ranking Member of this subcommittee, if he would like to deliver any preliminary comments.

Mr. LIVINGSTON. Thank you, Mr. Chairman. I have nothing formal but simply to say that I look forward to hearing the witnesses today.

I mentioned at the outset of the hearings last week that I was concerned that any hasty action by this committee or by the Congress to react to the events of the Iranian situation might further complicate the ability of the President as the Commander-in-Chief, and this nation to carry out a foreign policy which meets with the security interests of the United States, and frankly the witnesses

that appeared last week really didn't do much to dissuade me from that position.

I realize that we are going to have witnesses on the other side today and I look forward to hearing their comments, but I am again concerned that as I mentioned the old legal adage, bad facts make bad law, that frankly we met with an extraordinary situation in which the White House was dilatory in consulting with the Congress on the Iranian situation, and just because of that, I just don't yet see that we really should lead to the possibilities of changing legislation to meet with that set of circumstances.

I think that the current law so far seems to adequately govern our needs. But let's hear the witnesses and let's go forward.

Thank you for your statement, I thought you very appropriately set forth what was said. I look forward to working with you on this matter.

Chairman McHUGH. Thank you, Mr. Livingston.

As I mentioned in my opening comments, one of the bills before us has been introduced by the distincuished Chairman of our Full Committee, Mr. Stokes of Ohio. I would like to ask Mr. Stokes now if he has any opening comments this morning.

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

Mr. Chairman, I would like to make several points that I believe were missed during the discussion of many hypotheticals at last week's hearing.

First of all, the bills before this subcommittee and these hearings are not meant to engender a discussion of whether or not Congress should receive prior notice of covert actions. Congress decided that in 1980. Since then, as has been noted, we have received prior notice of all covert actions except the covert sale of arms to Iran.

Second, the 48-hour provision in the Stokes-Boland bill is not put forth as the normal latitude for notification. Rather, as the bill says, notification may be delayed for a maximum of 48 hours, in, and I quote, "extraordinary circumstances affecting vital interests of the United States, and only where time is of the essence. . . ." The "extraordinary circumstances" language is the same as contained in the existing statute for limited notice to the "Gang of Eight"—and that provision has only been used once since 1980.

Further, the "time is of the essence" language means just that—when the President, in the extraordinary circumstances noted above, does not have time to provide prior notice. Clearly, the expectation is that this provision would be rarely, if ever, used; the intention is not to give the President a 48-hour grace period for covert action notification.

Further, I would note again my belief that H.R. 1013 is expressive of the intent of the current law.

Senator Inouye, the first Chairman of the Senate Select Committee on Intelligence, discussed this point during Senate floor debate on the Oversight Act of 1980, and I want to quote him: "The purpose of this limited prior notice in extraordinary circumstances is to preserve the secrecy necessary for very sensitive cases while providing the President with advance consultation with the leaders in Congress and the Chairman and Ranking Minority Members who have special expertise and responsibility in foreign policy and intelligence matters. Such consultation will insure strong oversight, and

at the same time share the President's burden on difficult decisions concerning significant activities. I am of the firm belief that the only time the President would not consult with the Intelligence Committees in advance would be in matters of extreme exigency. In my experience as Chairman of the Intelligence Committee and as a member of that committee, I can conceive of almost no circumstance which would warrant withholding of prior notice, except in those very rare situations where the President does not have sufficient time to consult with Congress."

During the same debate, Senator Huddleston, the floor manager of the bill, stated, and I quote him: "I myself believe that the only constitutional basis for the President to withhold prior notice . . . would be exigent circumstances when time does not permit prior notice."

During Senate consideration of the Conference Report on the FY 1981 Intelligence Authorization Act, which included the Oversight Act of 1980, Senator Inouye stated, and I quote him: "I cannot conceive of any circumstance which would require the withholding of prior notice except where the nation is under attack and the President has no time to consult with Congress before responding to save the country."

Finally, Mr. Chairman, I would also note, in response to the point raised by the distinguished minority leader last week, that the Stokes-Boland bill does not change existing criteria for providing the committee with notice of intelligence activities that are not covert actions. Under existing law, the intelligence committees are to be kept "fully and currently informed" of all intelligence collection activities, and are to be given prior notice of significant collection activities. The timely notice provision does not apply to the latter.

Thank you very much.

Chairman McHugh. Thank you, Mr. Stokes. We would like to begin with two distinguished witnesses, Dr. Richard H. Shultz and Dr. Morton Halperin. I wonder if you two gentlemen would be kind enough to come to the table. Dr. Shultz is Associate Professor of International Politics at the Fletcher School of Law and Diplomacy at Tufts University, and a Fellow at the Hoover Institution on War, Revolution and Peace. He has written extensively on such topics as Soviet disinformation practices, international terrorism and counterinsurgency.

He holds a Ph.D. from Miami University.

Our other panelist is Dr. Morton Halperin, Director of the Washington office of the American Civil Liberties Union. Dr. Halperin obtained a doctorate in international relations from Yale in 1961, was an instructor and then professor of Government at Harvard from 1962 to 1966. He has served on the staff of the National Security Council and as Deputy Assistant Secretary of Defense for International Security Affairs.

We very much appreciate both of you gentlemen being with us this morning. I wonder if we might start with Dr. Shultz.

STATEMENT OF RICHARD H. SHULTZ, ASSOCIATE PROFESSOR OF INTERNATIONAL POLITICS, FLETCHER SCHOOL OF LAW AND DIPLOMACY, TUFTS UNIVERSITY

Mr. SHULTZ. Let me say it is a pleasure to be here. When I began to work on my testimony I tried to look back historically and it seems to me over the last twenty years we have debated two points about covert action, one is whether and to what degree it is appropriate for a democracy to undertake secret actions, and second and certainly a related question and the subject of H.R. 1013, the extent to which the President has constitutional authority to employ covert action as an instrument of foreign policy.

In my opinion there are two problems I have with H.R. 1013. First, the proposed amendment to section 501 National Security Act of 1947 as contained in H.R. 1013 infringes on executive authority. I think it goes beyond separation of powers and I will come back to that.

The second problem I have is that in many ways it appears reminiscent of the way oversight proceeded during the mid-1970s and the legislation produced at that time. You recall by the end of the 1970s, Congress itself was, felt impelled to modify the legislative enactments of the mid-1970s.

When the framers created the Constitution, separation of powers was viewed as a double-edged sword. It was supposed to prevent power abuse but it also provided for the more effective exercise of power by the different branches and this was apparent in the framers' deliberations over the role of the executive, particularly in the national security and foreign policy arena.

While they argued that Congress had a role to play in foreign policy, they nevertheless saw Congress as a deliberative and legislative body that was not best equipped to act quickly and with dispatch in serious international situations. This was left to the executive branch.

Now, I think that they also recognized that with changing times and circumstances, separation of powers would vary and sometimes, a branch might increase its power, other times it will lessen it a bit. It seems that the arena of intelligence is a good example.

If you remember from 1947 to the end of the 1960s, Congress did not actively pursue its oversight authority and there were reasons for that that I mentioned in the testimony. The events of the 1970s pushed the pendulum toward congressional-executive interaction and away from Presidential dominance.

So congressional restraint turned into activeness. That was nowhere more evident than in the field of intelligence oversight.

Some believe, and I agree with this, that by the end of the 1970s the pendulum had been pushed too far and this was reflected in the Hughes-Ryan amendment which dealt with covert action. You all remember the stipulations in the Hughes-Ryan amendment.

While it did not give Congress a veto over the President, and existing law does not give you a veto, the way the bill was constructed one could argue there was de facto veto power for any Member who disagreed with a particular covert action of the Executive. So Hughes-Ryan pushed the pendulum too far, from a separation of powers point of view, into Presidential authority.

The Federalists, even before the Constitution was adopted, clearly recognized that the conduct of foreign policy is first and foremost the responsibility of the Executive.

I believe that there are certain areas that Presidential powers in foreign policy may be constrained constitutionally. However, the conduct of secret intelligence operations lies at the center of Executive authority. By the way, Hughes-Ryan did recognize this by not giving veto power officially to the committees that would oversee the covert action.

The Oversight Act of 1980, I would assert recognized the ultimate discretionary power of the President in covert action. Consequently, while the two committees, the Senate and the House Intelligence Committees, were to be kept fully and currently informed about covert actions initiated by the President, this was within a framework, and the language is important, that had to be consistent with all applicable authorities and duties, including those conferred by the Constitution.

The Oversight Act recognizes separation of power, as described above, and the fact that in secret operations the President has authority.

So the framers assigned to the President broad, independent constitutional authority to conduct foreign policy. In retrospect, it is now generally held that in the 1970s, Congress pushed that pendulum too far and Hughes-Ryan was a good example. The Intelligence Oversight Act of 1980 restored the balance.

Also, if you look back at the end of the 1970s, you see that other legislation, particularly the charter legislation, was not ratified because, I would argue, the Congress itself recognized it was going too far in terms of Executive-Legislative interaction.

Hughes-Ryan and H.R. 1013 do have a lot in common because both were created during periods of political crisis. Remember, the atmosphere of the early 1970s and the effect of the Pentagon Papers, Watergate, Chile, and the revelations about certain domestic intelligence operations by the CIA. It was a charged political situation.

This was reflected in the way the committees approached the issue of oversight. The Church Committee, for instance, and Senator Church's famous statement about a CIA being a rogue elephant, created the atmosphere in which oversight proceeded. Now, everyone agreed at that time that we needed a more official oversight process. However, that atmosphere negated balanced judgment so by the end of the 1970s in a period of more political calm Congress reexamined what it did with Hughes-Ryan, and almost did with the charter. Furthermore, some even asserted that legislation and Hughes-Ryan contributed to some intelligence failures. For instance, we know that our human collection in places like Iran and Nicaragua was very inadequate and subsequently, we were surprised by the revolutions in those two situations.

We know there were a number of counterintelligence failures, misestimation of Soviet military power, and the nonexistence of any effective capability covertly to influence events abroad, Hughes-Ryan put the President in the position of only initiating noncontroversial covert actions, and steering clear of controversial ones.

The Intelligence Oversight Act of 1980 recognized that we had to make some changes, in part, because of the failures that occurred, but also in recognition of the President's discretionary power to use covert action. The Oversight Act reflects the balance.

On the one hand it allows for Congress' oversight in almost all cases, (501A). But 501B says there may be instances when the situation is very serious, where you need to act with secrecy, and to compartment the operation. So notification can be withheld. That is the recognition of the Executive-Legislative balance.

H.R. 1013, like Hughes-Ryan, in my estimation, is taking place in the heat of political crisis. At issue today is whether the Iran events necessitate a revamping of the 1980 oversight requirements.

The changes in H.R. 1013, by setting arbitrary time limits, infringe on the President's ability to conduct particularly sensitive covert actions.

While we can debate whether or not the Iran convert action activity meets the stipulation of the 1980 legislation, I don't think we should throw the baby out with the bath water. There are operations that are so sensitive and counterterrorism is one, in which security, secrecy and dispatch are crucial.

We should not lose sight of this in the heat of the current political crisis and Executive-Legislative confrontation.

If the President is going to use secret operations without notification, and you place a 48-hour reporting requirement on him, you are narrowing the options to rapid military strike operations. All other secret activities are eliminated as options. 48 hours is a very brief period in operational terms.

So if history teaches us anything, I think it is to avoid repeating mistakes that undermined our capacity to defend ourselves internationally. Hughes-Ryan had this effect by denying the President the option to employ covert action as an instrument of foreign policy.

H.R. 1013 is following the same course. I would ask that you step back a bit from the current crisis because I fear that if you enact this now, five years from now, just like five years or so after Hughes-Ryan, you are going to rethink it and push the pendulum back.

But what is worrisome is that in that period between the enactment of H.R. 1013 and any changes you might make down the road, we may suffer international setbacks because the President is limited in what he can do covertly to 48 hours.

Thank you.

[The statement of Mr. Shultz follows:]

COVERT ACTION AND CONGRESSIONAL OVERSIGHT

by

Dr. Richard H. Shultz, Jr.

* Testimony prepared for the House Permanent Select Committee On Intelligence, Subcommittee on Legislation (April 8, 1987).

* Richard H. Shultz, Jr. is an Associate Professor of International Politics, International Security Studies Program, The Fletcher School of Law and Diplomacy. He is also at present a fellow of the Hoover Institution on War, Revolution, and Peace and is preparing a book on Soviet promotion of insurgent movements in the Third World. He is a consultant to various U.S. government offices concerned with national security issues, and is a frequent lecturer to U.S. war colleges and military academies. His professional interests include U.S. foreign and national security policy, contemporary military strategy, intelligence and national security, international and state sponsored terrorism, unconventional war and power projection in the Third World, and propaganda and political warfare. His books include Hydra of Carnage, with Uri Ra'anan, et.al.; Dezinformatsia: Active Measures in Soviet Strategy, with Roy Godson; Special Operations in U.S. Strategy, with Frank R. Barnett and B. Hugh Tovar; and Lessons From An Unconventional War, with Richard Hunt.

Covert action is defined as an attempt to influence politics and the course of events in other countries without revealing one's involvement or at least by maintaining plausible deniabilty. Over the last two decades a spirited debate has taken place within the U.S. body politic over the place of covert action in the foreign policy arena. A major issue has been whether and to what degree it is appropriate for a democracy to undertake secret interference in the politics of another country. An important and related question, the subject of H.R.1013, is the extent to which the President has constitutional authority to employ covert action as an instrument of foreign policy.

In response to the question of whether a democracy should engage in covert action, four quite different perspectives have emerged:

- Under no circumstances should the United States be involved in covert action. It violates our democratic values and permits the President to undertake foreign policy initiatives without first testing their viability in the marketplace of public discussion.

- Covert action is an instrument of last resort. It should be utilized after all else fails and the other alternatives are either to send in the marines or remain passive.

- The United States should only carry out non-controversial covert actions. In other words, only do covertly that which, if it becomes public knowledge, will cause very little embarrassment.

- Covert action is an instrument of foreign policy. All foreign policy is, in effect, has to address the nexus between foreign and domestic policy in other countries. This can be carried out both overtly and covertly. Covert action as a tool of foreign policy can be either a carrot or stick.

The issue is to what degree the President has the Constitutional authority to exercise this instrument of foreign policy. In my estimation the proposed amendment to section 501 of the National Security Act of 1947, as contained in H.R.1013, infringes on Executive

authority. It goes beyond separation of powers, as understood by the Framers of the Constitution. Additionally, it appears to be reminiscent of the way Congressional oversight proceeded during the mid-1970s. Recall that by the end of the decade Congress itself was impelled to modify these earlier legislative enactments. The Intelligence Oversight Act of 1980 is a case in point.

PRESIDENTIAL AUTHORITY AND FOREIGN POLICY

The Framers of the Constitution were cautious both in how they defined the powers of government and the way they distributed these powers among the three branches that had been constructed to use them. They were also of the opinion that certain branches were better equipped to exercise specific powers than others. Separation of powers, therefore, was a double-edged sword. It could prevent power abuse, but also provided for power to be more effectively exercised. This was apparent in the Framers' deliberations over the role and powers of the executive branch, particularly in the areas of national security and foreign policy. Influencing the Framer's judgment was the ineffectiveness of the Congress in these issues under the Articles of Confederation. As a deliberative and legislative body, the Framers viewed Congress as ill-equipped to act with the energy and dispatch required in international relations. The composition and modus operandi of the legislative branch made timely action either difficult or impossible. Consequently, separation of powers resulted in the Framers designating the executive branch as the more appropriate body to exercise control over foreign policy.

Nevertheless, the Framers also recognized that while separation of powers established a division of authority and responsibility, it

was inevitable that at different times and in different situations the degree to which the three branches exercised authority and checked one another would vary. The changing role of the President and Congress in the arena of intelligence presents a good example.

From 1947 to the end of the 1960s, Congress did not actively pursue its formal oversight authority. There was a consensus both over the parameters of American foreign policy and recognition that its conduct was the responsibility of the executive. Intelligence was viewed as an instrument of foreign policy and Congress was reticent to impinge upon the constitutional authority of the President. Only a few members of each house of Congress informally took part in the oversight of intelligence, and by choice their involvement was held to a minimum.

The events of the 1970s reversed Congressional reticence and the mechanism of oversight, which always existed, came to be vigorously exercised. Clearly, the pendulum began to swing away from Presidential dominance. Underlying this was the shattering of the post-World War II consensus over the course of U.S. foreign policy. Congressional restraint turned into activism, and this was no where more evident than in the field of intelligence oversight.

By the second half of the decade, many argued that Congress had pushed the pendulum too far, particularly with respect to the President's ability to employ covert action as an instrument of foreign policy. This argument centered around the Hughes-Ryan Amendment to the 1974 Foreign Assistance Act, which called for explicit Congressional oversight of the President's use of covert action. Hughes-Ryan required that the President notify the

appropriate Congressional committees prior to or immediately upon initiation of a covert action. Under the prescription of the amendment a total of eight committees had to be informed of each planned covert operation.

Hughes-Ryan did not give Congress veto authority over the President's use of covert action. However, the fact that the members of eight committees were in the know made it very difficult to guarantee that covert programs would remain secret. The amendment gave any member of the eight committees a de facto veto over any proposed covert action he or she might find objectionable. The result was that Presidents would be willing to undertake only noncontroversial covert actions, which, if they became public knowledge, would cause little political discord.

Did Hughes-Ryan push the pendulum too far in terms of separation of powers and Presidential authority? Article II, section 1 of the Constitution places executive power in the President. This is the source of the President's wide and inherent discretion to act for the United States in foreign and national security affairs. Of course, this is subject to those limits the Constitution delegates to the Congress. Nevertheless, even before the Constitution was ratified, it was asserted in The Federalist that the President's executive power would include the conduct of foreign policy. Historical practice and legal precedents have confirmed this authority in formulating and implementing foreign policy.

While in certain areas the President's power in foreign policy may be constrained constitutionally, the conduct of secret intelligence operations lies at the center of executive authority.

This does not mean that Congress is excluded, as the oversight process has demonstrated. In fact, the wording of the Hughes-Ryan amendment itself recognized this fact. It did not give Congress formal veto power over a covert action authorized by the President, although the way the amendment was constructed an unauthorized and de facto veto power ensued. The 1980 amendment to the National Security Act of 1947 not only sought to correct this situation, but recognized the ultimate discretionary power of the President in covert action. Consequently, while the Senate Select Committee on Intelligence (SSCI) and House Permanent Select Committee on Intelligence (HPSCI) were to be kept fully and currently informed about covert actions initialed by the President, this was within the framework of what was "consistent with all applicable authorities and duties, <u>including those conferred by the Constitution upon the executive</u> and legislative branches." The language in quotations is precisely that which H.R.1013 seeks to excise from the National Security Act of 1947.

In sum, the Framers assigned to the President a broad and independent Constitutional authority to conduct foreign policy. In retrospect, it is now generally held that in the 1970s Congress pushed the pendulum to the point where the Framers' concept of separation of powers was circumvented. This was quite apparent in the direct and indirect impact of the Hughes-Ryan amendment. The Intelligence Oversight Act of 1980 restored the balance. The Hughes-Ryan amendment, along with other legislative efforts (including the Foreign Intelligence Surveillance Act of 1978 and the proposed but never enacted charter legislation drafted by the SSCI (S.2525)), dominated the Congressional oversight process of the 1970s. These measures were

enacted during a period highly charged with political crisis and executive-legislative confrontation. Beginning in 1979-1980, in a period of greater political tranquility, certain of these legislative actions were either revised or as in the case of the proposed charter never enacted. H.R.1013 would result in a repetition of the oversight pattern of the early mid-1970s.

POLITICAL CRISIS AND CONGRESSIONAL OVERSIGHT -- THE HUGHES-RYAN AMENDMENT AND H.R.1013

In many respects, the Hughes-Ryan Amendment and H.R.1013 have a great deal in common. To begin with, both grew out of a highly charged political crisis. Recall the climate surrounding the enactment of Hughes-Ryan. In 1971, the Pentagon Papers were published in the midst of the domestic turmoil over the Vietnam War. The next year was marked by the beginning of the Watergate scandal which resulted in the resignation of President Nixon in 1974. At that time, the controversial covert program in Chile was exposed, as were certain domestic intelligence operations run by the CIA. This led to the creation of House and Senate special committees to investigate past and present activities of the intelligence community. In many ways, the Chairman of the Senate special committee, the late Senator Frank Church, summed up the political tenor of this oversight period in his charge that the CIA was a "rogue elephant" out of control. Neither his committee nor the sister committee in the House found evidence to support this claim. The broad charge of massive and systematic abuses and illegal activities by the intelligence community was never documented.

Nearly everyone looking at the oversight process at that time recommended some kind of permanent committee system for intelligence.

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But it had become clear by the end of the seventies that speculation, like that of Senator Church, was unfounded and, further, that it created an atmosphere in which balanced judgment suffered. By the end of the decade, the SSCI and HPSCI more prudently concentrated on correcting the real errors and structural deficiencies of the intelligence community. In effect, oversight began to shift away from [redacted] an exclusive concern with rules and restraints on the intelligence community and the President's ability to work with it. This was reflected, in the first place, in the Senate's rejection of the charter legislation, which contained a set of complex regulations and prohibitions to rule and restrain every activity of U.S. intelligence.

In the 1980s, as the pendulum began to swing back the agenda broadened to include strengthening the performance of U.S. intelligence. A series of intelligence failures revealed the price of ignoring the requirements necessary to meet hostile intelligence services and to stand up to national security challenges facing the United States. These included the inability to collect sufficient information about the Iranian and Nicaraguan revolutions in order to provide early warning, various counterintelligence failures, mis-estimations of Soviet military power, and the non-existence of any effective capability covertly to influence events abroad.

The Intelligence Oversight Act of 1980 demonstrated both Congressional concern over these intelligence failures and deficiencies, as well as recognition of the fact that in certain situations the President requires discretionary power to employ covert action as an instrument of foreign policy. Consequently, the National

Security Act of 1947 was amended to provide both Congressional oversight and Presidential flexibility in special situations. Section 501(a) provided the following:

- o The SSCI and HPSCI would be kept fully and currently informed of anticipated covert actions. This did not require their approval in order to initiate the operation.
- o The President could limit prior notice to the ranking members of SSCI and HPSCI, the speaker and minority leader of the House and majority and minority leaders in the Senate if extraordinary circumstances existed.

For those situations in which the President determined that to comply with section 501(a) would endanger lives and/or operational security, section 501(b) required the President to inform the SSCI and HPSCI in a "timely fashion." This was to include a statement of the reasons for not giving prior notice. Finally, the 1980 legislation also required reporting of all intelligence failures.

In my estimation, the Intelligence Oversight Act recognized the inherent authority of the President to withhold notification. It was considered within his constitutional authority. It did not view withholding notification as the rule, but more of an exception. Consequently, the act sought to strike a balance. It also implied that the Congress understood the need for Presidential flexibility to act with dispatch and secrecy if the situation so warranted.

Although it would be unfair to compare the Iran crisis with the situation in the early/mid 1970s, H.R.1013 is, in a fashion, similar to Hughes-Ryan. It is undertaking legislative restrictions in the heat of political crisis. At issue today is whether the Iran events necessitate a revamping of the 1980 oversight requirements. In my estimation these changes recognized that to set arbitrary time limits infringe on the President's ability to conduct particularly sensitive

covert operations. While we can debate over whether or not the Iran activities met the stipulations laid down in section 501(b), we should not change the existing procedures. There clearly are operations that are so sensitive, for instance in the counterterrorism arena, that security, secrecy, and dispatch are crucial. We should not lose sight of this in the current political crisis and executive-legislative confrontation. Certainly the forty-eight hour requirement contained in H.R.1013 is a much too tight restriction and denies operational flexibility necessary for dealing with situations which involve grave danger to personal safety or which require speed and stealth. It restricts the range of secret options available to the President to rapid military strike operations. The emphasis thus far on short term and time sensitive actions does not imply that all covert operations of a longer duration require prior notification. While this may generally be the case, one can imagine circumstances where this would not be true.

In sum, if history is to teach us anything, it is to avoid repeating those mistakes that undermined the nation's capacity to defend itself against adversaries in the past. The Hughes-Ryan amendment had this affect by denying the President the option to employ covert action as an instrument of policy in controversial situations. H.R.1013 is bound to follow the same course. Congress should recognize that there are instances in which executive notification requires delay. In the midst of the political crisis surrounding the Iran events, it is not prudent to create legislative restrictions and rigidity that the nation may greatly regret later and which Congress may find it necessary either to revise or completely reverse. What is worrysome are the foreign policy failures that might occur in the period between the enactment of new restrictions contained in H.R.1013 and some future Congressional revision of these regulations.

Chairman McHUGH. Thank you very much, Dr. Shultz. Dr. Halperin.

STATEMENT OF MORTON HALPERIN, DIRECTOR, WASHINGTON OFFICE OF THE AMERICAN CIVIL LIBERTIES UNION; FORMER SENIOR STAFF MEMBER, NATIONAL SECURITY COUNCIL; AND FORMER DEPUTY ASSISTANT SECRETARY OF DEFENSE, INTERNATIONAL SECURITY AFFAIRS

Mr. HALPERIN. Thank you, Mr. Chairman. I appreciate the opportunity to be here and testify on behalf of the American Civil Liberties Union. I want to say first that the ACLU believes, and I believe that the United States should not conduct covert operations. I believe Mr. Hyde knows, and we have discussed it in the past, that this is our view. I would hope that at an appropriate time the Committee would hold hearings on that more fundamental question, and we would welcome an opportunity to discuss that.

But as I have done on a number of occasions when I have appeared before this committee, I want to accept the terms in which the committee is conducting this discussion, and try to be helpful to the committee in discussing how to improve the oversight process and covert operations on the assumption that the question of whether they should be conducted is not now on the table.

So I have attached to my statement a more detailed analysis of that question. I would like to ask permission to have my written statement and three attachments to it be made part of the record, and to have permission to revise those attachments when we submit the corrected version of my statement.

Chairman McHUGH. Without objection.

Mr. HALPERIN. In my view this bill simply makes clearer the meaning of the Intelligence Oversight Act of 1980. I do not think it adds in any significant way to the obligations of the Executive Branch to report on covert operations to the Congress.

If you look, as we have and spelled out in one of the attachments to my statement, at the legislative history, I think it is absolutely clear, and Mr. Stokes' quotes from the history makes clear, that this bill simply does what Congress intended. The intention was that prior notice be given in all but the most extraordinary situations, and that in those situations, there be what was called "timely notice" which is of course the language from the Hughes-Ryan amendments.

There was a good deal of discussion of when those circumstances would arise. They clearly were not cases where secrecy was important, because the Congress provided an alternative to deal with the question of secrecy, it named the so-called Gang of Eight.

What it said to the President was if you think the operation is so secret that you don't want to tell the members of the two committees, then just tell the eight leaders the Congress has designated to get this information. I find it insulting to suggest that those eight leaders of the Congress cannot be trusted even with the most sensitive information that the government has.

The notion that one of those eight people would leak information about an American going into Teheran to help the hostages out I find to be an extraordinary charge, one for which there is no basis

in the record of the congressional leadership, or even in the intelligence committees, in keeping information of that kind secret.

But the bill clearly intended that as the route for an especially secret instance.

It dealt with the alternative to prior notice in the other circumstances only for areas of great speed where there was an exigency, where there was not time to consult, and then it said if you had not consulted in advance you must consult in a timely manner. There was also a great deal of discussion about what timely meant. As we suggest, whatever it meant it did not mean "never." I think it is clear that the Administration never intended to report on that operation, certainly not until long after it was over.

I think it needs to be remembered that the purpose of informing Congress is not the usual sense of conducting oversight after an operation is over to see whether it was conducted properly. The purpose of the advance notice or the timely notice was to permit consultation with the congressional committees as a substitute for public debate.

We are talking here about authorizing the President to engage in operations which could lead the United States to war, which involve provision of military equipment to other countries, which involve hiring people to engage in military acts such as mining harbors and blowing up power plants. What the Congress said in the Oversight Act, I think correctly, is that if we are going to permit the President to do this without the normal public debate and congressional action which would normally be required for such acts, we are going to insist that we have a surrogate. The surrogate is that the President and the Executive Branch be required to consult with two congressional committees so that those committees not have the power of veto, but have the power of discussion with the Executive Branch, if necessary communication with the President, if necessary a meeting with the President. The purpose was that they can be a substitute for and a surrogate for the public debate that otherwise ought to occur, and can have a chance to talk the President out of it, to tell him he is wrong in thinking that when this hits the front pages of the newspapers everyone will approve it.

So that not only is there not any question of whether it is constitutional, I think there is a real question of whether covert operations are constitutional without it, without something which mandates that Congress have a chance, an opportunity, to comment before the covert operation goes forward.

Now, it has been suggested this morning and in your last hearing that Congress is rushing to act in the face of a crisis. I would say the Congress has been very slow to act, because the crisis has been clear since 1981. The statements that Mr. Casey made in public, the way in which he dealt with both this committee and the Senate committee, has led I think to the conclusion of everyone involved in the process that he simply did not accept the understandings embodied in the 1980 Act.

You remember that after the Vice Chairman of the Senate Committee resigned at one point, there was a detailed agreement negotiated between Mr. Goldwater and Mr. Casey about these issues, I think there is no question that there is now a fundamental dis-

agreement between the Executive Branch and the Congress as to the meaning of the 1980 Act.

I think such a disagreement is enormously dangerous when we are dealing with issues of this kind. Therefore it is necessary for the Congress to revise the Act simply to make it clearer what it is that is intended so that there cannot be any disagreement about it.

This is not in my view simply a reaction to the Iran affair which demonstrates, I think, the total disagreement about what the statute means, but it is an overdue reaction to the evidence beginning in 1981 that there was simply a disagreement about what the statute meant.

It was suggested this morning that the 1980 Act cut back on Congress' authority to get information about covert operations and about intelligence activities, and that the 1980 Act was a deliberate action as compared to the Hughes-Ryan amendment which was done in haste and on the back of an envelope, as indeed it was.

But I would argue just the reverse, that the 1980 Act added to the President's obligations to report and did not subtract except in one way, it says that the President only had to report to the two intelligence committees rather than all appropriate committees, although it went on to say that those committees had the authority and obligation to call the information to the attention of other committees.

But apart from that, it did not subtract at all from Hughes-Ryan. Indeed it enacted the Hughes-Ryan amendment. When we are told that section B somehow in contrast to Hughes-Ryan, is an acknowledgment of Presidential authority, that makes no sense because section B is the Hughes-Ryan language. It says that the Congress must be informed in a timely fashion of all covert operations. That is what Hughes-Ryan said, and that is what section B says.

It is section A which talks for the first time in legislation about prior notice. That is the new language. It was in 1980 that Congress added in my view two enormously important and correct requirements; one, prior notice which did not appear in Hughes-Ryan; and second, of keeping the committees fully and currently informed of all intelligence activities and of reporting in advance, not only of covert operations but of all of what the bill called "significant anticipated intelligence activities" which clearly includes more than covert operations.

So I think that Congress made its deliberate judgment in 1980, and not in the Hughes-Ryan, and in what it decided in 1980 was that Hughes-Ryan was not enough and not that it was too much, I think that was in fact the correct judgment. We are told there are constitutional questions about Hughes-Ryan. I reread my constitution last night. I am tempted to ask that it be made part of the record, but I will resist that. I find nothing in the Constitution that would prohibit the Congress from saying no funds may be appropriated for the conduct of covert operations. I know no serious constitutional scholar, indeed I think no constitutional scholar who believes Congress could not prohibit the expenditure of funds in its appropriations bills for covert operations.

I think if one includes in covert operations the sending of secret agents abroad to negotiate and things of that kind, that you run into constitutional questions. But if you are talking about whether

the President of the United States can be stopped by the Congress from hiring people to blow up powerplants or to mine harbors or to arm men to go into combat against a country with which we have diplomatic relations, if you are talking about those kinds of covert operations, I know of no scholar who thinks that Congress could not simply prohibit it by saying funds cannot be used for those purposes. Nor do I think there is any serious question that Congress can say you can do this but you have to tell us about it in advance, and if there is not time to tell us about it in advance, you have got to tell us about it within 48 hours.

That has no effect on the President's ability to operate with secrecy, vigor and dispatch, which I agree the Constitution intended him to do. He can move forward in a minute and then get the notice to the Congress within 48 hours. This is not a magic process. The President must approve a covert operation. Sometimes apparently the Executive thinks he can do it orally but as far as we know, except for the one time that nobody can remember, all the Findings have been in writing.

What we are talking about is giving the President 48 hours to get a piece of paper from the White House down to the Capitol. Now they have stopped reconstructing Pennsylvania Avenue and it no longer takes 48 hours to get a piece of paper from the White House to the Congress.

The notion that the President's ability to act quickly is constrained because within 48 hours of him signing a piece of paper it has to be delivered to the Congress is in my view absurd, and not a serious constitutional argument. Nor do I think it is a serious constitutional argument to say that because one of the eight leaders of Congress may leak something, that it violates the Constitution to require that information to be given to the Congress.

The Constitution assumes equal obligations and responsibilities of the two branches, and there is nothing in the record and nothing in the Constitution I think to justify the assertion that it violates the Constitution for the Congress to be informed.

I would like to turn finally to the concerns raised by Admiral Turner at the last hearing about whether the President should be required or the Director of Central Intelligence be required to give the committees information like the date and the time and the manner in which a CIA agent will be infiltrated into a country to help get Americans out.

I think that is a real concern. I share Admiral Turner's view that there ought to be situations in which that kind of specific operational detail should not be given to anybody except those people who absolutely need to have that information. But I see nothing in this legislation in its unamended form or its amended form that requires the provision of such information.

Let me take a minute to look at his example.

The President presumably could have, and I assume did—President Carter—sign a presidential Finding authorizing the CIA to undertake operations to rescue the Americans held in Teran.

That kind of finding should certainly be reported to the two intelligence committees. But at that point it seems to me wholly appropriate, and not at all inconsistent with the language of the statute, to say to the committees we are going to be doing a variety of

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different things to get the Americans out. If we are doing something of political consequence, like selling arms to a third country that we have an arms embargo with, we will tell you about it, but if what we are doing is infiltrating agents into that country for the purpose of gathering information for the conduct of operations, we don't intend to tell you about those specific details.

I can not imagine the committee saying, no, we want to know the name of the person, how he is getting in, what his disguise is, what passport he has and how he will get out.

Those kinds of details you may want to know afterwards for oversight and analysis, but nobody would want to know in advance, and I don't think the committees would ask for it and I don't think this legislation requires it.

I think Admiral Turner is confusing the requirements for informing about a covert operation with the requirement to keep the committees fully and currently informed about intelligence operations and reporting on significant anticipated activities. I think those requirements are properly in the law, but I think they do not require and should not require the provision of that kind of very specific operational detail that places lives in jeopardy.

If there is any doubt about what the legislation does, I would urge the committee to rewrite those provisions to make clear the distinction between the necessity of reporting that a covert operation is going forward, and the necessity of reporting the details that have political consequences, but not the kind of operational details that involve placing lives in jeopardy.

I appreciate the opportunity to testify and I of course would be delighted to respond to your questions.

[The statement of Mr. Halperin follows:]

PREPARED TESTIMONY

AND

STATEMENT FOR THE RECORD

OF

MORTON H. HALPERIN

DIRECTOR

AMERICAN CIVIL LIBERTIES UNION WASHINGTON OFFICE

ON

H.R. 1013

PRIOR NOTICE OF COVERT ACTIONS

BEFORE THE

LEGISLATION SUBCOMMITTEE

OF THE

HOUSE SELECT COMMITTEE ON INTELLIGENCE

APRIL 8, 1987

Mr. Chairman,

I very much appreciate the opportunity to testify on behalf of the American Civil Liberties Union on H.R. 1013. The ACLU is a non-partisan organization of over 250,000 members dedicated to the defense and enhancement of civil liberties guaranteed by the Bill of Rights.

There is no doubt, in my view, that Congress ought to go at least as far as this legislation does. Indeed, I believe that this legislation simply makes explicit what Congress clearly intended in 1980.

The record now before this committee and the nation demonstrate that covert operations are fundamentally incompatible with a democratic society. The ACLU has held that position for a number of years, and I have had the privilege of presenting it to this committee on more than one occasion. The basic argument is that covert operations are used by our Presidents to avoid the public and congressional debate mandated by the Constitution, a debate which is particularly crucial when questions of war and peace are at stake. Granting officials the authority to conduct covert operations inevitably leads to abuses of power, as it did in the Iran-contra affair. Officials begin to believe that they can and must lie to the American people and their colleagues, and that they have a license to break the law. These are the inevitable results of permitting such activities; they cannot be cured by more perfect legislation. (These arguments are spelled out in more detail in the first attachment

to this statement and I will not belabor them here.)

Taking as given that the committee at this stage is simply interested in clearing up the question of prior notice with regard to covert operations, let me offer the following observations.

First and most important, I would urge you to keep in mind what the 1980 Intelligence Oversight Act sought to accomplish. Its goal was to create a surrogate for public and full congressional debate. If this is done, it is essential to have the most complete possible substitute. Congress is thus entitled, in permitting such operations to go forward, to insist on procedures which in another context might constitute an unwarranted and even perhaps unconstitutional intrusion into the prerogatives of the President.

As the letters received by this committee from constitutional scholars make clear, there is no serious doubt as to the constitutionality of the provisions in the bill. I would go further and argue that they are necessary if the Congress is to perform its constitutional obligations to conduct effective oversight of activities which could lead to war.

During the first day of hearings on H.R. 1013, there were suggestions both from witnesses and members of the committee counseling against even this modest legislation. Two kinds of arguments were heard. The first suggested that since the key to effective oversight is cooperation between the executive and legislative branches, legislation would do no good and might even be counter-productive. The second suggested that the legislation would compel the intelligence agencies to disclose information

which might place the lives of agents in jeopardy. Let me express my views on both of these concerns.

Even a cursory review of the events of the past six years should leave no doubt that new legislation is necessary. The 1980 Intelligence Oversight Act was a carefully crafted compromise between the intelligence agencies and Congress. Its meaning was, I believe, well understood by all of those who participated in its drafting and approval. The difficulty, of course, arose because those in the executive branch who became responsible for its implementation after 1981 were not participants in the process. The new administration consistently chose on a range of issues, not simply the arms transfer to Iran, to ignore the letter as well as the spirit of the legislation. The statements of administration officials, and the legal analysis offered by the Department of Justice, leave no doubt that the administration never accepted the 1980 compromise. Oversight cannot work if there is fundamental disagreement about the President's obligations.

The record also makes it clear that legislative history, Presidential directives, and agreements between the intelligence committees and the Congress are no substitute for clear legislative language.

One does not have to read the legislative history of the 1980 Intelligence Oversight Act to understand that "timely" does not mean "never." The legislative history in fact leaves no doubt that the authority of the President to avoid prior notice could be exercised only in the most extraordinary circumstances, when the survival of the nation could be said to be at stake.

Moreover, it makes clear that "timely" notice could not be delayed indefinitely. Yet the administration on a number of occasions simply ignored, and perhaps was not even aware of, the legislative history of these phrases. Attachment two to this statement is a detailed analysis of the legislative history which leaves no doubt that the Act was repeatedly violated. Yet since this is not an area in which litigation is possible, there is no way to secure a judicial interpretation of the legislative history, or to enforce it.

Obviously, executive branch officials may simply choose to disobey the law. However, they are much more likely to do so when the words of the law are not absolutely clear, or when they seem to permit exceptions. Congress has an obligation not to offer such temptations to those who exercise power.

If careful legislative history is no substitute for statutory language, neither is a presidential directive. Here the report of the Tower Commission is instructive, even if its recommendations are not. The Commission notes that many of the procedural requirements that it recommends, and that would be mandated by the legislation you are considering, were included in an Executive Order in effect when this administration took office. That Order was replaced by a new one which did not include such procedures as requiring written findings, or consulting with members of the National Security Commission. The Tower Commission report states that the President later issued a secret directive, NSDD 159, which reinstated these procedures. But the report found that this directive was "promptly ignored"

in the Iranian arms sales.

From this history, the Commission reached the conclusion that the President should issue a directive and that it should be followed. From this history, this committee must conclude that any order that the President issues can be rescinded in public or in secret, or simply ignored.

Finally, explicit agreements between the intelligence committees and the Director of Central Intelligence cannot be counted on. Senator Moynihan has presented this committee with a copy of the agreements negotiated and signed by William Casey and the leadership of the Senate committee. They are staggering in what they reveal about the administration's willingness to abide by its agreements. Mr. Casey promised to inform the committee of any new Presidential findings in advance of implementation; he did not do so. He promised to let the committee know if any existing Presidential orders were ignored; he did not do so. Finally, he promised to notify the committee of any weapons transfers; he did not do so. The agreement was consistently disregarded by the administration. No committee serious about oversight would rely in the future on such agreements.

This brings me to the question of the committee's role in the oversight process. There is no doubt that the executive branch disobeyed the letter as well as the spirit of the law, both the Intelligence Oversight Act and the Boland Amendment. There is also little question in my view that this committee, and its counterpart in the Senate, failed to live up to its obligations. When Congress asks the public to accept secret operations and when it assigns committees to monitor them on

behalf of each house, those committees have a special obligation. Members of the committee and its staff must probe and question and take seriously charges of wrongdoing. With regard to the violation of the Boland Amendment, this committee did not, in my view, meet its responsibilities. One trusts that the lesson has been learned.

Let me turn briefly next to the issue raised by Admiral Turner and others about the risk of providing details about specific operations to any members of the Congress. I sympathize with the desire to keep such details secret, but I do not understand H.R. 1013 to require their disclosure. This concern confuses the requirement to notify the committees in advance about a covert operation with the requirement to keep the committees fully and currently informed and to inform them in advance of any significant anticipated intelligence activity.

The legislation would require advance notice of any Presidential finding authorizing a covert operation, but not necessarily of all specific details of the operation. Thus, to use Admiral Turner's example, if President Carter had issued a finding authorizing an operation to rescue the hostages in Iran, and had properly informed the two committees, neither the law as it now stands, nor as it would be amended, would require that the committee be noticed of each sub-operation. That is not to say that some activities within a covert operation should not be reported to the committees in advance, clearly they should. It is only to say that the law contemplated by the bill would not specify that they should.

If there is any ambiguity on this score, the legislation could, and probably should, be rewritten to separate the requirement with regard to a Presidential finding, which should be absolute, from the requirements to answer questions and to report in advance on other significant anticipated activities. With regard to the latter, some leeway and give and take between the committees and the executive branch may be in order. Once the committees know that an operation is underway, they have an obligation to press and probe and to make clear what information they want. I believe that the statute should require that the requested information be provided unless its compromise would directly and immediately place the lives of agents in danger during a finite period, and the proposed action did not raise questions of policy, propriety, or legality.

Finally, Mr. Chairman, I want to say a brief word about the proposal to create a joint intelligence committee. The Tower Commission, having detailed a willful refusal of the executive branch to obey the law, suggests that the solution is to create a single committee in the hope that executive branch officials would feel compelled to inform as required by the law. There are two fatal flaws in this argument. First, the Congress reduced the number of committees that had to be informed from eight to two based on exactly the same argument. Second, current law permits the President to notify only eight leaders of the Congress. Since he did not avail himself of this option in the case of the Iran operation, it is impossible to believe that he would have informed a joint committee. (Also attached is a more extensive analysis of the joint committee proposal.)

Mr. Chairman, let me once again commend you for holding these hearings and thank you for providing an opportunity to the ACLU to testify. I stand ready to answer your questions and to assist the committee in any way that we can.

Thank you.

Chairman McHUGH. Thank you very much for that testimony, and we have some contrasting views which will make it interesting for us to pursue.

Dr. Shultz, I guess I would like to first fully understand your objection to this bill, the nature of your objection.

As we all know, what Mr. Stokes' bill would do is require prior notice in virtually all cases except where the President determines that time is of the essence, and extraordinary circumstances affecting the vital interests of our country require withholding of prior notice, in which case there has to be notice within 48 hours after the fact.

Is your objection to that provision grounded in the Constitution, or is it simply, from your perspective, unwise policy?

Mr. SHULTZ. What I tried to suggest is both. I believe that constitutionally the President, as the principal officer responsible for foreign policy, has more latitude to act than you are giving him here. Additionally, from the point of view of operations I would disagree with Mr. Halperin. I believe that there are instances in which you need tight operational security and I am not convinced that in those instances, it is proper to put lives at risk in order to notify the Congress.

The President has to live with his policy and afterwards, it may well prove to be bad policy. Nevertheless, making foreign policy is the primary responsibility of the President.

Chairman McHUGH. There has been real disagreement over the wisdom of requiring notice within 48 hours even in exceptional cases. But there has been very little objection so far to the constitutionality of the proposal. I have difficulty understanding why there would be any question about its constitutionality.

Dr. Halperin has said Congress has the right to absolutely prohibit a particular policy, covert or overt. We passed a bill as you know and it was law for about two years, prohibiting the Administration from providing directly or indirectly military assistance to the contra revolutionary forces in Nicaragua.

We passed laws prohibiting assistance to the government of South Africa. Now if Congress has the authority constitutionally to prohibit a covert operation, presumably because Congress has a constitutional right to join with the President in determining policy of the United States, why doesn't Congress have the right to set certain conditions under which covert operations can be conducted?

Mr. SHULTZ. You are arguing that because you have budget authority, you can limit all Presidential covert actions. But can the President in his foreign policy of supporting the contras through covert negotiations with other friendly nations convince them to financially support the contras? Is that a violation of the ban that you have placed on direct support by the United States?

Chairman McHUGH. No, but the President can conduct a covert operation——

Mr. SHULTZ. And that would be conducted covertly.

Chairman McHUGH [continuing]. Because Congress provides authority to spend money on covert operations. Either by line iteming the covert operation or by providing contingency funds under which the President can proceed with covert operations.

Mr. SHULTZ. Right.

Chairman MCHUGH. But in doing so Congress says if you decide to proceed with this covert operation or any covert operation, you have to tell us about it.

Mr. SHULTZ. I don't have any problem but covert action can be secret negotiations without spending money.

Chairman MCHUGH. What is constitutionally wrong with that.

Mr. SHULTZ. I don't have any problem with your position.

Chairman MCHUGH. That is all we are talking about.

Mr. SHULTZ. No, I think the 48 hours limits the President's ability which evolves out of the Constitution to act with dispatch in serious situations.

Chairman MCHUGH. I won't beat a dead horse, but I have difficulty with that. If Congress has the authority to totally prohibit a covert operation such as the selling of arms to Iran or providing military assistance to the contras, it seems to me that requiring notice is somewhat less intrusive constitutionally and practically and therefore——

Mr. SHULTZ. I am not defending Iran, okay?

Chairman MCHUGH. I understand.

Mr. SHULTZ. I say that in the testimony. I don't think that what the President did in the case of Iran fits within the language as it currently exists. So I don't want to defend that.

What I want to say is that constitutionally the President has foreign policy power and there are situations in which he will have to act with dispatch and with secrecy, and that the 48 hours infringes upon his flexibility. By the same token——

Chairman MCHUGH. Why? Can you explain to me why that is true? You indicated in your testimony that somehow by requiring the President to notify Congress within 48 hours after he has begun a covert operation we preclude the President in certain cases from acting. I don't understand that. Why do we preclude him from acting?

All we are asking him to do is tell the intelligence committees or in certain limited cases the Gang of Eight. Why do we preclude him from acting?

Mr. SHULTZ. I think in most instances, probably clearly the majority, Congress should be notified. However, I want to allow a degree of flexibility for the President if there are situations where he and his counsel are convinced that they have to compartment an operation. In other words, I am saying that in almost all instances they should come and notify you and even in extraordinary instances, they should notify what you refer to as the Gang of Eight.

Chairman MCHUGH. Okay. I can appreciate that.

Mr. SHULTZ. Then I want to allow a bit of flexibility so that if there are situations that require tight operational security, that the President can act.

Now, I don't disagree completely with what Mr. Halperin says because I do believe you have an oversight authority. Still, I want to leave the President more flexibility. I think 48 hours does not.

Chairman MCHUGH. Here is our problem, and I think perhaps we are narrowing our differences. I think the intent of the bill, and Mr. Stokes can speak to this more directly than I, is to give the

President that bit of flexibility and what you are suggesting is maybe 48 hours is too rigid.

Mr. SHULTZ. I am saying——

Chairman MCHUGH. But our problem, Dr. Shultz, is that under existing law the only requirement is that the President give notice in a timely fashion in these limited cases, and here we have an Administration that interprets timely notice as no notice.

Mr. SHULTZ. Well——

Chairman MCHUGH. Or at least from the signing of the authorization in January of 1986 until we learned of it from a Middle Eastern magazine in November, we received no notice. In a situation like that the system is not operating because, as Dr. Halperin says, there is a fundamental disagreement about what timely notice means. What are we to do? Are we to leave the law as it is, which I think is your suggestion?

In that event we are subject to the same type of "liberal interpretation".

Mr. SHULTZ. You have to rethink what constitutes a "timely fashion." Should the President have notified Congress when he began secret negotiations or is that within his authority to do so without notification? I think it is. When he decided to sell arms to Iran I probably would have notified the gang of eight, but there was a time gap of more than 48 hours between when the Administration decided to explore an opening to Iran and when it was realized that in order to do business with Iran, the currency to carry this forward was going to be the sale of arms.

So that is where I want to allow for some Presidential flexibility, and by the same token the case of Nicaragua, which Mr. Halperin referred to, likewise quite complicated. On the one hand, Congress clearly said in legislation that the President could not provide funds to the contras. But the President can still have a foreign policy that supports the contras. He can carry that out short of providing funds or arms. The Congressional restriction did not mean that a friendly nation with the U.S. might not undertake that kind of activity with our encouragement.

So you see, it gets a bit slippery there. You are right, you have a hammer lock on the President in terms of funds, but does he have foreign policy flexibility to still support the contras? I think so. So that is where it gets tricky in my estimation.

Chairman MCHUGH. Thank you very much.

Mr. Livingston.

Mr. LIVINGSTON. Thank you, Mr. Chairman.

Dr. Halperin, I want to thank you for your presentation, a very thoughtful and well presented one. I just happen to disagree with you. Let me give you some thoughts in response.

I don't think I have heard any constitutional arguments against your position. I think that in essence if you are talking about covert action and I know your position is as you well stated it there, you stated in the past you are against covert action. I question the wisdom of that position from the point of view of a democracy in a hostile world.

I would like to think that if we unilaterally restrained ourselves from covert actions that the rest of the world would as well, but that doesn't seem to prove true.

I know we just simply disagree there. There is no need to comment on that.

You said that it is an extraordinary charge against the Congress to say that the Congress cannot keep a secret. Perhaps you were personalizing that to the eight individuals, the Big Eight. But in fact, last week Mr. Hyde elaborated at length on how the Congress has in many, many instances failed to keep a secret, and one circumstance that comes to my mind was in fact the, just before an advance of the Libyan raid when the President did consult with just a very few Members of Congress, Sam Donaldson got on the air about a half hour before the raid and announced that there was about to be a great big action against Libya.

Very shortly that edge.

That happens. It is unfortunate. But I think that we have to recognize that Congress often becomes a sieve and is incapable of keeping state secrets, so when you engage in these types of activities, it is indeed important to keep them as tightly knit as possible.

But really, I want to reserve that and just go on to the final argument. The Chairman has said what are we to do when in the Iranian situation, for example, the Administration failed to adhere to current law. Well, my feeling is as I indicated in my previous remarks, that currently is sufficient, that the Administration was in error, Professor Shultz has taken that position, all the witnesses last week took that position, that the Administration perhaps did not comply to the full extent of existing law.

So what are we to do? Are we to all of a sudden react to that malfeasance to use the word, and it may be improper but are we to react to that act by the Administration with a provision that ties the hands of the Commander-in-Chief and prohibits him and in fact, or in de facto, forces him to comply with your initial position against covert action?

Are you not just binding the President of the United States, whoever he may well be in the future, to just abandon covert action altogether and before you answer that, let me simply say that I know the ACLU is against capital punishment.

You are against capital punishment because you believe the laws on the books against murder are sufficient for society to protect itself against murderers. Let me simply say to you that are you now reversing that and saying that you are coming down on the President of the United States even though the laws on the books are sufficient to take care of the activity that you are concerned about?

Mr. HALPERIN. We have been accused of a lot of inconsistencies, but that is a new one. Let me try to absorb that as I comment.

First on the question of whether information sometimes leaks from the Congress. Sure that is true. But information also leaks from the Executive Branch of the government, and I would argue much more often. I think most people who have looked at it conclude that this government leaks mostly from the top of the Executive Branch.

So I think that that is not a basis for suggesting that consultation is inappropriate.

I find it hard to believe that leaks of genuine secrets will occur any more often, indeed I would argue much less often, from the

eight leaders of the Congress than from the dozens and dozens of bureaucrats and political appointees who get told about these operations even in the most limited kinds of situations.

But I also think the bill provides two other answers, it provides one answer in terms of the leadership rather than the two committees in extreme situations, and it provides an answer in saying you do not have to provide all the details. It recognizes I think, and properly so, that certain kinds of operational detail should not go to the Secretary of State and should not go to the committees because you are talking about directly and immediately placing lives in jeopardy.

I think in our system of government, that is the only proper response. Now, you say that this bill would tie the hands of the President in certain situations. I think it only ties the hands of the President if you believe that telling eight Members of Congress or two congressional committees prevents the covert operations from going forward. I would say that is simply not true. It is not true because in extreme situations like rescuing the Americans in Iran, I don't think anybody is going to leak those details and it is not true in other situations because even if the fact leaks, the covert operation does not stop.

Look at Nicaragua. It eventually did become public. It became public because the contras knew they were getting American aid and told the press about it. That is the way these things usually leak out. The people we are giving the money to brag in bars, in Honduras or wherever, that they are getting American support. Iranian arms merchants knew about this thing, the Soviet Union and lots of other people listen to their phone conversations. That is the way these things leak out, not by a senior Member of the Congress or member of this committee making it public.

You cannot keep secret large-scale, ongoing covert operations of the Nicaraguan kind or Iranian kind. Therefore, it is not true that requiring the reporting ties the President's hands. Moreover, the current statute requires reporting except in extraordinary circumstances, and reaches the judgment that that is a proper balance that Congress should be informed in advance of those operations.

Now, the problem with the present law is that it is not simply the Administration's view casually made during the crisis that it need not report in advance. The committee was given, and I assume has in its record, an analysis by the Department of Justice written after the crisis essentially, saying that timely means "never" essentially, saying there was nothing wrong with what the President did, that the Justice Department interpretation of the statute is that timely notice is a phrase of infinite flexibility and that it authorized the 20 months and more of no notice in the Iran situation.

Now you have to say to the Executive Branch that that is wrong and I think the only way to do it is to change the words of the statute in a way that reflects that difference. But if Congress simply reenacts the intelligence authorization leaving the language the way it is in the face of that Justice Department post facto explanation, then I think the President will tell you and the next President will tell you, you ratified it, you knew what we meant, you

didn't change the language and therefore, you accepted our interpretation.

Chairman McHUGH. Dr. Shultz.

Mr. SHULTZ. It seems to me that the objective here is not and should not be to punish this Administration. They are punished by their own actions. What has occurred to the Administration because they didn't follow the procedures is quite adequate. They are paying a very dear price. So we don't have to punish them, they have punished themselves.

Therefore, it would be my argument that to change the law in order to say to the Administration you guys went too far, I don't think that is necessary.

Public opinion is telling them that. The fact is that the Reagan Administration has suffered a tremendous political crisis. In my own opinion, I don't think they will be able to go very far forward with their agenda in what is remaining of the Administration.

Chairman McHUGH. We have a recorded vote now, and so I will recess the committee for approximately 5 or 6 minutes and when we resume, Mr. Stokes will have the floor.

[Recess.]

Chairman McHUGH. The Committee will resume its sitting.

At this point I call on Mr. Stokes.

Mr. STOKES. Thank you, Mr. Chairman.

Dr. Shultz, I noted that in your testimony a little while ago you said that you would have notified the Gang of Eight. Is that correct?

Mr. SHULTZ. I would have, yes.

Mr. STOKES. And I assume because that is what the law requires, is it not?

Mr. SHULTZ. I think you were getting into an area where if you are going to start clandestinely selling arms, and since the Congress has the budgetary authority, that you should generally follow the notification procedures.

Now, it may be, I know that the Administration would argue that in the initial stages of that they felt for secrecy reasons they should withhold notification. But I would disagree simply because I think that when you are moving millions of dollars worth of arms that it is not going to be a secret for very long, I would have notified when arms were transferred, that is correct.

Mr. STOKES. I notice also when Mr. Halperin testified, he indicated that he felt offended under these circumstances that the implication was that the Gang of Eight could not be trusted. Considering the fact that in this case the Iranians—we are talking about the Iranian situation—the Iranians were told what was going on, the Israelis were told what was going on, there were numerous other people in the White House who knew what was going on, does it offend you that the so-called Gang of Eight was not told?

Mr. SHULTZ. Well, I am not offended by this, but I would have notified you. I would argue that this is very controversial to sell guns to the Iranians, because of the prior history and there would have been strong opposition to that from both sides of the aisle. So, consultation would have been prudent politically.

I don't think opposition would have been just from the democratic side. And yet, while the Iranians knew about this and the Israe-

lis knew about this, the Administration still wanted this not to be a subject of public debate. I think it is because of the controversial nature of it, but also the need to maintain some veil over the operation.

I don't know that I would use the term "offended" by it. I think they should have notified Congress. I think they can probably come up with an argument for not doing it early on. I don't think their argument long-term is a defensible argument.

Mr. STOKES. Mr. Halperin, would you like to comment?

Mr. HALPERIN. I think the history is a little confused here. The issue of a finding arose because the CIA was asked to help with the first arms shipment of the Israelis. As you recall that was done without a finding. As I understand it, the CIA then insisted if it was going to be asked to help out again, there had to be a finding. So the finding that was made was made not during diplomatic negotiations, but it was made by the President at the time that the CIA was instructed to facilitate an arms transfer.

There were two other things at work here. One was there is another law that requires Congress to be notified of arms transfers and the only way the Administration could get around that was to say it was a covert operation within the meaning of the Intelligence Act, and therefore they had this argument which I think is false but nevertheless they tried to make, that they didn't have to notify under the Arms Transfer Act because it was a covert operation.

They couldn't have it both ways, saying it wasn't an arms transfer, but it also wasn't a covert operation. So it clearly was a covert operation from the moment the CIA got involved. There also was as we now know an explicit agreement between the Senate Intelligence Committee and Mr. Casey that the committee would be notified of arms transfers to countries with which we were not now trading arms.

That was violated as well in this situation.

Mr. STOKES. Dr. Shultz, on this question of timely notice, that is what the law presently or currently provides, is it not?

Mr. SHULTZ. That is correct.

Mr. STOKES. Nothing unconstitutional about that?

Mr. SHULTZ. No.

Mr. STOKES. Now the Stokes-Boland bill really does nothing except clarify what timely notice will be, doesn't it?

Mr. SHULTZ. Well, I think you clarify timely notice but I disagree with the time limit that you are putting on extraordinary situations. We realize, gentlemen, that we are talking about not the norm, we are talking about the exception and we have used rare exception to clarify that.

Now, timely fashion I agree can be tricky but I object to the 48 hours.

Mr. STOKES. What would you consider a timely notice?

Mr. SHULTZ. You know I tried to think about that because that is a tough call.

I guess we have to find a point between 48 hours and what the Administration did.

Mr. STOKES. And fourteen months.

Mr. SHULTZ. Fourteen months I am not here to defend, of course.

Mr. STOKES. I understand.
Mr. SHULTZ. But I see 48 hours as a straightjacket.
Mr. STOKES. Thank you, Mr. Chairman.
Chairman MCHUGH. Thank you, Mr. Stokes.
Mr. Shuster.
Mr. SHUSTER. Thank you very much, Mr. Chairman.

We certainly appreciate your testimony today. A couple weeks ago in this committee we had a top secret briefing on a Presidential finding to initiate covert activity against the communists in the Philippines.

The next week I picked up Newsweek magazine and read all about it, and perhaps because although I have been around this institution for 15 years I am a new member of this committee, I was stunned. And, of course, as you dig into it, you realize this is not the exception; this is the rule.

It raised the question in my mind—and, indeed, I would acknowledge Mr. Halperin's point that perhaps it was not this committee or the Senate committee that leaked that information or other information, perhaps it was the Administration. I doubt it, but who knows?

Doesn't this raise the vexing and very difficult question of shouldn't we address ways in which to keep top secret information secret and by that I mean a strengthening of our laws, of our criminal laws? What is your reaction to that?

Mr. HALPERIN. Well, I am not sure—I think criminal laws which apply to the press raise a number of other kinds of issues. I think criminal laws narrowly drawn which apply to Executive Branch officials are appropriate. Congress passed such a law relating to covert agents, the identities of covert agents. We objected to the part that applied to the public but not to the part of it that applied to government officials.

So I think the problem is to define a narrow class of information, one which does not affect public debate on a range of issues. But I would have to say that I do not think it will really solve this problem, because the leaks of information occur anonymously and they are very hard to track down. I think people think that even if the FBI investigates, it won't find out who did it. So I do not think it is a solution to the problem.

I think one of the solutions to the problem is to recognize that there are lots of things we try to keep secret that do not have to be kept secret. I think the case that you cite is a good example. The Philippines is an ally of the United States; there is an armed rebellion going on against that government. We have every right to help them deal with that rebellion and to do so openly.

Mr. SHUSTER. It is my understanding, however, that we not only did it with Mrs. Aquino's approval, but she considers it very embarrassing that this information came out.

Mr. SHULTZ. Correct.
Mr. SHUSTER. So whether we might think it is——
Mr. HALPERIN. It is something that——
Mr. SHUSTER. Let me finish. We may or may not think it will hurt our foreign policy. The fact that we have an ally who wanted us to keep a secret but we didn't, now that has had a chilling effect on other allies in future cases. So it is not simply a question of our

thinking that our country could withstand the exposure of this information, but it is the impact that it has on our friends around the word.

Mr. HALPERIN. But I think that is a constant tradeoff. Other countries are always telling us what their domestic systems require and I think we have a right to tell them what our system requires. I suspect she will take the aid, notwithstanding the leaks.

Mr. SHUSTER. Dr. Shultz.

Mr. SHULTZ. I think your point is very well taken. In the case of the Philippines there are very good reasons why such publicity is extremely dangerous for Mrs. Aquino. However, receiving covert CIA assistance from the United States to fight the insurgency is essential. So to make that a public policy means that most assuredly if she does take it—and she may well—she is putting herself in a very, very serious political situation in the Philippines vis-a-vis those people who want to bring down that government.

We have to take into consideration in our foreign policy not just our own domestic requirements but how to help friends who want help and yet cannot overtly take that assistance, and the Philippines is not the only example.

Mr. SHUSTER. Should we address the issue of strengthening our criminal laws? How far should we go? Should we have an official secrets act?

Mr. SHULTZ. I am not sure how far to go, but I think that if one leaks something like this that there should be accountability and maybe that would be a good subject to examine in terms of the work of this committee. We have looked at it some in the past, but maybe we ought to take a harder look. Some go so far as to say that maybe we need the equivalent of what the British have (the Official Secrets Act). I have not thought about that enough to take a position right now, but certainly it is worth seriously examining.

Mr. SHUSTER. Thank you.

Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Beilenson.

Mr. BEILENSON. Thank you, Mr. Chairman.

I am just thinking out loud. This is not directed to anybody at the moment, but we have the problem of leaks under the existing law, as I understand it. Our colleagues on the other side and Dr. Shultz, are not suggesting we repeal existing law; is that correct?

Mr. SHULTZ. That is correct.

Mr. BEILENSON. So leaks, to the extent they exist, are a problem and obviously they do cause a problem.

Mr. SHULTZ. Maybe it is one we should address.

Mr. BEILENSON. I understand, but the leak problem would not be any worse under the proposal by Mr. Stokes and Mr. Boland over what it is now?

Mr. SHULTZ. No.

Mr. BEILENSON. In response to my friend from Pennsylvania, I think it is Pennsylvania——

Mr. SHUSTER. Yes.

Mr. BEILENSON. I always get Pennsylvania and Ohio mixed up for some reason. Sorry.

With respect to strengthening criminal law, I think that the problem is that we apparently cannot find or do not find those who

do leak. There are existing strong laws that could be applied against such people right now, so I am not sure if we need to tighten those laws.

We need to be able to find out where the leaks occur and apply existing laws. If we found out that new laws are needed, that would be another matter.

I have a question to ask Mr. Halperin. Granted, as you did and as one must, that we are not talking about prohibiting covert activities here, but simply you are testifying with respect to the proposal by Mr. Stokes and Mr. Boland, just on that basis, on those limited grounds, I assume you are supportive of the bill.

Mr. HALPERIN. Right.

Mr. BEILENSON. Would you draft the bill differently from what it is now? Are there additions or subtractions that you think would make it better or more enforceable or do you have any specifics?

Mr. HALPERIN. We do have specific suggestions.

Mr. BEILENSON. In your testimony?

Mr. HALPERIN. They are, and I would like to submit them to the committee for the record.

Mr. BEILENSON. Okay.

Mr. HALPERIN. But I think you might want to——

Mr. BEILENSON. Were they in the material you submitted?

Mr. HALPERIN. They were materials we gave to the staff informally, not attached to my testimony.

Mr. BEILENSON. Can you testify now to us in any general way? You do not have to, but if you can, just in terms of—are you telling us you do have specific suggestions as to how you would amend this existing law in ways somewhat different from the bill before us?

Mr. HALPERIN. Yes, and I would be happy to give you that. I think you should, first of all, require that the President consult with the members of the National Security Council before he makes the finding. I think another way to substitute for public debate is to do basically what the National Security Act originally was intended to do which is to say to the President, consult with this senior group of advisers before you make major decisions.

Mr. BEILENSON. He may well have, just picking Iran, I suppose he may well have in some sense, at least on occasion.

Mr. HALPERIN. The history in the Tower Commission is that he inherited an Executive Order from the Carter Administration which required that consultation. He repealed it. He then issued a secret directive which required that consultation and then, the Tower Commission says, ignored that secret directive which was in effect at the time of the Iran operation. I think the testimony at least of the two Cabinet officers is that——

Mr. BEILENSON. But he could ignore your proposal then.

Mr. HALPERIN. But at least he would then be breaking the law. There is always a question of how far you can go.

Mr. BEILENSON. You wouldn't require that the NSC approve his finding?

Mr. HALPERIN. No, no. I think that would be unconstitutional.

I think I would strike all of the preamble section; the draft bill strikes only that part of the preamble section referring generally to the authorities of the President as Commander in Chief, but it leaves in the section that talks about due regard for the protection

from unauthorized disclosure of classified information. The fear I have is that the next Justice Department will write a memorandum saying that language is authority to withhold prior notice for the same reasons. I think you just ought to say clearly that you are requiring prior notice except in the circumstances specified in the other portion of the act.

Mr. BEILENSON. Okay.

Mr. HALPERIN. I have two other suggestions.

Mr. BEILENSON. Please go on.

Mr. HALPERIN. I think you might want to consider indicating explicitly that the statute does not require the provision of details about an operation that has been reported which relate to things which would directly and immediately place lives in jeopardy.

Mr. BEILENSON. I agree. I think we should have that in existing law, as I noted in our conversations with Admiral Turner last week.

Mr. HALPERIN. It is implicit in the law; but if there is a concern, I urge you to make it explicit.

Mr. BEILENSON. I think we have that concern and I do not think it is intended that we know those things. That is a good suggestion.

Mr. HALPERIN. I have two others. I think the committee ought to consider requiring under normal circumstances a 30-day delay between the Presidential finding and the initiation of the covert operation because if the purpose of the prior notice to the committee is to permit the committee to hold hearings and then to give advice to the President as to whether he ought to initiate the covert operation or not, I think, recognizing again that I would have an exception which said that unless the President found that to wait would jeopardize the operation or harm the operation.

Mr. BEILENSON. But that is another loophole. I understand your reasoning, but you start thinking immediately of situations where the President would feel the same way, would not wait. Then you will be arguing over the——

Mr. HALPERIN. I would let him do it and give you an explanation of why he was not waiting.

Mr. BEILENSON. When will he have to give the explanation? Forty-eight hours after?

Mr. HALPERIN. He would have to give you the notice right away.

Mr. BEILENSON. When?

Mr. HALPERIN. The prior notice would have to include a statement that said I am not waiting the 30 days for the following reason.

Mr. BEILENSON. Okay.

Mr. HALPERIN. I do not think it solves the problem, but it emphasizes that the purpose of prior notice is to permit the committees to advise the President before he starts rather than try to catch up with what he is doing. Those are the specific changes. I also think having reviewed the testimony from the last time and from this discussion that there is some reason to think that this thing is written in very convoluted language because it attempted to meld together the old Hughes-Ryan amendment with new language. There is some reason to think it is worth starting over and trying to say what the requirements are in simple sentences that follow each other rather than with exceptions to the exceptions, and to

lay out much more clearly what is required about covert operations and distinguish that from the requirement of fully and currently informed and notifying about other significant anticipated activities.

Mr. BEILENSON. I find the same problem. You have to keep going one to the other to get it.

Mr. HALPERIN. You have to juggle them all around. We will try our hand at that and submit it for the record.

Mr. BEILENSON. Thank you, Mr. Chairman.

Chairman MCHUGH. Thank you.

Mr. Lungren.

Mr. LUNGREN. Thank you, Mr. Chairman.

Mr. Halperin, I am concerned, you know, in the past and in the future that a President might not get the information to the Congress that Congress deems is necessary, but I am also concerned on the other side, as has been mentioned here, by revealing things that were covert to the detriment of the United States.

So I can understand where you are coming from and understand why we may have some differences in application here.

Is it an overstatement for me to say that judging from your articles and your statement here that you do not believe in the necessity for covert operations?

Mr. HALPERIN. Yes, I think I started my testimony by——

Mr. LUNGREN. But I——

Mr. HALPERIN. My view is that the conduct of covert operations, which I distinguish from counterintelligence operations and intelligence collection operations, are incompatible with the kind of democratic society that we have and not necessary to defend the security interests of the country.

Mr. LUNGREN. I can understand if I had that position why I would not be concerned about the problem of leaks of covert operations because, in fact, I would think it would be a good thing, frankly, from wherever they came.

But if you could assume for the moment that it is important for us to——

Mr. HALPERIN. I have tried to do that in all my testimony.

Mr. LUNGREN [continuing]. Engage in covert operations, what is the alternative to the present situation if you superimpose this law on it? What do we do if there are leaks intentionally taken by Members of Congress? Are we to say that is just the price you pay, because unless I am mistaken, virtually no criminal law with respect to an Executive Branch leaker would cover Congress.

Mr. HALPERIN. Yes.

Mr. LUNGREN. But I would suggest you have constitutional problems if a Congressman or Congresswoman would leak it in furtherance of his or her responsibilities here as he or she saw them.

Mr. HALPERIN. I agree. These things were debated in great detail at the time the two intelligence committees were set up. I do not remember whether you were involved in that process.

Mr. LUNGREN. No, I was not, but——

Mr. HALPERIN. Let me remind you of the answers in there because I think they are the right answers. There was a lot of discussion about this, and the answer was judged to be that Congress, in requiring the Executive Branch to give this information to the two

committees, had an obligation to see to it that the committees did not leak the information. A procedure was set in place which I read in the papers now is being followed in the Senate with regard to some statements that the former chairman of that committee made; namely, the Ethics Committees of the two Houses were given special responsibilities and obligations to investigate any allegations of leaked information and to recommend to the house the appropriate punishment for that.

Mr. LUNGREN. Are you aware of any actions finalized, taken against anyone in the Congress for leaking secrets of the United States?

Mr. HALPERIN. No, but I think the committees have been derelict in their duties in a variety of ways, in oversight, and I think in that way too; but the Congress has an obligation to police itself and the appropriate way to do that is through that mechanism. And if it needs tightening up in certain ways, we would not see any objection to that tightening up.

The other things the legislation establishing the two committees did is to establish a procedure for Congress to make public information that it gets from the Executive Branch that a Member thinks ought to be made public. So if a member of this committee is informed in a secret briefing or something that he or she thinks ought to be public and not secret, there is a specific procedure in the rules of this committee and of the Senate to make that public.

I think a Member who has something that he or she thinks ought to be made public has an obligation to follow those rules and to seek through the procedures of the Congress to have the committee and the Congress authorize the release of that information. So I am not at all suggesting that any Member who has anything either has a right to get up on the Floor and release it or to leak it to the press. I think that insofar as there are instances of violations of those rules that the Congress has an obligation to take steps to discipline its own Members and fire its own staffs.

Mr. LUNGREN. I think it should, I think it does, but I wonder if we have an ability to do that. The speech and debate clause of the Constitution, I think, limits a lot of what we can do in terms of real sanctions against a Member of Congress. I suppose you could throw a Member of Congress out for leaking information, but I wonder if the speech and debate clause would come into place in those circumstances. I wonder if we are between the proverbial rock and a hard place. Is it more like a reporter gets it, then once the reporter gets the information you are constitutionally barred in many ways from going after that reporter, you have to go back and find out the source of the information; and, of course, you cannot compel the reporter to tell you. So it sounds like you can protect yourself; but once the passage of information takes place, it is virtually impossible.

Do you have a similar situation here in which to the extent the information is given to Congress you do not have any real constitutional ability to either restrict the dispersal of that information or to judge and then sanction anybody that does it.

If that is the case—and I sense that may be the case—I think we have to take much more seriously the problem of requiring a President even under the most extreme circumstances to give that infor-

mation to the Congress, as much as I want Congress to have that information.

Mr. HALPERIN. Let me say I think the hard problem is finding out who leaked it. In the Executive Branch you can certainly punish people that leak information. We do not argue with you, and I do not think anybody else has, that the President can't do that. The problem is to find out who, whether it is from the Congress or the Executive Branch. But I do not think it is true about the Congress. I think notwithstanding the speech and debate clause that Congress can make its own rules about the right of Members to have access to and to release classified information which the Congress gets in confidence from the Executive Branch of the government.

Those rules first appeared in the Senate Resolution 400; they were carefully discussed and debated at that time. I think they are constitutional. I think the Congress can say to a Member if you want to get information that we get in confidence you have to agree not to disclose it. Many Members of Congress do not want to see that information, do not look at the classified report of this committee; their position is they want to be free to scout around, anything they learn on their own they will get up on the Floor and say. I do not think you can stop that.

But I think you can say to a Member if you want to look at a classified document, you have to agree to abide by the rules of the Congress as to the procedure that we have for making our judgment. I do not think the President can keep you from releasing it, and these rules do not permit that. But I think the House of Representatives can say to its own Members, we will discipline you if you choose to get access to what we are keeping secret and then release it to the public.

I would urge you to look at those rules and urge this committee and the Ethics Committee to be more vigorous in enforcement.

Mr. LUNGREN. I just noticed that you indicated in one of your proposals that we require the President to consult with his National Security Council before he finalizes his decision and someone suggested that that may be already required now under Executive Order. You say but he can ignore it. At least he would then he breaking the law.

I am not sure what that proves. I am not sure that we should be trying to put a President into a box so that he breaks the law on the one hand when it is so difficult for us to say, Members of Congress, you are not to break the law and if you do, some consequences will follow.

Thank you, Mr. Chairman.

Chairman MCHUGH. Thank you.

Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

It seems to me we have insufficiently discussed the real world today and many of these covert operations involve third country cooperation and third country participation. It may well be that these third countries do not want to cooperate or participate if their nationals, their agents are not going to be protected. They may feel a little queasy about knowing that our law requires the disclosure within 48 hours, at least to eight people, at least to eight

people, especially in view of the comments made publicly by the former chairman of the other body's Intelligence Committee which is now currently under investigation by the Ethics Committee over there. Because we are not talking about political advantage; we are talking about lives, people's lives are at stake.

And to hogtie an executive to a 48-hour period or 62 hours or four days and 22 minutes is utterly unrealistic. The timely fashion we concede was violated in the Iranian thing and Professor Shultz so well said the Administration is paying a very heavy price for that. I wish they had consulted with at least the gang of eight. But it would seem to me a much more effective measure would be the length of time during which the risk is so high that disclosure would jeopardize the success of the operation and jeopardize people's lives, whether they are hostages or cooperating agents in another country or our own agents.

Last week I brandished the book by William Colby, "Honorable Men," former director of the CIA. This week I have "Secrecy in Democracy" by another former director, Stanfield Turner, and he said:

> In my confirmation hearings I had declined to agree to advance notification. Three years after I was glad I had. The CIA was called on to provide covert support for an operation by another branch of the government. Secrecy was vital to the entire mission. Because the CIA support was technically a covert action, not intelligence collection, we were required to report it to the Congress. Had we done so before the operation, it would have been the only way the Congress found out that the operation was being planned. It probably could not have been kept secret.
>
> The argument can be made that the Congress should be informed of any operations undertaken by the Executive Branch. In fact, the Congress has attempted to insure through the War Powers Act of 1973 that it is informed of military operations, but inadvertent informing of Congress through reporting on covert actions is not the way to accomplish such a purpose.
>
> Accordingly, I strongly opposed a move by the Senate Committee on Intelligence to insert in the Intelligence Oversight Act of 1980 a requirement for prior notification of all covert actions. Another reason I opposed prior notification was that I felt it unreasonable to ask a person to risk his life and then tell him I was going to notify some 30 Congressmen and their staffs about what he was going to do.
>
> If the Congress someday does legislate prior notification—I know he is talking about prior notification, but within 48 hours has the same disability in my judgment—the Congress someday does legislate prior notification, the CIA may cease some useful covert activities for fear of premature disclosure or it may just back away from risky covert actions altogether to avoid the danger of arousing the Congress again. In either case, the country loses.

Now, I know Mr. Halperin opposed covert action. As a matter of fact, Mr. Halperin goes even further than that, just quoting from your testimony, December 5, 1975 before the Church Committee, I believe, you said, "I believe that the United States should no longer maintain a career service for the purpose of conducting covert operations and covert intelligence collection by human means. I believe also that the United States should eschew as a matter of national policy the conduct of covert operations."

So you do not believe, do you, Mr. Halperin, we even should have a capability of collecting intelligence covertly? That was your position then.

Mr. HALPERIN. That was my position then. That is not my position now.

Mr. HYDE. You have changed your mind since then?

Mr. HALPERIN. Yes, sir. I think we are all open to changing our minds.

Mr. HYDE. I hope so. I sure hope so.

Mr. HALPERIN. I hope that is true on the other side of this table as well.

Mr. HYDE. Well, we labor manfully, but we have less to work with than you do, you understand.

Mr. HALPERIN. Right.

Mr. HYDE. Ideology kinds of bends reality sometimes, and that is on both sides of this, I am sure.

Anyway, now we can have a career service, but we should not exercise it because you are against all covert actions.

Mr. HALPERIN. I am against covert operations. I think the statements there on clandestine collection are ones that I would no longer subscribe to.

Mr. HYDE. You are a great believer that Congress does not leak, but it comes from the Executive.

Mr. HALPERIN. More often.

Mr. HYDE. I believe that—on percentage-wise, how would you do that? Sixty-forty?

Mr. HALPERIN. Seventy-thirty, eighty-twenty.

Mr. HYDE. Ninety-ten?

Mr. HALPERIN. You are getting it about right.

Mr. HYDE. I have a different view. I think Congressmen live and die on publicity and, boy, they like to stroke the press and, boy, the press knows who to stroke; and the way you become loved and beloved is by being a good source and we all have the press beseiging us daily for information, especially with this Iranian thing going, just for background, you know, without attribution, just to confirm what I have heard from somebody else.

Then we have the Leo Ryan syndrome, I would call it, the late Leo Ryan who told Daniel Schorr, which Schorr reprinted—you remember Daniel Schorr, he got the report from the Pike Committee, the secret report and had a little problem with that. And he says here, a member of that committee told me in an interview at the time that he could condone such a leak if it was the only way to block an ill-conceived operation. So if a Member abrogates to himself that power to say this is an ill-conceived operation and, oh boy, are we polarized with a Republican President and a Democratic Congress, why don't we just legislate it and that way we answer to higher law?

That is what scares intelligence people whose lives are on the line in these things and in the world of terrorism, in the world of proliferating spies, and the Marines and the Navy, in the CIA, in the FBI, not the ACLU, but these other organizations.

Mr. HALPERIN. Right.

Mr. HYDE. So it just seems to me that we should back up and take a little more realistic view of this whole issue, especially when our own committee, our own committee says in the black book they have given us that the only time the Oversight Act has not been implemented was the January 17, 1986 Iran finding. As far as we know, all covert actions carried out since 1980, again with the exception of the 3 January 1986 arms transfer activity with Iran, have been the subject of findings.

As far as we know since enactment of the Oversight Act, the committees have been given notice prior to the implementation of all findings. So, you know, we have got one incident that was a major gaff, I concede that, and I think the price is being paid. But if it really is not broken, I do not know why we have to try to fix it because I think we are going to screw it up.

Mr. HALPERIN. I would like to comment on that. First of all, let me say that at least when I was a bureaucrat, which was some time ago, we were stroked by the press in the same way and asked for things on background. I suspect it still goes on; that it is not only the Congress that is visited regularly by the press and asked to provide information.

Mr. HYDE. You did not have to be elected like we are. You see, publicity, we want our names in the paper. You did have a passion for anonymity, as I recall——

Mr. HALPERIN. But a desire to get our policies through which sometimes requires seeing them in the press as well.

Mr. HYDE. A leak here and there.

Mr. HALPERIN. Which I never did.

Mr. HYDE. Heavens forbid, I am sure you never did nor have you been the recipient of leaked information. I would wager my life on it.

Mr. HALPERIN. I would turn it away.

Mr. HYDE. Yes, turn the other cheek.

Mr. HALPERIN. But I do want to say on the—I think that there is operational detail for which that argument is right. We now know what Admiral Turner was talking about; the CIA wouldn't let him reveal either, but they have since let him describe it and we know it did for the committee. It was things it did to lead to the Iranian rescue mission. I think, as I said, perhaps before you came in, I think that kind of detail should be withheld. What I suggest as the way to deal with that problem is to have a Presidential finding that the CIA assist in rescuing the hostages from Iran and then for it to be understood between the committee and the CIA and the President that this kind of operational detail in that situation need not be provided. I see nothing in the statute that provides or that requires that operational detail, but I think given that this concern is raised it would be appropriate to make that clear in the legislation, that that kind of detail which does place lives of agents directly and immediately in jeopardy is not the kind of information that the committee needs.

Now, to say that the system does not have to be clarified because it was only one exception to it—it was a very large exception. Moreover, it has stimulated the Justice Department to write a memorandum saying it was right. If you have not looked at the December 17, 1986 memorandum, Mr. Hyde, from Office of the Legal Counsel of the Department of Justice, I urge you to look at it. The problem is that having done that one operation, having done a legal memorandum that says it was consistent with the law, if Congress does not do anything, this Administration and the next will believe that that is the correct interpretation, and I think you will have more exceptions to the rule than now.

Mr. HYDE. I have that and I think an argument can be made, a legal argument can be made that the law was not broken. I prefer

to make my position on one of policy; I think certainly the spirit of the law was broken.

Mr. HALPERIN. I agree with that.

Mr. HYDE. But I think it was politically inept and harmful.

Mr. HALPERIN. It is precisely that a legal argument can be made a law was not broken and because everybody understands the intent of the law was broken that I think the law ought to be clarified so that legal argument cannot be allowed to stand.

Mr. HYDE. You are for nailing it down to 48 hours then?

Mr. HALPERIN. I do not know that I would bleed and die for 48 hours, but I think——

Mr. HYDE. Somebody is going to have to because that is in the bill and we have not heard anybody yet who wants to bleed and die for 48 hours.

Mr. HALPERIN. I would give you 50.

Mr. HYDE. All right.

Mr. HALPERIN. I would bleed and die for 50 hours.

Mr. HYDE. Okay.

Chairman MCHUGH. Thank you, Mr. Hyde.

Mr. Stokes.

Mr. STOKES. Thank you, Mr. Chairman.

I just would take a moment to make a statement. Both this morning and at last week's hearing the question has been raised with reference to a matter which appeared in Newsweek magazine, and the inference that was permitted was that that information was information which had been given to this committee and had been leaked. As chairman of the full Intelligence Committee, I want to make it patently clear on the record that no one has come to me with any evidence that this committee or any member of this committee or its staff has leaked any information. I think it is incumbent upon any member of this committee that does have any such information to bring it to my attention as chairman of the full committee. In compliance with the statement made by the Speaker of the House at last week's hearing in which he said that at any time such evidence is brought to his attention, he would remove such a person from this committee. I would bring it to his attention for that purpose.

Chairman MCHUGH. Thank you, Mr. Stokes.

I would like to express on behalf of the entire subcommittee our appreciation to you, Dr. Shultz, and to Dr. Halperin for your contributions this morning. We appreciate it very much.

Our next two witnesses will testify in a panel, and they, like our prior witnesses, are very distinguished gentlemen with experience in this area and we appreciate their being with us today. The first is Mr. Lloyd Cutler, who is a founding partner of the law firm of Wilmer, Cutler and Pickering, and during 1979 and 1980 was counsel to the President of the United States, Jimmy Carter. In that latter role, Mr. Cutler conducted the majority of negotiations leading to the 1980 Oversight Act about which we are concerned this morning.

Our second panelist will be Mr. Bill Miller, who has an extensive background in foreign affairs issues generally and in Congress' role in the area, in particular. He was an officer in the Foreign Service from 1959 to 1967, with service in Iran and as a special assistant to

the Secretary of State, Dean Rusk. From 1967 to 1972 he served on the staff of John Sherman Cooper and was staff director, in order, of the Senate Select Committee on Presidential Powers and Emergency Powers, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, and the Senate Select Committee on Intelligence. He is a former associate dean at the Fletcher School of Law and Diplomacy, Tufts University, and is now president of the American Committee on U.S.-Soviet Relations.

We appreciate both of you gentlemen being with us. I wonder if we might start with Mr. Cutler.

STATEMENTS OF LLOYD CUTLER, ESQ., WILMER, CUTLER & PICKERING, FORMER COUNSEL TO THE PRESIDENT; AND WILLIAM G. MILLER, PRESIDENT, AMERICAN COMMITTEE ON UNITED STATES-SOVIET RELATIONS

STATEMENT OF LLOYD CUTLER

Mr. CUTLER. Thank you, Mr. Chairman.

I should first give my own background and confess my biases. I think you would have to look on me as more of a Presidential person than a congressional person, although on most of the issues before you now I do come down on the side of Congress.

But I was in the intelligence business, as it is called, as a very young man during World War II, and I helped to draft the report of the so-called Brownell Committee in 1950 that came in after the invasion of South Korea to see what we had missed in communications intelligence which was a business I had once been engaged in. That was the committee that led to the creation of NSA and the establishment of the responsibilities of the Director of Central Intelligence as, in effect, the chairman of the board of all the intelligence activities of the government.

It is some commentary on what has happened to us between 1950 and the present time that the Brownell Committee, which was not Herbert Brownell but a General George Brownell, a distinguished New York lawyer, came into existence and worked for six months, made recommendations and went out of business and nobody even knew it was there.

Its recommendations, most of them, were adopted. That, of course, could not possibly happen now that the intelligence business is a shared activity. We read about it every night or hear about it on the evening news.

I also took part in some of the decision making relating to the Iran rescue mission, in particular whether or not there was a duty to consult Congress, and I worked along with some other members of the Legal Counsel's Office with Bill Miller on the drafting of the 1980 amendments to the intelligence statute.

I have sent to Mr. O'Neil at his request my detailed comments on the bill. I gather those have been made part of your record. I won't go into those now, but I would say on the issue you have just been discussing I certainly agree that Congress has the right and the duty to exercise an oversight function in the intelligence area and that the key to exercising an oversight function is to know at least at some stage of the game what is going on.

Congress also, however, has a duty that goes along with this power of oversight to keep intelligence secrets when it is necessary to do so. I do not mean to suggest that Congress has been deficient in carrying out that duty. It is always hard to know when leaks happen where they came from, but there is no question that leaking has become a very, very serious problem and that the fact of leaking inhibits Presidents and those who conduct intelligence activities in being as forthcoming as they might otherwise be if they had some assurance that what they imparted to a congressional committee would remain right there except in the rare case where Congress collectively felt some need to go public.

I myself do not think Congress has done enough on that subject. I defer to Bill Miller who knows it much better than I do, but there are weapons available to the Congress such as SNEP type contracts, such as the selection power, the consequence that can be imposed on right to serve on one of the intelligence committees, such as greater discipline on members of congressional staff of the kind that is imposed on the Executive Branch and I do not mean to suggest polygraphs or anything of that type.

I do think Congress could probably do more to reduce leaking or at least build a confidence, greater confidence on the Executive Branch side and intelligence agency side that leaking is unlikely to occur than it has done.

Having said that though I think the system that was worked out in the 1980 statute is a very sensible system. I also think it was not only the spirit, but that the letter of it was breached in the Iran/Contra affair. I am not myself an advocate of a 48-hour no ifs and/or buts notice, but I do think timely fashion was twisted in a way that is inexcusable, that there is no way that an 11-month period or 14 months or whatever it was could be regarded as a timely manner, and we all know that intent was not even to inform then but for the fact that the story leaked somewhere else. The intent may well have been never to inform.

I think that, one, it is a very difficult problem to decide how to correct for that. Part of it, of course, is trust. I have read what Senator Moynihan has said and written in his testimony before you. I think it is fair to say that there was a breach of trust by the director of the CIA and his people, a violation of his own agreement—I am going back to more like the mining and the whole business of the support of the Contras at a time when Congress had decided against congressional appropriations for that purpose.

That now poisons this entire atmosphere. I hope that will end with the appointment of Bill Webster and that trust will be rebuilt and that is far more important than any words that you can put into the statute.

I do think though that you should do something about the timely notice requirement, either put in a deadline and as far as I am concerned I see nothing wrong with a deadline of even three months or six months if it is as soon as feasible, but in no event later than a deadline that would be sufficient to cover most operations.

Another alternative might be to impose on the President—and I do not think it can really go any lower—a duty to notify you when he has initiated a special intelligence activity but has not informed you about it. If he simply said to you, if he was required to say to

you I have initiated an activity which for the highest reasons of state or protection of sources or dealings with foreign powers or whatever I cannot tell you about now, at least then you would be alert and every time the director of the agency came back to see you, as he must, you could say when are you going to tell us about that particular activity.

Something like that might be a better remedy than a flat time period, particularly a 48-hour period. I also think that it would be better not to take out the preamble clauses that reserve both to the President and the Congress their respective constitutional responsibilities. Taking it out does not change the fact that there are such responsibilities. Leaving it in and leaving to the President and, of course, to yourselves the right to depart from the letter of the statute in particular cases, it seems to me, is a sound process. Since they are not criminal statutes, and, of course, they are carefully crafted allocations of this shared power to manage foreign affairs and provide for the security of the country, if the President were to take the position that because of a particular constitutional responsibility in a particular case I am not required to give you the notice, I think he should be left with that. He bears a heavy burden of proving if the facts as we all know in the modern world will come out sooner or later, in any event, and he would then have to defend himself to the public and to you for not having given the notice that was required in the statute.

I would also suggest you consider—it may not be necessary—but if you feel that trust that you want to place and inevitably must place in the end on those who are conducting intelligence activities is being abused, if you think it is ever repeatedly being abused, you should take more seriously both your impeachment responsibilities and also the possibility which was a suggestion made by Mr. Madison in the very first Congress, that you should consider changing the term of the director so that it is not simply indefinitely at the will of the President but so that it is at the will of the President but for not more than so many years after which he would have to be nominated again and you would have another chance to go over his record and refuse to confirm him, even though you were not ready to impeach, if you felt he had committed and not corrected a very serious breach of trust. That is what Mr. Madison proposed for the Comptroller of the Treasury back in the first Congress who was going to keep the accounts of the government.

My own view is that would be constitutional. It may not be necessary at the moment, and I personally have the utmost faith based on 30 years of personal friendship and acquaintance with Judge Webster, and it may be that it is something to just keep in mind if at some future time your trust is violated again.

Chairman McHugh. Thank you, Mr. Cutler, very much.

Mr. Miller.

STATEMENT OF WILLIAM G. MILLER

Mr. Miller. Thank you, Mr. Chairman.

It is an honor to be asked to testify before this subcommittee. I have been asked to focus on oversight matters that I directly experienced during the period that I served as staff director of the

Senate Intelligence Committee. As staff director of both the investigative phase and the later oversight mode from 1975 to 1981, I served under five chairmen. I was directly involved in negotiations leading to oversight guidelines under Executive Order—and I worked with Lloyd Cuter on these things—agency regulation as well as the statute passed in 1980 known as the Intelligence Oversight Act of 1980, which modified the so-called Hughes-Ryan amendment and added a new section to the National Security Act of 1947.

I have served in both the Legislative and Executive Branches, first as a Foreign Service officer and, later, as a Senate staff aide working on foreign policy and national security issues during seven Administrations of both parties. I know how difficult it has been for the legislature to find an effective and constitutionally sound balance between the competing requirements of the Executive and Legislative Branches in the area of secret national security activities.

I do not have to remind this committee that secret activities are among our country's most difficult problems of governance. In a time when we are all worried about the loss of secrets through traitors, espionage and spy wars, we find ourselves in the curious legal situation of not yet having clearly defined statutes which allow us to determine what should be classified as secret. We do not have a classification system defined by law. We have some espionage laws—some few areas of protected information such as communications intelligence and the names of agents. At the other end of the balancing question, we do have Freedom of Information statutes, which under certain limited and controlled circumstances, release to the public information judged upon review to be no longer sensitive.

From a legal point of view and from the perspective of those in government who must plan, decide, undertake, oversee or evaluate "secret activities," the very foundations are shifting and uncertain. Perhaps the ebbs and flows of perceptions of danger to our country's national security are so great and so devoid of consistent pattern that statutes which cover most circumstances cannot be written. I know these are issues which this committee and others in the Congress have to grapple with continually. But they are, nonetheless, issues that remain unresolved and underlie some, if not all, of the difficulties you have experienced in trying to exercise effective, constitutionally appropriate oversight of intelligence activities.

In a fundamental way, the Oversight Act of 1980, and the amendments you are now considering in H.R. 1013 are a part of the pattern of statutory efforts to build a sound system within our constitutional framework of divided powers and shared responsibilities, for the governance of what we have called secret activities. They represent what some constitutional scholars call "framework legislation," that is, they are attempts to establish through statutes agreed-upon processes and to use those legislative procedures to create a constitutional balance between the coordinate branches of government.

The key to controlling secret activities, the requirement for the governance and control of secret power—and this is the practical issue for oversight committee—is in the first instance an awareness

of the activity. There is no possibility of policy discussion, consultation, approval or limitation, unless the activity proposed is made known. The guts of the oversight process contained in the Intelligence Oversight Act of 1980 concerns three principal factors: first, what information shall be transmitted; second, who in the Congress shall be informed; and, third, when the proper parties should be made aware of the covert plans. The 1980 statute is a conscious attempt to prescribe the obligations of the Executive and Legislative Branches with regard to knowledge about secret activities which, in the language of the act, "are the responsibility of, are engaged in, or are carried out for or on behalf of any department, agency, entity of the United States." That clause captures the whole bag of secret activities.

Information about secret intelligence activities to be reported to Congress was intended to be all inclusive—not selective or in on respect exclusive—whether these activities were conducted by the CIA, the White House, or some ad hoc basement group. According to the statute the activities were to be reported whether they were performed by employees of the government directly or indirectly, or by other governments, directly or indirectly on our behalf, or by private individuals or groups.

So this law was intended to cover liaison arrangements with other governments, private activities, including any knowledge our government may have of these activities; it was all to be made known to the Congress.

It should be emphasized again that the drafting of the Intelligence Oversight Act of 1980 was a joint effort by the Legislative and Executive Branches. This statute could not have been passed any other way. This legislative attempt to arrive at a consensus between the two branches was a conscious, agreed upon process, carried out over five years with the approval of two Presidents (one from each party), a succession of Secretaries of State, Defense, Directors of the CIA, DIA, NSA, FBI, the leadership of both Houses of Congress as well as a broad spectrum of Congressmen and Senators. The introduction of statutes governing oversight was deferred by agreement until there had been considerable interaction between the Oversight Committees that had been formed in 1976–1977 and the Executive Branch and a trial run in a series of Executive Orders, promulgated by Administrations of both parties. These Executive Orders were jointly drafted by the appropriate Members and staff of both branches of the Congress and the White House. I led the staff drafting on the Senate side over that five year period. Without such a joint process, and a reasonable period of testing and experimentation, it was the shared view or the leaders of both branches that a statute on so sensitive a matter as secret activities affecting the national security should not be passed. There had to be agreement between Presidents, the national security departments, agencies and entities, and the overwhelming majority of both Houses of Congress that the process would meet the needs of both branches and would do so in a constitutionally appropriate way. I can attest that over those five years there was considerable give and take, and I am sure Lloyd Cutler would agree. There were hundreds of meetings and thousands of drafts and letters, and I have to admit a great many false starts.

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The basic premise of the 1980 Oversight Act is that our Constitution provides means for the Legislative Branch to give its advice and views to the Executive Branch on any and all matters of public policy. This applies particularly to areas of great sensitivity such as national security that can affect the security, reputation or integrity of the nation, or require the expenditure of funds and the use of personnel or facilities. There was an overwhelming consensus in 1980 that meaningful consultation between the branches was a sensitive protocol prerequisite for sound policy and effective constitutional government. The Constitution provides, as you well know, for a system of divided powers, but also prescribes ways that the two coordinate branches should work together.

There was also a recognition in 1980 that meaningful consultations, advice and the possibility for sound policy, which would receive long-term popular support, required an awareness of a proposed activity before it takes place. There was also an awareness that some actions would have to be taken in response to unforeseen events, and particularly events that required immediate reaction, events that have to be taken quickly and in a protected environment. As a consequence, there was a recognition that a special procedure would have to be created to deal with those few cases where consultation and deliberation may have to be foreshortened or in some cases impossible. This latter point shows the necessity of having established rules of procedure in such a sensitive area of government activity as secret operations.

I would like to turn to the first issue of what categories of information were expected to be made available through the Oversight Act. The congressional view held throughout the period of negotiations of five years was that all intelligence information should be available to the Congress without exception. The dominant initial arguments, advanced by some in the Executive Branch, that there were a number of categories of information so sensitive that Congress should not have access to them—these arguments that I hope could be any exclusive categories were disposed of, at least in theory.

After careful consideration of actual cases and a series of hypothetical circumstances, and the pragmatic experience of the oversight process over several years, it was accepted by both branches including the operations departments and agencies that Congress had a right under the Constitution to any and all categories of information. There was, however, one hypothetical case developed, that Lloyd Cutler and I developed, that helped define the outer limits of access, the so-called "mole in Ruritania" example. In this imaginary case, a source has suddenly become known to the President alone by means external to the U.S. and known to the President alone. This source holds the key to the survival of the United States and because of a complicated series of circumstances, the President cannot inform anyone else about the source's information without risking the destruction of both the source and the United States. This is obviously an extreme, improbable case, but it was agreed the President had a constitutional duty not to inform anyone else, including Congress. And here, at this theoretical boundry line, tough argument begins: If the circle of knowledge could extend with safety to one or two people beyond the President,

the exclusion of Congress from the circle of knowledge would no longer apply. It was agreed that there was no valid way of conferring more loyalty or security on a White House aide than on a House leader or a committee chairman. Constitutionally, we agreed, once the circle was widened beyond the President himself, the Legislature had as much right to the information as the Executive Branch. It was recognized, however, and Lloyd knows this, because he and I helped develop those procedures that some areas of activity required maximum care and protection by both branches, such as sources, methods and the details of ongoing operations. These were the issues that we both recognized that required this very sensitive handling.

The fundamental and most difficult issue between the congressional oversight committees of the Congress and the Executive Branch concerned the issue of when, as Congressman Hyde mentioned, prior notice was held off for a long period. In fact, before the legislation was passed in 1980, prior notice of all covert actions was given to the committees from 1975 or only the statue was deferred until 1980 and not the actual practice of providing ratification of covert actions and other forms of secret activities.

As early as 1975, during the period of the investigation of the intelligence agencies, prior notice of all covert actions was a requirement and the actual practice. In 1974, the Hughes-Ryan amendment required the President to report all operations in foreign countries "to the appropriate committees of Congress" (which was determined in 1974 to be eight committees) in "timely fashion." As a practical matter, after the establishment of permanent oversight committees in the House and the Senate, in 1976 and 1977, all covert actions were reported only to the two committees. So Hughes-Ryan was inoperative after 1976 anyway.

Part of the tradeoff, and this was the tradeoff between the two branches, arrived at in the 1980 statute, was the agreement to reduce the formal reporting requirement to only the two intelligence oversight committees in return for what was in 1980 already the regular practice, a clear expression of the obligation of the Executive Branch to report any and all information concerning intelligence activities in a manner and at a time required by the oversight committees.

The principles in the Intelligence Oversight Act of 1980 that define when intelligence information should be supplied should now be discussed, because they affect Congressman Stokes' and Mr. Boland's proposed legislation.

The first principle, known as the right of complete access, is the requirement of the Executive Branch through the Director of Central Intelligence, to keep the committees "fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on the behalf of any department, agency or entity of the United States . . ."

The realm of intelligence information covered was intended to be all encompassing and is so expressed. The phrase "fully and currently" has a long history. It goes back to Section 202 of the Atomic Energy Act of 1946 which created the Joint Committee on Atomic Energy. That committee was kept fully and currently informed of any and all information pertaining to atomic energy

matters. How fully and how currently was determined by the Joint Committee it self, which provided funds for all such activities. The history of that committee amply documents how the power of the purse authority was used by that committee to assure that the committee was informed in accord with its wishes.

In certain indicated categories such as covert action and significant collection programs, the oversight committees require, in what should be regarded as the second principle of the Oversight Act, that they be informed before actions were undertaken. It was understood that other categories of intelligence activity that required prior notice could be added from time to time. For example, the intelligence oversight committees now require prior notice of any prospective use of the contingency fund. That requirement was agreed upon and put into effect after the act was passed. There are also a number of areas of activity in which the intention of making transfers of funds require that the two committees be informed before such actions are taken.

I want to turn to the convoluted language of 501(1)(A) that was developed by Senator Howard Baker, then a member of the Intelligence Committee, who held the view that while it was constitutionally proper to compel the Executive Branch to inform the Congress before an anticipated secret intelligence activity, there was no constitutional power or authority to compel the President to obtain approval of that action before acting. While he was obligated to inform the committee prior to the action, he was free to act on his own constitutional authority if he felt it was necessary. That was a majority view.

Section 501(1)(B) was intended to deal with a few very sensitive issues of vital importance that required extremely careful handling. In these very few cases the access could be limited to the "gang of eight." It was believed that extraordinarily fragile operations like the Iran rescue attempts were the kinds of activities that might fall into this category.

"Timely fashion" as it was used in Section 501(b), while it does have a reference back to Hughes-Ryan, was, in fact, intended to deal with those situations in which it was not possible to inform the Congress because the appropriate committees or Members could not be contacted. It was believed that there would be very few cases at the time of the drafting. It was believed that such cases would be rare or perhaps would remain hypothetical. A time delay was never intended to be built in. On the contrary, this after-the-fact reporting contained in this section was to take place as soon as possible. The possibility of a delay of more than a few hours was never contemplated. Nor was there envisioned the need for a delay of 48 hours and certainly not one of 11 months.

I should say the constitutional authority the President may feel he has to act without regard to the Congress still remains. He can do that, but he does so at his peril. This issue something that Lloyd Cutler and I discussed at great length, and I think there was an understanding on that issue.

That is the reason for the preamble language in the 1980 act, to take account, historically, of the argument and the reservoir of flexibility that both sides thought they had and should reserve.

In sum, therefore, under the 1980 statute the Executive Branch was required to report all intelligence activities as follows: (a) All covert actions and significant collection activities would be reported prior to implementation; (b) If the actions were of such a vital nature and so urgent that they had to be undertaken even though Congress was not informed, with the President acting on presumed constitutional authority before Congress was informed, only because it was physically impossible to get word to the appropriate committees or Members, such actions had in any case to be reported as soon as possible thereafter. A built-in time delay was not the intention of the act; (c) All other intelligence activities were to be reported as required by the committees "fully and currently." This all inclusive phrase meant—and I believe it means for you today—most secret activities would be reviewed in the normal process of the consideration of the budget. Reports on particular activities of interest to the committees could be required in accordance with particular circumstances. Such reports could include prior notice on any and all of a broad range of secret activities. A good example is a release of funds for certain specified activities that are now part of the budget process.

It was always understood that new initiatives in any aspect of intelligence activities, if they had important or vital—and there are arguments on those phrases—implications for policy, cost or risk would be reported before they were carried out.

During the six years I was staff director, I was involved in all of the discussions, negotiations and drafting of the key understandings, Executive Orders and statutes at issue. Between 1975 and 1980 procedures were developed to assure that Members could be contacted at all times, that secure facilities and security procedures existed and that the committees' requirements for information were fully understood and accepted, not only by the White House, but by the CIA, FBI, NSA and others.

It took work and constant rigor to assure that the requirements were being met. As Admiral Turner has already testified, the Executive Branch withheld information on one issue in the 1976–1980 period and that was the Iran rescue effort. When postmortems on these operations were studied by committee members, it was the view of an overwhelming majority that there was no convincing reason why the Intelligence Committee chairman could not have been informed or deemed at least as trustworthy as the considerable number of Executive Branch officials who were aware, including several White House officials not directly concerned with the operation. The view was then expressed by congressional leaders that meaningful consultation and advice can only be given if the time and occasion are available. After the fact advice is of little use, as you know.

Consultation, of course, means many things. There is an all too familiar kind of consultation in which the Executive informs Congress at a point when the decision or action has already been taken. This kind of "consultation" is, at best, a kind of record keeping.

You have a situation where you are taking temperature to find out what Congress might do in a given case.

There is a second type of consultation which could be likened to taking the temperature. Selected, usually sympathetic, Senators or Congressmen, are informed in an informal, even private way about the direction of administration policies. The purpose of "consultation" in these instances is to get advice on the likely reaction of Congress to policies or decisions that they will, in fact, have no part in determining.

Finally, there is full consultation, which means fully discussing an issue with a microcosm of the Congress and seeking advice and reactions before a policy is decided. In most cases this means a committee. A good example where real consultation can take place is the notice on covert action programs of the CIA, which is given to the intelligence committees prior to their implementation.

Turning to H.R. 1013, under its provisions, it is proposed to strike from the preamble the phrases which do nothing more than affirm that both the Legislative and Executive Branches have rights and duties under the Constitution. But in my view there would be no substantive loss or gain by striking the language. There are good historical reasons which were seen as important at the time for the inclusion of the language. If you agree that it does not add or detract any authority I would leave it.

Striking (b) of Section 501 might clarify what has become, apparently, a confused reading of what was intended in 1980.

The new (e) which you have prepared for Section 501 creates, in my view, a built-in time delay of 48 hours and would open up a loophole where one did not exist before. If you want to give advice and to engage in real consultations on the crucial issues, I would not specify a 48-hour time period to defer reporting. I suggest, rather, that you modify (e) to reflect an obligation to report "as soon as possible and in no case later than 48 hours." The appropriate committees or congressional leadership can be reached within hours of any foreseeable circumstance except possibly during an all-out nuclear war. I suggest that you make it clear that the obligation is to report in writing immediately or as soon as possible thereafter. Further, I would make this requirement clear through legislative history, committee reports, Floor colloquy and written understandings between the leaders of Congress and the White House, incorporating the appropriate procedures.

I would end these coments on your proposed legislation that by saying it in no way diminishes the flexibility of the President to act under his constitutional rights, whatever they are. Whatever a President's interpretation of his rights are and whatever a particular President's view of his own power may be, a President will use that power as he deems it his responsibility. The preamble really was aimed at leaving that discretion which cannot be taken away from him anyway by statute.

Finally, Mr. Chairman, it seems to me that the strength and integrity of our democratic constitutional system depends upon an informed President, Congress and public. Secret intelligence activities pose a very difficult problem of governance for our open democratic society. It has taken over 40 years to develop a reasonably workable system controlling secret activities that fits within our constitutional framework of accountability, divided power and particularly shared responsibility.

The National Security Act of 1947 which created the vast, powerful structure of secret activities our nation now possesses is the first legislative great milestone in the post World War II national security era. The Intelligence Oversight Act of 1980 which sought to bring the great power of secret intelligence activities under congressional review in a constitutionally appropriate and reasonably systematic accountable way is a second crucial enactment passed by the Congress and signed by the President to protect our freedoms. I am sure that the members of the committee who have such great responsibilities for assuring that our country has the means necessary to protect our liberty from enemies both foreign and domestic will continue as they are doing here in H.R. 1013 to seek more effective ways to maintain the constitutional balances crucial for the preservation of our democracy.

Thank you very much.

[The statement of William Green Miller follows:]

TESTIMONY ON H.R. 1013

THE INTELLIGENCE OVERSIGHT AMENDMENTS

OF 1987

Before the House Permanent Select Committee
On Intelligence,
Subcommittee on Legislation

April 8, 1987

Submitted by:

William Green Miller

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Chairman McHUGH. I want to thank both of you gentlemen for a very thoughtful presentation. I found the background of your working together to construct this framework legislation in 1980 very interesting, indeed.

I would like in just a moment, Mr. Cutler, to ask if you have any reaction and response to Mr. Miller's testimony, but I would like to direct your particular attention to the question of consultation, the importance of consultation.

It seems to me as you have described that background that in the 1970s through 1980 we had Administrations including the Ford Administration, which recognized the importance of some consensus in the conduct of foreign policy, and understood that in order to sustain a foreign policy, in order for it to be effective and workable, you had to have some essential understanding and support on a bipartisan basis within the Congress and between the Executive and the Congress. Also, you had Administrations where covert activities were seen as exceptions rather than as the rule.

Frankly, in my own view, the current Administration does not appreciate the importance of having more bipartisan consensus for the conduct of foreign policy and has looked upon covert operations in particular as a more useful tool for the conduct of foreign policy. It has seen the Congress, where it thought that the Congress might raise objections to policy, as a hindrance to be avoided, and it is precisely for that reason that we got into the Iran arms situation.

That, frankly, is not an aberration in my mind but rather a reflection of an attitude which has prevailed in this Administration. If I am right, Congress, if it is concerned about this, as many of us are, has to do something about it. We have to assure ourselves that we have not only information but an opportunity to consult on fundamental policy.

In the Iran case the President covertly changed in a very fundamental way the policy of the United States, and it was significantly different than the overt, expressed policy which he himself had been stating. We did not know about it for a long time.

My question, Mr. Cutler, goes to your specific proposal which as I understand it, would be to say, well, the President should give notice after the fact as soon as feasible but not later than three months or four months or whatever certain limited cases.

My concern with that is that we would have no opportunity or any meaningful consultation on fundamental policy where the President's covert operation effected a change in fundamental policy. I think, if I understand Mr. Miller's testimony correctly, he is concerned about that, as I am, and would suggest that it should be immediately or as soon as possible but no later than 48 hours. I think there may be a difference of view here between the two of you. I would like you to react if you would.

Mr. CUTLER. I do not think, Mr. Chairman, there is that much of a difference of view. I think it is more a matter of a difference in types of special intelligence activities. When it comes to the handling of an agent or some other intelligence source or, let's say, an in-and-out rescue mission such as the 1980 Iran rescue mission, those do not involve fundamental changes of policy, foreign policy.

There are powerful reasons for narrowing the group that knows in advance what you are doing as much as possible. On the other

hand, when, as you point out, a secret change in policy is made such as the provision of the arms to Iran at a time when we are publicly proclaiming that Iran is a terrorist state that should not be receiving arms and urging other countries not to supply them—that is a secret foreign policy. That is a change in policy. That, it seems to me, is wrong on all sorts of counts, including the failure to notify Congress in advance of what you are doing.

But even if they did notify Congress in advance, if you had been privy, let us say, to that Iran/Contra operation and let's assume for the moment you had sanctioned it, it would still have been a very serious thing for the United States to have had a public foreign policy that ran one way and a secret foreign policy that ran the other.

It may be you could draw a distinction between those two types of covert or special intelligence activities. I certainly agree on anything that involves a departure from the stated foreign policy of the United States that has been disclosed to or approved by Congress there ought to be advance consultation. I certainly go along with that.

I do think though that any kind of sooner or later duty to notify will be a powerful deterrent. It is very hard to be precise on what the right number of days is. Whatever you pick, somebody can think of something that would take longer for which there might be a justification of secrecy, continuing secrecy. That is why I also lean myself to the notion, although I did not put it in my letter to Mr. O'Neil, that if you could require the President to notify each time he initiated an activity, the details or substance of which he had high policy reasons for not disclosing, if, at least, he said I have started an intelligence activity, number one, let's say, at least you would know that and every time the director came before you and every time money was needed you could say, tell us about that activity and he would have to give a reason why he did not and ultimately he would have to do it.

Something like that might be a useful device.

Chairman McHugh. Dr. Halperin, when he testified, suggested a distinction on the tough case. A tough case, as you have said, is the hostage rescue operation in which it may play out over a number of days or even weeks, people's lives are at stake, and there is understandable concern about any disclosure of that information. He suggested that in a situation like that Congress should be told that as a matter of policy we are going to undertake a rescue operation or a series of steps which we hope will lead to the rescue of our hostages or whatever, but that the details of how that is done is not something that the committees need to know: who is involved, the timing precisely, and so on.

Is that a reasonable distinction to make and, if so, is it something we should consider in trying to refine it?

Mr. Cutler. I do not think so for a rescue operation. If it had become public that the United States was planning a rescue operation in 1980 in Iran, even though the time, the place, the method were not specified, the Iranians would immediately have dispersed those 53 hostages into 53 different places, as they did after our aborted rescue mission, and mooted the whole idea.

Chairman McHUGH. My time is up and we have a vote as well, but inevitably it gets back in part at least to the question of who can be trusted.

You have the tension here between the Congress' right to know and it's right to advise, on the one hand, and the sensitivity of the information on the other. Even in the case of the hostage operation, assuming the details are not disclosed, why shouldn't this group of eight in the leadership be aware of the policy and have an opportunity to give the President the benefit of their advice with respect to this policy before it is undertaken? In the case of the Iran hostage situation, Secretary of State Vance obviously had strong objections to this to the point where he resigned afterward.

Perhaps if the Speaker of the House or Majority Leader of the Senate had also expressed some strong reservations to President Carter it might have been enough to give him second thoughts about whether or not that policy, without giving the details of it, was worthwhile.

Mr. CUTLER. The point is a valid point and I faced it in real life terms. First the problem existed under this act with respect to the activities that Admiral Turner wrote about, the preparations within Teheran which his agents conducted that lasted quite a period of time. Second it existed under the War Powers Resolution on the duty to consult Congress before introducing armed forces into the territory of another state where hostilities might be imminent.

The hard fact was that while the President wanted to himself, no matter how tightly you drew the circle of those you would consult and the War Powers Resolution says consult Congress, which leaves you entirely up in the air, that circle included people who we believe, rightly or wrongly, do not keep secrets well. They are people of the utmost good faith, utmost loyalty to the United States, but what they hear at 12:00 they tell a staff assistant at a quarter after 12 or at least so we believed, and that is the kind of problem you face.

In a rescue mission it does seem to me when it is in and out like that and while it may be debatable as a matter of policy, it is the sort of decision you just have to leave to the President in the end. There was no doubt that Mr. Vance was not going to go public or confide in someone who might in turn go public and ruin the whole operation, and the President just has to be trusted just as he is with that nuclear button, to do that kind of thing and take the consequences.

They cannot be that great. It is not like a secret foreign policy to supply arms to the Ayatollah's government; and, in fact, when the mission aborted and we went up and told Congress everything, of course, there were no reproaches for failure to consult in advance. The only reproaches were it is too bad it did not succeed.

Chairman McHUGH. Thank you very much.

We will take a brief recess and come right back. I hope you can stay with us for a few more minutes.

[Recess.]

Chairman McHUGH. The committee will be in order. Mr. Stokes.

Mr. STOKES. Thank you, very much.

At the outset, let me express my appreciation to both Mr. Cutler and Mr. Miller, not only for their appearance here, but for the excellent testimony they have given on behalf of this legislation.

Let me say, Mr. Miller, I very much appreciate your suggestion that the language here be modified to say as soon as possible, in any case, not later than 48 hours. I thought that was an excellent suggestion, and one which I certainly think would be a good modification in this case.

Last week when the minority leader of the House testified on this legislation, he referred to the 48 hour period as being a strait jacket on the President in light of the fact that the gang of eight may at any given time be in all different parts of the world. Of course, I think the argument has some merit in the sense we know that during the Easter recess, for instance, many of us take off to places beyond Washington. But knowing the work of the Hill, as you have so well articulated in your formal statement here for us, do you see that as being a real problem in terms of let's say the gang of eight?

Mr. MILLER. No, I don't think so. The experience that I have had on the Hill indicates that the opposite is the case. Senator Mansfield, when he was majority leader, did a number of things to deal with the problem of sudden emergencies. He, as a legal matter, never permitted the Congress to go out of session, it was always in session. So that he could deal with matters pertaining to Vietnam and what have you. There was always a Senator on duty. He had a duty roster.

Further, with the advance in communications, secure telephones and so on, the ability to get to a secure telephone to be notified of really sensitive matters was something that was developed. For example, Senator Inouye, when he was Chairman of the oversight committee, arranged with the CIA and Defense Department that he could get to secure facilities within minutes wherever he was. He took his responsibility that seriously.

And so I think the issue of notification, of getting the word, is not a big problem. There are instances—the wonderful story about Lyndon Johnson, when he was President, he was to be part of a nuclear attack exercise and they couldn't find him for a period of hours. He was engaged in very private matters.

Those things are bound to happen, and the ability of human beings to not be where they are supposed to be, or to foil air tight systems, I am sure will always be the case, but it seems to me there is a practical matter you can notify the leaders of the Congress, you can set up procedures which would make notification a relatively easy matter and the issue of a few hours seems to me a quite normal expectation. If the country was under a nuclear attack, it is going to be a different ball game.

Mr. STOKES. Mr. Cutler, let me ask you this in terms of Mr. Miller's statement regarding notice no later than 48 hours. Would this provision stop the President from doing whatever he felt he had to do within his constitutional powers? Having been an advisor to the President of the United States and having the enormous responsibility that goes with that, would you say that it is true in a pragmatic sense that the President will always do what he has to do notwithstanding such limitations?

Mr. CUTLER. Well, I think the limitation would have a powerful effect on Presidents. There are some things I think Presidents clearly have a constitutional power to do that Congress cannot change, such as acting as Commander in Chief of the Armed Forces, and repelling an attack—let us say the nuclear button that I referred to earlier.

But it is hard to say that even against an overriding congressional statute, the President has the constitutional power to mount a rescue mission for Americans abroad. One could certainly argue, absent a congressional provision that bars him from doing so, that he had that power inherently as Commander in Chief.

But it does seem to me that none of us is 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.

Let me go back to Admiral Turner and the Iran rescue. One of our problems there was that he had people in place in Teheran, and when the mission aborted, we had to get everyone out. We had to allow enough time before we announced that the mission had aborted and we were taking people out, so that he could get his people out. Suppose he couldn't get them out in 48 hours, and if the President gave the notice in 48 hours, and it became publicly known, the lives of those agents would be prejudiced.

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 initiative to the President, although you require him to account to you afterwards. We can only have one President at a time. I would submit we can only have one person deciding at a time whether to do a rescue mission or not.

Mr. STOKES. Even under those circumstances—we are talking about the most exigent of circumstances?

Mr. CUTLER. Right.

Mr. STOKES. Thank you very much, both of you. I appreciate it.

Chairman MCHUGH. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Then, Mr. Cutler, you agree with former CIA Director Admiral Stanfield Turner, you agree with former CIA Director William Colby, you agree with former I guess Deputy Director of CIA, Ray Kline, that you just can't measure timeliness by the clock. You agree with—I think Admiral Turner put it best—he said that timeliness is not measured by a clock, that timeliness is measured by the risk.

I don't think we should focus on hours and days, I think we should focus on the completion or the diminution of the risk. It could be that is an operation as an operation goes along, the risk

drops off to human life. When that risk to human life has diminished sufficiently, when it is timely to notify the Congress. So you would generally agree with that?

Mr. CUTLER. I don't quite agree with that, Mr. Hyde. I am not sure you do either. You agreed earlier that ten months or whatever it was, in the Iran/Contra case was far too long, and that timely fashion cannot be construed in that manner even though it is an open ended date.

I would think that a bar date—it is hard for me to think of cases—there may be some, in which after 30 days or 60 days, or 90 days, at least limited consultation with the gang of eight wouldn't be appropriate.

I did make a suggestion while you were out about another way to go at it that would be to require the President, when he makes a finding, and authorizes an operation, the details of which he doesn't feel he can properly share with the Congress, he at least notifies them I have started operation number one, or 101—I can't tell you now what it is—and then after time, the DCI comes up to testify, you will be asking him what was that operation, and why can't you tell us?

Sooner or later, as long as you know that something is happening, eventually you will find out and it is the finding out and requiring him to account I think is more powerful than the consultation earlier.

Mr. HYDE. You mean you would have the President say I am doing something but I won't tell you, can't tell you what it is?

Mr. CUTLER. Yes. What is wrong with that?

Mr. HYDE. Well, I am trying to think what is right with it.

Mr. CUTLER. What is right with it, what you cannot allow rather, is that timely fashion can be construed to be forever.

Mr. HYDE. I will agree with you there. I think this Administration made a serious mistake, political mistake. I am reluctant to say a legal mistake, because I think timely fashion is a word of art that like beauty, it is in the eye of the beholder, and I will agree that 14 months was much too long, but you know, it is tough to put a time limit on it. It depends on the other country you are working with. If they say no way do we want this disclosed to 50 people on the Hill, or count us out, what do you do with that?

You have got a law that says within 30 days, within 60 days, you must disclose. You put the President in a box.

Mr. CUTLER. What do you do with the operation that goes on, let's say an agent who is in place for five years——

Mr. HYDE. That is right.

Mr. CUTLER. You tell Congress nothing about it. You open up the possibility of forever, then that is the real problem, and in the Iran case, Mr. Casey probably intended forever. He wasn't going to tell us about that until he had to.

Mr. HYDE. Well, that may be and we may never know, and in Mr. Casey's defense, however, I would probably outdo him in paranoia if I had his responsibilities and the long litany of sensitive operations that were disclosed time and time again in the media, and we have had an incident very recently that boggles the mind, and so we have got a problem. America has a problem. I hope we can address it.

Mr. CUTLER. I have said I think Congress should do more to tighten up its own procedures.

Mr. HYDE. You are absolutely right. Try that one out for size.

Would you agree with Professor Lewis Henken of Columbia University, who makes an interesting distinction. He says intelligence gathering activities may not be subject to regulation by Congress. Congress is probably entitled to ask to be informed of such activities as necessary and proper to the exercise of its various powers, and those of the other branches of government of the United States.

The right of Congress to be informed, however, ought not to be exercised in ways that would interfere with the activity.

"The distinction between gathering information, et cetera, since H.R. 1013 proposes to eliminate the reference to executive authority, under the Constitution as well as existing subsection (b), you may wish to consider either excluding intelligence gathering from intelligence activities, under section 413, or writing additional reporting requirements in different terms."

I think what Professor Henken has pointed out is that the gathering of information is a principal purpose of the President in sending Ambassadors, maintaining diplomatic relations, and it is an exclusive presidential power.

It is only a small extension to conclude that gathering of information by any means is a part of the President's eyes and ears function. There is, therefore, a strong case for presidential authority to obtain intelligence not only through our embassies, but also through other agents representing the Executive or through military agencies under the President's command. Congress should not interfere with that function.

Do those words resonate with you?

Mr. CUTLER. I have a great respect for Professor Henken. I think a lot of what he is saying there is policy advice to the Congress rather than a constitutional form of advice to the Congress. I do think, as I have said, we can only have one President at a time. I do think it is desirable to retain the provisions of the present Act that reserves the constitutional powers of the President and of the Congress.

Mr. HYDE. You wouldn't strike those out as this bill does?

Mr. CUTLER. No, and I have so written to the committee. But I do think also that Congress does, through the power of the purse and even beyond the power of the purse, Congress shares the foreign policy making power and Congress certainly shares the defense and security power. And it is within the power of Congress—I think it would be foolish to do so—to say we are not going to appropriate any money for intelligence activities or that we are going to forbid certain types of covert activity, such as, let us say, assassination.

All of those are within your power. You share the power to defend and represent this country and conduct its foreign policy.

Mr. HYDE. Isn't intelligence gathering in the constitutional sense, isn't that the President's preserve?

Mr. CUTLER. It is his preserve in the sense that when he receives an ambassador who says to him, I only tell you this if you don't tell anybody else. He can make that commitment and keep that confidence. I think that is right.

Mr. HYDE. What if Canada——

Mr. CUTLER. If he has $20 billion appropriated by you to carry on intelligence activities then you have the right to decide as a Congress what activities will be carried on and how much will be spent for it, you have that power. Now, it is foolish to exercise it in the way that frustrates the collection of intelligence or the keeping of proper secrets. We all agree with that. But I think it is idle to speculate on whether the President has the right to do this or someone else.

As a practical matter, we have to have a President and he has got to make the decisions, and I have said before you got back here, I think it is just as good in most cases and just as effective for you, to hold him accountable after he does something, rather than insist on consulting with him while he is doing it, provided he is not making a new foreign policy, secret foreign policy, as may have been the case in this episode.

Mr. HYDE. How do you deal with the cooperating country essential to this operation, and the operation is very important to our national security, that sets down some ground rules. See they look at our gang of eight and they are not as confident that someone is going to go down to Florida and say something to somebody and their lives are at stake. And if you want us in and then you just don't tell anybody until it is over, how do you deal with that? You wouldn't deal with them?

Mr. CUTLER. The President in those circumstances, if you bind him up in a gang of eight requirement, he has either got to say no, I am sorry, I can't take a part with you or you had better not give me that information, or he has got to decide whether to violate a statute.

Mr. HYDE. Is that wise thinking to put the President in that box?

Mr. CUTLER. I agree, it is maybe foolish to put him into a box. I think you have the power to do it if you wish to do it. I agree with you it is foolish to put him into too tight a box.

On the other hand, he has got to conduct himself vis-a-vis Congress so that he and his agents are trusted and I think that trust was breached in this case.

Mr. HYDE. Well, lastly, you have been very generous, Mr. Chairman, I think there has been a mutual breach of trust, one that is very easily identifiable with the Administration and culpability too. They did not, obviously Mr. Casey did not trust the intelligence committees.

Mr. CUTLER. I am speaking of the Goldwater-Casey agreement. Mr. Casey, a grown man, made an agreement with Senator Goldwater and he violated it, in my view.

Mr. HYDE. Well, at the President's direction.

Mr. CUTLER. I don't care whose direction it is. It just makes the President that much more responsible. One of them should have resigned.

Mr. HYDE. All right, well, I will agree with that, that was an order he could not really obey and maintain—keep his word with Senator Goldwater—and the Vice Chairman there.

Mr. CUTLER. An honorable man has to resign.

Mr. HYDE. Well, that is not quite fair. Because ones honor may also require protecting operations and people whose lives are at

stake and the future security of this country, and it is not quite that simple. I think it is a little unfair, with Mr. Casey disabled, to make such sharp and unredeemable accusations.

But be that as it may, I am certainly not comfortable nor happy with that situation, and that role that was played. I think it was a mistake, I think they are paying a price, but I think the other side of the equation needs every bit as much attention, and it is getting zero, and that is the justifiable lack of confidence in our whole process, in keeping a secret. And we have got to do something about that, too.

Mr. CULTER. I agree with you on that side of it, Mr. Hyde. I think it is very difficult when the President has 1,700 White House aides and when you have 20,000 aides up here in Congress, and we have the vast press that we have, it is very, very difficult. But I certainly agree with you, Congress could do more to carry out its responsibilities to preserve the secrets that need to be preserved.

And I have long been a personal friend of Mr. Casey's and I certainly wish him very well. I don't see, however, how one can read Senator Moynihan's testimony about the Goldwater-Casey agreement and not feel that there was a breach of trust.

Mr. HYDE. On the agreement?

Mr. CUTLER. I regret to have to say that.

Mr. HYDE. On the agreement, there is sharp differences of opinion on notification of the intelligence committees on the mining of the harbors there, and I am saving my extended questioning on that, for one, when the dear Senator comes over. But I agree, they made an agreement and it should have been lived up to.

Mr. CUTLER. Or they should have withdrawn from it.

Chairman MCHUGH. Thank you, Mr. Hyde.

You made mention of the letter from Professor Louis Henken. I think, without objection, we should include that in the record.

I know Mr. Cutler, you, and I suspect Mr. Miller, would like to be dismissed. I just want to be sure that I understand the thrust of your position. If I understand what you have told us correctly, it is that in virtually all cases, particularly where it involves the establishment of policy for the United States Government, the intelligence committees, in the case of covert operations should be notified in advance of those operations.

However, in cases such as hostage rescue cases, which do not involve the establishment of a new policy, and which do involve the risk of life, the President should have somewhat more flexibility than 48 hours in certain instances, to notify the Congress. Is that correct?

Mr. CUTLER. I would say also the same as to the gathering of intelligence and the handling of agents, but I think the existing law already has an exception for that.

Chairman MCHUGH. Finally, I should note, because the question of trust in Congress keeps coming up—Mr. Hyde, understandably, points out certain instances where he believes leaks have occurred and we all recognize there is a problem here in terms of leaks. But I must say for the record, that since I have been on this committee, every time that we have asked an executive official, including high officials in the CIA, where the major problem exists with respect to

leaks, they have responded that the problem is in the Executive Branch of government, not in the Congress.

So for that reason and others, it seems to me unreasonable to suggest that Congress should be excluded from the policy making process and from notice of covert operations, which are important to our country, on the grounds that Congress may leak, and I don't think you have suggested that, but I do think some people do, and I don't understand it or agree with it. I feel it is important.

Mr. CUTLER. I am sure the honors are at least even. I did refer to the 1700 members of the White House staff. You may remember when Mr. Meese was testifying in that famous press conference, the question was, did the President know about the transfer of the money to the Contras?

His answer was no, the President cannot be expected to know what all 1700 members of the White House staff are doing and, of course, you could add a few more zeros for the additional size of the intelligence community, including the agency, the NSA, the Defense Department, the State Department, and others.

Chairman MCHUGH. In that context, it is awful hard, for me at least, to accept the proposition that the Speaker of the House and seven other top leaders in the Congress cannot be trusted with this sensitive information.

Thank you both very much. We appreciate it.

Our next and last witness for today is the author of the other bill that the subcommittee is considering, Congressman Norman Mineta, of California, who has previously served with distinction on this Intelligence Committee. He served here for six years and has continued his interest in a strong intelligence community and in a strong process of oversight.

We are delighted to have you with us, Norm.

STATEMENT OF HON. NORMAN MINETA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MINETA. Thank you, Mr. Chairman.

I apologize for having missed the opportunity to be here earlier in the day when I was originally scheduled to testify. As one who sat on the Permanent Select Committee on Intelligence for six years, I am delighted to have this opportunity to appear before this subcommittee.

There are two bills before you today, Mr. Chairman. Both bills are similar in that they seek to cure the defect in current law that allows the Administration to avoid the appropriate and necessary congressional oversight of covert actions.

H.R. 1013, introduced by Mr. Stokes and Mr. Boland, requires written notice of all covert activities prior to their start, with an exception that allows notice up to 48 hours after the start of an action.

My bill, H.R. 1371, is similar, except it requires written notice prior to the initiation of all covert activities. H.R. 1371, does give the Administration the power to limit this notice to the so-called gang of eight—the leadership of both Houses and both Intelligence Committees.

I support these bills because I believe in the principle of congressional oversight. And I say this not just because I am protective of Congress' prerogatives—which I am—but also because I believe that such oversight makes our intelligence efforts stronger.

As the members of this committee know all too well, on more than one occasion the private but careful scrutiny of congressional oversight has saved the intelligence community from mistakes and indeed disasters. And is there anyone of us who doubts that had this committee had the opportunity to review the Iran arms deals, that the nation would have been spared this whole sad affair?

Some may say that current law has failed only once in several years—why change it? I say if a simple change would have spared us the Iran disaster, we must make the change, or else, what fiasco may be next?

Mr. Chairman, this proposed change was first approved by this committee in 1980. Many of us, such as myself, have fought for more thorough oversight for many years now. This bill is more than timely, it is long overdue.

I cannot speak for those who are opposed to these bills, but I suggest that at the heart of their opposition is a mistrust, a doubt, about the usefulness, reliability and appropriateness of congressional oversight.

Mr. Chairman, I have no such doubts. And I submit that once you fully accept the principle of thorough congressional oversight, these bills become obvious necessities.

Of course, there are those who say in effect that Congress and this committee cannot be trusted. As a former military intelligence officer myself, I do not share that view. Indeed, my six years on this committee convinced me that the single biggest sieve in this town is not the Congress, but the Administration.

More than once when I sat on this committee we sought documents that the Administration said were too sensitive for us to see, and then I saw those same documents in the media when it suited the Administration's purpose.

Under H.R. 1371, for example, notice of very sensitive covert actions could be limited to Speaker Wright, Minority Leader Michel, Chairman Stokes, Mr. Hyde, and Senators Byrd, Dole, Boren and Cohen. Just these eight distinguished leaders. The question is: can these eight people and their successors be trusted with national security matters?

If these officials cannot be trusted—and we have not heard any evidence that they cannot be trusted—then who can?

I have no doubt that these people, and the members and staff of both intelligence committees, are worthy of our trust. I trust them not only to keep our secrets, but to play a useful and contributory role in our intelligence operations.

But no oversight can continue without timely and complete information. Without such information, the committees are charged with a vital task, but will be denied the tools to carry it out.

Mr. Chairman, oversight is necessary. And information is necessary to carry out that function. These bills are necessary to get that information.

Thank you.

Chairman McHUGH. Thank you very much, Norm. I appreciate once again your being with us and your contribution.

I was not on the committee in 1980 as you were, but as you recall, the Intelligence Committee of the House, and indeed the entire House, adopted a bill which would have required prior notice of all covert operations just as your proposal before us does. However, in conference with the Senate, the House accepted the Senate's position which is reflected in current law, which, as you know, permits in some cases prior notice to be withheld and notice then to be given within a timely fashion.

Do you recall why the House acceded to the Senate position in 1980, and gave up the proposal which you are now advocating that the committees be given prior notice in all cases or that prior notice be given in limited cases to the leadership group of eight?

Mr. MINETA. I think it was probably out of practical considerations, Mr. Chairman, in that we wanted to get the bill passed. What we bought in 1980, was an improvement over then current law, and I think these bills will even improve the situation now. In accepting the Senate language in 1980, what we did was to rely on their assertion that prior notice could be dispensed with only in emergencies, but obviously this has not been the case. But I think the basic answer is to get the bill passed in 1980.

Chairman McHUGH. As I am sure you know, the argument is being made that the proposals, your proposal certainly, and Mr. Stokes' proposal, would unduly tie the hands of the President, particularly in cases where lives were at stake and where time was important. The obvious example that has been cited time and again, is the hostage rescue situation, such as the Iran hostage rescue attempt in the Carter Administration.

In your proposal, prior notice even in that situation would have to be given. How do you respond to those who argue that this is too inflexible and too risky in terms of lives at stake and in terms of the President's need for some discretion?

Mr. MINETA. Well, I think both in terms of lives at stake and timeliness, I think that even in those instances, there are present day circumstances where I think notification has been made to both of the Intelligence Committees without risk to those people who are in place doing intelligence work.

So I think we have already experienced situations where lives are at stake but information is given, and still not disclosed. I think that to require timely notification is not a hinderence. This is I think an anecdotal argument that is brought up, but I think in terms of what we have experienced, it has not been a problem. I know this is an argument that is brought up in terms of lives are at stake, but there are lives at stake everyday and there haven't been problems where that information has been given.

Chairman McHUGH. Thank you.

Mr. Hyde. Thank you, Mr. Chairman.

Thank you, Congressman Mineta for an excellent statement. You are one of the students of intelligence and the intelligence process, because of your service on the committee and your prior services in the military, so what you say is important and has value.

I am not quite as confident, however. You mentioned the gang of eight and you even were kind enough to refer to it as distin-

guished. That applies to most of them, myself excluded, but I have in my hand a headline from the Jeruselem Post of Friday, March 20, 1987, disclosing a speech made to a private group down in Florida by the former Chairman of the Senate Intelligence Committee, revealing information that, at least in my judgment, is not helpful to our national interest. And without commenting too much on that—I understand it is under investigation in the other body—that doesn't add to the quotient of confidence that one has, if even the gang of eight is not beyond making mistakes and disclosures.

But basically, I agree that if we are to have an oversight function, and we must have an oversight function in a democracy, we can't exercise that if we don't know what questions to ask or what operations to look at. And what we need is a formula that will impress on the Administration the responsibility of communicating to this committee and our counterpart in the Senate, those matters which are properly for our oversight.

We are trying to find that formula. You have come up with one that requires prior notice and this bill of Mr. Stokes, our chairman, and Mr. Boland, is 48 hours anyway.

You then don't agree I guess with Admiral Turner, who objected to prior notice in his book "Secrecy in Democracy," discussing his tour as Director of the Central Intelligence Agency.

He said, "inadvertent informing of Congress through reporting on covert action is not the way to accomplish such a purpose. Accordingly, I strongly oppose the move by the Senate Committee on Intelligence to insert into the Intelligence Oversight Act of 1980 a requirement for prior notification of all covert actions.

"Another reason I opposed prior notification was that I felt it unreasonable to ask a person to risk his life and then tell him I was going to notify some 30 congressmen and their staffs about what he was going to do."

Then description down here: "If Congress someday does legislate prior notification, the CIA may cease some useful covert activity for fear of premature disclosure and may back away from risky covert actions altogether, to avoid the danger of arousing the Congress again. In either case, the country loses."

That is not Mr. Casey talking, that is Stanfield Turner, and I take it you disagree with those sentiments?

Mr. MINETA. Yes sir, I do, and remember this is not that we approve the operation, it is simply prior notice. We have no approval or ability to turn down that Presidential finding.

Mr. HYDE. It might very well abort it, we understand that. I mean, if you don't like a policy, if it suddenly appears in the press that may well abort the entire operation, and you have accomplished your purpose. I am hypothetizing, not you, of course, the American who has leaked it. So the damage is done at least from the——

Mr. MINETA. Frankly, I have no compunctions about the criminal prosecution of anybody who might do that.

Mr. HYDE. That is a very splendid statement and a good idea, I think. I hope we address ourselves to that.

Mr. MINETA. I have been in that position myself and if anyone ever cuts the rug from under me by disclosing information that is going to be putting lives at risk, I have no compunctions at all

about seeking prosecution in that kind of a circumstance. I don't care who it is.

Chairman McHUGH. Mr. Stokes.

Mr. STOKES. Thank you, Mr. Chairman.

Mr. Chairman, at the outset, let me commend our colleague, Mr. Mineta, for an excellent statement here this morning on behalf of the Mineta bill, and on this whole subject with which we are grappling, and it is a pleasure to have him here.

Let me just start out with this. You would think that this legislation had something to do with leaks from the kind of discussion that we have heard here this morning. This bill is not directed toward leaks. This legislation is directed toward having the President of the United States comply with the law that requires the United States Congress to share in the tremendous responsibility that he has with reference to covert action. Recognizing that we are a nation of laws and not of men, we have offered legislation that requires the President to share this onerous responsibility with the Congress.

But since we have had all this discussion about leaks, and since you have been a member of the Intelligence Committee in the House for a six year period, having during that period of time been privy to our own analysis in terms of whether the Congress is guilty of major leaks or whether the Executive Branch of government does more leaking, would you comment for us from your own observation as to who does most of the leaking in Washington?

Mr. MINETA. Well, I think, as Mr. Hyde has pointed out, when it is to their convenience and advantage I have found the Executive Branch will leak. We have had this happen to us here on the Intelligence Committee. We were seeking a document—and I believe it was 1983—we were trying to get a national security decision document from the White House. We couldn't get it and the whole thing appears in the paper one day.

The problem was that frankly, we were, I think, as members of the Intelligence Committee, hung out to dry by the Executive Branch because Members of Congress, our colleagues, would then see that document in the paper, and then say to us what in the devil is going on, what are you folks up there doing? And here we were left dangling in the breeze because we are supposedly to do oversight, here we were seeking a document, couldn't get it, and then it appears in the printed media.

And I know I was hit by a number of our colleagues at that time, wondering what is going on, how is it this was allowed to go on. Questions were raised, and I was really upset that that had happened to us. As I said, we were left hanging in the wind. But I have seen more disclosures and leaks by the Executive Branch than the Legislative Branch.

The other problem I see is this: I think what we are trying to do is to make sure that the information is coming to the committees that have oversight. I am not sure what the total number of staff now is on the Intelligence Committees, but let's say even if it is a total of six or eight professionals, how do we make sure that those eight professional staff people are in a position to gather the information we need, versus all of the employees of the intelligence

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agencies that we have? They can hide in every nook and cranny anything they want.

And we have got to be detectives, and in how many instances have we had here the experience of playing a cat and mouse game with the intelligence agencies because they were not forthcoming? There were times when I remember Mr. Mazzoli would have to ask, "am I going to have to ask the right question to get an honest answer?"

Oh no, no, we will be forthcoming, candid, et cetera was the reply.

And yet we never get the right answer or get any answer. It is a constant cat and mouse game that we were playing up here.

I just feel that while we expect our professional staff people to do proper oversight, it is a near impossible task, given the number of employees in the Executive Branch.

Mr. STOKES. Let me ask you this. The basic difference I see between your legislation and the Stokes-Boland bill is in terms of prior notice. Yours does not make any allowance for any exigent circumstances.

Under our bill, we provide the 48 hour period. Can you conceive of any circumstances under which we might need to provide that type of latitude in terms of notification?

Mr. MINETA. Perhaps those involving joint actions with foreign governments. I believe there was one such example, for instance, that we experienced at the time of the takeover of our embassy in Teheran. The Canadian Embassy had a number of our employees and they were able to whisk them out and in that instance, the Canadians did ask President Carter that the Presidential finding not be submitted to Congress, and it was withheld by the President until those folks were on the airplane on the way to Germany, as I recall.

So I do think that where you have dealings with a foreign government an exception to that may be in order. But it seems to me that totally within our own jurisdiction, it seems to me we ought not to have any exceptions.

Mr. STOKES. Thank you.

Mr. MINETA. I think that what is more important, however, is not so much the difference between the bill as submitted by the distinguished chairman of the Intelligence Committee and my bill, but I think the more important distinction is between these kinds of changes and present law. I think that is what we ought to be focusing on.

Mr. STOKES. I agree wholeheartedly with the gentleman.

Thank you, Mr. Chairman.

Chairman MCHUGH. Thank you very much, Congressman Mineta, for your testimony this afternoon.

I would like to state for the record that back in 1980, the Intelligence Committee of the House reported a bill which included prior notice of all covert operations. That was never acted upon by the House, so I misspoke in that respect.

Again, Congressman Mineta, thank you very much.

I should mention also that the Administration has been asked to testify on both occasions that we have held hearings. Unfortunately, it has not been convenient for the Administration to do so. We

will, therefore, be holding at least one more hearing to afford that opportunity to the Administration.

It is quite possible we will also have additional witnesses. If the minority has any suggestions in that respect, we would be delighted to hear from you.

Mr. HYDE. We might want to ask some of the witnesses that have already testified to testify again.

I am kidding.

Chairman MCHUGH. Thank you.

We will think about that one.

Thank you all very much.

The hearing is now adjourned.

[Whereupon, at 1:00 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

H.R. 1013, H.R. 1371, AND OTHER PROPOSALS WHICH ADDRESS THE ISSUE OF AFFORDING PRIOR NOTICE OF COVERT ACTIONS TO THE CONGRESS

WEDNESDAY, JUNE 10, 1987

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

The subcommittee met, pursuant to call, at 9:35 a.m., in Room 2237, Rayburn House Office Building, Hon. Matthew F. McHugh (chairman of the subcommittee) presiding.

Present: Representatives McHugh, Stokes, Kastenmeier, Livingston, Shuster and Lungren.

Also Present: Representatives Beilenson, Daniel, Hyde, and McEwen.

Staff: Michael J. O'Neil, Chief Counsel; Bernard Raimo, Jr., Counsel; Stephen D. Nelson, Counsel; Calvin R. Humphrey, Counsel; Diane S. Dornan, Professional Staff Member; Jeanne M. McNally, Clerk; Sharon Curcio, Assistant Clerk; Delores E. Jackson, Secretary; and Dana Gerard, Secretary

Chairman MCHUGH. The subcommittee will please come to order.

Today the subcommittee concludes its hearings on legislative proposals designed to improve congressional oversight of covert actions. More particularly, the proposals before us would amend current law to make more specific the requirements governing notice to Congress when the President authorizes a covert action.

To briefly restate the law, the statutes now provide that, as a general rule, the President must notify the House and Senate Intelligence Committees prior to undertaking a covert operation that he has authorized. However, the law recognizes two limited exceptions to this general rule. If the President determines that there are extraordinary circumstances affecting vital interests of the United States, he may limit prior notice to a leadership group of eight Members of the House and Senate—the so-called "Gang of Eight". The law recognizes, as a second exception, that in certain undefined cases the President may choose not to provide prior notice to anyone in Congress, but in such cases the President must provide the Intelligence Committees with notice of the covert action in a "timely fashion", together with a statement explaining why prior notice was not given.

Many of us in Congress believe that the President disregarded the spirit, if not the letter, of the law when he authorized the covert sale of military weapons to Iran. In that case, the President conducted a covert operation for at least 10 months without notifying anyone in Congress. He not only failed to provide prior notice of this operation; he provided no notice whatsoever. We learned of the operation many months after it was begun only because it was disclosed in a foreign publication.

In this case, the President apparently decided that circumstances justified his dispensing with prior notice. He must have further determined that not providing notice for at least 10 months after the operation began did not violate his legal obligation to provide timely notice after the fact. In my judgment, that was a wholly unreasonable interpretation of the law. However, presumably the President would argue that he was not violating the timeliness requirement.

These two views of what constitutes timely notice are quite divergent. If Congress accepts the President's view, Congress can be totally deprived of information regarding major policy for a substantial period of time. For those of us who care about Congress' constitutional responsibilities, this is simply not acceptable.

The two bills before the subcommittee address this problem and seek to make more precise the rules governing notice to Congress. H.R. 1371, introduced by Mr. Mineta of California, would require prior notice of all covert operations without exception. H.R. 1013, introduced by Mr. Stokes of Ohio and others, would require prior notice in almost all cases, but would give the President discretion to defer notice of the operation until after its inception, only where time is of the essence and there are extraordinary circumstances affecting the vital interests of the United States. However, in such cases, the legislation would require the President to notify the Intelligence Committees within 48 hours after the covert operation began. Both bills would retain the President's right to limit prior notice to the leadership group of eight if there are extraordinary circumstances affecting the vital interests of the United States.

A major point of contention in prior hearings has been the provision in H.R. 1013 which, in those cases where the exigencies of time do not permit the President to give prior notice, would define timely notice as 48 hours after the covert operation has begun.

Some witnesses have argued that a President needs more discretion. If a President exercises discretion reasonably, a vague term like "timely notice" can serve quite adequately. But when a President deliberately uses such a broad guideline to completely shut Congress out of the policymaking and oversight process, it is a serious matter for the Congress and the country.

That is what happened in the case of the IRAN arms sales and, unfortunately, it is not an isolated incident. Congress passed the Boland amendment with the very clear purpose of prohibiting our Government from extending military aid to the Nicaraguan contras, directly or indirectly. In recent weeks, the President has argued that the Boland amendment was ambiguous; that while it may have prohibited some agencies of Government from providing aid, it did not apply to the President or to the National Security Council. Such an argument, employed to rationalize a pattern of

conduct designed to get around the clear intent of Congress, does not inspire confidence—at least with some of us in Congress. If Congress is serious about its proper role under the Constitution, it cannot be inert in the face of such misinterpretations of law. It has no choice but to define, as expressly as possible, what is intended.

I have no doubt that the administration witnesses who testify this morning will disagree with this, but it is in that context in which the two bills before us have been introduced.

I would like at this time to recognize the distinguished Chairman of the Intelligence Committee, who as I mentioned is a prime author of one of the bills before us, and who has been a leader in getting this subcommittee to focus on this critically important issue. Mr. Stokes.

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

Mr. Chairman, these hearings, as well as the Iran-contra hearings, have reinforced my views as to the wisdom and necessity of introducing and passing H.R. 1013. When Eddie Boland and I introduced H.R. 1013 on February 4, I stated: "When the executive branch treats congressional oversight as an irritant to be avoided or overcome, the result is quite often a policy or program failure. Occasionally, such failures are of such magnitude as to directly affect the national interest.

"Clearly, this has been the case with regard to the so-called Iran initiative. The intent to evade congressional oversight is clear; the disastrous result is equally clear. It has come in the one area of secret governmental activity—covert action—where effective congressional oversight is imperative and where congressional access to information must be unfettered. If the Intelligence Committees are not informed of covert actions, then no one in Congress is informed and no oversight is performed. If the Intellience Committees are not permitted to offer sound advice and constructive criticism before an action is initiated, then rarely will any such advice or criticism be heard from anyone who does not have a direct operational or policy connection to the particular covert action contemplated."

At that time I also noted: "That bond of mutual respect and trust between the Intelligence Committees and the CIA, which Eddie Boland, Ken Robinson, Senator Inouye, Senator Bayh, Senator Goldwater and others strove so hard and so successfully to establish, has been broken. It has been replaced of late by a demonstration of arrogance that permits high-ranking Government officials to look for ways to avoid the law rather than to execute it, and to reason that a statute designed to ensure prior notice authorized no notice at all for ten months."

Since I made those statements in February, the Congress has heard testimony from a former National Security Advisor and an Assistant Secretary of State, admitting that they deliberately misled or misinformed congressional committees, including this one.

A CIA official has asserted, in effect, that his superiors did not tell the truth when testifying before congressional committees, including this one.

We have learned that the DEA was directly involved in a covert attempt to free our hostages, a covert action for which there was

no finding and which was not reported to the requisite committees, including this one, in violation of the Oversight Act of 1980 and Executive Order 12333.

We have been bombarded with misleading allusions to the Boland amendment. It is either too vague, or too broad, or too confusing, or not specific enough. And, in any case, it does not apply to the NSC or to the President.

Mr. Chairman, against this backdrop, dare we risk any confusion about what is essentially the charter of the intelligence oversight process, the Oversight Act of 1980? We should leave no room for doubt or dissembling. The legislative intent should be clear: prior notice of covert actions, prior notice to the 8-person leadership group for matters of rare and extraordinary sensitivity, and a short delay of such notice in extraordinary circumstances when the President must act before he can provide notice.

That is what the Congress meant in 1980. That is what we should restate today.

It is, it seems to me, a reasonable and sound foundation upon which to rebuild the intelligence oversight process. It ensures that the Congress has the information it needs, when it needs it, to perform adequate oversight, and it provides the President with all of the flexibility he needs to respond to emergencies.

I thank you very much, Mr. Chairman.

Chairman MCHUGH. Thank you, Mr. Stokes.

I would like now to invite our ranking member of the subcommittee, Mr. Livingston of Louisiana, to make any opening comments he would like.

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

First of all, I want to thank you for your indulgence when I had to request that this hearing be postponed from last week. I apologize to the witnesses for the last minute inconvenience, but there was a conflict that we couldn't reconcile. So I do appreciate your delaying the hearing until this week.

Mr. Chairman, I also appreciate the opportunity to speak in this, the third hearing on legislation that I firmly believe to both unnecessary and very possibly, even a harmful attempt to bind the hands of the President of the United States as he undertakes his responsibilities to guard the security of the American people.

Mr. Chairman, the Iranian-contra affair may have been fraught with mistakes, but it was an isolated instance. To use this episode in American history as an excuse to compel the President of our country, whoever he may be in the future, to consult with Congress every time he considers utilizing covert action to effect foreign policy would, in my opinion—and in the opinion of the vast majority of the witnesses who have appeared before this committee, including Stansfield Turner, the former Chief of the CIA under President Carter—be an irresponsible and gross overreaction by the Congress to an event that is adequately being dealt with by the Congress with the legislative tools already at hand.

In further advance of that proposition, Mr. Chairman, I would like to read a letter from Zbigniew Brzezinski, the former Chief of the NSC for President Carter, who wrote Congressman Hyde on April 10, 1987. In his letter he says:

DEAR CONGRESSMAN HYDE: I agree that there is a need for mechanisms for proper congressional oversight of covert operations. But we must not make such mechanisms so restrictive that they put the success of needed covert operations in jeopardy. No one disputes the fact that congressional oversight is necessary. Nor does anyone dispute the fact that total secrecy is sometimes necessary for particularly sensitive covert operations to succeed. The problem is how to balance the two when they come into conflict.

I believe that the two key items of the proposed amendments to the Hughes-Ryan Act—the 48-hour notice for covert operations and the immediate provision of written presidential intelligence findings—are an inappropriate response to the problem. They would undercut fatally the President's ability to conduct the necessary operations which occasionally require absolute secrecy. If they had been in effect during the Iranian hostage rescue mission in 1980, the President would have had to inform Congress and therefore increase the risk of a breach in security, at the same time as the American rescue force was driving toward Tehran.

We must face up to the fact that we cannot create a risk-free system. In covert operations, administrations, past and present, have made mistakes. There is no way to legislate away the risk of future mistakes except by prohibiting covert operations. In the aftermath of the Iran-contra affair, the greatest risk is that we will legislate new restrictions so strict that they would guarantee that all the Congress would find itself overseeing is failed covert operations—or none at all.

Sincerely,

ZBIGNIEW BRZEZINSKI.

Mr. Chairman, on the basis of the testimony of the witnesses, and the letter by Mr. Brzezinski, I therefore am convinced, after hearing those witnesses and reading his letter, that to enact either H.R. 1013 or H.R. 1371 would be a terrible mistake. However, I am open to further argument, and I look forward to hearing the testimony of the witnesses who will appear before us today.

Thank you.

Chairman MCHUGH. Thank you very much, Mr. Livingston.

At this point I would like to welcome our two witnesses representing the administration this morning. I will ask each of them to make their statements and we will refrain from questions until both statements have been completed.

Our first witness is Mr. Michael Armacost, who is the Under Secretary of State for Political Affairs from the Department of State, and our second witness will be Mr. David Doherty, who is the General Counsel of the Central Intelligence Agency. We welcome both of you here this morning and appreciate your time.

Mr. Armacost, I wonder if you would begin with your statement.

STATEMENTS OF MICHAEL H. ARMACOST, UNDER SECRETARY FOR POLITICAL AFFAIRS, DEPARTMENT OF STATE; AND DAVID P. DOHERTY, GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

STATEMENT OF MICHAEL H. ARMACOST

Mr. ARMACOST. Thank you, Mr. Chairman. I am pleased to have the opportunity to appear before the committee on this matter of great importance.

The amendments proposed by H.R. 1013 and H.R. 1371 go to the heart of intelligence activities that extend beyond the collection of information, a category commonly known as covert action. In our judgment, they go too far. Covert action, of course, could be a critically important tool of foreign policy. When our vital international interests are at stake, the President must be able to act covertly when circumstances would make overt action unwise or impossible.

There are times when our vital interests require action, but the revelation or acknowledgement of U.S. involvement would increase the possibility of international confrontation or hinder related efforts on the political or diplomatic front. The President is in the best position to determine when to incorporate a covert action into the implementation of a particular policy.

Americans can reasonably disagree about the specific decisions of a President to employ covert action, but I think few would assert that no circumstances justify such activity. In some situations, it may be the only means of achieving the highest humanitarian and political objectives.

Every administration should approach covert action with two operating principles, and these are the principles which have been reaffirmed by this administration. First, before beginning any covert program, we must be confident that it is consistent with U.S. law, U.S. policy, U.S. interests, and American national values.

Secondly, any program of secret action by the Government to shape events beyond our borders should be something the American people would support. As President Reagan recently said, we must be sure that if a covert action operation is disclosed, the American people will say "that makes sense."

To ensure this, covert action programs must undergo continuing and comprehensive review. That process must ensure that foreign policy, together with practical and legal considerations, are fully taken into account in covert action decisions. Further, the process must also consider the need for support from and accountability to the Congress. Both are indispensable to the success and sustainability of any covert program.

By National Security Decision Directive 266, which he sent to Congress with his message of March 31, 1987, the President reaffirmed that "all requirements of law concerning covert activities, including those requirements relating to presidential authorization and congressional notification, be addressed in a timely manner and complied with fully." The executive branch is thus fully committed to both the letter and the spirit of the legally mandated review and oversight functions of the congressional intelligence committees.

Covert action also must fit within a specific, articulated and well-understood foreign policy framework. The President's directive implementing the recommendations of the Tower Board reaffirmed a process that is designed to ensure that proposed and ongoing covert action programs are considered, in every case, within precisely that framework. Even before the Tower Board issued its report, the President restructured the covert action decison-making process to ensure the participation of all NSC principals and the Attorney General and the transmission to the President of individuals views. The National Security Council's Planning and Coordination Group has completed a comprehensive review of all covert action programs to ensure their consistency with the law, with our foreign policy, and with the executive obligation to keep Congress informed.

With this background, let me address the amendments that are before the committee. The administration believes the existing process of congressional oversight provides adequately for timely

notification and continuing consultations with the intelligence committees on covert action proposals and ongoing covert activities. In short, the administration accepts the findings of the Tower Board, its conclusion that our recent problems stem from the failings of men, not from the system. The President has endorsed each of the Board's conclusions and recommendations, and has directed that they be fully implemented in practice. He has taken strong action to prohibit the NSC staff from undertaking covert operations.

The Tower Board further cautioned that legislative inflexibility should be avoided. The Board recommended that no substantive change be made in the provisions of the National Security Act dealing with the structure and opertion of the NSC systems. In his message to Congress on March 31, 1987, the President endorsed this conclusion as well. He said: "I must make clear that I will strongly oppose legislation that would attempt to encroach further on what I regard as the President's independent constitutional authority in the intelligence field." In attempting to fix a system that is not broken, Congress risks impairing the effectiveness of an essential policy tool.

In the administration's view, H.R. 1013 and H.R. 1371 intrude unconstitutionally into the President's authority to conduct the Nation's foreign relations. In a separate submission, the Department of Justice has detailed the basis for that view. The bills would delete the current language in section 501 of the National Security Act, which acknowledges that the provisions of that section are subject to the authorities and duties conferred by the Constitution on the executive and legislative branches. Of course, no statutory amendment may limit constitutional authorities and duties. By striking such language, such legislation would give the appearance that Congress in some fashion wishes to diminish or undermine the President's constitutional position and authority.

We believe that H.R. 1013 and H.R. 1371 would undermine the flexibility and discretion the President must have to carry out covert action programs. The bills would require that a copy of a written finding be provided to certain individuals prior to the initiation of any covert operation, but apart from the fact that provision represents an unconstitutional intrusion in the President's authority to seek advice, a point argued by the Justice Department, it may not be possible or practicable to do so in the event of an urgent need to act.

H.R. 1013 would place an absolute limit of 48 hours on the President's ability to defer notification in extraordinary cases. This requirement may not be reasonable when sensitive operations require the tightest security for the success of the mission and the safety of human lives. The 1980 Iran rescue mission is an example of such a situation. Even a requirement for notification within 48 hours of initiation of action could pose great risk while the activity is still underway.

The executive branch is firmly committed to using its discretion under current law to defer notification only in genuinely extraordinary circumstances. The record should be clear that recent administrations have not exercised such discretion lightly. Such circumstances have arisen only rarely in the past, I believe, in relation-

ship to the 1980 Iranian rescue effort and the Iranian arms sales of 1985-86.

Obviously, the controversy that has surrounded the 1985-86 arms sales to Iran can only heighten any President's sense of the political risk to be incurred in making such exceptions. Nevertheless, as the Justice Department has explained in its letter, the Constitution recognizes and the Supreme Court has held that the President must have the flexibility to act to protect the Nation's vital interests. Among his duties in discharging his constitutional responsibilities in the conduct of foreign affairs is the obligation to deal with increasingly sophisticated threats to our national security. To fulfill his obligations, the President must have the flexibility to conduct covert action and to delay congressional notification if extraordinry circumstances require a delay.

The administration, therefore, opposes the adoption of H.R. 1013 and H.R. 1371.

[The statement of Michael H. Armacost follows:]

STATEMENT BY

Michael H. Armacost
Under Secretary for Political Affairs
Department of State

House Permanent Select Committee Hearing
on H.R.1013 and H.R. 1371

June 10, 1987

The amendments proposed by H.R. 1013 and H.R. 1371 go to the heart of intelligence activities that extend beyond the collection of information, a category commonly known as covert action. And they go too far. Covert action is a critically important tool of foreign policy. When our vital international interests are at stake, the President must be able to act covertly when circumstances would make overt action unwise or impossible. There are times when our vital interests require action, but the revelation or acknowledgment of US involvement would increase the possibility of international confrontation or hinder related efforts on the political or diplomatic front. The President is in the best position to determine when to incorporate a covert option into the implementation of a particular policy.

Americans can reasonably disagree about the specific decisions of a President to employ covert action, but few would assert that no circumstances justify such activity. In some situations, it may be the only means of achieving the highest humanitarian and political objectives.

Every Administration should approache covert action with two operating principles. First, before beginning any covert program, we must be confident that it is consistent with U.S. law, policy, interests and national values.

Secondly, any program of secret action by the government to shape events should be something the American people would support. As President Reagan recently said, we must see that if and when a covert action operation is disclosed, the American people will say, "that makes sense."

To ensure this, covert action programs must undergo continuing comprehensive review. This process must ensure that foreign policy, together with practical and legal considerations, are fully taken into account in covert action decisions. Further, the process must take into account the need for support from, and accountability to, Congress; both are indispensable to the success and sustainability of a covert program. By National Security Decision Directive 266, which he sent to Congress with his message of March 31, 1987, the President reaffirmed that "all requirements of law concerning covert activities, including those requirements relating to presidential authorization and congressional notification, be addressed in a timely manner and complied with fully." (Attached) The Executive Branch thus is committed to both the

letter and the spirit of the legally mandated review and oversight functions of the congressional intelligence committees.

Covert action also must fit within a specific, articulated and well understood foreign policy framework. The President's Directive implementing the recommendations of the Tower Board reaffirmed a process designed to ensure that proposed and ongoing covert action programs are considered, in every case, within just such a framework. Even before the Tower Board issued its report, the President restructured the covert action decision-making process to ensure the participation of all NSC principals and the Attorney General and the transmission to the President of individual views. The National Security Council's Planning and Coordination Group has completed a comprehensive review of all covert action programs to ensure their consistency with the law, with our foreign policy, and with the executive obligation to keep Congress informed..

With this background, let me now address the amendments before this Committee. The Administration believes the existing process of congressional oversight provides adequately for timely notification and continuing consultations with the intelligence committees on covert action proposals and ongoing covert activities. In short, the Administration accepts the

Tower Board's conclusion that our recent problems stem from the failings of men, not from the system. The President has endorsed each of the Board's conclusions and recommendations, and has directed that they be fully implemented in practice. And he has taken strong action to prohibit the NSC staff from undertaking covert operations.

The Tower Board further cautioned that legislative inflexibility should be avoided. The Board "recommend[ed] that no substantive change be made in the provisions of the National Security Act dealing with the structure and operation of the NSC systems." In his message to Congress of March 31, 1987, the President endorsed this conclusion as well. He said: "I must make clear that I will strongly oppose legislation that would attempt to encroach further on what I regard as the President's independent constitutional authority in the intelligence field." In attempting to fix a system that is not broken, Congress risks impairing the effectiveness of an essential policy tool.

In the Administration's view, HR 1013 and H.R. 1371 unconstitutionally intrude into the President's authority to conduct the nation's foreign relations. In a separate submission, the Department of Justice has detailed the basis for this view. The bill would delete the current language in Section 501 of the National Security Act, which acknowledges

that the provisions of that Section are subject to the authorities and duties conferred by the Constitution on the executive and legislative branches. Of course, no statutory amendment may limit constitutional authorities and duties, but, by striking such language, such legislation would give the appearance that Congress in some fashion wishes to diminish or undermine the President's constitutional position and authority.

We believe that HR 1013 and H.R. 1371 would undermine the flexibility and discretion the President must have to carry out covert action programs. The bill would require that a copy of a written Finding be provided to certain individuals prior to the initiation of any covert operation, but, apart from the fact that provision represents an unconstitutional intrusion in the President's authority to seek advice, a point argued by the Justice Department, it may not be possible or practicable to do so in the event of an urgent need to act.

H.R. 1013 would place an absolute limit of 48 hours on the President's ability to defer notification in extraordinary cases. This requirement may not be reasonable when sensitive operations require the tightest security for the success of the mission and the safety of human lives. The 1980 Iran rescue mission is an example of such a situation.

Even a requirement for notification within 48 hours of initiation of action could pose great risk while the activity is still underway.

The Executive Branch is firmly committed to using its discretion under current law to defer notification only in genuinely extraordinary circumstances. The record should be clear that recent Administrations have not exercised such discretion lightly. Such circumstances have arisen only rarely in the past, for example in regard to the 1980 Iranian rescue effort and the Iranian arms sales of 1985-86.

Obviously, the controversy that has surrounded the 1985-86 arms sales to Iran can only heighten any President's sense of the political risk to be incurred in making such exceptions. Nevertheless, as the Justice Department explains in its letter, the Constitution recognizes and the Supreme court has held that the President must have the flexibility to act to protect the nation's vital interests. Among his duties in discharging his constitutional responsibilities in the conduct of foreign affairs is the obligation to deal with increasingly sophisticated threats to our national security. To fulfill his obligations the President must have the flexibility to conduct covert action and to delay congressional notification if extraordinary circumstances require delay.

The Administration therefore opposes the adoption of H.R. 1013 and H.R. 1377.

Chairman McHUGH. Thank you very much, Mr. Armacost.

As I said at the beginning, we will defer questions until Mr. Doherty has given us his statement.

At this point, Mr. Doherty, will you proceed, please.

STATEMENT OF DAVID P. DOHERTY

Mr. DOHERTY. Thank you, Mr. Chairman and members of the committee.

Let me say initially that Jim Taylor, who is our executive director, had planned to appear today to give this testimony. In light of the change in scheduling, he had a conflict and asked me to sit in for him.

Let me begin by stating that the Central Intelligence Agency joins the Department of State and the Department of Justice in strongly opposing H.R. 1013. We share their view that the proposed legislation not only would impermissibly intrude on the President's authority in foreign affairs but also, as a policy matter, improperly would deny him the necessary flexibility to meet the increasingly sophisticated threat to our national security and to that of our friends and allies. We believe that the system now in place acceptably reconciles the constitutional authorities of the executive and legislative branches.

Let me first briefly describe the current system. I should like to clarify for the record the comprehensiveness of the CIA's efforts to facilitate meaningful oversight by this committee and its counterpart in the Senate of the Nation's covert action programs. The Iran arms transfers stand as an exception to this administration's practice. Whatever the committee's concerns about that exception, the committee should not lose sight of the basic practice.

In his March 31 message to Congress, the President said that he welcomes the Congress' oversight role in the intelligence field as it has developed in the last decade. The record of the past six years and of the notifications, reports, briefings, and testimony on covert action provided by the CIA for the benefit of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence is evidence of the President's commitment to make the congressional oversight process work. By its very nature, that record cannot, in any detailed way, be made public. We can, of course, provide a classified annex to this testimony detailing our performance in this area.

The chronology of the administration's consultations with Congress point up the abundant successes of the current statutory scheme. It also demonstrates the care, as the Tower Board found, with which executive branch procedures have been drawn to ensure that responsible committees of Congress are kept fully and currently informed of covert action programs.

There appears to exist a widespread misperception of these procedures. I should like to set the record straight. At the initiation of a covert action, the CIA routinely provides this committee and the Senate Select Committee on Intelligence with the full text of the presidential finding that the contemplated action is important for the national security. The CIA also provides accompanying papers setting forth the scope of a proposed operation and other back-

ground information. Once a program is initiated, the CIA provides periodic briefings on the conduct and effectiveness of the covert program in question. The congressional intelligence committees are informed when and if events dictate significant changes in programs as well as of success and failure. They thus are informed both at the inception and then periodically during the life of a program until the President cancels the finding.

My impression is that, although there are some areas of disagreement, there is a fair consensus between this committee and the CIA over how oversight responsibilities can be accommodated. A chronology of congressional notifications and briefings would show the extent of our consultation efforts. In fact, the CIA provides Congress even more information about the details of covert actions than it provides to most people who are actually engaged in the operations themselves.

The issues presented by H.R. 1013 are not new but were thoroughly considered during deliberations on the Intelligence Oversight Act of 1980. The most difficult issue between the executive and the legislature when considering the Intelligence Oversight Act of 1980 is the question of prior notification, with the executive asserting on constitutional grounds that the President could delay notification. The compromise that was worked out was that prior notification of the oversight committees would be the norm but that there would be allowance for exceptional circumstances.

On the question of the President's constitutional prerogative to delay notification, the Congress challenged that constitutional authority in that bill and therefore added section 501(b). This section takes into account the President's constitutional authority to delay notification and sets forth the circumstances under which he should report after delaying notification. This is an important point because of the view expressed by some in recent months that the President's decision not to provide advance notice in the Iran operations is a violation of section 501. This simply is not the case, although legislative history surrounding consideration of the Oversight Act makes clear that it was acknowledged by all concerned that notification would be delayed only in the most extreme cases. In fact, the committees have received advance notification of every presidential finding but for the two involving the attempted rescue of our hostages in Iran in 1979–80 and the NSC initiative in 1985 and 1986.

The executive branch's position on this critical issue of notification is unchanged, and we therefore oppose the provisions of H.R. 1013. The administration will do everything reasonable to respond to the requirements of congressional oversight, but the President must preserve reasonable flexibility for dealing with unforeseeable future contingencies.

As the Tower Board noted, there is a natural tension between the desire for secrecy and the need to consult Congress on covert operations. That tension has always existed. We do not believe that the legislation, however well intentioned, will reduce that tension.

As Congressman Boland remarked at the time the existing law was passed, the Congress left the Constitution as it found it. It is my view that the President's constitutional prerogatives cannot be taken away by statute, and I understand that the Department of

Justice is submitting a separate letter to set forth the constitutional objections to the statute.

An attempt to remove those authorities would simply increase the tension in this area in situations where flexibility is most needed. Instead, we should, as the current law contemplates, continue to attempt to work out differences in a spirit of comity and mutual understanding.

Thank you.

[The statement of Mr. Doherty follows:]

STATEMENT OF DAVID P. DOHERTY

GENERAL COUNSEL

CENTRAL INTELLIGENCE AGENCY

THANK YOU MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. LET ME BEGIN BY STATING THAT THE CENTRAL INTELLIGENCE AGENCY JOINS THE DEPARTMENT OF STATE AND THE DEPARTMENT OF JUSTICE IN STRONGLY OPPOSING H.R. 1013. WE SHARE THEIR VIEW THAT THE PROPOSED LEGISLATION NOT ONLY WOULD IMPERMISSIBLY INTRUDE ON THE PRESIDENT'S AUTHORITY IN FOREIGN AFFAIRS BUT ALSO, AS A POLICY MATTER, IMPROPERLY WOULD DENY HIM THE NECESSARY FLEXIBILITY TO MEET INCREASINGLY SOPHISTICATED THREATS TO OUR NATIONAL SECURITY AND THAT OF OUR FRIENDS AND ALLIES. WE BELIEVE THAT THE SYSTEM NOW IN PLACE ACCEPTABLY RECONCILES THE CONSTITUTIONAL AUTHORITIES OF THE EXECUTIVE AND LEGISLATIVE BRANCHES.

LET ME FIRST BRIEFLY DESCRIBE THE CURRENT SYSTEM. I SHOULD LIKE TO CLARIFY FOR THE RECORD THE COMPREHENSIVENESS OF THE CIA'S EFFORTS TO FACILITATE MEANINGFUL OVERSIGHT BY THIS COMMITTEE, AND ITS COUNTERPART IN THE SENATE, OF THE NATION'S COVERT ACTION PROGRAMS. THE IRAN ARMS TRANSFERS STAND AS AN EXCEPTION TO THIS ADMINISTRATION'S PRACTICE. WHATEVER THE COMMITTEE'S CONCERNS ABOUT THAT EXCEPTION, THE COMMITTEE SHOULD NOT LOSE SIGHT OF THE BASIC PRACTICE.

IN HIS MARCH 31ST MESSAGE TO CONGRESS, THE PRESIDENT SAID HE "WELCOME(S) THE CONGRESS'S OVERSIGHT ROLE (IN THE INTELLIGENCE FIELD) AS IT HAS DEVELOPED IN THE LAST DECADE." THE RECORD OF THE PAST SIX YEARS -- AND OF THE NOTIFICATIONS, REPORTS, BRIEFINGS, AND TESTIMONY ON COVERT ACTION PROVIDED BY THE CIA FOR THE BENEFIT OF THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE AND THE SENATE SELECT COMMITTEE ON INTELLIGENCE -- IS EVIDENCE OF THE PRESIDENT'S COMMITMENT "TO MAKE THE CONGRESSIONAL OVERSIGHT PROCESS WORK." BY ITS VERY NATURE, THAT RECORD CANNOT -- IN ANY DETAILED WAY -- BE MADE PUBLIC. WE CAN, OF COURSE, PROVIDE A CLASSIFIED ANNEX TO THIS TESTIMONY DETAILING OUR PERFORMANCE IN THIS AREA. THE CHRONOLOGY OF THE ADMINISTRATION'S CONSULTATIONS WITH CONGRESS POINT UP THE ABUNDANT SUCCESSES OF THE CURRENT STATUTORY SCHEME. IT ALSO DEMONSTRATES THE CARE, AS THE TOWER BOARD FOUND, WITH WHICH EXECUTIVE BRANCH PROCEDURES HAVE BEEN DRAWN TO ENSURE THAT RESPONSIBLE COMMITTEES OF CONGRESS ARE KEPT "FULLY AND CURRENTLY INFORMED" OF COVERT ACTION PROGRAMS.

THERE APPEARS TO EXIST A WIDESPREAD MISPERCEPTION OF THOSE PROCEDURES. I SHOULD LIKE TO SET THE RECORD STRAIGHT. AT THE INITIATION OF A COVERT ACTION, THE CIA ROUTINELY PROVIDES THIS COMMITTEE AND THE SENATE SELECT COMMITTEE ON INTELLIGENCE WITH THE FULL TEXT OF THE PRESIDENTIAL FINDING THAT THE CONTEMPLATED ACTION IS IMPORTANT TO THE NATIONAL SECURITY. THE CIA ALSO PROVIDES ACCOMPANYING PAPERS SETTING FORTH THE SCOPE OF A PROPOSED OPERATION AND OTHER BACKGROUND INFORMATION. ONCE A PROGRAM IS INITIATED, THE CIA PROVIDES PERIODIC BRIEFINGS ON THE CONDUCT AND EFFECTIVENESS OF THE COVERT PROGRAM IN QUESTION. THE CONGRESSIONAL INTELLIGENCE COMMITTEES ARE

ON THE QUESTION OF THE PRESIDENT'S CONSTITUTIONAL PREROGATIVE TO DELAY NOTIFICATION, THE CONGRESS CHOSE NOT TO CHALLENGE THAT CONSTITUTIONAL AUTHORITY IN THAT BILL, AND THEREFORE ADDED SECTION 501B. THIS SECTION TAKES INTO ACCOUNT THE PRESIDENT'S CONSTITUTIONAL AUTHORITY TO DELAY NOTIFICATION AND SETS FORTH THE CIRCUMSTANCES UNDER WHICH HE SHOULD REPORT AFTER DELAYING NOTIFICATION. THIS IS AN IMPORTANT POINT BECAUSE OF THE VIEW EXPRESSED BY SOME IN RECENT MONTHS THAT THE PRESIDENT'S DECISION NOT TO PROVIDE ADVANCE NOTICE OF THE IRAN OPERATIONS WAS A VIOLATION OF SECTION 501. THIS SIMPLY IS NOT THE CASE. ALTHOUGH LEGISLATIVE HISTORY SURROUNDING CONSIDERATION OF THE OVERSIGHT ACT MAKES CLEAR THAT IT WAS ACKNOWLEDGED BY ALL CONCERNED THAT NOTIFICATION WOULD BE DELAYED ONLY IN THE MOST EXTREME CASES. IN FACT, THE COMMITTEES HAVE RECEIVED ADVANCED NOTIFICATION OF EVERY PRESIDENTIAL FINDING BUT FOR THE TWO INVOLVING THE ATTEMPTED RESCUE OF OUR HOSTAGES IN IRAN IN 1979-1980 AND THE NSC INITIATIVE IN 1985 AND 1986.

THE EXECUTIVE BRANCH'S POSITION ON THIS CRITICAL ISSUE OF NOTIFICATION IS UNCHANGED, AND, WE THEREFORE, OPPOSE THE PROVISIONS OF H.R. 1013. THE ADMINISTRATION WILL DO EVERYTHING REASONABLE TO RESPOND TO THE REQUIREMENTS OF CONGRESSIONAL OVERSIGHT, BUT THE PRESIDENT MUST PRESERVE REASONABLE FLEXIBILITY FOR DEALING WITH UNFORESEEABLE FUTURE CONTINGENCIES. AS THE TOWER BOARD NOTED, "THERE IS A NATURAL TENSION BETWEEN THE DESIRE FOR SECRECY AND THE NEED TO CONSULT CONGRESS ON COVERT OPERATIONS." THAT TENSION HAS ALWAYS EXISTED. WE DO NOT BELIEVE THAT THE LEGISLATION, HOWEVER WELL INTENTIONED, WILL REDUCE THAT TENSION. AS CONGRESSMAN BOLAND REMARKED

INFORMED WHEN AND IF EVENTS DICTATE SIGNIFICANT CHANGES IN PROGRAMS AS WELL AS OF SUCCESS AND FAILURE. THEY THUS ARE INFORMED BOTH AT THE INCEPTION AND THEN PERIODICALLY DURING THE LIFE OF A PROGRAM UNTIL THE PRESIDENT CANCELS A FINDING.

MY IMPRESSION IS THAT, ALTHOUGH THERE ARE SOME AREAS OF DISAGREEMENT, THERE IS A FAIR CONSENSUS BETWEEN THIS COMMITTEE AND THE CIA OVER HOW THE OVERSIGHT RESPONSIBILITIES CAN BE ACCOMMODATED. A CHRONOLOGY OF CONGRESSIONAL NOTIFICATIONS AND BRIEFINGS WOULD SHOW THE EXTENT OF OUR CONSULTATION EFFORTS. IN FACT THE CIA PROVIDES CONGRESS EVEN MORE INFORMATION ABOUT THE DETAILS OF COVERT ACTIONS THAN IT PROVIDES TO MOST PEOPLE WHO ARE ACTUALLY ENGAGED IN THE OPERATIONS THEMSELVES.

THE ISSUES PRESENTED BY H.R. 1013 ARE NOT NEW, BUT WERE THOROUGHLY CONSIDERED DURING DELIBERATIONS ON THE INTELLIGENCE OVERSIGHT ACT OF 1980.

THE MOST DIFFICULT ISSUE BETWEEN THE EXECUTIVE AND THE LEGISLATURE WHEN CONSIDERING THE INTELLIGENCE OVERSIGHT ACT OF 1980 WAS THE QUESTION OF PRIOR NOTIFICATION, WITH THE EXECUTIVE ASSERTING ON CONSTITUTIONAL GROUNDS THAT THE PRESIDENT COULD DELAY NOTIFICATION. THE COMPROMISE THAT WAS WORKED OUT WAS THAT <u>PRIOR</u> NOTIFICATION OF THE OVERSIGHT COMMITTEES WOULD BE THE NORM, BUT THAT THERE WOULD BE ALLOWANCE FOR EXCEPTIONAL CIRCUMSTANCES.

AT THE TIME THE CURRENT LAW WAS PASSED, THE CONGRESS LEFT THE CONSTITUTION AS IT FOUND IT. IT IS MY VIEW THAT THE PRESIDENT'S CONSTITUTIONAL PREROGATIVES CAN'T BE TAKEN AWAY BY STATUTE, AND I UNDERSTAND THAT THE DEPARTMENT OF JUSTICE IS SUBMITTING A SEPARATE LETTER TO SET FORTH THE CONSTITUTIONAL OBJECTIONS TO THE STATUTE. AN ATTEMPT TO REMOVE THOSE AUTHORITIES WOULD SIMPLY INCREASE THE TENSION IN THIS AREA IN SITUATIONS WHERE FLEXIBILITY IS MOST NEEDED. INSTEAD, WE SHOULD, AS THE CURRENT LAW CONTEMPLATES, CONTINUE TO ATTEMPT TO WORK OUT DIFFERENCES IN "A SPIRIT OF COMITY AND MUTUAL UNDERSTANDING."

Chairman McHUGH. Thank you very much, Mr. Doherty.

We will begin now with the questions under the usual five-minute rule.

Gentlemen, the problem, as you know, that Congress is facing is that we do have before us now the example, the real live case, of the Iran arms sales policy, and, as we all know, in that situation, the President formally authorized the sales to Iran on January 17, 1986. Indeed, before that time, our Government was, in some measure, involved in the provision of arms to Iran, but the formal finding or authorization occurred on January 17, 1986. There was no prior notice to the intelligence committees or to the limited leadership group of eight before that policy was implemented, and, as I mentioned in my opening remarks, there was no notice whatsoever of that policy provided to the intelligence committees or to the leadership group until we learned about it some 10 months later in a foreign publication.

Now it has been suggested by some administration people—and I think, Mr. Armacost, you have implied this in your statement—that that was an exception, that the Iran arms sales situation is the exception to the rule, and perhaps you would go so far as to say it wouldn't happen again.

But we are faced here with a question of interpretation: What does the current law mean, and what will the administration do in the future in interpreting current law? Will it take the same position that it did in Iran that no prior notice is required under similar circumstances, or that where no prior notice is provided, notice after the fact can be delayed for up to 10 months or longer? That is an important part of our exploration in the subcommittee.

My first question, I suppose, Mr. Armacost, is: Do you agree that the decision by the President to sell arms to Iran was a major policy decision for the United States?

Mr. ARMACOST. Yes, I do.

Chairman McHUGH. The second question is: Why, in your opinion, was prior notice not given? As you have indicated and Mr. Doherty has indicated, prior notice to the intelligence committees before the implementation of a major policy decision, albeit a covert one, is the norm, is the general rule, is what is expected as a general requirement. What circumstances in this case justified withholding prior notice?

Mr. ARMACOST. I can't speak to the details of the case, Mr. Chairman. I think this has come out in other testimony. In the Department, we were unaware of the finding until November 10 when the Secretary was briefed on it. I saw it first on November 18. We were not privy to the discussions on this issue.

I would however, make the general point that the fall-out from this case has been extraordinary. It has gripped the whole country. As a result of this care, the President established the Tower Board to review procedures within the executive branch, to examine both the NSC's role in covert operations and the procedures for coordinating covert activities within the executive branch.

I described in my testimony the current implementation of those reforms. These include directions which preclude the NSC staff from engaging in the covert operations; a requirement for thorough

review of the legality and consistency with policy of covert actions, and an assessment of the notification requirements.

So this case does seem to me to be an exception, particularly in the sense, that in the wake of this, the President is going to be especially mindful of the importance of securing broad support in the executive branch and within the Congress for basic decisions of this sort.

Chairman McHUGH. If one goes back, Mr. Armacost, and looks at the legislative history of the Oversight Act of 1980, which is the law which primarily incorporates the rules with respect to notice, one finds the only exception contemplated by the managers of the bill in the Senate was where time is of the essence, where the President, simply, under the circumstances then existing does not have time to notify the intelligence committees or the leadership group of eight.

As the representative of the administration, are there any other circumstances which you could envision which would justify a President in not providing prior notice to the intelligence committees?

Mr. ARMACOST. Stan Turner, whom Mr. Livingston recalled was the director of the CIA under a previous administration, cited several instances in which he personally judged it unwise to expand the circle of those who knew about an operation because agents were putting their lives on the line. This, obviously, did not involve a deferral of notification for months but it was a matter of considering the danger in which people who were advancing or protecting American interests overseas were placed.

Chairman McHUGH. Here we have a situation in the case of the Iran arms sales where no one in Congress was notified before or after the policy was implemented. The Speaker of the House was not notified. But you had merchants of arms who were fully apprised: Mr. Ghorbanifar, Adnan Khashoggi, General Secord, a whole variety of people, including officials of the Iranian Government who knew about this, but the Speaker of the House couldn't be trusted; it was too sensitive, apparently. This is something which our committee and the Congress as a whole, I think, is quite concerned about, and it is precisely why we are taking up this bill.

Let me ask you, before my time expires, about the second exception, which is notice in a timely fashion if prior notice is not given. Would you argue on behalf of the administration that delaying notice for as long as 10 months after a finding was signed by the President was notice in a timely fashion under existing law?

Mr. ARMACOST. I would not argue with that.

Chairman McHUGH. Wasn't it obvious it was not timely notice?

Mr. ARMACOST. I'm not here to argue that point.

Chairman McHUGH. Well, you see, we are faced with that set of circumstances, and that is precisely why the bill that has been introduced would say we have to define what timely notice is, because we have an administration that takes the position that timely notice is 10 months and presumably would have gone on longer if the Iranians had not disclosed the information in a Middle East magazine.

Mr. ARMACOST. I'm not here, Mr. Chairman, to argue that mistakes were not made in the Iranian arms sale. I'm saying merely

that the Tower Board, which was composed of judicious men of great experience in both parties, men who confronted these issues through their own experience and have the highest interest of the country in mind, came to the conclusion, after their examination of this episode, that it wasn't a change of the law that was required. The Tower Board, however did conclude that administrative and other procedures and greater attentiveness to the meaning of timely notification were probably required. What is being proposed in this legislation is an inflexibility which we believe not only intrudes on the President's constitutional authority but, in certain circumstances, could deprive him of that discretion which he needs in a practical way to conduct highly sensitive operations.

Chairman McHUGH. I understand that argument if "flexibility" is interpreted in a reasonable way by an administration, but we are faced with a set of circumstances in which flexibility was actually determined to be no notice to Congress, a total shutting out of the oversight process by an administration that chose not to tell anyone in Congress of its policy for a long time. That is the set of facts that we have to deal with; that is a reality. If that is what "flexibility" means on the part of this administration, then we have a real problem.

I might say in closing my opening questions that there is an opinion from the Department of Justice which was written for the Attorney General by the Office of Legal Counsel on December 17, 1986, after many of the facts were disclosed in this case, which says, as a matter of law, that not providing notice to the Congress for that period of time was consistent with existing law. That is an official opinion of the Office of Legal Counsel in the Department of Justice in the face of the facts we had in the Iran arms sales case, where there was no notice to Congress whatsoever for many, many months, followed by a legal opinion by the Department of Justice saying that's okay under existing law.

We have no alternative, unless we are prepared to accept that set of circumstances and that opinion of law, but to change existing law to make it clear that is not acceptable to Congress, and that is the problem we have.

I would like to include in the record a copy of that legal opinion.

Chairman McHUGH. Mr. Livingston.

Mr. LIVINGSTON. Thank you, Mr. Chairman.

While I might concede that 10 months seems like a long time, it seems that the proponents of this bill would go to exactly the opposite extreme and compel the President to notify Congress in advance of any covert actions undertaken or, at least, 48 hours after they were undertaken. That is the extreme on the other end of the scale which in my opinion borders on being somewhat ludicrous, in my opinion.

Let me point out that Admiral Turner, when he testified before us in April, told us that he objected to substituting an arbitrary period of time, such as a 48-hour maximum proposed in extremely limited cases in H.R. 1013, for the more flexible timely notification standard permitted in existing law even if the period of time were a year.

He stated: "The timely is not measured by a clock. The timely is measured by this risk. We were three months getting the six

people from the Canadian Embassy. We were six months doing the other two operations" which he referred to. "So I don't think we should focus on hours or days. I think we should focus on the completion or the diminution of the risk. It could be that there is, as an operation goes along, the risk drops off to human life. When the risk to human life is diminished sufficiently is when it is timely to notify Congress." Two other expert witnesses, Mr. Colby and Dr. Cline, basically concurred in his statements.

Now, gentlemen, I put to either/or both of you, isn't that opinion by Admiral Stansfied Turner, the former director of the CIA under President Carter, more realistic than to try to set an arbitrary time limit such as a 48-hour period in H.R. 1013 or no period under the bill within which even the most sensitive life-threatening intelligence activities must be reported to Congress?

Mr. DOHERTY. The 48-hour notice we do believe is unnecessarily restrictive. Certainly the circumstances where there is a possible loss of life is the one that immediately comes to mind where one considers the possibility of delayed notification.

I indicated in my remarks, but I think it is really important to emphasize that what we are talking about here is a bill that deals with notice of covert actions, and since the enactment of the Oversight Act of 1980, I think it is important to bear in mind that there has been only one circumstance where the committee has not been informed in advance of a covert action, and that is the Iranian arms transaction. That was an aberration, that was an exception.

The norm, I think, has been established very clearly through our track record that when you are talking about advance notification of covert actions, the committee has been advised in advance in each and every circumstance but for one, and on that one I think no one is suggesting that we would like to do it over that same way. We have all learned lessons from it. But it would be my view that we ought not to change the law. People are always going to make a mistake, and we ought not to change the law simply because we have one example out of many over a period of many years where there is a substantial concern over what transpired.

Mr. ARMACOST. I might add, Mr. Livingston, that we are seeking a balance between our requirements in the performance of the executive branch responsibilities in the conduct of foreign affairs and the requirements that you have performing oversight functions. That is always a balance that is difficult.

But the thing that is striking to me, having been back in this job for three years and seeing a lot of this on our end, is the truly staggering amount of information that is shared on a routine basis now with the intelligence committees. The scope of the information that is supplied, the amount of detail, and the timeliness simply does not compare with what the practices have been in the past.

You are focusing on what I think is an exceptional case, and yet the remedy would, in effect, alter the balance between the constitutional apportionment of responsibilities between the branches I think the remedy is not appropriate to a problem which I think has been fixed, it has been fixed both by decisions that have been taken already in the light of the Tower Board recommendations, and it has been fixed by the lessons, as Mr. Doherty said, we learned from this recent episode.

Mr. LIVINGSTON. Mr. Armacost, let's talk about the other side of the equation, not the timeliness but the risk of divulgence. You say that in the vast majority of the cases over these last few years you have actually consulted with Congress and with the intelligence committees. Has the security of those disclosures been guarded and maintained in every single instance?

Mr. ARMACOST. No.

Mr. LIVINGSTON. Without being specific, can you give us any elaboration? Have the details of those consultations leaked out?

Mr. ARMACOST. It is always difficult to pinpoint precisely the source of the leaks, but I think we all are aware that many details of covert operations are routinely found on the front pages of the press.

Mr. LIVINGSTON. What is the risk of advance consultations in particularly sensitive covert operations?

Mr. ARMACOST. In those covert operations in which there is risk to life or limb or operations of importance to the United States, whenever one expands the circle of those who know, one creates the added potential for some individual to frustrate the operation by prematurely disclosing it. Therefore, there is an inherent risk both within the executive branch and in our relations with Congress that a widening of the circle inevitably provides to additional individuals the capability to frustrate an operation by leaking it.

Mr. LIVINGSTON. When Admiral Turner testified before this subcommittee, he described three covert actions, two involving the Desert One abortive hostage rescue mission in Iran, and the third the successful rescue of six Americans who secretly had taken refuge in the Canadian Ambassador's residence in Teheran.

The admiral explained that because of the high risk to the lives and safety of those involved he withheld notification to Congress for six months in the case of the Desert One operation and for three and one-half months in the case of the so-called Canadian caper. Was he justified in the deferral of congressional notification, in your opinion?

Mr. ARMACOST. I believe he was.

Mr. LIVINGSTON. And if the oversight law that we are considering at this time had been imposed at that time and it had imposed a sweeping and rigid requirement of previous consultation, such as that contemplated in H.R. 1013, would Admiral Turner have been justified in deferring notice under those circumstances?

Mr. ARMACOST. If the laws that are currently being contemplated were in effect? Well, I think as a practical matter the question would have been raised as to whether or not one could go forward with sensitive operations, as we do obviously feel an obligation to comply with the law.

Mr. LIVINGSTON. So, in fact, the operation might not have taken place at all.

Mr. ARMACOST. It might not have taken place.

Mr. LIVINGSTON. Thank you.

Chairman MCHUGH. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Mr. Chairman, while I am a cosponsor of the principal bill before us, my problem with it is, it does not go far enough, but I under-

stand the political necessities that presumably went into its formulation.

I think it is ironic that we tend to focus on the rescue mission in Iran, and the National Security Council Initiative in 1985 and 1986, as the two cases where the Congress was not informed. I say that because the irony is that both of those were colossal failures, and, as a matter of fact, the only thing that could have been in question in either case is whether consultation with the Congress might have led to a more prudent activity.

I would also question Mr. Doherty on his assumption that the Congress chose not to challenge constitutional authority in the bill he was referring to, the 1980 Oversight Act. Rather, I think the correct construction is that Congress chose not to recognize such an authority. We have had other analogues to that type of situation.

Also, I think it somewhat misrepresents the relationship of the Central Intelligence Agency to the committee in suggesting that the CIA provides Congress even more information about details of covert actions than it provides to most people engaged in the operations. As a matter of fact, we have, of course, cases such as the mining of the harbors of Nicaragua which Congress was not informed at all about.

I must say, as one member of the committee, frequently I learn more about these operations by reading the paper than from what is given to us in closed sessions. Obviously, those leaks do not come from the committee, because we haven't even been given that information.

I would like to ask Secretary Armacost whether, in the event a President, acting on what he construes to be the exercise of his authority to conduct the Nation's foreign relations, decided increasingly to decline to give notice, could, in fact, sustain himself in that respect. Let's say half the time he declines, not just the one or two cases that have been cited. What would be your view? Is he legally sustainable?

Mr. ARMACOST. I don't think that is the issue we are confronting, Congressman. It seems to me the practice has been established that we accept the arrangements for notification. It has become routine. We are talking about a couple of exceptions. In the wake of the most recent exception I think we must contemplate a future in which there would be more exceptions.

The issue that I believe we are discussing, Congressman, is timely notification under extraordinary circumstances. All we are arguing is that it is unwise to establish an inflexible straitjacket of 48 hours on the supposition that those extraordinary circumstances, whatever they may be—and it is always difficult to imagine all possibilities in advance—could be accommodated within that kind of a deadline.

It is possible, for example, to imagine counter-terrorist operations in which someone's life is on the line, in which an operation is initiated, or at least instructions are given. The person in the field has to have the flexibility to operate in the light of what is happening around him, and his life may be in danger for several days. In the example cited by Stan Turner, an operation unfolded for a purpose I think all would have accepted as justifiable but required some weeks before the risks were minimized to the point

where Turner felt that the circle of knowledgeability could be expanded.

We are not here arguing about a desire by the President to evade the provision of information which the Congress needs for its oversight function. We are simply arguing that there is no need for a legal change which would impose a very inflexible rule on the President. In our judgment, this violates the prerogatives of the President derived from the Constitution rather than from statute.

Mr. KASTENMEIER. I think we are, sir. You yourself quote the President in what he refers to as the President's independent constitutional authority in the intelligence field. If this President or any other President should elect, in fact, rather than one or two exceptions, to engage in a number of exceptions, what I want to know is, constitutionally, where are we? Is the President sustainable in enlarging exceptions?

Mr. ARMACOST. I'm not a constitutional lawyer. Perhaps Mr. Doherty can answer.

Mr. DOHERTY. My view would be that you would have to look at the facts and analyze each particular circumstance. I think that the record that has been developed would demonstrate very clearly that that simply is a most unlikely circumstance, where, as a practical matter, we live with these provisions and we live in substance with the provisions of the proposed bill. In the normal course of events, advance notice is given, written documents are provided to the committee.

In substance, we live with these provisions day in and day out, and it is the one extraordinary exception that I would suggest should not warrant a reaction that would require a change in the law.

I would like to add a couple of things that I think also would put this in perspective, and that is that we have the one exception.

Mr. KASTENMEIER. Let me take exception to your referring to one exception. This other committee is looking at the Iran-contra thing. The Iran-contra affair involves many exceptions, particularly with respect to Central America, and we haven't even gotten to the bottom of that yet.

So in terms of what this committee has been told by your superiors, the dissembling that has gone on, I don't accept the fact that we are talking about merely the exception of the Iran transaction involving the National Security Council.

Mr. DOHERTY. If I could just respond to that, Mr. Kastenmeier, this bill is a bill that does not address, or does not deal with, the other circumstances that you referred to. I think that the facts are still being developed in that other case, and it is hard to make a judgment as to, at this point, what kinds of information may or may not have been provided. But this is a bill that deals with the advanced notification with respect to presidential findings, as to the need for a covert action, and there has been only one exception on that score. This bill would not deal with those other kinds of situations.

I think our record on this is a good one, and what I would like to say is that with respect to this issue, we are not simply where we found ourselves several months ago when this situation broke,

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where it is clear that everyone has a concern, or that it is clear that no one wants to repeat it.

We have had the deputy director of Central Intelligence come up here and tell our oversight committees that, in terms of his view, that he would recommend to the President that there would be withholding in only the most extraordinary of situations that might involve life or death and then only for a few days. You have had the new director of Central Intelligence advise you substantially the same thing. Those are assurances, I think, that should be comforting to the committee.

You have had the Tower Board examine the matter. The President has directed the National Security Council's Policy Coordination Group to provide recommendations to him that will deal with some of the problems that arose in the Iran-contra affair. They are going to provide recommendations that will require that covert action be coordinated with all members of the NSC, including the Attorney General. There has been a review of all covert actions, all existing covert actions, to assure their compliance with law and policy. The recommendations will provide that the NSC staff will not be allowed to participate in the conduct of covert activities. Recommendations will be made with respect to the use of private individuals, the limitation of it, and appropriate supervision of it, if that is continued in the covert action area. You have a new national security advisor and you have a new counsel to the national security advisor.

So when you put all of these facts together, I think the administration is reacting responsibly to an aberration one time over six years, and that ought to be given an opportunity to work.

Mr. KASTENMEIER. I would remind you, Mr. Doherty—and I will yield back, Mr. Chairman; I have extended over my time—that in the Iran transaction the matter had been conducted for some time before Mr. McMahon blew the whistle and forced a finding, literally, on the White House. You would not have had a finding at all, presumably, except for at least one person who insisted that a finding ultimately be issued on this particular transaction. It had been conducted for some months before the finding had ever been made.

Mr. DOHERTY. One flight of an aircraft prior to that time, as I understand it. Within a couple of days, Mr. McMahon became aware of it, and as soon as management became aware, a finding was drafted within 24 hours of that. So there was a quick reaction when the information came to our attention.

Mr. KASTENMEIER. I yield back the balance of my time, Mr. Chairman.

Chairman MCHUGH. Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman.

We certainly appreciate your testimony today, gentlemen.

Let me ask you a hypothetical question. If the CIA dropped agents into the Bekaa Valley or some other hot spot of the world in a covert effort to free American hostages, and the Congress was given prior notification of that, what do you think the probability is that we would read it in the newspapers within one to two weeks?

Mr. ARMACOST. I hesitate to put probabilities on these things, Congressman Shuster. My own proposition stands that every time

you broaden the circle of knowledgeability the risks increase. To the extent you are putting people out there in extreme personal danger, then it seems to me there is an obligation to minimize those risks as much as possible.

Mr. SHUSTER. Do you think it is a real risk? Do you think it is a 10 percent chance or a 50 percent chance? minor risk? acceptable risk? unacceptable risk?

Mr. ARMACOST. Stan Turner, who had to live with the risks, felt there was a sufficient risk to delay the notification for precisely the reason that he felt it warranted to limit the risk to whatever degree was possible.

Mr. SHUSTER. Do I hear you saying it is an unacceptable risk?

Mr. ARMACOST. He had to live with that. I think people who ask others to put their lives on the line to defend interests are probably the best judge.

Mr. SHUSTER. What is your view?

Mr. ARMACOST. If you were asking someone to do that, I would think you would think long and hard before you——

Mr. SHUSTER. What is your view? Do you believe it is an acceptable risk or an unacceptable risk?

Mr. ARMACOST. Well, I think there are situations in which extraordinary circumstances warrant delaying longer than 48 hours and allowing those circumstances to dictate when the notification is given.

Mr. SHUSTER. Don't we have a dilemma here, an insoluble problem, of Congress expecting, and indeed having a right to have, certain information, on the one hand, and yet on the other hand a situation where we put American citizens at risk? How do we solve this problem?

The National Security Act spells out the purpose of informing the Congress is not to get prior approval from the Congress, and if we are not getting prior approval from the Congress, then why must there be prior notification? What is the logical reason for prior notification if, under the act, it is not prior approval?

The other side of that same question is, should indeed there be prior approval from the Congress on covert activities?

Mr. ARMACOST. No, we don't believe there should. We are in one of those classic situations, balancing the requirements of the President to conduct policy with the requirements of Congress to manage its oversight functions, and that is an area where a balance needs to be struck. We think the balance that is proposed in this law is too rigid, too inflexible.

There are circumstances in which 48 hours is an unreasonable standard, and therefore the oversight responsibility doesn't demand that that information be provided within 48 hours, or 24 hours, or 72 hours, and that is an area where I think the comity between the branches and the confidence on your part in the integrity and honesty of people in the executive branch and our confidence in your discretion in handling information of great sensitivity is required.

I doubt that a law at this juncture which dictates new procedures which we feel encroach on our constitutional authority is the means to promote that kind of comity and mutual confidence.

Mr. SHUSTER. First let me stipulate that I think an arms-for-hostages deal was an absolutely terrible policy, disgraceful, dumb,

stupid; choose your words to define it—unbelievable. Having said that, do you believe that the administration is paying such a heavy price for that policy and for not having informed the Congress for 10 months that either they or any future administration already has been sufficiently disciplined and, indeed, will think an awfully long, long time before they withhold information from the Congress again for 10 months, whether or not we pass any legislation?

Mr. ARMACOST. I do believe that, of course.

Mr. SHUSTER. I think Mark Twain said that once a cat jumps up on a hot stove the cat is not going to jump up on a cold stove either, and I would think there has got to be an educational process here. If I understand you correctly, then you are indeed saying that the message already has been conveyed and, in a sense, this legislation is not needed to convey the message on the up side and, on the down side, indeed, could cause some very serious security problems.

Mr. ARMACOST. That is a very cogent and incisive summary. I wish I had said it that efficiently.

Mr. SHUSTER. Thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Lungren.

Mr. LUNGREN. Thank you, Mr. Chairman.

I think at the very outset we ought to stipulate that neither the CIA nor the executive branch is infallible. Sometimes it appears that what we are attempting to do with legislation is to create a zone of infallibility, and if we fail that, we then have to rush in with further information.

As Mr. Brzezinski said in his letter to Mr. Hyde, "we must face up to the fact we cannot create a risk-free system. In covert operations, administrations past and present have made mistakes. There is no way to legislate away the risk of future mistakes except by prohibiting covert operations."

I guess my concern is this. With respect to this type of legislation, we have discussed at least briefly the Canadian experience referred to by Stansfield Turner. I guess I would ask this of both of you. If we had had this law in effect, and if the Canadians had understood at that time that it obligated the President to give prior notice to Congress that the U.S. would be undertaking a covert operation in concert with them to extricate our six people out of Iran, and given the past record of leaks in Washington, do you think that would have presented a situation in which the Canadians would have been as likely to offer the essential but risky cooperation that they did give us?

Mr. ARMACOST. I think undoubtedly it would have increased the likelihood that they would have had second or third thoughts about it. I think the agency is perhaps better positioned to speak to this, but it is my impression that the consequence of widening the circle with the inevitable increase in risks of public disclosure has affected liaison arrangements around the world. That does inevitably narrow in certain circumstances options because of the reluctance of other countries to cooperate, given the risks of publicity.

Mr. LUNGREN. Mr. Doherty.

Mr. DOHERTY. Well, I think we have to recognize that the system we have here in the United States is very different from the system in other countries, and where we have oversight provisions

and requirements to share information, I think we have to recognize that that has some effect on the willingness of third countries and liaison people to share information. That is our system, and we are not going to change our system. It has got benefits, and we don't argue with the system at all, but I think we need to recognize that the further the system gets pushed and the further the requirements are for disclosure, that that has an effect certainly.

Mr. LUNGREN. Following up on a question that Mr. Shuster asked, the National Security Act, on its face, does not require intelligence committee approval of significant covert operations or anticipated intelligence activities before a President initiates them. If you were to view this in some ways as an indirect way of requiring such approval, you have really basically changed the relationship that has existed since 1947 between the Congress and the executive branch with respect to these special intelligence activities.

If you view it in that light, I would like to pose this question to you, Mr. Armacost. Ought we to have a situation in which prior approval of the legislative branch through the intelligence committee is required before actions of this sort are to be taken?

Mr. ARMACOST. No. I believe that the Constitution delegates quite clearly the responsibility for conducting foreign policy—and intelligence operations of the sort we are discussing go to the core of that responsibility—to the executive branch, to the President. Prior congressional approval if it is accomplished by legislation would represent a major readjustment in the balance of constitutional authority through statute. That is certainly any President would resist that.

Mr. LUNGREN. The reason I just want to bring that out on the table is, I think if you analyze it from that standpoint and see that that would be the effect of the legislation, you are talking about something far more fundamental than on its face this legislation may appear, and I think we have to think long and hard whether we want to absolutely reconstruct a relationship that exists between the executive branch and the legislative branch.

As Congressman Shuster has suggested, no one has to support the subject matter of the investigations going on and the Irangate hearings to still suggest that this is the wrong response to that episode.

I'm very fearful, in the first place, that the American public has not been given enough basis on which to make a judgment of the importance of the intelligence community and certainly the necessity for covert operations and that in some ways it is easier for us to address what is perceived to be a problem without true regard for the necessity for these things.

We live in the real world, a tough world, one in which, without the assistance of a Canadian Government, we would probably not have gotten six Americans out of Iran. Had that Canadian Government admitted, or had there been the suggestion they were helping us, they would not have gotten out, and we would have had continued repercussions at that particular time. I am very concerned about legislation of this sort which would place us in a no-win situation.

I thank both of you for your testimony today.

Thank you, Mr. Chairman.

Chairman McHugh. Thank you.

Mr. Hyde.

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

I would just like to comment briefly. I think there is general agreement that the 10-months delay in notifying Congress was unfortunate. I think we have a political problem, and we have a legal problem. Politically, it was unwise. Politically, it would have been much better very early on to get some risk insurance and share the burdens of this high risk policy. I think if the President had been advised by some people on the Hill, he could only have benefited.

On the other hand, it is a judgment call, and you are dealing with people's lives, and to set a time limit arbitrarily on the exercise of that judgment is really to misunderstand the purpose of the executive power, the function of the executive power in the President, and the deliberate vagueness of "timely fashion."

If you measure it by the clock, as Stansfield Turner said, then let's set an arbitrary, let's say, 48 hours, 48 minutes; let's arbitrarily pick a time. But if indeed the circumstances dictate the wisdom, the necessity of notifying Congress, that could well be 10 months, it could be 10 years, depending on the circumstances, and they are all different.

Here you had hostages who were being held, one of whom was a CIA station chief, tortured; you have people in a hostile government ostensibly trying to negotiate with the "Great Satan of the West" whose lives were at stake, and this was an ongoing, torturous process.

Again, we all, with hindsight, wish and stipulate that Congress should have been brought in on this with the hope and expectation that Congress could, for a change, keep a secret. But we know the record is replete with statements by people that if they don't agree with the policy, they feel they have a duty, an obligation, to leak that policy. So it gives a veto, really, over any covert action to disaffected Members of Congress.

What hasn't been talked about is third country cooperation. Many of these covert activities involve the cooperation of a third country—the Canadian cooperation in Iran was a notable example—and they may not be as free wheeling as perhaps some of us want to be about notification, because their citizens' lives are at stake. If they know that the executive must trudge up to the Hill and tell the committees of Congress or the Gang of Eight what is going on, they may say, "Count us out," and that could damage our national security interests.

I think we ought to recognize that if we change it to 48 hours and if we require prior notification of other subordinate executive officials, which really bothers me, and we intrude into the operation of the executive function, there is still no criminal penalty. You can still impeach the President for violating that or violating current law.

If we have all conceded that 10 months is much too long and the law was broken, what is the penalty? Well, the penalty is a severe political penalty. The administration is paying that penalty every day by being told by editorial writers, commentators, and politicians that they flouted the law and did not notify Congress in a timely fashion.

So I just hope that in restricting, in my judgment, very unconstitutionally the exercise of the executive function, which is bestowed by the Constitution, we won't overreact to this concededly unusual if not aberrational situation. I hope we will remember that succeeding Presidents need flexibility and other countries need to know we can be trusted to cooperate with them. There is no one in the intelligence business other than one person that I'm aware of, maybe two, that have disagreed that the President needs flexibility.

So I just hope that this legislation will have sent a message that evidently is behind it but that we don't hamstring and hogtie a future President, not to say the existing President, and do real harm to our ability to cope with a very dangerous world. I thank you, Mr. Chairman, for indulging me.

Chairman McHUGH. Thank you, Mr. Hyde.

Mr. Beilenson.

Mr. BEILENSON. Thank you, Mr. Chairman.

I apologize. As you noticed, I came in here late and did not hear the testimony of these two witnesses, so I have no direct questions for them, but let me bring up a couple of things, nonetheless, if I may.

Just from having overhead the questions of some of our colleagues over there to the left, or to the right, I suppose, depending on whether you are facing them or not, it sounds as if they are not even in favor of the existing requirements of prior notification that are current in the law. As I said, I am not directing my questions to Mr. Armacost or to Mr. Doherty, but, as the Chair and others know, there are, generally speaking, requirements in current law that prior to undertaking a covert operation the President is supposed to notify certain people, whether it is the smaller group or the larger group here in the House and over in the Senate, and if, for justifiable reasons, he wishes not to do so, he has got to give them notice in a timely fashion.

It is disturbing to this Member to hear what he thinks others Members are saying; that, in fact, they don't even agree with the current status of the law. I may be misunderstanding the direction of their questions, but that is the drift I got. We are not even talking, it seems to me, about what our chairmen, Mr. McHugh, Mr. Stokes, Mr. Boland, and others are proposing. We are not even agreeing, apparently, with the existing state of the law, and that is, as I said, a bit troubling.

Secondly, from the beginning of these hearings, I think it has been obvious to all of us that one could and should draw a distinction between different kinds of operations. It has been true of the two earlier meetings, Mr. Chairman, that people make a very justifiable case, whether it was Admiral Turner or anybody else, any of our friends over there in the minority, with respect to certain limited kinds of operations, specifically hostage rescue operations and so on.

I don't think we want to know necessarily, I don't think we need to know, I don't think basically that is what we are talking about, and I would hope, Mr. Chairman, if we ever get around to trying to rewrite the law in some respect, perhaps we could specifically exclude prior notice of all the details on those kinds of operations.

What this Member and most other Members, I think, are generally concerned about are what, at least in recent instances, one could describe as major foreign policy initiatives, specifically the Iran caper, or affair, which quite clearly ought to be reported, whether it is within 48 hours or prior notice or whatever, but everyone agrees that there was no notice given, and since it is a major initiative and does involve a major shift in foreign policy of the United States, quite clearly, it would have been useful and helpful not only to the President but to the country if other people had been notified and had a chance to say something about it.

So it may well be, Mr. Chairman, that we could distinguish in any legislation that we try to write between these various kinds of operations.

Finally, let me just comment, our good friend from Illinois over there—and he is our good friend—Mr. Hyde, said something to the effect that any Member of Congress might have a veto power, in effect, over a covert operation because he can go out and talk about it. I suppose to a very limited extent, perhaps, that might be true. It is also fair to say that major covert operations have been in the press for a long, long time. In fact, this gentleman might remind his colleagues that the President of the United States announced publicly, and if one of us had done it, I take it there would have been a very big flap about it, that we were going to undertake a "covert operation" against a particular country. The President of the United States announced that. That is not a covert operation.

I really don't see how anybody can claim that individual Members of the Congress, because they might disagree with our involvement in Nicaragua or Angola, will exercise that alledged veto power.

So it may well be, Mr. Chairman—and I have spoken longer than I intended—if we can narrow this down and start talking about the specific kinds of situations we are concerned about, we might be able to find some useful middle ground. Members, I think, agree that in a major operation such as Iran we ought to have been involved, at least, if not prior, very soon thereafter.

I think most of us agree, and I am only speaking for myself, of course, on this side too that, as I said earlier, Mr. Chairman, with respect to the Canadian involvement apparently in that hostage situation, or also our own unfortunately, unsuccessful attempt to land at Desert One, we don't need to know about that in advance. Those are specific short-term finite operations, and, you know, good luck to our guys, and we don't need to know about it. They should tell us about it as soon as they can thereafter. It may be that we can work something out that might be useful. I don't know.

Thank you.

Chairman McHugh. Thank you, Mr. Beilenson.

Mr. Armacost, I think Mr. Beilenson has touched upon one thing that is important here, and that is that there is a difference between the establishment of foreign policy for the United States and the conduct of foreign policy.

In your statement, you have referred appropriately to the President's right to conduct foreign policy. But in the case of the Iran arms sales, this was the establishment of foreign policy. Indeed, we had a publicly stated policy of not dealing with Iran or other states

that supported terrorism. That is one reason it was so shocking to learn many months later that in covert operations we were doing just the reverse.

Now this was a substantial policy change of the United States undertaken secretly, and we in Congress have our own constitutional responsibilities to participate at some appropriate level in the establishment of the policy for the people of the United States who elected us. This is, fundamentally, why we are concerned about what this administration and subsequent administrations believe the current law means in cases like the Iran arms sales case, which was a fundamental policy decision.

Mr. HYDE. Would the gentleman yield?

Chairman MCHUGH. Yes.

Mr. HYDE. If I might just comment, because I think the chairman has said something that I would respectfully disagree with. I don't think the Iran initiative was a major foreign policy change. I think it was an excursion, a probing, to see if there were some elements within the Iranian Government that might be more tractable, that might be moderate and pragmatic and could somehow gain influence through our assistance with the Army, the Revolutionary Guards, and help shape Iran's policy to a more benign one toward the West.

Our policy is still whatever is in our national security interests to protect our allies, and I don't think we were suddenly going to recognize and try to get an ambassador over there. There was a sortie, a foray, an initiative, a probing.

Now it got out of hand in that the arms became more than initially thought, and it ended up a trade for hostages, and nobody defends that, but it was a very secret, high risk probing to try to develop contact with some elements within the Iranian Government, and therefore I can understand the need for secrecy. I still think Congress should have been brought in on it, and I concede that, but I don't think this was a decision that Congress should have had a decisive voice in other than to be notified. That is just my own thoughts, and I appreciate you letting me express them.

Chairman MCHUGH. Well, the gentleman and I do certainly disagree, and I believe, Mr. Armacost, you yourself indicated in response to an opening question of mine that this was a major foreign policy decision. We had said publicly many times that we would not deal with Iran or other states or terrorist groups in exchange for hostages. We had a law which identified Iran, among others, a state which supported terrorism. It was the law of the United States not to deal with them as well as our expressed policy, and in secret this policy, in my judgment, was reversed and conducted for a significant period of time.

Now, we were not even suggesting that prior approval of this policy is necessary, although I think a reasonable argument can be made in so fundamental a case as this that prior approval should be required from Congress. But I am not arguing that, and this bill is not arguing it. What we are suggesting is that notification, advice, consultation, on so fundamental a policy is important in terms of the conduct of our constitutional responsibilities, and we did not get it.

Mr. Shuster asked an important question earlier: Why is prior notification important? Prior notification is important, one, because Congress has constitutional responsibilities in the establishment of foreign policy; and, two, because the President can benefit from consultation with Congress. As Mr. Hyde has said, if the President had consulted with Congress with regard to this policy, undoubtedly Members on both sides of the aisle would have expressed very strong objection and reservation, and it might have helped the President avoid what was a very damaging policy for the country. So there is a good reason for prior notification and consultation.

Then there is the question of risk. I think we all agree that policies of this kind involve some measure of risk, and all of us want to avoid or minimize that risk as much as possible. But it is wholly unacceptable to most Members of Congress, I believe, to suggest that it is okay to include in the circle of knowledgeable people the Iranian Government, Mr. Ghorbanifar, Mr. Khashoggi, a variety of former officials of this government who are now, for patriotic or other reasons, involved in this private network, but it is not okay to tell the Speaker of the House of Representatives or the Minority Leader of the House or their counterparts in the Senate or the chairman of the intelligence committees or their ranking members, because it is too risky and they can't be trusted. That is not acceptable, and that is not consistent with the law as it now reads, but that is precisely the argument that is being given to withhold information from the intelligence committees and this leadership group of eight people. Now that is simply not acceptable, and it is not just an aberration, and that is why we are not willing to simply accept the reassurances.

I mentioned earlier an opinion by the Justice Department. This opinion describes the facts in the Iran arms sale case and then discusses the question of whether the President acted in a lawful fashion in not providing notice for a period of 10 months. The conclusion is, "We now conclude that the vague phrase 'in a timely fashion' should be construed to leave the President wide discretion to choose a reasonable moment for notifying Congress." The memo supports the legality under present law of the President's not notifying Congress for this long a period of time.

In the face of that kind of legal opinion by this administration, by an official of this administration, and in the face of the facts that are being developed in the Iran case, how can we accept the very vague language of the existing law with assurance that this type of thing won't happen again? That may be a rhetorical question, but that is the primary concern which many of us have.

Then, frankly, we have an administration, when faced with interpreting other law, which says that it doesn't apply in certain cases. In my opening remarks, I made reference to the interpretation now being given to the Boland amendment. As Mr. Doherty said, that is not directly on point in the sense it doesn't deal with the issue of notice, but it is on point in terms of how we can expect this administration to interpret laws passed by the Congress, which is pertinent to our discussion here.

The clear intent of the Boland amendment was to prevent our Government from providing military assistance, directly or indi-

rectly, to the contras. Now I know that that is a real issue of controversy, and we debated it many times, but that is precisely what the law said, once we completed our debate, at least for a period of about two years. Now the argument is being made, "Well, we understand, but it didn't apply to the National Security Council or the President," and so this network was set up, in part by Government officials and in part with the help of private arms merchants, to get around the law, and it didn't apply.

What confidence can we in Congress have when we have an administration that interprets the law in that way? That is the problem we have. As someone said—and, Mr. Armacost, I think it was you—a great deal in our Government depends upon understanding, and trust, and comity, and, if, frankly, we had a great deal of that today, this bill wouldn't be necessary, because we know a President and his administration would define "timely notice" in a reasonable way. But when you have an administration that says 10 months is timely notice and a legal opinion of an administration official which says that is consistent with current law, that is not satisfactory, and that is precisely the reason this bill has been introduced.

I don't know if 48 hours is an appropriate period of time. If I were in the administration, I'm sure I would argue that I would like more flexibility, but I hope that I would exercise my flexibility a lot more reasonably and with a lot more confidence and trust in the leadership of the Congress than this administration has, and, if I did, there wouldn't be a bill of this kind introduced to try to deal with the problem.

You are free to comment on any of that, if you would like.

Mr. ARMACOST. I find it very interesting. I think you are wrestling with very real problems on which people will differ as to precisely where the balance should be struck.

I might comment on Mr. Beilenson's remark about trying to evade the burden of current practices. We don't do that. We are quite prepared and have, as a general rule, provided prior notification in every case except the two that we mentioned in our testimony. So we are not fighting that problem. I would be less than candid if I didn't say that some people feel that, on occasion, it increases the risk excessively in view of the volume of materials that are provided and the frequency of leaks. Nonetheless, we accept that as part of the working arrangement.

What we have been discussing are these extraordinary cases. Nobody is arguing that the Iranian arms sales caper is something anyone would wish to repeat. On the contrary, the President established a board to look into it. We think very sober recommendations have been given. All have been accepted, all have been implemented, and those changes have been designed precisely to avoid repetition of that.

We don't fight the provision of information to the intelligence committees precisely because we know, especially on matters with large political and policy significance, that we cannot sustain a policy over the longer term without congressional support, and therefore it is part of the political process. Mistakes are made; the objective is to avoid them in the future, and I think, as Mr. Hyde said, a very large political message has been conveyed. I guarantee you, in the internal deliberations of the executive branch, that

lesson is not forgotten. A huge price is being paid for that, and that does affect both the consideration of particular activities and the question of notification. We are very mindful of the need for Congressional support and the sensible interpretation of these timely notification requirements.

Mr. HYDE. Mr. Chairman, I wonder if you would indulge me with just a little more time to make a comment or two.

Chairman MCHUGH. Yes. Go ahead.

Mr. HYDE. If we can, and it is difficult, put aside this particular set of facts that bothers all of us, I think we are dealing with a very profound constitutional issue, namely, what are the limits of the separation of powers? Under the executive power, which our Constitution vests in a sole executive, the President, what are the powers and limits on that executive power? And, the legislative power which the Constitution vests in the Congress, what are its limits, and do we overlap? Have we got a parliamentary type of government with a privy council, where Members of Congress are ministers who are a part of the executive and the legislative, or did we reject that 200 years ago, and did we have a separation of powers where the President, has the executive function by the terms of the Constitution, and the cases? I might add—*U.S. v. Curtiss-Wright,* a 1936 case says the President is the sole organ of foreign policy.

Now we would like to be senior partners with the President in the fashioning of foreign policy. We have to pick up the pieces, I guess, later on, and it is untidy. But, I think we ought to be very mindful of the fact that our Founding Fathers set up an executive power and a separate legislative power, and that we rejected a form of government which would have a cabinet or privy council authority in the Congress.

Now when you asked as a matter of constitutional right for prior notice to the legislative branch of a covert action, I have trouble finding warrant for that in the Constitution. It would be nice to widen the circle of the President's advisors and to give him or her the benefit of our great wisdom, but I don't find it in the Constitution.

So I just simply say we are legislating hopefully for future generations, too. We ought to go back to the Constitution and see what the limits and the powers of the executive are and the legislative are. I know we have got the power of the purse, I know we have oversight power to get information for legislation, but whether we are such a partner in the fashioning of foreign policy that we are entitled to prior notice so we can get our two cents in as a matter of law, constitutional law, I really have my doubts.

Again, I thank you for indulging me.

Chairman MCHUGH. Thank you, Mr. Hyde.

I will cease in just a moment, but, again, I think we do have some disagreement because I thought it was fairly well established that in the establishment of foreign policy both the executive and the legislative branches have a role to play, and because it is a dual responsibility there is always going to be a certain groping for the proper balance, and every generation of public officials in the executive and legislative branches has been faced with that problem, and, in a sense, we are arguing about it again.

But I don't think there is much question that in the formulation and establishment of foreign policy the congressional branch has a role to play with the executive, and once that foreign policy is established it is the role of the executive to conduct, to implement, the foreign policy with the oversight of the congressional branch. Now in particular cases we can argue what that means, and I think this is one of those cases, but I don't think the essential principles are in doubt.

I also think 200 years ago we rejected a monarchy. We do not have a dictatorship or an absolute monarchy, we have a constitutional system of government which involves both the executive and legislative branches, and therefore I think some participation and consultation by the Congress is appropriate.

The Iran arms case, hopefully, is an aberration, but the attitudes which I hear expressed suggest to me, as they did to Mr. Beilenson, that it is not an aberration.

Mr. Armacost, I have no quarrel with what you have said. I think you have made a reasonable case. I disagree with your conclusion, but I think the principles which you have outlined are quite consistent with my view at least of the constitutional responsibilities of both branches.

In this case, the State Department, itself, as you indicated earlier, was shut out of the fundamental policy decision and certainly the implementation. You did not personally learn about it as an under secretary of state until November. I find that to be rather unusual even if, as Mr. Hyde suggests, the executive branch is unilaterally the formulator of foreign policy as well as the conductor of foreign policy.

It is rather extraordinary to me that the State Department, which is supposed to be the executive branch's primary agency for the conduct of foreign policy, was shut out and an under secretary of state for political affairs was shut out of this decision and implementation of policy.

Mr. ARMACOST. May I comment on that?

Chairman MCHUGH. Sure.

Mr. ARMACOST. Because I would associate myself with what Mr. Hyde has said in this respect. The instinct to include others in the decision-making process, in retrospect, is a very sound one. Indeed, that is one of the recommendations that came out of the Tower Board. But it does seem to me it is inappropriate for inclusion in the law, because that would involve Congress in specifying precisely the nature of advisors and the means by which the President would solicit advice to perform duties derived from the Constitution, not from statute.

Maybe it would be convenient for me to have you legislate that under secretaries would receive all of these findings in the future, but whatever the soundness of a decision-making process, it does not seem to me to be an appropriate part of a law.

Chairman MCHUGH. To require that the under secretary be advised——

Mr. ARMACOST. To specify the nature of the decision-making process within the executive branch in pursuit of sensitive intelligence operations, and that is one of the provisions of the law.

Chairman McHugh. Yes. I personally tend to agree with you about that. I think it may be inappropriate for the legislative branch to mandate in law the process by which the executive branch makes its decisions within the executive branch. So that provision of the proposed bill is one which I personally am not particularly supportive of, and I think there is a legitimate question about that.

My primary concern, as I have said, is with the responsibilities of the Congress in the formulation of and establishment of foreign policy, and that is why my remarks have been directed to that.

Mr. Livingston.

Mr. Livingston. Thank you, Mr. Chairman, and I appreciate your position on this. I just have to quarrel with your conclusions. You seem to feel that this is not an aberration, and you are concerned that this whole instance might arise again.

I would simply suggest that any President worth his salt in the future should learn the lessons of history and not push this issue any time in the future or the very distant future. In fact, I believe that this is an aberration, whether you concede that mistakes were made or not. I believe very strongly that this bill is unnecessary and that the likelihood of any recurrence of this type of a situation is extraordinarily slight.

You said that had certain Members of Congress been allowed to participate in this decision, that they would have likely expressed reservations, and I agree with that. Quite frankly, I might have expressed reservations about some aspects of this whole situation. But does that possibility justify congressional participation in decisions about covert actions, all covert actions, in the future, either in advance or within 48 hours afterwards?

I can only reiterate the comments of Mr. Brzezinski, and I would like to take the liberty of rereading his conclusions in his letter, because I think they are very pertinent. He says, "We must face up to the fact that we cannot create a risk-free system. In covert operations, administrations, past and present, have made mistakes. There is no way to legislate away the risk of future mistakes except by prohibiting covert operations. In the aftermath of the Iran-Contra affair, the greatest risk is that we will legislate new restrictions so strict that they would guarantee that all the Congress would find itself overseeing is failed covert operations—or none at all." I think that is the risk that this legislation poses.

If you concede the position of the head of the ACLU, Mr. Halperin, that no covert operations are justified under any circumstances, then pass this legislation, because we are not going to have any in the future. But I simply don't believe that is the case. I think that covert operations have a justifiable place in foreign policy. They are a justifiable tool available to the President.

Mr. Hyde. Mr. Livingston, would you yield to me for a second just to correct the record? Mr. Halperin told us that used to be his view, that he was opposed to all covert activities, but he said he has since modified it.

Mr. Livingston. Well, I appreciate the gentleman's interjection, but actually he said that was still his position but that he was arguing in this particular case for this legislation. In other words, he was conceding that we are going to have covert operations, but he

was going along with this legislation. It was his personal view, the gentleman said in his testimony, that we shouldn't have any covert operations.

Mr. HYDE. I knew that was his testimony, his views previously, but I just wanted to be fair to him. But if your recollection is clearer than mine, I yield to you.

Mr. LIVINGSTON. I remember having him under direct questioning, and I appreciate the gentleman's comments, but that was his view. I very distinctly remember him saying that he personally didn't believe in any covert operations.

I think the surest way for him to get his way is to pass this legislation. This legislation will, in many instances, as Mr. Armacost pointed out, inhibit covert operations and ultimately bring about their demise, and in instances where American lives are in jeopardy, such as the Canadian Embassy situation in Iran, we may be inhibited or prevented from undertaking covert operations and from rescuing those people from great harm or perhaps possibly death.

So I think that this legislation is ill advised and plan to do all in my power to see to it that we don't pursue it.

Thank you.

Mr. HYDE. Mr. Livingston, just so the record can have its final flip-flop, I am advised by staff that Mr. Halpirn's views are still opposed to covert activity, and I was wrong, that he did change in that previously he didn't believe there should even be collection of intelligence. He now concedes that collection of intelligence is permissible, but he is opposed to all covert activities. So I stand corrected, and I thank you for yielding.

Chairman MCHUGH. Mr. Lungren.

Mr. LUNGREN. Mr. Chairman, obviously we are all concerned. We have talked about the concern about timely notification and the fact that it was missing in a particular instance, which has given rise to a lot of problems for the executive branch.

But it seems to me, as was pointed out by the testimony of one of our witnesses, that really it goes to a question of trust, and trust runs two ways. The Tower Commission recommendations, as I read them, have all been adopted by the administration and are being implemented, save one. That one is directed to the legislative branch, and that is the suggestion that one of the reasons there is a lack of trust from the executive branch, and not just this administration but prior administrations, is the possibility and the fact of leaks in the past.

We know it occurs at both ends of Pennsylvania Avenue, but there is a significant difference between leaks that take place in the executive branch and the legislative branch. Leaks that take place in the executive branch can be pursued for prosecution. I believe there is a constitutional impediment to prosecuting a Member of Congress who would leak knowingly, and, in fact, as staffs are an extension of Members of Congress, I think there is an impediment against any sort of prosecution for a staff member from leaking.

So the question is, how does the legislative branch police itself so that leaks will, in fact, be minimized, and the suggestion of the Tower Commission is for a single intelligence committee combining

representatives of the Senate and the House, and I know there is a lot of discussion on that, I know there is opposition from Members on this committee, but at least we ought to seriously consider that if we are going to consider this legislation, because it goes to the question of trust between the two institutions.

You can try and legislate trust, but that is very difficult. It reminds me of what we have done in the arena of politics. We created a whole panoply of new laws in terms of funding of Federal elections, and we thought that would take care of it, and now we are back again seeing that some of the things we are trying to get rid of have been created and perhaps intensified by the creation of the laws that we have.

The last thing I would say is this. On the Boland amendment, Mr. Chairman, you have suggested that the administration's position on the Boland amendment is counter to what the legislative intent was. I would just say that if we look back at the Constitution, there are shared legislative powers. The President of the United States has to sign a piece of legislation, or we have to override his veto by two-thirds.

If you go back and you look at the debates during the Constitutional Convention, you will find a very interesting thing. The debate was not over whether the President ought to have veto power. The debate—and several votes were taken—was on the question of whether the President ought to have a total veto power with no opportunity for the Congress to override that veto. The compromise was a two-thirds vote. That suggests the President is an indispensable party to legislation.

This administration most recently—and I know this in the immigration bill—has now taken upon itself to systematically articulate what their legislative intent is when they sign a bill. It hasn't been done in prior administrations; it wasn't done by this administration at the time of the Boland amendment. At the same time, that does mean that if courts were having to interpret the law, they would have to give at least equal weight to the interpretation of the law signed by the President of the United States as to the Congress, and for many of us in this Congress, and, frankly, for the panel investigating it, there seems to be a lack of appreciation that the judgment of the executive branch, the President of the United States, in determining what the legislative intent is of the bill that he signs has to be given similar weight to that of the legislative branch.

So rather than suggest that now the President says that he may or may not be bound by certain parts of the Boland amendment in certain respects and to suggest it is a gratuitous argument by the President, does not give that significance to his constitutional authority in signing legislation. I would hope we would look to that as well.

I thank you, Mr. Chairman.

Chairman MCHUGH. Mr. Hyde.

Mr. HYDE. I have nothing further, and I thank you for your generosity so far.

Chairman MCHUGH. Mr. Beilenson.

Mr. BEILENSON. I don't know if this is fair, Mr. Chairman, but might I ask our colleagues and friends on the committee whether

they would, in fact, be supportive, were it before us, of the current requirements of section 501 of the National Security Act?

Mr. HYDE. I would surely be, yes.

Mr. LUNGREN. I would.

Mr. HYDE. I think timely notification is very important, and even prior notification, except in those extreme circumstances. I am very satisfied with the current law.

Mr. BEILENSON. And you would vote for it if it were before you again?

Mr. HYDE. Yes, sir.

Mr. BEILENSON. Well, that is reassuring, Mr. Chairman.

I am sorry, I was getting another message, a different message, but I feel a lot better.

Mr. LUNGREN. Shall we vote on it?

Mr. BEILENSON. I'm afraid to take a vote on it, frankly, because I'm not at all sure that my friends over there would vote for it.

Mr. HYDE. Your vibrations receptor is defective today.

Mr. BEILENSON. So long as it doesn't require anything too much of any administration, our friends, I guess, support it.

Okay, Mr. Chairman. Thanks.

Chairman MCHUGH. Thank you very much, members of the committee.

Gentlemen, you have been very patient. This hearing inevitably turned into a debate between the Members, and the questions were not forthcoming to you so much as at the beginning, but we do appreciate very much your being here and your statements and your candor in answering our questions. It has been very helpful in terms of our consideration.

Unless there is further business, the subcommittee is now adjourned.

[Whereupon, at 11:30 a.m., the subcommittee was adjourned.]

APPENDIX A

100TH CONGRESS
1ST SESSION

H. R. 1013

To strengthen the system of congressional oversight of the intelligence activities of the United States.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 1987

Mr. STOKES (for himself, Mr. BOLAND, Mr. BEILENSON, Mr. MCHUGH, Mr. MCCURDY, Mr. DANIEL, Mr. BROWN of California, Mr. DWYER of New Jersey, Mrs. KENNELLY, Mr. KASTENMEIER, and Mr. ROE) introduced the following bill; which was referred jointly to the Permanent Select Committee on Intelligence and the Committee on 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,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Intelligence Oversight Amendments of 1987".

SEC. 2. WRITTEN FINDINGS.

Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is amended—

(1) by inserting ", in writing," after "the President finds"; and

(2) by inserting ", and a copy of each such written finding shall be furnished, prior to the initiation of any such operation, to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives, or, as the case may be, to the Members of Congress referred to in section 501(a)(1)(B) of the National Security Act of 1947, and to the Vice President of the United States, the Secretary of State, the Secretary of Defense, and the Director of Central Intelligence" before the period at the end thereof.

SEC. 3. DEFERRAL OF NOTICE.

Section 501 of the National Security Act of 1947 (50 U.S.C. 413) is amended—

(1) in subsection (a), by striking "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";

(2) by striking subsection (b);

(3) by redesignating subsections (c), (d), and (e) as subsections (b), (c), and (d), respectively;

(4) in subsection (b), as so redesignated, by striking "subsections (a) and (b)" and inserting in lieu thereof "subsection (a)"; and

(5) by adding at the end the following new subsection:

"(e) Only in extraordinary circumstances affecting the vital interests of the United States, and only where time is of the essence, the provision to the Congress of notice of a significant anticipated intelligence activity may be deferred for not more than 48 hours after the initiation of such an activity or the signing of a finding pursuant to section 662 of the Foreign Assistance Act of 1961.".

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APPENDIX B

100TH CONGRESS
1ST SESSION

H. R. 1371

To strengthen the system of congressional oversight of the intelligence activities of the United States.

IN THE HOUSE OF REPRESENTATIVES

MARCH 3, 1987

Mr. MINETA introduced the following bill; which was referred jointly to the Permanent Select Committee on Intelligence and the Committee on 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,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Covert Action Notification Act of 1987".

SEC. 2. WRITTEN FINDINGS.

Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is amended—

(1) by inserting ", in writing," after "the President finds"; and

(2) by inserting ", and a copy of each such written finding shall be furnished, prior to the initiation of any such operation, to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives, or, as the case may be, to the Members of Congress referred to in section 501(a)(1)(B) of the National Security Act of 1947, and to the Vice President of the United States, the Secretary of State, the Secretary of Defense, and the Director of Central Intelligence" before the period at the end thereof.

SEC. 3. PRIOR NOTICE.

Section 501 of the National Security Act of 1947 (50 U.S.C. 413) is amended—

(1) in subsection (a), by striking "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";

(2) by striking subsection (b);

(3) by redesignating subsections (c), (d), and (e) as subsections (b), (c), and (d), respectively; and

(4) in subsection (b), as so redesignated, by striking "subsections (a) and (b)" and inserting in lieu thereof "subsection (a)".

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APPENDIX C

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Tyler Professor of Constitutional Law

GRISWOLD HALL 307
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

February 24, 1987

Bernard Raimo, Jr., Esq.
Counsel
Subcommittee on Legislation
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, DC 20515-6415

Dear Mr. Raimo:

I have received your letter of February 18 and the attached copy of H.R. 1013, the proposed legislation to strengthen the system of congressional oversight of the intelligence activities of the United States. I share the view of the co-sponsors of this bill that the bargain struck in 1980 between Congress and the executive branch has been abused by the Reagan administration in ways violating the intentions underlying that bargain and that the proposed restatement of the Act, with the greater precision contained in H.R. 1013, would reduce the risk of further abuse without infringing in any way upon the constitutional responsibilities of the President and of the Executive Branch.

Although my schedule would make it impossible for me to testify in late March, I would be happy to have this brief letter read into the record of any hearings that might be scheduled.

Sincerely,

Laurence Tribe

Laurence H. Tribe

LHT:lks

APPENDIX D

Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW POSTAL CODE 27706

March 2, 1987

Mr. Bernard Raimo, Jr., Counsel
U.S. House of Representatives
Permanent Select Committee on Intgelligence
Washington, D.C. 20515-6415

Dear Mr. Raimo:

I am writing in brief reply to your letter and enclosures of February 17th, re proposed amendments to 50 U.S.C. §413, and to 22 U.S.C. §2422. On the face of the proposed changes, I do not see any basis for serious constitutional concern, but I regret that my impression is necessarily highly tentative for lack of sufficient background: (a) in respect to how these particular statutes operate with other statutes; and (b) what objections, if any, the executive department may see reason to present.

To the extent that this brief letter will be unhelpful in failing to have identified the "right" problems, I would be pleased to kept current with the scheduled Committee hearings to see whether, at that later time, a more concrete and more useful review can be provided. Generally, however, the matters broached by this bill seem to me to encompassed by the following constitutional propositions.

The President and the Congress have a large degree of overlapping (concurrent) constitutional authority in respect to foreign affairs in the first instance. In the absence of congressional legislation, moreover, the tendency of our judiciary is to sustain executive action by deferring to the presumed good faith, superior competence, and wide range of implied executive power over foreign relations. Alternatively, executive action uncircumscribed by Congress is treated as essentially "nonjusticiable" in our courts.

Even in respect to foreign affairs, however, the plan of the Constitution establishes Congress as primus inter pares, i.e., as first among equals, most especially in framing basic standards to guide the executive obligation--to take care that the laws shall be faithfully executed. The general standard is best enunciated in Justice Jackson's concurring opinion in Youngstown Sheet & Tube v. Sawyer. It remains the single most reliable utterance in this field. Accordingly, to the extent Congress desires clarity, certainty, and reliability in highly problematic areas of executive direction of foreign intelligence activity, it is both appropriate and essential that Congress should say so, by law, as concretely as it can agree to do. The current proposals appear to recognize such a need. As concrete and affirmative statutory provisions, they are important.

The explicit tightening of the executive notification requirements in the manner reflected in the proposed legislation seems to me to be well within congressional prerogative, moreover, especially as it is limited to "Central Intelligence Agency . . . operations in foreign countries, other than activities intended solely for obtaining necessary intelligence." (Emphasis added.) To the extent that Congress might not wish the C.I.A. to be used other than for strictly information-gathering purposes at all, I have no doubt Congress could, constitutionally, so provide. To the extent that certain covert action may instead be authorized under executive discretion, that it not be done through the C.I.A. unless strict reporting standards are satisfied, seems to me to stand on the same footing. It is up to Congress to determine whether the creation, funding, and organization of a given agency is, in its own sole view, "necessary and proper" to carry into execution either its own obligations or those of the executive department. Correspondingly, to the extent the Congress does not wish the C.I.A. utilized in certain ways without strict executive observance of prescribed notification requirements, involving pertinently identified special committees of the Congress, it may assuredly, and constitutionally, so provide. (Insofar as the executive department may have practical misgivings about the proposed restrictions, it is of course appropriate for the department so to speak its mind--but that is the extent of its prerogative, nothing more.)

On the other hand, it may be arguable that the President, as Chief Executive, cannot be made to provide identical notice to subordinates within the Executive Department itself (including members of his own Cabinet) if the President deems this undesirable, as a matter of exclusive executive discretion. I have not specifically tried to research the point, but it seems to me that it may stand on a different footing than the notice to Congress requirements, despite the preceding discussion which would otherwise seem controlling. Briefly, the argument would run something like this.

In respect to Congress, insofar as Congress need not authorize a C.I.A. at all, I believe the President's use of the C.I.A. (especially for covert action as distinct from strict information gathering) may be made subject to the congressional reporting conditions reflected in the bill. It may seem that the same observation would apply to any other condition, of a merely similar kind, such as that he must also provide identical notice to the Secretary of State, and the Secretary of Defense if Congress so requires by law. But the latter two offices are themselves executive offices and, within his own "house" (so to speak), the President is master; he is not merely a colleague or even a chief administrator with only limitable discretion over whom he may or may not wish to confide in, within the executive department itself.

If that is so, then an effort to restrict the President by

"conditioning" use of the C.I.A. by requiring him to report in some way to the Secretary of Defense and Secretary of State is arguably an unconstitutional condition on his authority as chief executive; whereas the use of such a requirement in respect to permanent select committees in Congress is not.

I have not researched or thought about this problem very deeply, however, and I may well be incorrect, i.e., that in fact such "subordination" of the President (to require his own reporting to other Cabinet officers) may not violate the separation of powers, although it appears to me that it may. Rather, it is simply the particular feature of the bill that alone gives me some pause and on which further research and discussion would be warranted.

Finally, the omission proposed from §501 of Title 50 of the United States Code seems to me probably to be altogether for the good. The language proposed for omission is currently but a confusing phrase which, on its face, seems to give too much away, or at least to leave the balance appearing as more merely precatory than authoritative, and I see no good constitutional reason to object to the deletion the bill proposes.

Again, my apologies for writing rather hastily. But should there seem any purpose to be served as the hearings develop on this legislation, I would be pleased to hear from you once again.

Sincerely,

Wm. Van Alstyne

William Van Alstyne
Perkins Professor of Law

APPENDIX E

ONE BATTERY PARK PLAZA
NEW YORK, N. Y. 10004

March 2, 1987

Dear Mr. O'Neil:

Thank you for sending me a copy of H.R. 1013, introduced by Messrs. Stokes and Boland. I wholeheartedly agree that it is essential to tighten the provisions of the statute relating to covert action reporting requirements. My recollection and a reading of the legislative history supports the conclusion that the bargain struck in 1980 between Congress and the Executive Branch did not contemplate that prior notice could be withheld for ten months or more. H.R. 1013 properly restates the 1980 act so as to remove the existing ambiguity and makes clear what I believe was the intent of the parties at the time the 1980 act was enacted.

It is important that action be taken on H.R. 1013 promptly, as the nation cannot afford a repetition of the action which has sadly led us into such a damaging situation as is revealed in the Iranian-Contra matter. In sum, I fully support the amendment proposed in the Stokes-Boland bill.

Sincerely yours,

Cyrus Vance

Michael J. O'Neil, Esq., Counsel
Permanent Select Committee
on Intelligence
U. S. House of Representatives
Washington, DC 20515-6415

APPENDIX F

New York University
A private university in the public service

Faculty of Arts and Science
Department of History

19 University Place, Room 501
New York, N.Y. 10003
Telephone: (212) 673-9270, 598-7842

March 10, 1987

Dear Mr. O'Neil:

I have now had a chance to think about H. R. 1013 which you sent me with an explanatory letter on February 18. It seems to me that the proposed changes are generally sensible, but there is one point on which I wish to raise a question.

I can imagine cases in which it would be unfortunate to have a legislative requirement that all statutory members of the NSC be informed. Obviously in the ordinary case it is sensible that they should be so informed, and in the five years of my own service I can remember no case in which a Presidential authorization was not known to these officers. At the same time, however, I can recall cases in which for reasons they found entirely sufficient Presidents have kept in one or another of these high offices persons with whom they did not always share this kind of information. It may be a mistake to attempt to correct obvious recent errors by making a rule that a President might well find it important to break in a particular case at some point in the future.

I do not think that the Congress should assume in legislation that every statutory member of the NSC will always be a reliable recipient of this kind of information. The bill makes perfectly good sense with the present cast of characters, and it would certainly have worked under President Kennedy and President Johnson, but a careful look at the roster of these officials in the years since Pearl Harbor will suggest that it may not always be so.

Sincerely,

McGeorge Bundy

Mr. Michael J. O'Neil
Counsel
Permanent Select Committee on Intelligence
U. S. House of Representatives
Washington, D. C. 20515-6415

APPENDIX G

STANSFIELD TURNER

March 5, 1987

Dear Mike,

My apologies for taking so long to respond to your request for comments on the proposed revision to the National Security Act. I have been on the road on business almost constantly.

Let me start by reaffirming what I hope you know, that I am a strong supporter of congressional oversight of the intelligence process. The issue is not whether, but just how we carry out oversight. I have two concerns with the provision in the proposed bill which provides for a limit of 48 hours for notification of all covert actions. The first involves instances in which human life is at risk. There were three occasions during my tenure as DCI that we delayed notification of the Congress on covert actions. One was the rescue of the "Canadian Six" when we sent two CIA officers into Teheran at risk to their lives for the purpose of leading the six other Americans out. Another was the secret flight of a light aircraft into the desert of Iran with two CIA officers and an Air Force officer to prepare the way for the hostage rescue operation. And, the third was the frequent infiltration of CIA officers and agents into Teheran throughout the 444 day hostage crisis. In all instances a lot more than 48 hours passed from initiation of the operations until their completion.

In all three cases I sincerely believed that I was asking people to risk their lives or their personal freedom. I would have found it difficult to look them in the eye and tell them that I was informing even one more person than absolutely necessary of what they were going to do. It wasn't a matter of whether I would tell an extra member of Congress or an employee of the CIA, it was simply a case of not increasing the risk that these individuals were accepting.

I believe there should be sufficient flexibility in the law to let DCIs and Presidents feel that they are conscientiously doing their best to protect the lives of Americans whom they ask to take risks for our

country. I understand why such flexibility worries the Congress. It could mean that they would not be informed of a covert Presidential initiative that they thought advisable. That brings me to my second concern.

The only way Congressional oversight will work well is if there is mutual understanding and respect between the Committees on Intelligence and the Administration. If, in order to make oversight work, you have to draw the law so tightly that it may choke off covert actions that place lives at risk, it very likely isn't going to work anyway.

I would expect a cooperative Administration to notify the eight specified members of Congress of even a life-threatening covert action if it also were a questionable or controversial one. An uncooperative Administration, would find some way around any law requiring notification in such circumstances. Witness the fact that Mr. Casey signed a written agreement with the SSCI to inform the Committees of all covert actions (as I understand it) and then failed to inform them. When confronted with an Administration that does not want to cooperate, the Committees are simply going to have to be more insistent about being informed, using the power of the purse if necessary.

Some day we should redo all the laws governing intelligence and place them in a Charter, but for now I suggest leaving well enough alone. We are all anxious and concerned because of the abuses and questionable activities of the years just past, but let's let matters cool for a bit.

Happy to share my views and best wishes.

Yours,

Stansfield Turner

Mr. Michael O'Neill
House Permanent Select Committee on Intelligence
H 405 The Capitol
Washington, DC 20515

APPENDIX H

Columbia University in the City of New York | *New York, N.Y. 10027*
SCHOOL OF LAW 435 West 116th Street

The Honorable Louis Stokes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515-6415

31 March 1987

Dear Mr. Stokes,

Your Committee has invited my views on the constitutionality of "the prior notice provision" in H.R. 1013, "insofar as it may impinge on Presidential powers to conduct the foreign relations of the United States."

The Constitution does not expressly confer authority in respect of intelligence activities upon either Congress or the President. Any authority they may have to carry out or regulate such activities is an aspect of their general foreign affairs powers.

The Constitutional blueprint for the distribution of power in regard to foreign affairs is reasonably clear insofar as it is explicit, but it leaves much unsaid. Some general principles and guidelines for supplying "missing powers" have become established. The authority which the Constitution expressly confers on the President to appoint and receive ambassadors has been construed to imply a larger responsibility. In 1936, the Supreme Court referred to the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 320

(1936).

As "sole organ," the President has authority to conduct foreign relations, and is "the eyes and ears" as well as "the voice" of the United States. Presidents have also claimed authority to determine the foreign policy of the United States and to engage in "foreign affairs activities." But the President has generally asserted power to engage in such activities on his own authority when Congress was silent. He has not often denied the power of Congress to regulate them. He has rarely insisted on the power to act when Congress has directed him not to, or to disregard conditions imposed by Congress on his action.

In principle, the President's power to act inconsistently with Congressional directive is limited to small areas where the President's Constitutional authority is exclusive. For the rest, there is a strong case that even if the President may act when Congress is silent, he is subject to Congressional direction. In his famous exposition of the principles of separation of powers, Justice Jackson said:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . .

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952).

Where the President has independent constitutional authority to act, Congress is constitutionally bound to implement his actions, notably by appropriating the necessary funds. Where the President's authority to act is not exclusive but is subject to regulation by

Congress, Congress may prohibit or limit the President's activity directly by legislation, or indirectly by denying him funds or by imposing conditions on the use of funds appropriated.

Applying these general principles and guidelines to "intelligence activities," I distinguish between gathering information and other covert actions commonly included in that rubric. The gathering of information is a principal purpose of sending ambassadors and maintaining diplomatic relations, an exclusive Presidential power. It is only a small extension to conclude that gathering information by any means is part of the President's "eyes and ears" function. There is, therefore, a strong case for Presidential authority to obtain intelligence not only through our embassies but also through other agents representing the Executive, or through military agencies under the President's command. Congress should not interfere with that function.

On the other hand, there is little to support the view that other kinds of activities now lumped under the heading of "intelligence activities," which are not designed for gathering information and are not otherwise intimately related to the diplomatic or military command function, are an exclusive Presidential function. Assuming that the President has the power to carry out such activities without Congressional authorization, Congress has the power to regulate such activities, and the President is bound by Congressional directives. Since Congress can regulate such activities, it may properly refuse to appropriate funds to support them and may impose conditions on the use of any funds appropriated for such purposes. The President is

constitutionally bound to see that such Congressional mandate is respected and faithfully executed.

Addressing H.R. 1013, I am of the opinion that Congress can properly require prior notice (or notice within 48 hours) of "covert activities" other than those limited to intelligence gathering.

Intelligence-gathering activities, however, may not be subject to regulation by Congress. Congress is probably entitled to ask to be informed of such activities as necessary and proper to the exercise of its various powers and those of other branches of the government of the United States. (U.S. Constitution, Art. I, sec. 8, cl. 18.) The right of Congress to be informed, however, ought not to be exercised in ways that would interfere with the activity. In particular, it is difficult to make a case for the right of Congress to know of every particular intelligence-gathering activity in advance, or within 48 hours.

The distinction between gathering information and other intelligence activities was recognized in the Hughes-Ryan Amendment to the Foreign Assistance Act, 22 U.S.C. §2422, which H.R. 1013 proposes to amend. The distinction is not found in the general provisions for keeping the Congress "fully and currently informed" embodied in the Intelligence Oversight Act of 1980, 50 U.S.C. 413(a), but it is found in §413(b) requiring "timely" notice when prior notice is not given under subsection (a). Since H.R. 1013 proposes to eliminate the reference to executive authority under the Constitution as well as existing subsection (b), you may wish to consider either excluding intelligence-gathering from "intelligence activities" under §413, or writing an additional reporting requirement in different terms, tailored to intelligence-gathering activities.

Sincerely yours,

Louis Henkin

Louis Henkin

APPENDIX I

STANSFIELD TURNER

JAN 29 1986

The Honorable Henry J. Hyde
House of Representatives
Washington, D.C. 20515

Jan. 27, 1986

Dear Henry,

Thank you for asking for my views on your proposed Joint Resolution to establish a Joint Committee on Intelligence. I apologize for taking so long to respond.

I fully support your concept and your resolution. In my recently published book "Secrecy and Democracy", I list a Joint Committee as one of 11 recommendations to improve our intelligence. Doing so would not only reduce the number of leaks, but would encourage the Director of Central Intelligence and other officials to be more forthcoming, knowing that they had only one committee to which to report.

My only suggestion for possible improvement of your resolution concerns the time of service of members of the committee. I understand the motives that led to limitations on length of membership on the present committees, but I believe we've seen more of a problem from short tenures than long. It seems to me that the both Select Committees today are short of experienced members.

Rather than initial terms of two, four and six years for the initial members, I'd make that four, six and eight, even though once the system is rolling there would be a six year maximum. A two year term is pretty short to learn the intelligence business and means opening a lot of highly sensitive material to people who will not need it for long.

I would also suggest one exception to the six year rule. That is, if a member who has served six years is likely to and wants to become Chairman or Vice Chairman, he or she should be allowed to stay on the Committee an additional two years if elected Chairman or Vice Chairman. One of the few disadvantages of the program you have designed is that it is likely to lead to a lot of turnover in chairmanships.

Again, I appreciate the opportunity to comment and would be happy to attempt to be of any further assistance.

Yours,

Stansfield Turner

APPENDIX J

SAFEER COMPANY
INTERNATIONAL CONSULTING

RICHARD HELMS
PRESIDENT

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March 24, 1987

The Honorable Henry J. Hyde
U.S. House of Representatives
House Office Building
Washington, D.C. 20515

Dear Mr. Hyde:

You indicated that you would be interested in any comments I might have about H.R. 1013.

This bill proposes to tighten up certain reporting requirements on new covert actions undertaken by the Central Intelligence Agency. In so doing it demands that Presidential "findings" be "in writing" and that a copy of the written "finding" be furnished to certain members of Congress and to the Vice President, Secretaries of State and Defense, and the Director of Central Intelligence. At the rate written documents of the Executive branch appear in the newspapers these days, I would have thought that this requirement almost constitutes a guarantee that no action would long remain "covert." When a written finding is sent to a Senator, a Congressman, or a Cabinet officer, how many individuals on their staffs actually see this document? Quite a few, I would surmise. Put another way, this legislation would further insure that with the inability of the Executive and Legislative branches to identify "leakers," "covert action" as an option in support of U.S. foreign policy is doomed. This is not necessarily because future Presidents and Directors would be unwilling to take the chance, but because the experienced officers who must carry out such operations would not wish to become involved in what they would inevitably regard as a "no win" situation.

It strikes me that rather than focus on H.R. 1013, the Senate and House of Representatives might better exert their energies on the adoption of a Joint Committee along the lines you have proposed. The Tower Commission Report contains the most recent recommendation for establishing such a Joint Committee. Last year's report of the Vice President's Task Force on Terrorism contains a similar recommendation. Cord Meyer in his column of March 13, 1987 in the Washington Times argues the

SUITE 402 - 1627 "K" STREET N. W., WASHINGTON, D. C. 20006 - (202) 466-4226

case in favor of a Joint Committee. Under date of December 9, 1985 I sent you a letter supporting your original bill. I feel even more strongly in favor today and repeat what I wrote to you at that time.

This past weekend Senator David Durenberger, former Chairman of the Senate Select Committee on Intelligence, was quoted in the Washington Post as having exposed during a speech in Florida an alleged American intelligence operation in Israel. Equally egregious classified information leaks come from the Executive departments. If the Executive and Legislative branches of our government cannot reach an appropriate balance on the issue of congressional oversight and the mutual confidence implicit in it, the security of intelligence information acquired for the United States of America is indeed in serious trouble. Let us hope that the Congress will see the wisdom of making this collaboration easier by moving toward a Joint Committee with a small staff. This would reduce the number of individuals privy to intelligence secrets, thus making it less contentious for the two sides to work in harmony.

Sincerely yours,

Richard Helms

APPENDIX K

Center for Strategic & International Studies
Georgetown University • Washington DC

April 10, 1987

Dear Congressman Hyde:

I agree that there is a need for mechanisms for proper congressional oversight of covert operations. But we must not make such mechanisms so restrictive that they put the success of needed covert operations in jeopardy. No one disputes the fact that congressional oversight is necessary. Nor does anyone dispute the fact that total secrecy is sometimes necessary for particularly sensitive covert operations to succeed. The problem is how to balance the two when they come into conflict.

I believe that the two key items of the proposed amendments to the Hughes-Ryan Act -- the 48-hour notice for covert operations and the immediate provision of written presidential intelligence findings -- are an inappropriate response to the problem. They would undercut fatally the President's ability to conduct the necessary operations which occasionally require absolute secrecy. If they had been in effect during Iranian hostage rescue mission in 1980, the President would have had to inform Congress, and therefore increase the risk of a breach in security, at the same time as the American rescue force was driving toward Tehran.

We must face up to the fact that we cannot create a risk-free system. In covert operations, administrations, past and present, have made mistakes. There is no way to legislate away the risk of future mistakes except by prohibiting covert operations. In the aftermath of the Iran-Contra affair, the greatest risk is that we will legislate new restrictions so strict that they would guarantee that all the Congress would find itself overseeing is failed covert operations -- or none at all.

Sincerely,

Zbigniew Brzezinski

The Hon. Henry Hyde
2104 Rayburn House Office Building
Washington, D.C. 20515

1800 K Street Northwest, Suite 400 • Washington, DC 20006 • Telephone 202/887-0200

APPENDIX L

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 9, 1987

Representative Matthew F. McHugh
Chairman, Subcommittee on Legislation of the
House Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1013, a bill relating to the system of congressional oversight of intelligence activities. The Department of Justice opposes enactment of this legislation because we believe it would unconstitutionally intrude on the President's authority to conduct the foreign relations of the United States.

H.R. 1013 would make substantial revisions of both the congressional reporting requirements of the National Security Act and the Hughes-Ryan Amendment. Besides appearing to broaden the congressional notification requirements, section 3 of H.R. 1013 would delete from section 501(a) of the National Security Act the present express acknowledgment that the Act imposes reporting requirements on the President only insofar as the requirements are consistent with his authorities and duties under the United States Constitution.[1] It would also delete the Act's provision acknowledging the

[1] Section 501(a) presently provides (emphasis added):

> To the extent consistent with all applicable authorities and duties, <u>including those conferred by the Constitution upon the executive and legislative branches of the Government</u>, 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 --
>
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on

President's independent constitutional authority, namely section 501(b), which provides for presidential discretion in deferring notice to Congress concerning exceptionally sensitive intelligence activities.[2] In place of the current Act's provision acknowledging the President's authority to provide "timely notice" in such sensitive situations, section 3 of H.R. 1013 would purport to require that such notice be given within 48 hours after the initiation of such operations.

Section 2 of H.R. 1013 goes even further with respect to operations involving the Central Intelligence Agency. It would purport to require that copies of Hughes-Ryan "findings" be provided to certain executive branch officials and that this be done before the initiation of any operation requiring such findings.[3]

[1] Cont. Intelligence of the House of Representatives . . . fully and currently informed of all intelligence 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, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) 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 chairman 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.

Needless to say, deleting the underscored language would be only symbolic and could not alter the constitutional rights or duties of either branch.

[2] Section 501(b) currently provides (emphasis added):

> 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.

[3] The Hughes-Ryan amendment, 22 U.S.C. 2422, provides in its present form:

> No funds appropriated under the authority of

While the 48-hour provision of the new section 501(e) of the National Security Act would apply to congressional notification of the "Hughes-Ryan" operations, this unprecedented requirement of notification of subordinate executive branch officials appears to impose an absolute rule of prior notice.[4]

In keeping with the long-standing view of Presidents of every Administration that has considered this issue, the Department believes that these provisions of H.R. 1013 are unconstitutional. As you know, these same issues were the subject of thorough debate and extensive negotiation in 1980, when Congress was considering proposals for intelligence oversight legislation. It was the position of the Administration then, as it is of this Administration now, that there may be exceptional occasions on which the President's exclusive and inalienable constitutional duties in the area of foreign affairs would preclude him from giving prior notice of very sensitive intelligence-related operations.

This Administration, like prior Administrations, is anxious to work with Congress in devising arrangements to satisfy the legitimate interests in legislative oversight. But the executive branch in 1980 recognized that there is a point beyond which the Constitution simply would not permit congressional encumbering of the President's ability to initiate, direct, and control the sensitive national security activities at issue here. Testifying before the Senate Select Committee in 1980, then CIA Director Stansfield Turner emphatically pointed out that the prior notification then being considered "would amount to excessive intrusion by the Congress into the President's exercise of his powers under the Constitution." See National Intelligence Act of 1980: Hearings before the Senate Select Committee on Intelligence, 96th Cong., 2d Sess. 17 (1980).

The Constitution confers on the President the authority and duty to conduct the foreign relations of the United States. Covert intelligence-related operations in foreign countries are among the

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[3] Cont. this chapter 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 operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 413 of title 50 [i.e., section 501 of the National Security Act].

[4] Section 2 of H.R. 1013 also requires that the national security finding be in writing. We do not, however, interpret this to mean that signed copies of the finding must be provided to Congress or

most sensitive and vital aspects of this duty, and they lie at the very core of the President's Article II responsibilities. In this letter the Department will not seek to detail all the authorities and precedents relevant to our conclusion that an absolute prior notice requirement of the kind proposed in H.R. 1013 would be unconstitutional. In summary, however, the Department believes that the Constitution, as confirmed by historical practice and clear statements of the United States Supreme Court, leaves the conduct of foreign relations, which must include foreign intelligence operations, to the President except insofar as the Constitution gives specific tasks to the Congress.

The principal source for the President's wide and inherent discretion to act for the nation in foreign affairs is section 1 of article II of the Constitution wherein it is stated: "The executive Power shall be vested in a President of the United States of America." The clause has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically 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. The President's executive power includes all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.

Before the Constitution was ratified, Alexander Hamilton explained in The Federalist why the President's executive power would include the conduct of foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate." See The Federalist No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961). By recognizing this fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" the Framers made clear that the Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens. As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of the "executive Power."

The authority of the President to conduct foreign relations was first asserted by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain neutral in the war between France and Great Britain. The Supreme Court and Congress,

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[4] Cont. to subordinate executive branch officials.

too, have recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the Constitution itself, stating that "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress." 299 U.S. at 319-320 (emphasis added). Moreover, as the Curtiss-Wright Court noted, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history, stating that "the President is the constitutional representative of the United States with regard to foreign nations." The Committee also noted "that [the President's constitutional] responsibility is the surest pledge for the faithful discharge of his duty" and the Committee believed that "interference of the Senate in the direction of foreign negotiations [is] calculated to diminish that responsibility and thereby to impair the best security for the national safety." 299 U.S. at 319 (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). Curtiss-Wright thus confirms the President's inherent Article II authority to engage in a wide range of extraterritorial foreign policy initiatives, including intelligence activities -- an authority that derives from the Constitution, not from the passage of specific authorizing legislation.

Despite this wide-ranging authority, Presidents have been careful to consult regularly with Congress to seek support and counsel in matters of foreign affairs. Moreover, we recognize that the President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court's Curtiss-Wright decision itself notes the President's exclusive power to negotiate on behalf of the United States. The Supreme Court has also, and more recently, emphasized that this core presidential function is by no means limited to matters directly involving treaties. In United States v. Nixon, 418 U.S. 683 (1974), the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the

utmost deference to Presidential responsibilities." 418 U.S. at 710 (emphasis added).

We are unaware of any provision of the Constitution that affirmatively authorizes Congress to have the role provided in H.R. 1013. Congress' implied authority to oversee the activities of executive branch agencies is grounded on Congress' need for information to consider and enact needful and appropriate legislation. Congress in the performance of this legislative function, however, does not require detailed knowledge of virtually all intelligence activities particularly prior to initiation. Oversight of ongoing operations has the potential to interfere with the ability of the President to discharge the duties imposed on him by the Constitution. Accordingly, the President must retain his constitutional discretion to decide whether prior notice, in certain exceptional circumstances, is not appropriate.

Since the current legislation was adopted in 1980, of course, the President has provided prior notice of covert operations in virtually every case. Moreover, in acting to implement the recommendations of the Tower Board, the President recently reaffirmed his committment to the current statutory scheme of notification. See the text of National Security Decision Directive No. 266, which accompanied the President's message to Congress of March 31, 1987.

The Department of Justice also objects to Section 2 of H.R. 1013, which would purport to require that the President furnish copies of his national security findings to the Vice President, the Secretary of State, the Secretary of Defense, and the Director of Central Intelligence before the initiation of any operation requiring a Hughes-Ryan finding. Like the congressional prior notice requirements, though for somewhat different reasons, this provision is inconsistent with the President's constitutional authority. By requiring certain of the President's subordinates to be notified of covert actions before they occur, this proposal would infringe on the President's prerogatives as head of a unitary executive branch to exercise full discretion in consulting and communicating with his subordinates.

The Constitution places the whole executive power in the hands of the President. In contrast to political systems that employ some form of cabinet government, our Constitution is based on the principle of the unitary executive. It is worth emphasizing that the Framers deliberately chose this principle and deliberately rejected the cabinet (or privy council) alternative, with which they were quite familiar from British practice and from the constitutions of most of the original states. Indeed Article II, section 2, of the Constitution provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" (emphasis added). Plainly, it is the President who decides when he requires the advice of others in the Executive Branch and which persons he will consult. Neither his authority to seek advice from such officials as he may choose nor the manner in which he makes such consultations may be circumscribed by Congress.

The Framers' two main reasons for choosing to create a unitary executive were complementary and mutually reinforcing. First, they thought that for the executive branch, in sharp contrast to the legislative branch, rapid and decisive decision-making is sufficiently important that it outweighs the inevitably concomitant danger that rash or ill-considered actions will be undertaken. See The Federalist No. 70, at 423-24 (A. Hamilton) (C. Rossiter ed. 1961). Second, the Framers believed that unity in the executive would promote what today we call "accountability." As Alexander Hamilton pointed out, the more that the executive power is watered down and distributed among various persons, the easier it is for everyone concerned to avoid the blame for bad actions taken or for desirable actions left undone. See The Federalist No. 70, at 427 (A. Hamilton) (C. Rossiter ed. 1961).[5] Certainly, it would be unwise, as well as unconstitutional, to move our governmental institutions in a direction that could lead to less presidential accountability.

Of course, we acknowledge that consultation with the members of the National Security Council would almost always be a prudent presidential policy.[6] We object only to undertaking to make such consultation a legal obligation. As a constitutional matter, there is no difference between the subordinate officials listed in this bill and thousands of other executive branch officers. If one statute could require the President to notify any of them of his national security findings prior to initiating a covert operation, another statute could just as easily require him to notify other subordinates, or all of them. Thus, given the Constitution's creation of a unitary executive, the cabinet notification requirements in section 2 of this bill, like the congressional notification requirements discussed earlier, are inconsistent with Article II of the Constitution.[7]

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[5] The Framers also believed that placing the whole of the executive power in one man was usefully "conducive" to secrecy -- a consideration directly relevant to H.R. 1013. See The Federalist No. 70, at 424 (A. Hamilton) (C. Rossiter ed. 1961).

[6] Indeed, in keeping with past practice, the President has directed that "proposed covert actions . . . be coordinated with NSC participants, including the Attorney General, and their respective recommendations communicated to the President . . . ." NSDD 266 (March 31, 1987).

[7] The requirement in section 2 of H.R. 1013, that the national security finding mandated by the Hughes-Ryan Amendment be in writing also raises questions insofar as it has some potential to interfere with the President's discretion in choosing how to run his own office. On the other hand, because this provision does serve the legitimate purpose of facilitating after-the-fact congressional oversight, it is the least objectionable feature of H.R. 1013.

In closing, the Department notes that when proposals similar to those in H.R. 1013 were introduced in 1979 and 1980, it was recognized that no President has either the right or the power to alter the Constitution's allocation of powers among the institutions of our government. This view was correct then and is correct now.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report to Congress.

Sincerely,

John R. Bolton
Assistant Attorney General
Office of Legislative Affairs

APPENDIX M

Attachment #1
First Principles
Vol. 12 No. 2

Prohibiting Covert Operations

by Morton H. Halperin

The original Senate Intelligence Committee, known after its chair as the Church Committee, conducted in 1975-76 the only objective and comprehensive investigation of the C.I.A.'s covert operations ever undertaken. The committee examined the secret "successes" as well as the public fiascos; it considered the foreign policy implications as well as the consequences for constitutional government. It reported on efforts to assassinate foreign leaders, to overthrow democratically elected governments, and to spread disinformation. It described also how the CIA had come home and spied on Americans. The committee concluded that the covert operations had not, on balance, contributed to the national security and that they did pose a threat to American democracy.

The committee noted in its final report that it had seriously considered recommending a statutory prohibition on all such operations. However, the committee did not make that recommendation. Instead, it proposed a series of measures designed to ensure that covert operations would only be conducted in extraordinary situations and only after full consultation within the executive branch and with the Congress.

In the wake of the Iran-Contra affair, in which the executive branch ignored all the limits that Congress has imposed, it is time to revisit the question of a total ban. If there were any doubt after the revelations included in the Church Committee report, there can be none any longer: covert operations are simply incompatible with constitutional government and should be abolished. There is no countervailing national security value that makes this a hard choice.

It is not that each one of us cannot think of circumstances in which we would approve of a covert operation—an effort to overthrow Hitler is perhaps the one with the greatest appeal. Rather, it is that if the President is given the authority to conduct such operations he will use it routinely and in dangerous ways.

The reason why Presidents are irresistibly drawn to covert operations explains precisely why they are a threat to constitutional procedures and the First Amendment. All Presidents become frustrated by the difficulty of getting things done. They tire of being told by bureaucrats why an action will not succeed and that consultation is required in advance with allies. They grow wary of all the requirements imposed by various laws and they become reluctant to consult with the Congress. And so they turn to covert operations.

Supporters of covert operations tell us that they are necessary to provide an alternative between mere diplomacy and sending in the Marines, and that such activities must be conducted in secret. These are both myths, part of a time-worn rationale designed to protect the right to conduct such operations in secret.

It is not, of course, true that the United States has no options between military action and diplomacy apart from covert operations. The U.S. has a number of ways that it can influence foreign governments, from trade embargoes to arms sales, from support of their objectives in the international community to overt economic and military assistance, to shows of force.

Moreover, it is false to assert that the actions which are labeled "covert activities" must be done in secret. Indeed, we are now in the era of what are known as "overt covert operations." Their existence should destroy the myth that such operations must be conducted in secret with no one knowing that the United States is involved. Consider the case of aid to the contras in Nicaragua. When that covert operation became public it did not come to an end. On the contrary, the administration simply asked for the money overtly and the President publicly defended the policy of supporting the contras. The same was true for aid to one faction in the Angolan civil war and to the Afghan rebels. Even arms sales to Iran could be resumed publicly. The one kind of covert operation for which secrecy is essential—the planting of false propaganda—simply has no place in the conduct of a democratic society. Such operations are of marginal value abroad and frequently "blow back" to corrupt the political process at home.

Not only is secrecy not necessary for most such operations, they are often not secret at all to those in the world who care. American arms sales to Iran, to take just one example, was discussed so often with so many people in so many insecure channels of communication that it was known to any government that cared and to a variety of arms merchants in the world.

Why then the secrecy? The answer is simple and reveals why covert operations are anathema to constitutional government. The tight holding of the information about covert operations within the United States is not the necessary by-product of the conduct of such operations; it is the purpose which lies behind the decision to engage in such activities.

Consider once more the arms sales to Iran. Can anyone doubt that a full venting of the issue within the executive branch let alone with the Congress would have led to the canceling of the operation? Can anyone doubt that this was the purpose of the secrecy?

The Iran-contra affair is not an exception. Aid to the contras was begun in secret because the administration knew that Congress was not willing to support the initiation of a war against a government with which we had diplomatic relations. Once the operation was underway, Congress could be told that we could not cut and run and had to follow through on a commitment made in secret.

Covert operations can lead to war; they can commit the United States in various ways which involve large expenditures and risks of armed conflict. Covert operations are the way in which the United States affects much of the world. In a democratic society it is simply unacceptable to have such fundamental decisions taken in secret, especially when one, if not the only, purpose of the secrecy is to prevent public debate. Voters cannot assess the record of a President if he does not reveal what he is really doing. Congress cannot play its constitutionally mandated role if the President acts without consultation.

Point of View: Prohibiting Covert Operations, *continued*

In the wake of the scandals revealed in the 1970s, Congress sought to deal with the problem by mandating reporting of such operations. The Intelligence Oversight Act of 1980 laid down a set of procedures that had to be followed before covert operations could be conducted. These requirements were systematically ignored by the Administration in the Iran-contra affair. There is now an effort underway in the Congress to tighten the rules. Certainly such action is necessary, but it misses the fundamental point.

The conflict between the secrecy of covert operations and the dictates of the First Amendment should be enough to lead Congress to prohibit such operations, but there are other costs as well to a democratic society. Let me just mention two: the compulsion to lie and the belief in a right to disobey the law.

Covert operations breed a disrespect for the truth. One starts out lying to the enemy, then to the public, then the Congress, then other agencies, and then to the person in the next office. One starts out lying about the essentials and then discovers how easy it is and how effective and starts lying about other aspects of the operation and then about many things. If it is okay to lie about aid to the contras, why not about arms for hostages, or an imminent invasion of Grenada? If the extent of the lie spreads inexorably, so do the targets of the lie. The need to know principle justifies lying not only to the public and to the Congress but to others in the Executive branch and even in the CIA and on the staff of the National Security Council who are not within the circle.

This right to lie leads to a contempt for the rights and responsibilities of others. If they can be lied to, if they are not in the know, then their views cannot be taken seriously and they can be ignored on other matters as well.

The inevitable results are there to see: The White House lying to the Secretary of State about whether arms sales to Iran were continuing. The American press being a target of the Libyan dis-information campaign. The efforts to cover up with deception the Iran-contra affair as the story broke.

Another inevitable consequence of covert operations is disrespect for the rule of law. Covert operations involve breaking the laws of other nations. Those who conduct them almost inevitably come to believe that they can break American laws as well and get away with it. How else to understand the continuing efforts to provide aid to the Contras when Congress specifically prohibited it? Those involved were operating in secret and behind the bodyguard of lies, and in violation of international law. It was one more very small step to ignore the requirements of domestic law.

If the case for abolishing covert operations is so clear why does Congress not act? We live in an age in which there is a flinging from responsibility and a suspicion of absolutes. One Washington observer suggested that if Congress was now considering the First Amendment it would add two exceptions and an escape clause. So it did when it considered abolishing covert operations. So it will be tempted to do again unless members of Congress learn from their constituents that the Executive branch may be responsible for the failure of the reforms of the 1970s, but Congress will be responsible if it tries once again to square the circle.

There is no way to do it. Covert operations and the American constitutional system are incompatible. Congress can show that it is serious about celebrating the Bicentennial by acting on that simple truth. ■

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Attachment #2

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It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to

First Principles.

THOMAS PAINE
Dissertation on First Principles of Government, July 1795

Timely Does Not Mean Never: Notice to Congress of the Iran Arms Deal

by Jay Peterzell

Here is what President Reagan said last November when asked to comment on "the prolonged deception of Congress" about the Iran arms deal:

> I was not breaking any law in doing that. It is provided for me to do that. At the same time, I have the right under the law to defer reporting to Congress, to the proper congressional committees, on an action, and defer it until such time as I believe it can safely be done with no risk to others.

In setting out this interpretation of the Intelligence Oversight Act, the President was apparently following the advice of his top legal advisors. According to a preliminary report on the Iran operation issued by the Senate Intelligence Committee, Attorney General Edwin Meese testified that, before the President signed the January 17, 1986 intelligence finding authorizing the operations, Meese gave his opinion that withholding notification was legal, on the basis of the President's constitutional powers and justifiable because of jeopardy to the hostages.

The then-General Counsel of the CIA told the committee that the administration had decided not to inform the intelligence committees of the operation until the hostages were released, even though it was understood that this might mean a lengthy delay.

Letter of the Law

The Intelligence Oversight Act of 1980 says that the heads of agencies involved in intelligence activities must give the intelligence committees of Congress prior notice of covert operations.

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Timely Does Not Mean Never: Notice to Congress of the Iran Arms Deal

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In extraordinary circumstances, the President may limit advance notice to the so-called "gang of eight": the chairmen and vice-chairmen of the two committees and the ranking majority and minority leaders of both Houses.

This relatively simple arrangement is complicated by a "preamble" to the prior notice section which states that the requirement applies to the extent consistent with the constitutional powers of the President and the protection of classified information. If, based on the authority described by this preamble, the executive branch does not give the intelligence committees advance notice of a covert action, another section of the statute requires that the President inform the committees of the operation "in a timely fashion" and that he provide a statement of the reasons for not giving prior notice.

The two vital issues left ambiguous by the language of the law are: in what circumstances the President may give "timely" rather than prior notice; and how long notice may be delayed without violating the requirement that it be timely.

The Meaning of Timely Notice

If President Reagan's advisers had reviewed the legislative history of the oversight act, they would have quickly found answers to these questions, and could have only come to the conclusion that the President's January 17, 1986 finding—which ordered the CIA to keep the Iran operation secret from the intelligence committees—involved a clear violation of the law.

This is what they would have learned:

- At the time the law passed, both Congress and the executive branch clearly understood "timely" notice to mean prompt notice given as soon as possible after the initiation of a covert operation. Both branches agreed that the language in the "preamble" applies only to the section on prior notice and not to the section on timely notice. Thus the President has no constitutional authority to give the committees "timely" notice that is not prompt.
- The President's only authority to withhold prior notice is based on his powers under the Constitution. The second clause in the preamble, which concerns the protection of classified information and sources and methods, cannot be the basis for withholding prior notice of covert operations, though it may be the basis for withholding certain details of the operations.
- Congress and the executive branch disagreed about when the President may withhold prior notice. The position of Congress was that this authority exists only in extraordinary circumstances affecting the nation's most vital interests. The basis for prompt action. The position of the executive branch was that the President also has the authority to defer notice because of the sensitivity of the information to be conveyed. Congress intended situations of the latter sort to be covered by the provision for giving prior notice to the "gang of eight."
- The executive branch's view that timely notice means prompt notice seems inconsistent with its view that the President has the authority to withhold prior notice because of the sensitivity of the information to be imparted. In the case of a long-term covert operation, the need for secrecy might continue unchanged until the operation was over—or even beyond the life of the operation. Approaching the issue in practical rather than legal terms, the executive branch suggested that prior notice was generally required in the case of long-term covert operations.
- Congress believed it had the power to require prior notice in all cases. Although negotiations with the executive branch led Congress to allow exceptions to the rule by including the timely notice provision, Congress also required that in each case the President provide a statement of his reasons for not giving prior notice. The purpose was to allow Congress to determine whether the President was asserting his power on a basis Congress considered proper and to determine whether further legislative measures were needed to prevent or limit such actions in the future.

The basis for these conclusions is explained below.

Timely Notice: Prompt? Or Before the End of Time?

The Carter Administration, although unwilling to agree to a precise quantitative definition of "timely" in legislation, clearly took the position that timely notice meant prompt notice to the committees as soon as possible after the initiation of the activity.

In a 1977 memorandum to the Attorney General concerning the requirements of the Hughes-Ryan amendment (which was the predecessor of the oversight act), the Justice Department's Office of Intelligence Policy wrote:

> The second requirement of the Hughes-Ryan Amendment is that the President report, "in a timely fashion, a description and scope of such [covert] operation to the appropriate committees of Congress. . . ." It is clear from the legislative history that reports to Congress need not occur before the operation is conducted. Nevertheless, reports should be made as soon as reasonably possible, whether or not this occurs before the operation is conducted.

This understanding was reflected in then-CIA Director Admiral Stansfield Turner's testimony on the proposed National Intelligence Act of 1980, an earlier bill that included the substance of the Intelligence Oversight Act but was not itself enacted.

Admiral Turner was asked by Congressman Romano Mazzoli whether a significant delay in informing the committees did not in effect deny the committees useful access to the information. The two men had this exchange:

The relevant portion of the Intelligence Oversight Act (Title V of the National Security Act of 1947) states:

CONGRESSIONAL OVERSIGHT

SEC. 501 [50 U.S.C. 413] (a) 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—

(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence 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, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) 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 chairman 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;

(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

(b) 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) and shall provide a statement of the reasons for not giving prior notice.

Mr. Mazzoli. That concerns me a little bit, because if you can withhold information long enough on the basis that the timing is not correct, this committee, in essence, is unable to perform its work. As far as we are concerned, that information has been withheld because you may not want to reveal it to us for a month or two months or two years. So is that not tantamount to withholding the information from this committee?

Admiral Turner. Mr. Mazzoli, the law requires that I inform you of findings for covert actions in a timely manner. I think you could take me to jail if I waited a month or two to tell you of something. I suppose there's some wild circumstance, but it just doesn't seem practical at all to me to think that that kind of delay could be anything but reprehensible and punishable.

These understandings concerning the requirements of Hughes-Ryan were also intended to apply to the timely notice provision of the Intelligence Oversight Act. The Senate intelligence committee report says of the provision:

This requirement retains in full force the current statutory obligation under the Hughes-Ryan Amendment for the reporting of covert operations in a timely fashion to the two oversight committees (but not to other committees).

Senator Huddleston stated during floor debate on the bill his belief that the timely notice provision applied only

when time does not permit prior notice; in such a case the committee could be notified as soon as possible.

The point that the President's constitutional power does not allow him to delay notification of the committees under the timely notice provision was made even more strongly during floor debate in a formal colloquy between Senator Walter Huddleston, representing the intelligence committee, and Senator Jacob Javits, representing the Foreign Relations Committee. The colloquy was made part of the legislative history of the oversight act and was intended to supersede the language of the report insofar as it differed from it. The answers and interpretations given by Senator Huddleston had been reviewed and approved by the administration, represented by the Counsel to the President, the General Counsel of the CIA and the Legislative Counsel of the CIA.

In the colloquy, Senator Javits asked:

If prior notice has been withheld on grounds of "independent constitutional authority" on what basis can the President be compelled to report it subsequently under section 501(b) [the timely notice provision]?

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Senator Huddleston replied that

> Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operations, but would not be able to claim the identical authority to withhold timely notice under section 501(b).

Indeed, any other interpretation would be inconsistent with the language of the bill, which incorporates the phrases concerning the President's constitutional powers and the protection of information as a preamble to section 501(a) [prior notice] but does not apply them to 501(b) [timely notice].

Constitutional Powers v. Protection of Classified Information

The Senate intelligence committee report on the oversight act states that the clause in the preamble concerning the duties and authorities conferred by the constitution on the executive and legislative branches is "a recognition that such constitutional authorities . . . may sometimes come into conflict with one another." But the report adds that

> Nothing in this subsection is intended to expand or to contract or to define whatever may be the applicable authorities and duties . . .

In the authoritative colloquy between Senator Javits and Senator Huddleston, the Senators established, and the administration accepted, that the law conveys no new authority. Senator Huddleston agrees in the colloquy with Senator Javits' statement that

> The first preambular clause . . . is simply a routine disclaimer that the bill does not purport to change whatever authorities and duties may exist under the Constitution.
>
> . . . this language should not be interpreted as meaning that Congress is hereby recognizing a constitutional basis for the President to withhold information from Congress. We have never accepted that he does have that power; he has never conceded that he does not under certain circumstances, and the courts have never definitively resolved the matter.
>
> But we are leaving that dispute for another day, specifically reserving both of our positions on this issue, and nothing in this statute should be interpreted as a change in that situation.

Later in the exchange, the two senators make clear that any authority the President has to withhold prior notice is based only on the first clause of the preamble and not on the clause concerning the protection of sources and methods and classified information. Senator Javits asks whether prior notice can be withheld "on any grounds other than 'independent constitutional authority,' and if so, what grounds?" Senator Huddleston replies that

> A claim of constitutional authority is the sole grounds that may be asserted for withholding prior notice of a covert operation. However, as stated in the report, highly sensitive aspects of an operation, such as the identity of an agent, may be withheld prior to implementation of an operation.

Under What Circumstances May Prior Notice Be Withheld?

The administration's views on this issue were most clearly explained by then-CIA Director Turner in testimony on the National Intelligence Act. Turner told the Senate that the administration did not object to prior reporting in most circumstances but that

> Prior reporting would reduce the President's flexibility to deal with situations involving grave danger to personal safety, or which dictate special requirements for speed and secrecy.

Testifying before the House, he explained the administration's practice to date:

> In the past three years there has been only one instance, already well known to you [involving the rescue of American citizens from the Canadian Embassy in Tehran], in which the report was subsequent to implementation . . . It was a case in which the President directed that notification be withheld until any risk to the operation had passed. We subsequently made notification of the finding within hours of the risks being behind us.

The administration's view at this point was thus that prior notice could be withheld in two kinds of situations: in emergencies where the need for speedy action made it impractical, or because the information to be imparted was exceptionally sensitive.

The only congressional statement in the legislative history in support of the latter claim was a general comment by Senator Sam Nunn during floor debate on the bill supporting the oversight act and saying that it

> provides for a significant degree of reporting to the Intelligence Committees on these sensitive covert operations, while recognizing that in certain instances the requirements of secrecy preclude any prior consultation with the Congress.

Turner's testimony on the National Intelligence Act was

delivered in February and March of 1980, shortly after the successful conclusion of the Canadian Embassy operation. By the time the more limited Intelligence Oversight Act was reported by the Senate intelligence committee, Congress had devised the provision for giving limited prior notice to the leadership of the intelligence committees and the two Houses in cases involving exceptionally sensitive information. The Senate report states:

> Provision has been made . . . for those rare cases in which the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting the vital interests of the United States. For these cases, the President shall limit prior notice to the [eight leaders].
>
> The purpose of this limited prior notice in extraordinary circumstances is to preserve the secrecy necessary for very sensitive cases while providing the President with advance consultation with the leaders in Congress and the Chairmen and ranking minority members who have special expertise and responsibility in intelligence matters. Such consultation will ensure strong oversight, and at the same time, share the President's burden on difficult decisions concerning significant activities.

In floor debate on the bill, Senator Huddleston, who was chairman of the intelligence subcommittee on charters that drafted the oversight act, explained his and the administration's understanding of the President's authority to withhold prior notice as follows:

> I myself believe that the only constitutional basis for the President to withhold prior notice of a significant intelligence activity would be exigent circumstances where time does not permit prior notice; in such a case the committee would be notified as soon as possible. At the same time, the executive branch has argued that the President's "constitutional authorities and duties" might permit a withholding of prior notice through the exercise of the President's constitutional authority.

Senator Daniel Inouye, who had served as chairman of the intelligence committee in the previous congress and was still a member of the committee, stated that:

> I am of the firm belief that the only time the President would not consult with the Intelligence Committees in advance would be in matters of extreme exigency. In my experience as chairman of the Intelligence Committee and as a continuing member of that committee, I can conceive of almost no circumstance which would warrant withholding of prior notice, except in those very rare situations where the President does not have sufficient time to consult with Congress.
>
> The Select Committee on Intelligence voted unanimously in favor of this bill. The present membership of the committee reflects the full spectrum of Senate views from left to right. The committee's unanimous vote in favor of this bill is a recognition that the bill strikes the proper balance between maintaining the secrecy of information and ensuring that Congress knows what the executive branch is doing in the name of the American people.

In remarks during floor discussion of the conference report on the bill, Senator Inouye drew the connection between the limited prior notice provision and the President's constitutional power to withhold prior notice more explicitly. He began by quoting language from the intelligence committee's report:

> The purpose of this limited prior notice in extraordinary circumstances is to preserve the secrecy necessary for very sensitive cases while providing the President with advance consultation with the leaders in Congress and the chairmen and ranking minority members who have special expertise and responsibility in intelligence matters. Such consultation will ensure strong oversight, and at the same time share the President's burden on difficult decisions concerning significant activities.

Senator Inouye then continued:

> Because the limited notice provision preserves the secrecy necessary for very sensitive cases, I am of the firm belief that the only time the President has the constitutional authority to withhold prior notice to the intelligence committees would be in matters of extreme exigency. In my experience as chairman of the Intelligence Committee and as a continuing member of that committee, and after four years of reviewing the covert operations of our intelligence system, I cannot conceive of any circumstance which would require the withholding of prior notice except where the Nation is under attack and the President has no time to consult with Congress before responding to save the country.

Finally, Senate Majority Leader Robert Byrd expressed his view of the President's obligations under the oversight act during floor debate on the measure in these terms:

> If the President were to undertake a significant intelligence activity without notice to Congress, he would not only jeopardize his relations with Congress, but would call into question the wisdom of the activity.
>
> The preamble . . . states that the executive branch shall make information available to Congress, "to the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches."

The language recognizes a "buffer zone" of overlapping constitutional powers between the legislative and executive branches, a zone in which both branches might claim the right to intelligence information. The bill wisely does not seek to resolve all of these potential conflicts.

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Nevertheless, the President bypasses the procedural provisions of this bill, and moves into the gray, constitutional buffer zone, at his peril. This is because the presumption of this bill is that prior notice must be given to Congress, period.

Short-Term v. Long-Term Operations

There is an apparent inconsistency between the executive branch's view that, on the one hand, prior notice can be withheld for reasons of sensitivity as well as in emergencies and, on the other, its view that timely notice must be prompt. The sensitivity of a long-term operation might continue unchanged until the operation was over or even after.

The administration's position on these matters was set forth most clearly by Admiral Turner in testimony delivered before the procedure for limited prior notice was devised. That procedure was intended by Congress to resolve the problem. To the extent that the executive branch did not accept that solution, however, its views on the subject were explained by Admiral Turner in the course of his testimony. His position was that

> Prior reporting would reduce the President's flexibility to deal with situations involving grave danger to personal safety, or which dictate special requirements for speed and secrecy. On the other hand, activities which would have long-term consequences, or which would be carried out over an extended period of time, should generally be shared with the Congress at their inception, and I would have no objection to making this point in the legislative history.

Later in the hearing, Senator Birch Bayh had this exchange with the CIA Director:

> Senator Bayh. But now I see in your testimony where you say, as far as long-term policy having significant consequence to the country, it should "generally" be shared.
>
> What example of something like that should not be shared?
>
> Admiral Turner. I cannot think of one.
>
> Senator Bayh. That "generally" business is a word of art, sort of like Mother Hubbard's closet. It covers everything and touches nothing.
>
> Admiral Turner. Statements will be quoted back from these hearings for years to come, sir, and one has to be a little cautious.
>
> Senator Bayh. If the Congress of the United States and the representatives of the people cannot be involved before that project moves beyond the point of recall, it seems to me we have not learned a great deal.
>
> Admiral Turner. That is to be resolved in the legislative history, the proper working that generally can be negotiated. I do not think there is a problem on these long-term ones. I think it is a real short-term, import [?] operational activity, actual endangerment of human life, and the only reason that the legislature can require notification here, it seems to me, if they want to have an opportunity to cancel these—and I leave that to others who are more profound in constitutional law. But the Executive needs some freedom here to take actions on a short-term basis critical to the national interests.

The President's Reasons

The Senate intelligence committee report on the oversight act says:

> Congress, of course, has the power to attach the condition of prior notice to expenditure of funds for intelligence activities. The preambular clause referring to authorities under the Constitution is an indication that a broad understanding of these matters concerning intelligence activities can be worked out in a practical matter, even if the particular exercise of the constitutional authorities of the two branches cannot be predicted in advance.

Concerning the provision for timely notice, the report states:

> The further requirement of a statement of the President's reasons for not giving prior notice is intended to permit a thorough assessment by the oversight committees as to whether legislative measures are required to prevent or limit such action in the future.

Given the current administration's view that notice of covert operations may be withheld from the intelligence committees indefinitely for reasons of sensitivity, it appears that the clear understandings embodied in the Intelligence Oversight Act have not been adhered to and that new legislation is needed to write those understandings into law.

Last month, House intelligence committee chairman Louis Stokes recognized this need by introducing legislation requiring that covert operations be reported to the intelligence committees not more than forty-eight hours after they begin. The measure would also require presidential "findings" under Hughes-Ryan be put in writing. As the facts of the Iran operation unfold, hearings will no doubt be held to determine whether these proposals go far enough in restoring effective oversight. ■

:achment #3

WASHINGTON OFFICE

122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681

National Headquarters
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

MEMORANDUM

From: Alex Whiting

To: Interested persons

4/7/87

Proposal to Establish a Joint Intelligence Committee of Congress

The proposal to merge the two Congressional Intelligence committees into a joint committee was recently revived when the Tower Commission endorsed the idea. This memorandum demonstrates why the proposal makes little sense in light of the history of the oversight provisions, and the Tower Commission's own findings. Finally, it shows why two committees are essential to an effective oversight process.

History of the 1980 Intelligence Oversight Act

For many years after the Central Intelligence Agency was created in 1947, there was no formal oversight process at all. Even after the U-2 incident and the Bay of Pigs fiasco, the executive successfully resisted all efforts to establish any congressional intelligence committees. In the early 1970's, however, the American public was shocked as it began to discover that the CIA had participated in assassinations of foreign leaders and attempts to overthrow governments abroad. The Congress reacted in 1974 by passing the Hughes-Ryan amendment, constituting the first step toward an oversight process.

The Hughes-Ryan amendment contained two main provisions. First, it required the President to find that a covert activity was "important to the national security of the United States" before the operation could begin. Second, it obliged the President to inform "in a timely fashion" the appropriate committees of Congress--as many as eight--of all covert operations. On the floor of the Senate one of the two sponsors

of the amendment, Senator Hughes, described the provision as a "temporary arrangement" until a more permanent one could be developed.

By 1980, both sides in the debate had clear ideas about how they wanted to change the oversight process. Executive branch officials, concerned about protecting intelligence secrets, wished to reduce dramatically the number of congressmen who had the right to be informed of covert operations. Congress, on the other hand, concerned that it was receiving insufficient information to play a meaningful role in the decision-making process, wanted to modify Hughes-Ryan to insure prior notice of covert operations, and substantial access to information in the intelligence agencies.

After lengthy negotiations, a compromise was reached. As one representative explained in final debate on the bill, known as the 1980 Intelligence Oversight Act, "[t]he compromise provision which resulted reduces reporting of covert actions required under the Hughes-Ryan amendment to the two Intelligence Committees, but strengthens the requirement that reporting occur in advance of the covert activity." The act provided that the executive keep just the two intelligence committees "fully and currently informed of all intelligence activities...including any significant anticipated intelligence activity." In addition, the act required the intelligence agencies to inform the Congress of any "illegal intelligence activity or significant intelligence failure," and it included a provision which allowed the executive in "extraordinary circumstances" to inform only eight leaders in Congress.

The Reagan administration, which came into office shortly after the Oversight Act was enacted into law, resisted its provisions almost right away. The intelligence committees began complaining that the administration was not keeping them "fully and currently" informed about ongoing covert operations. The CIA, for example, significantly expanded operations in Nicaragua without informing the committees, and refused to provide detailed information about secret operations unless the right questions were asked. Finally, Congressional leaders became enraged when they learned that the CIA had mined the harbors in Nicaragua without fully informing the Senate Intelligence Committee. The situation was diffused only when Casey apologized and agreed to inform the committees of any significant activities undertaken as part of ongoing operations. Shortly after this arrangement was made, the intelligence committees were again stunned to discover from press reports that in 1983 the CIA had published a manual for the contras in Nicaragua which seemed to urge the assassination of government officials.

The Tower Report

There should be little doubt that if the administration had consulted with Congress before involving itself in the secret

arms sales to Iran, it would have been prevented from embarking upon an operation that could never win the support of the American people. The Tower report found, however, that the administration resisted the congressional oversight process at every stage of the Iranian operation.

When President Reagan first agreed to replenish Israeli arms sold to Iran in the summer of 1985, the Congress was not informed of the operation, even though it constituted a "significant anticipated intelligence activity".

Later that year, the CIA was drawn into the operation when it was called on to assist in the transfer of 120 Hawk missiles to Iran which were supposed to win the release of five American hostages. Even though the deal collapsed when the Iranians discovered that the Hawks were not what they had requested, CIA officials did not insist that the Congress be told of this "significant intelligence failure", or of the illegal intelligence activity involved in engaging in a covert action prior to Presidential approval. Instead, they began efforts to have the President sign and conceal from the intelligence committees a retroactive finding that the operation was important to the national interest.

President Reagan did finally sign a finding (though not retroactive) at the beginning of 1986, and included a section, drafted by the CIA, specifically ordering the "Director of Central Intelligence to refrain from reporting this Finding to the Congress..." Eleven months later, when the covert sales became public after being leaked in Teheran, the Congress still had not received any indication from the administration that the operation was taking place.

The administration's failure to comply with the compromise arrangement implemented in the 1980 Oversight Act suggests that reforms should be directed at compelling the executive branch to take part in the oversight process. But that is not what the Tower Commission has told us. Even though the Iran arms scandal demonstrated no shortcomings with the two intelligence committees, the Commission's only recommendation for legislation to improve the oversight process is that they be abolished and replaced with a joint committee. The report suggests that the executive may have had security concerns about having to tell the members of two congressional committees, and thus chose to withhold notification altogether. The existing law, however, gives the Executive the option of notifying only eight leaders of Congress. Since it did not avail itself of this option, it is impossible to believe that it would have told a joint committee of Congress.

Two Committees are Essential

In fact, there are many reasons why two committees are essential to the legislative and oversight process. That becomes

clear when one considers the purpose of the oversight process. Because covert operations are by nature secret, they cannot be debated openly like other government policies. The system of Congressional oversight was designed in part to serve as a substitute for public debate. Before the executive could begin a covert operation, it would first have to defend it before a select group of members of congress. This process, it was hoped, would keep the intelligence agencies on their toes, and would prevent them from initiating operations which, if known, would not command public support.

For this process to work properly, there should be separate intelligence committees in the House and the Senate. If a limited and secret debate must substitute for a full public debate, then at least all sides in the debate should be represented. Senators and Representatives are liable to have different concerns and interests and to feel different pressures from their constituents. They will likely ask different questions of the intelligence agencies reflecting their different concerns, and this diversity of perspectives under the present system should be maintained and not curtailed.

Furthermore, the existence of two committees compels each to stay alert, and if one of the committees does not function well, then the other committee becomes an essential backup. That is what happened in the early 1980's when the Senate Intelligence Committee was suffering from organizational problems which prevented it from operating effectively. At the same time, the House Intelligence Committee became significantly more active and aggressive. As a result, when in 1984 the CIA mined the Nicaraguan harbors, the House Intelligence Committee knew about the project while the Senate Committee did not. Although it is clear that CIA Director William Casey had not been completely candid with the Senators, it also became known that the Senate Committee had not picked up on vague references by Casey to the project, nor had it asked the right questions to elicit the information. Needless to say, the Senate Committee members were later embarrassed and furious to discover that their House counterparts had known about the project all along.

Finally, it is unlikely that one committee could handle all of the work of the two present committees. While the two committees certainly do some work which is redundant--as they should--it is also natural that each committee would examine certain areas more carefully than others. This is especially important on issues affecting the rights of Americans, such as statutes penalizing the disclosure of information or permitting surveillance of Americans. The intelligence committees have jurisdiction over such legislation and its importance necessitates the normal procedures of review in each house.

APPENDIX N

U.S. Department of Justice
Office of Legal Counsel
December 17, 1986

Office of the
Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act

This memorandum responds to your request that this Office review the legality of the President's decision to postpone notifying Congress of a recent series of actions that he took with respect to Iran. As we understand the facts, the President has, for the past several months, been pursuing a multifaceted secret diplomatic effort aimed at bringing about better relations between the United States and Iran (partly because of the general strategic importance of that country and partly to help end the Iran-Iraq war on terms favorable to our interests in the region); at obtaining intelligence about political conditions within Iran; and at encouraging Iranian steps that might facilitate the release of American hostages being held in Lebanon. It is our understanding that the President, in an effort to achieve these goals, instructed his staff to make secret contacts with elements of the Iranian government who favored closer relations with the United States; that limited quantities of defensive arms were provided to Iran; that these arms shipments were intended to increase the political influence of the Iranian elements who shared our interest in closer relations between the two countries and to demonstrate our good faith; and that there was hope that the limited arms shipments would encourage the Iranians to provide our government with useful intelligence about Iran and to assist our efforts to free the Americans being held captive in Lebanon.

On these facts, we conclude that the President was within his authority in maintaining the secrecy of this sensitive diplomatic initiative from Congress until such time as he believed that disclosure to Congress would not interfere with the success of the operation.

As we indicated in our memorandum of November 14, 1986, section 501 of the National Security Act permits the President to

withhold prior notification of covert operations from Congress, subject to the requirements that he inform congressional committees of the operations "in a timely fashion," and that he give a statement of reasons for not having provided prior notice. We now conclude that the vague phrase "in a timely fashion" should be construed to leave the President wide discretion to choose a reasonable moment for notifying Congress. This discretion, which is rooted at least as firmly in the President's constitutional authority and duties as in the terms of any statute, must be especially broad in the case of a delicate and ongoing operation whose chances for success could be diminished as much by disclosure while it was being conducted as by disclosure prior to its being undertaken. Thus, the statutory allowance for withholding prior notification supports an interpretation of the "timely fashion" language, consistent with the President's constitutional independence and authority in the field of foreign relations, to withhold information about a secret diplomatic undertaking until such a project has progressed to a point where its disclosure will not threaten its success.[1]

I. The President's Inherent Constitutional Powers Authorize a Wide Range of Unilateral Covert Actions in the Field of Foreign Affairs

A. The President Possesses Inherent and Plenary Constitutional Authority in the Field of International Relations

"The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, sec. 1. This is the principal textual source for the President's wide and

[1] The vagueness of the phrase "in a timely fashion," together with the relatively amorphous nature of the President's inherent authority in the field of foreign relations, necessarily leaves room for some dispute about the strength of the President's legal position in withholding information about the Iranian project from Congress over a period of several months. The remainder of this memorandum outlines the legal support for the President's position, and does not attempt to provide a comprehensive analysis of all the arguments and authorities on both sides of the question. This caveat, which does not alter the conclusion stated in the accompanying text, reflects the urgent time pressures under which this memorandum was prepared.

inherent discretion to act for the nation in foreign affairs.[2] The clause has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically 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. The President's executive power includes, at a minimum, all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.

Before the Constitution was ratified, Alexander Hamilton explained in The Federalist why the President's executive power would include the conduct of foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate."[3] This fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" explains why the Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American

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[2] The Constitution also makes the President Commander in Chief of the armed forces (Art. II, sec. 2); gives him power to make treaties and appoint ambassadors, subject to the advice and consent of the Senate (Art. II, sec. 2), and to receive ambassadors and other public ministers (Art. II, sec. 3); the Constitution also requires that the President "take Care that the Laws be faithfully executed" (Art. II, sec. 3). These specific grants of authority supplement, and to some extent clarify, the discretion given to the President by the Executive Power Clause.

[3] The Federalist No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961). This number of the The Federalist was devoted primarily to explaining why the power of making treaties is partly legislative and partly executive in nature, so that it made sense to require the cooperation of the President and the Senate in that special case.

citizens.[4] As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of

[4] Congress's power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," art. I, sec. 8, cl. 11, like the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," art. I, sec. 8, cl 10, and the power "[t]o regulate Commerce with foreign Nations," art. I, sec. 8, cl. 3, reflects the fact that the United States is, because of its geographical position, necessarily a nation in which a significant number of citizens will engage in international commerce. A declaration of war immediately alters the legal climate for Americans engaged in foreign trade and is therefore properly treated as a legislative act necessarily binding on an important section of the private citizenry. Similarly, Congress's broad power over the establishment and maintenance of the armed forces, art. I, sec. 8, cls. 12-16, reflects their obviously important domestic effects. In accord with Hamilton's distinction, however, the actual command of the armed forces is given to the President in his role as Commander in Chief. Treaties (in whose making the Senate participates under art. II, sec. 2) have binding legal effect within our borders, and are most notable for the significantly small role that Congress plays.

the "executive Power."[5]

The presumptively exclusive authority of the President in foreign affairs was asserted at the outset by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain impartial in the war between France and Great

[5] As one would expect in a situation dealing with implied constitutional powers, argument and authority can be mustered for the proposition that Congress was intended to have a significant share of the foreign policy powers not specifically delegated by the Constitution. Perhaps the most oft-cited authority for this position is James Madison's "Helvidius Letters" (reprinted in part in E. Corwin, The President's Control of Foreign Relations 16-27 (1917)), where he cautioned against construing the President's executive power so broadly as to reduce Congress's power to declare war to a mere formality. Madison's argument was directed principally at countering some overstatements made by Alexander Hamilton in his "Pacificus Letters" (reprinted in part in E. Corwin, supra, at 8-15); Madison's argument is not properly interpreted to imply that Congress has as great a role to play in setting policy in foreign affairs as in domestic matters. Even Jefferson, who was generally disinclined to acknowledge implied powers in the federal government or in the President, wrote: "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. . . ." 5 Writings of Thomas Jefferson 161 (Ford ed. 1895). While we agree that Congress has some powers to curb a President who persistently pursued a foreign policy that Congress felt was seriously undermining the national interest, especially in cases where Congress's constitutional authority to declare war was implicated, well-settled historical practice and legal precedents have confirmed the President's dominant role in formulating, as well as in carrying out, the nation's foreign policy.

Britain.[6] Similarly, the First Congress itself acknowledged the breadth of the executive power in foreign affairs when it established what is now the Department of State. In creating this executive department, Congress directed the department's head (i.e. the person now called the Secretary of State) to carry out certain specific tasks when entrusted to him by the President, as well as "such other matters respecting foreign affairs, as the President of the United States shall assign to the said department."[7] Just as the first President and the first Congress recognized that the executive function contained all the residual power to conduct foreign policy that was not otherwise delegated by the Constitution, subsequent historical practice has generally confirmed the President's primacy in formulating and

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[6] Proclamation of the President, April 22, 1793, reprinted in 1 Messages and Papers of the Presidents 156-157 (J. Richardson ed. 1896). President Washington also warned that his Administration would pursue criminal prosecutions for violations of his neutrality proclamation. Although such prosecutions were upheld at the time, a rule that would prohibit such prosecutions was recognized by the Supreme Court relatively soon thereafter. Compare Henfield's Case, 11 F. Cas. 1099, 1102 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.), with United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). It is worth emphasizing that Presidents have sometimes encountered constitutional obstacles when attempting to pursue foreign policy goals through actions in the domestic arena, but have rarely been interfered with in taking diplomatic steps, or even military actions short of war, outside our borders. The present significance of President Washington's proclamation has less to do with the particular actions he might have taken in the domestic sphere than with his claim that foreign affairs are generally within the constitutional domain assigned to the Executive. This claim is consistent with the Constitution and has now been reinforced by long historical practice.

[7] Act of July 27, 1789, 1 Stat. 28-29. See also Act of Jan. 30, 1799, 1 Stat. 613 (similar provision currently codified at 18 U.S.C. 953), which made it a crime for any person to attempt to influence the conduct of foreign nations with respect to a controversy with the United States.

carrying out American foreign policy.[8]

The Supreme Court, too, has recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the Constitution itself and that congressional efforts to act in this area must be evaluated in the light of the President's constitutional ascendancy:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations--a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be

[8] The fact that Presidents have often asked Congress to give them specific statutory authority to take action in foreign affairs may reflect a practical spirit of courtesy and compromise rather than any concession of an absence of inherent constitutional authority to proceed. For example, President Franklin Roosevelt requested that Congress repeal a provision of the Emergency Price Control Act that he felt was interfering with the war effort; he warned, however, that if Congress failed to act, he would proceed on the authority of his own office to take whatever measures were necessary to ensure the winning of the war. 88 Cong. Rec. 7044 (1942).

As one would expect, of course, Congress has not always accepted the most far-reaching assertions of presidential authority. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Constitution did not authorize President to take possession of and operate privately owned steel mills that had ceased producing strategically important materials during labor dispute); id. at 635 (Jackson, J., concurring) ("[The Constitution] enjoins upon [the government's] branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

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exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful

results.[9]

Based on this analysis, the Supreme Court rejected the argument that Congress had improperly delegated a legislative function to the President when it authorized him to impose an embargo on arms going to an area of South America in which a war was taking place. The Court's holding hinged on the essential insight that the embargo statute's principal effect was merely to remove any question about the President's power to pursue his foreign policy objectives by enforcing the embargo within the borders of

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[9] 299 U.S. at 319-320 (emphasis added). See also Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948) (President "posseses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); id. at 109-112 (refusing to read literally a statute that seemed to require judicial review of a presidential decision taken pursuant to his discretion to make foreign policy); id. at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."), quoted with approval in United States v. Nixon, 418 U.S. 683, 710 (1974).

In Perez v. Brownell, 356 U.S. 44, 57 (1958) (citations omitted), the Court stated, "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation." The Perez Court, however, was revieving the constitutionality of a statute in whose drafting the Executive Branch had played a role equivalent to one of Congress's own committees. 356 U.S. at 56. Furthermore, the statute at issue in Perez provided that an American national who voted in a political election of a foreign state would thereby lose his American nationality. If the President lacks the inherent constitutional authority to deprive an American of his nationality, then the Perez Court's language about congressional "regulation of foreign affairs" may refer only to "regulation of domestic affairs that affect foreign affairs." In any case, Perez should not be read to imply that Congress has broad legislative powers that can be used to diminish the President's inherent Article II discretion.

this country.[10] As the Court emphatically stated, the President's authority to act in the field of international relations is plenary, exclusive, and subject to no legal limitations save those derived from applicable provisions of the Constitution itself.[11] As the Court noted with obvious approval, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history:

> "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution

[10] See 299 U.S. at 327 (effect of various embargo acts was to confide to the President "an authority which was cognate to the conduct by him of the foreign relations of the government")(quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 422 (1935) (emphasis added)). This implies that while the President may in some cases need enabling legislation in order to advance his foreign policy by controlling the activities of American citizens on American soil, he needs no such legislation for operations and negotiations outside our borders.

[11] Because the presidential action at issue in Curtiss-Wright was authorized by statute, the Court's statements as to the President's inherent powers could be, and have been, characterized as dicta. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring). We believe, however, that the Curtiss-Wright Court's broad view of the President's inherent powers was essential to its conclusion that Congress had not unconstitutionally delegated legislative authority to the President. Furthermore, the Supreme Court has since reaffirmed its strong commitment to the principle requiring the "utmost deference" to presidential responsibilities in the military and diplomatic areas. United States v. Nixon, 418 U.S. 683, 710 (1974).

> and unity of design, and their success frequently depends on secrecy and dipatch."

299 U.S. at 319 (emphasis added) (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). It follows inexorably from the Curtiss-Wright analysis that congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and that statutes infringing the President's inherent Article II authority would be unconstitutional.[12]

B. Secret Diplomatic and Intelligence Missions Are at the Core of the President's Inherent Foreign Affairs Authority

The President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court has repeatedly so held in modern times. For example:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over

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[12] See e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (citations omitted):

> The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

See also Worthy v. Herter, 270 F.2d 905, 910-912 (D.C. Cir. 1959) (statute giving President authority to refuse to allow Americans to travel to foreign "trouble spots" simply reinforces the President's inherent constitutional authority to impose the same travel restrictions).

> internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (emphasis in original). The Court has also, and more recently, emphasized that this core presidential function is by no means limited to matters directly involving treaties. In United States v. Nixon, 418 U.S. 683 (1974), the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 710 (emphasis added).[13]

Such statements by the Supreme Court reflect an understanding of the President's function that is firmly rooted in the nature of his office as it was understood at the time the Constitution was adopted. John Jay, for example, offered a concise statement in The Federalist:

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[13] See also id. at 706 ("a claim of need to protect military, diplomatic, or sensitive national security secrets" would present a strong case for denying judicial power to make in camera inspections of confidential material); id. at 712 n.19 (recognizing "the President's interest in preserving state secrets").

Note also that the Curtiss-Wright Court expressly endorsed President Washington's refusal to provide the House of Representatives with information about treaty negotiations after the negotiations had been concluded. 299 U.S. at 320-321. A fortiori, such information could be withheld during the negotiations.

> 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.
>
> . . . So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.[14]

Jay's reference to treaties "of whatever nature" and his explicit discussion of intelligence operations make it clear that he was speaking, not of treaty negotiation in the narrow sense, but of the whole process of diplomacy and intelligence-gathering. The President's recent Iran project fits comfortably within the terms of Jay's discussion.

[14] The Federalist No. 64, at 392-393 (J. Jay) (C. Rossiter ed. 1961) (emphasis in original). Jay went on to note that "should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them." Id. at 393. Jay did not, however, suggest that the President would be obliged to seek such advice and consent for actions other than those specifically enumerated in the Constitution.

C. The President Has Inherent Authority to Take Steps to Protect the Lives of Americans Abroad

Perhaps the most important reason for giving the federal government the attributes of sovereignty in the international arena was to protect the interests and welfare of American citizens from the various threats that may be posed by foreign powers. This obvious and common sense proposition was confirmed and relied on by the Supreme Court when it held that every citizen of the United States has a constitutional right, based on the Privileges or Immunities Clause of the Fourteenth Amendment, "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."[15] Accordingly, the Supreme Court has repeatedly intimated that the President has inherent authority to protect Americans and their property abroad by whatever means, short of war, he may find necessary.

An early judicial recognition of the President's authority to take decisive action to protect Americans abroad came during a mid-nineteenth century revolution in Nicaragua. On the orders of the President, the commander of a naval gunship bombarded a town where a revolutionary government had engaged in violence against American citizens and their property. In a later civil action against the naval commander for damages resulting from the bombardment, Justice Nelson of the Supreme Court held that the action could not be maintained:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof . . . .
>
> Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the

[15] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

> duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not infrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.

Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186) (emphasis added).

Later, the full Court confirmed this analysis in an opinion holding that the President has inherent authority to provide bodyguards, clothed with federal immunity from state law, to protect judicial officers, even when they are travelling within the United States in the performance of their duties. In re Neagle, 135 U.S. 1 (1890). Rather than base its decision on a narrow analysis of the status of federal judges, the Court held that the presidential duty to "take Care that the Laws be faithfully executed"[16] includes "any obligation fairly and properly inferrible [sic] from" the Constitution.[17] The Court specifically stated that these were not limited to the express terms of statutes and treaties, but included "the 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."[18] As the Court pointed out, Congress itself had approved this position when it ratified the conduct of the government in using military threats and diplomatic pressure to secure the release of an American who had been taken prisoner in Europe. Noting that Congress had voted a medal for the naval officer who had threatened to use force to obtain the American's release, the Court asked, "Upon what act of Congress then existing can any one lay his finger in

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[16] U.S. Const., art. II, sec. 3.

[17] In re Neagle, 135 U.S. at 59.

[18] Id. at 64 (emphasis added).

support of the action of our government in this matter?"[19] If military force may be used on the President's own discretion to protect American lives and property abroad, surely the less drastic means employed by President Reagan during the Iran project were within his constitutional authority.

II. Any Statute Infringing upon the President's Inherent Authority to Conduct Foreign Policy Would be Unconstitutional and Void.

Congress has traditionally exercised broad implied powers in overseeing the activities of Executive Branch agencies, including "probes into departments of the Federal Government to expose corruption, inefficiency or waste." Watkins v. United States, 354 U.S. 178, 187 (1957); see also McGrain v. Daugherty, 273 U.S. 135, 161-164 (1927). This power of oversight is grounded on Congress's need for information to carry out its legislative function. Because the executive departments are subject to statutory regulation and to practical restrictions imposed through appropriations levels, Congress can usually demonstrate that it has a legitimate and proper need for the information necessary to make future regulatory and appropriations decisions in an informed manner. McGrain, 273 U.S. at 178.

As the Supreme Court has observed, however, the congressional power of oversight "is not unlimited." Watkins, 354 U.S. at 187.[20] It can be exercised only in aid of a legitimate legislative function traceable to one of Congress's enumerated powers. See McGrain, 273 U.S. at 173-174. The power of oversight cannot constitutionally be exercised in a manner that would usurp the functions of either the Judicial or Executive Branches. Thus, the Supreme Court has held that by investigating the affairs of a business arrangement in which one of the government's debtors was interested, "the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature

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[19] Id. The fact that such a statute may have existed, see Expatriation Act of July 27, 1868, ch. 249, sec. 3, 15 Stat. 223, 224 (current version at 22 U.S.C. 1732) (authorizing the President to use such means, short of war, as may be necessary to obtain the release of Americans unjustly held prisoner by foreign governments), does not diminish the force of the Supreme Court's statement that no such statute would be needed to support such an exercise of executive power.

[20] It is worth observing that Congress's oversight powers are no more explicit in the Constitution than are the President's powers in foreign affairs. See McGrain, 273 U.S. at 161.

clearly judicial." Kilbourn v. Thompson, 103 U.S. 168, 192 (1881). The same principle applies to congressional inquiries that would trench on the President's exclusive functions. "Lacking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive." Barenblatt v. United States, 360 U.S. 109, 112 (1959) (emphasis added).[21]

It is undoubtedly true that the Constitution does not contemplate "a complete division of authority between the three branches." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). Nevertheless, there are certain quintessential executive functions that Congress may not exercise in the guise of its "oversight power." Congress, for example, may not give its own agents the power to make binding rules "necessary to or advisable for the administration and enforcement of a major statute." Buckley v. Valeo, 424 U.S. 1, 281 (1976) (White, J., concurring in part). Nor may Congress unilaterally alter the rights and duties created by a prior statutory authorization. INS v. Chadha, 462 U.S. 919, 951 (1983). In general, the management and control of affairs committed to the Executive Branch, even those given to the Executive by Congress itself, must remain firmly in the control of the President. Myers v. United States, 272 U.S. 52, 135 (1926). A fortiori, the conduct of affairs committed exclusively to the President by the Constitution must be carefully insulated from improper congressional interference in the guise of "oversight" activities.

This principle has three immediately relevant corrolaries. First, decisions and actions by the President and his immediate staff in the conduct of foreign policy are not subject to direct review by Congress. "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[22] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803).

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[21] On its facts, Barenblatt did not involve an inter-branch dispute. The Court upheld a contempt citation issued by a House Committee against a witness who refused to answer questions about his ties with the Communist Party.

[22] Obviously, Congress may investigate and consider the President's past actions when performing one of its own assigned functions (for example, while giving advice and consent to treaties or appointments, deciding whether to issue a declaration of war, or during the impeachment process).

Second, while Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs. Just as an individual cannot be required to waive his constitutional rights as a condition of accepting public employment or benefits, so the President cannot be compelled to give up the authority of his office as a condition of receiving the funds necessary to carry out the duties of his office.[23] To leave the President thus at the mercy of the Congress would violate the principle of the separation of powers in the most fundamental manner. The Federalist indicates that one great "inconveniency" of republican government is the tendency of the legislature to invade the prerogatives of the other branches, and that one of the main concerns of the Framers was to give the other branches the "necessary constitutional means and personal motives to resist [such] encroachments."[24] In an effort to address this problem the Constitution provides that the President's personal compensation cannot be altered during his term of office,[25] and it must be acknowledged that the President's constitutional independence is even more precious and

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[23] The doctrine of unconstitutional conditions has pervasive application throughout the law. For a good general statement of the doctrine, see Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 594 (1926):

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

[24] The Federalist No. 51, at 321-322 (J. Madison) (C. Rossiter ed. 1961).

[25] U.S. Const., art. II, sec. 1, cl. 7; The Federalist No. 51, at 321 (J. Madison) (C. Rossiter ed. 1961); id. No. 73, at 441-442 (A. Hamilton).

vulnerable than his personal independence.[26]

Third, any statute that touches on the President's inherent authority in foreign policy must be interpreted to leave the President as much discretion as the language of the statute will allow. This accords with the well-established judicial presumption in favor of construing statutes so as to avoid constitutional questions whenever possible.[27] Because the President's constitutional authority in international relations is by its very nature virtually as broad as the national interest and as indefinable as the exigencies of unpredictable events, almost any congressional attempt to curtail his discretion raises questions of constitutional dimension. Those questions can, and must, be kept to a minimum in the only way possible: by resolving all statutory ambiguities in accord with the presumption that recognizes the President's constitutional independence in international affairs.

III. Statutory Requirements that the President Report to Congress about his Activities Must Be Construed Consistently with the President's Constitutional Authority to Conduct Foreign Policy.

In 1980, the National Security Act of 1947 was amended to provide for congressional oversight of "significant anticipated intelligence activities." This section now provides (section

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[26] See 41 Op. A.G. 230, 233 (1955):

> It is recognized that the Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy.

[27] "[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' a court should adopt that construction." Califano v. Yamasaki, 442 U.S. 682, 693 (1979) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

501(a) of the National Security Act, 50 U.S.C. 413(a)) (emphasis added):

> 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 --
>
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence 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, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) 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 chairman 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.

For situations in which the President fails to give prior notice under section 501(a), section 501(b), 50 U.S.C. 413(b), (emphasis added) provides:

> 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.[28]

The delicate connection between the "timely notice" requirement of section 501(b) and the President's inherent constitutional authority, acknowledged in section 501(a), is dramatically confirmed by a colloquy between Senators Javits and Huddleston, both of whom were on the committee that drafted this provision. Senator Javits asked: "If information has been withheld from both the select committee and the leadership group (as section 501(b) envisages), can it be withheld on any grounds other than 'independent constitutional authority' and, if so, on what grounds?" Senator Huddleston answered: "Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operation [sic], but would not be able to claim the identical authority to withhold timely notice under section 501(b). A claim of constitutional authority is the sole grounds that may be asserted for withholding prior notice of a covert operation." 126 Cong. Rec. 17693 (1980)

[28] Section 501 of the National Security Act does not contemplate that prior notice of "intelligence activities" will be given in all instances. Subsection (b) of section 501 makes specific provision for situations in which "prior notice was not given under subsection (a)." Because subsection (a) includes situations in which the President provides notice to the full intelligence committees under subsection (a)(1)(A) and situations in which he provides prior notice restricted to designated members of Congress, including the chairmen and ranking members of the House and Senate intelligence committees under subsection (a)(1)(B), it seems clear that subsection (b) contemplates situations in which no prior notice has been given under either of these provisions.

(emphasis added).[29] If, as Senator Huddleston contended, section

[29] A similar colloquy took place on the floor of the House between Rep. Boland, Chairman of the House Select Committee on Intelligence, and Rep. Hamilton:

> Rep. Hamilton: As I understand that subsection, it allows the President to withhold prior notice entirely: that is, he does not inform anyone in that circumstance. He only has to report in a timely fashion.
> Is that a correct view of subsection (b)?
>
> Rep. Boland: In response to the gentleman, let me say that the President must always give at least timely notice.

126 Cong. Rec. 28,392 (1980). Thus, Rep. Boland clearly, if reluctantly, confirmed Rep. Hamilton's interpretation. During the floor debates, several Senators also acknowledged that the proposed legislation did not require that Congress be notified of all intelligence activities prior to their inception. According to Senator Nunn, the bill contemplated that "in certain instances the requirements of secrecy preclude any prior consultation with Congress." 126 Cong. Rec. 13,127 (1980)(statement of Sen. Nunn). See also id. at 13,125 (statement of Sen. Huddleston)("Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operations . . . ."); id. at 13,103 (statement of Sen. Bayh).

In the course of the floor debates, some Senators stated that the situations in which prior notice was not required would be very rare. See, e.g., 126 Cong. Rec. 26,276 (1980) (remarks of Sen. Inouye). Such statements are of little relevance to determining the scope of the prior notice requirement. First, the executive branch has always agreed that instances of deferred reporting will be rare and has consistently given prior notice. Second, section 501 at the very least permits the President to defer notice when he is acting pursuant to his independent constitutional authority; the scope of this authority is determined, not by legislators' view of the Constitution, but by the Constitution itself. Third, the draftsmen of section 501 decided that because the scope of the President's constitutional "authorities and duties" was in serious dispute, the legislation would not attempt to resolve the issues separating the parties to the dispute. See 126 Cong. Rec. 13,123 (1980) (statement of Sen. Javits). The ambiguities of subsection (b) reflect Congress' inability to override the executive branch's view of the President's constitutional authority. That dispute cannot now be settled, contrary to the Executive's position, by reference to the statements of individual Congressmen who had a narrow view of the President's constitutional role.

501(b) is to be interpreted to require the President to act on his inherent authority in withholding notice of covert operations until after the fact,[30] then any further statutory limitations on the President's discretion should be narrowly construed in order to respect the President's constitutional independence. The requirement that such after-the-fact notification be made "in a timely fashion" appears to be such an additional limitation.

The entire analysis in this memorandum supports the proposition that the phrase "in a timely fashion" must be construed to mean "as soon as the President judges that disclosure to congressional committees will not interfere with the success of the operation." To interpret it in any other way--for example, by requiring notification within some arbitrary period of time unrelated to the exigencies of a particular operation--would seriously infringe upon the President's ability to conduct operations that cannot be completed within whatever period of time was read into the statutory provision.[31] Furthermore, several putatively discrete intelligence "operations" may be so interrelated that they should realistically be treated as a single undertaking whose success

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[30] Senator Huddleston's interpretation is not necessarily correct. As we indicated in our memorandum of November 14, 1986, the President may be able to withhold prior notice even without invoking his independent constitutional authority.

[31] On the floor of the Senate, the bill's sponsor indicated that his personal view of the President's constitutional powers was very narrow, and that he wanted the relevant congressional committees notified "as soon as possible." He acknowledged, however, that the executive branch took a different view, and that he expected "that these matters will be worked out in a practical way." 126 Cong. Rec. 13096 (1980) (remarks of Sen. Huddleston). These statements show that the legislation was not thought to preclude the President from acting on his own view of his own constitutional powers. In guarding against such improper interference, the President's own interpretation of his constitutional powers "is due great respect" from the other branches. See United States v. Nixon, 418 U.S. 683, 703 (1974).

might be jeopardized by disclosure prior to its completion.[32]

Thus, a number of factors combine to support the conclusion that the "timely fashion" language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification. The word

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[32] In his prepared testimony on S. 2284, President Carter's CIA Director, Stansfield Turner, stated (National Intelligence Act of 1980: Hearings before the Senate Select Committee on Intelligence, 96th Cong. 2d Sess. 17 (1980)) (emphasis added):

> Prior reporting would reduce the President's flexibility to deal with situations involving grave danger to personal safety, or which dictate special requirements for speed and secrecy. On the other hand, activities which would have long term consequences, or which would be carried out over an extended period of time should generally be shared with the Congress at their inception, and I would have no objection to making this point in the legislative history.

Turner's testimony cannot properly be interpreted to imply that all "long term," as opposed to "short term," projects require prior notice. First, Turner drew a distinction between projects involving great personal danger or requiring speed and secrecy and projects of long duration or with long term consequences. He did not address projects that are both long term and that involve danger to personal safety, such as the recent Iranian initiative. The inadvisability of prior reporting applies as forcefully to such a project as to "short term" projects that involve personal safety. Second, Turner was careful not to say that long term projects must always be reported at their inception: he said only that they will generally be so reported. In a colloquy with Senator Bayh concerning the word "generally," Turner stressed that "one has to be a little cautious" in making such a statement because "it will be quoted back from these hearings for years to come." Hearings, supra, at 32. Turner never stated that the Executive would or should give prior notice of all long term projects. Third, a distinction between long and short term projects would virtually force the President to prefer military to diplomatic initiatives in situations like the one at issue in this memorandum, which could not have been Congress' intent.

In any event, S. 2284 was not enacted, and the full Congress never had its attention directed to Turner's statements. Those statements are therefore not a significant aid in interpreting section 501(b). As we have shown, both the text of the statute and the colloquies on the floor of the House and Senate indicate that Congress did not require prior notice when the President was acting pursuant to his independent constitutional authority. In permitting "timely notice" in section 501(b), Congress made no distinction between long and short term projects, and no such distinction should be read into the statute.

"timely" is inherently vague;[33] in any statute, it would ordinarily be read to give the party charged with abiding by a timeliness requirement the latitude to interpret it in a reasonable manner. Congress apparently thought that the notification requirement was meant to limit the President's exercise of his inherent authority, while at the same time Congress acknowledged the existence and validity of that authority. Because the President is in the best position to determine what the most reasonable moment for notification is, and because any statutory effort to curtail the President's judgment would raise the most serious constitutional questions, the "timely fashion" language should be read, in its natural sense, as a concession to the President's superior knowledge and constitutional right to make any decision that is not manifestly and indisputably unreasonable.[34] This conclusion is reinforced by the nature of intelligence operations, which are often exceptionally delicate undertakings that may have to extend over considerable periods of time. The statute's recognition of the President's authority to withhold prior notification would be meaningless if he could not withhold notification at least until

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[33] The statute uses a more precise phrase in section 501(a), where it requires that certain committees be kept "fully and currently informed" of activities not covered by section 501(b). This phrase was interpreted by the Senate Committee to mean that "[a]rrangements for notice are to be made forthwith, without delay." S. Rep. No. 730, 96th Cong., 2d Sess. 9 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4192, 4199. No such interpretation was placed on the "timely fashion" language of section 501(b). See id. at 12, reprinted in U.S. Code Cong. & Admin. News, at 4202-4203.

[34] The legislative history of section 501(a) specifically indicated that "[n]othing in this subsection is intended to expand or to contract or to define whatever may be the applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative branches." S. Rep. No. 730, 96th Cong., 2d Sess. 6 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4192, 4196. Furthermore, the Senate Committee acknowledged that it was "uncertain" about the distribution of powers between the President and Congress in the national security and foreign policy area. See id. at 9, reprinted in 1980 U.S. Code Cong. & Admin. News, at 4199.

after the undertaking as a whole was completed or terminated.[35]

Conclusion

Section 501(b) of the National Security Act of 1947 must be interpreted in the light of section 501 as a whole and in light of the President's broad and independent constitutional authority

[35] Section 502 of the National Security Act, 50 U.S.C. 414, generally limits the use of funds appropriated for intelligence activities to cases in which Congress has been given prior notice of the nature of the activities. Section 502(a)(2) allows expenditures when "in the case of funds from the Reserve for Contingencies of the Central Intelligence Agency and consistent with the provisions of section [501] concerning any significant anticipated intelligence activity, the Director of Central Intelligence has notified the appropriate congressional committees of the intent to make such funds available for such activity." This provision should be interpreted to allow the President to use funds from the Reserve for Contigencies in order to carry out operations for which he withholds notice in accord with section 501(b). Section 502(a)(2)'s specific reference to section 501 should be taken to give the President implicit authorization to withhold notification of the expenditure of funds just as he withholds notification of the operation itself: to read it otherwise would mean that section 502 had effectively, though impliedly, repealed section 501's acknowledgement of the President's independent constitutional authority.

It should be noted, however, that section 502(a)(2) is clumsily drafted; if read literally, it could be taken to suggest that Congress must always be notified in advance when funds appropriated for intelligence activities are to be used for covert operations. The Conference Committee commented on the language in question by noting that it did not expect situations to arise in which there would have to be prior notice under section 502 as to the funding of an activity that did not itself have to be reported under section 501; the Committee also indicated that if such a situation were to arise, it should be resolved in a spirit of "comity and mutual understanding." H.R. Conf. Rep. No. 373, 99th Cong., 1st Sess. 19 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 952, 961-962. Accord S. Rep. 79, 99th Cong., 1st Sess. 5 (1985). Similarly, the House Committee Report indicated that "the same event . . . can be treated in the same way under new Section 502(a) and Section 501. H.R. Rep. No. 106 (Part 1) 8 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 952, 954. This supports the reasoning outlined above.

to conduct foreign policy. The requirement that the President inform certain congressional committees "in a timely fashion" of a foreign intelligence operation as to which those committees were not given prior notice should be read to leave the President with discretion to postpone informing the committees until he determines that the success of the operation will not be jeopardized thereby. Because the recent contacts with elements of the Iranian government could reasonably have been thought to require the utmost secrecy, the President was justified in withholding section 501(b) notification during the ongoing effort to cultivate those individuals and seek their aid in promoting the interests of the United States.

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

APPENDIX O

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POWER OF CONGRESS TO OBTAIN ADVANCE INFORMATION CONCERNING INTELLIGENCE OPERATIONS

Raymond J. Celada
Senior Specialist In
American Public Law
April 8, 1980

POWER OF CONGRESS TO OBTAIN ADVANCE INFORMATION CONCERNING INTELLIGENCE OPERATIONS

The recent controversy over the advisability and practicability of the Hughes-Ryan Amendment, 22 U.S.C. § 2422, has given rise to a more fundamental question regarding the constitutional boundaries between Congress and the President with respect to the national security power. The Hughes-Ryan Amendment, which added a new section 662 to the Foreign Assistance Act of 1961, as amended, limits the use of funds appropriated under any act, "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 operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress...." Excluded from the reporting requirements of law, at least insofar as they might necessitate pre-operational reports, are those intelligence operations which occur "during military operations initiated by the United States under a declaration of war approved by the Congress or an exercise of powers by the President under the War Powers Resolution."

The legislative history of the Hughes-Ryan Amendment makes clear that it was intended to give Congress some amount of control over covert activities (i.e., what popularly might be termed espionage activities) as distinguished from intelligence gathering activities and, thus, from proponents' perspective, prevent the conduct of the former particularly in friendly foreign countries. Throughout the debate on the amendment, the alleged involvement of the CIA in Chilean internal affairs was cited as the kind of operation which Congress

hoped to forestall or curb by conditioning the use of appropriated funds for covert operations upon compliance with the described reporting requirements.

During the recent controversy the Director of the CIA has disclosed that his agency did not read Hughes-Ryan as requiring advance notice to Congress of impending covert operations and he or others seem to suggest that a contrary reading of the law raised constitutional problems insofar as the Executive national security power is concerned. Although resolution of the relative strength of the constitutional interests of the Congress and the President in this context imports broad considerations, including such matters as the nature of the institutions created by the Framers, the power to legislate versus the power to faithfully execute the law, correlative powers of the political branches in the areas of war and external affairs, and the congressional power to raise and appropriate revenues and to determine by what manner and by what means they shall be spent, the legal issue raised by a reporting requirement may be stated in fairly narrow terms: whether and to what extent the assumed constitutional power of the President to assure secrecy of sensitive national security information is assertable against Congress.

Two matters should be noted at the outset. First, neither the congressional power to investigate and obtain information in aid of its legislative function nor the presidential power to safeguard national secrets (i.e. Executive Privilege) are expressly mentioned in the Constitution. Second, although decisional authority confirms the existence of both powers, the courts have yet to resolve in some definitive way the relevant legislative and executive interests when they clash head on. The Supreme Court in United States v. Nixon, 418 U.S. 683, 712 note 19 (1974), left open the question of the "balance...between the [presidential] confidentiality interest and congressional demands for information" and it has

yet to decide a case involving such inter-branch dispute. Cf. Nixon v. Administrator of General Services, 433 U.S. 425 (177) and Nixon v. Warner Communications, 435 U.S. 589 (1978).

Despite the Constitution's silence, the "Congressional power to investigate and acquire information by subpoena, is on a firm constitutional basis..." United States v. American Tel. & Tel Co., 551 F.2d 384, 393 (D.C. Cir. 1976). The Supreme Court in McGrain v. Daugherty, 273 U.S. 135 (1927), ruled that the congressional power in this regard inheres in its power to legislate. It said:

> We are of [the] opinion that the power of inquiry - with process to enforce it - is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history - the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action - and both Houses have employed the power accordingly up to the present time. The Acts of 1798, and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both Houses and to enable them to employ it" more effectually" than before. So, when their practices in this matrer is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short as a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

* * *

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information — which not infrequently is true -recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry — with enforcing process — was regarded and employed as a necessary and appropriate attribute of the power to legislate — indeed, was treated as inhering in it. Thus, there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised. 273 U.S. at 174-175 (footnote omitted).

The power to obtain information in aid of its legislative function is not confined to the framing and passing of laws, but also includes the oversight of the activities of government agencies and investigating matters of potential legislative concern. Thus, in Watkins v. United States, 354, U.S. 178, 187 (1957), the Court observed as follows:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

Justice Harlan summarized the matter in 1959 as follows:

> The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential

> power to enact and appropriate under the Constitution. Barenblatt v. United States, 360 U.S. 109, 111 (1959).

Although broad, the power to investigate is not unlimited. In this connection, the Supreme Court in Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 note 15 (1975) stated as follows:

> ... "[t]he scope of the power of inquiry ... is as penetrating and farreaching as the potential power to enact and appropriate under the Constitution." ... We have made it clear, however, that Congress is not invested with a "'general'power to inquire into private affairs." ... The subject of any inquiry always must be one "on which legislation could be had."

It should be noted that most of the cited cases have concerned the reach of the power to inquire into the activities of private citzens; inquiry into the administration of laws and departmental corruption, while of substantial political consequence, has given rise to fewer judicial precedents.

Against the power of the Congress to secure through its investigatory process information relevant to its legislative responsibilities, and its power of oversight as to the administration of the laws, stands the doctrine of Executive Privilege. The doctrine has been invoked by the President to refuse the release of information to congressional committees or to prohibit an executive official from testifying before committees.

The doctrine has been justified as being "necessary to exercise Executive functions effectively, i.e., where it is required for the proper conduct of the foreign affairs of the nation or in the interest of military security, or generally, for the furtherance of the efficiency and integrity of the Executive branch. [The latter is rationalized] as safeguarding of frank internal advice and discussion of information received in confidence, of sources of confidential

information, of methods of investigation, and of the reputation of possibly innocent persons from the disclosure of unreliable accusations." Leading Cases On Congressional Investigatory Power [Committee Print] Compiled by the Joint Committee on Congressional Operations, 94th Cong., 2d Sess. (1976) at 81, quoting Kramer and Marcuse, "Executive Privilege — A Study of the Period 1953-1960," 29 Geo. Wash. L. Rev. 827, 899-900 (1961) (footnote omitted). Until very recent times, most disputes between the political branches have been resolved more or less by mutual compromise -- the degree of mutuality largely dependent on which branch's interests was matched by its constitutional strenghts and the willingness to exercise them.

Although the President's power to determine the need to maintain the secrecy of material touching on the areas of national security and foreign policy have long been recognized by the courts, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) and Chicago & Southeren Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948), judicial recognition of the constitutional basis of Executive Privilege has come about recently. United States v. Nixon, 418 U.S. 683 (1974). In the matter of secrecy in the areas of foreign affairs and national security, the Court in Curtiss-Wright, 299 U.S. at 319, quoting from a Senate report, said "The nature of transactions with foreign nations ... requires caution and unity of design, and their success frequently depends, on secrecy and dispatch." Similarly, the Court in the Waterman, S.S. case sustained the need for presidential secrecy in these areas, and stated that it was beyond the reach of judicial process. It said:

> ... The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intollerable that courts,

> without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even it courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary, has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. ... 333 U.S. at 111.

Without deprecating the support given by this judicial dicta regarding inherent presidential authority in foreign affairs, a number of points can and should be made. First, neither the cited cases nor others in this vein involved an interbranch dispute, but the United States and private parties. Second, the Court acknowledged the matters ultimately affected by the litigation involved areas of shared legislative-executive powers, not areas of unique presidential concern. Third, and significantly, the presidential authority in the cited cases was there exercised pursuant to statute, i.e., in conformity with the congressional will. As Justice Jackson pointed out in the Steel Seizure Case, the President's power in these circumstances is at its maximum.

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. ... Concurring, Youngstown Co. v. Sawyer, 348 U.S. 579, 634, 636 (1952).

Conversely, when the President acts in opposition to the will of Congress, his powers are at their "lowest ebb".

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. 343 U.S. at 637-638.

In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court addressed the issue of presidential confidentiality privileges in the context of an interbranch dispute for the first time. The controversy at issue involved the executive and the judiciary.

The decision unanimously affirmed a District Court's order requiring the President to respond to a subpoena calling for tape recordings of presidential conversations for in camera inspection and further proceedings prior to transmission to the Watergate Special Prosecutor for use in a criminal trial. The Court rejected the President's claim of absolute discretion to determine what information is to be withheld on the basis of Executive Privilege and held that the courts must weigh the competing interests involved in inter-branch disputes over information. Despite what the Court found to be "constitutional underpinnings" of the privilege, an unqualified privilege was seen as clashing with similarly constitutionally-based needs of the courts to do justice in criminal prosecutions. 418 U.S. at 706. The Court stated:

> ...[N]either the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national

> security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide. Ibid.

Having found no absolute privilege, the Court proceeded to weigh the competing, constitutionally-based interests, "in a manner that preserves the essential functions of each branch." 418 U.S. at 707. Recognizing the need for candor in high level presidential discussions and the necessity for privacy to facilitate candid conversation, the Court held that, while presidential communications may therefore be presumptively privileged, the privilege must yield in this case to the "right to production of all evidence at a criminal trial", a right which also has "constitutional dimensions". 418 U.S. at 711. The Court found that it must "weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against inroads of such a privilege on the fair administration of criminal justice." 418 U.S. at 711-712. It concluded:

> A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of converstions preliminarily shown to have some bearing on the pending criminal cases. 418 U.S. at 712-713.

Several important points must be noted with respect to United States v. Nixon. The Court emphatically held that it had the power to adjudicate the competing claims, rejecting the assertion by the President of discretionary power to withhold information. It also explicitly distinguished between the broad, generalized privilege asserted for presidential conversations and a "claim of

need to protect military, diplomatic or sensitive national security secrets" 418 U.S. at 706, to which "the courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 710. Finally, perhaps most importantly, the Court found a constitutional basis for the concept of Executive Privilege, stating that "[n]owhere in the constitution... is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." 418 U.S. at 711. The Court earlier, observed that----

> Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings. 418 U.S. at 705-6.

The Supreme Court also specifically left open the question of the "balance ... between the confidentiality interest and congressional demands for information" 418 U.S. at 712 note 19, and it has yet to decide a case involving such an interbranch dispute.

Other cases arising out of the Watergate affair suggest that the presumptive privilege of presidential confidentiality that must be overcome in order to obtain executive information "hold[s] with at least equal force" in the case of a congressional committee request. Senate Select Committee on Pres. Cam. Act. v. Nixon, 498 F.2d 725, 730-731 (D.C. Cir. 1974). In order to overcome the presumptive privilege in favor of nondisclosure there must be sufficient showing of need for the information before the Executive may be required to justify its claim of privilege. Ibid.

In these and other cases, the courts have employed a balancing test wherein the showing required by another branch of government to overcome the presumption favoring presidential confidentiality depended "on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment."

Perhaps not untypical of the factors to be balanced in these circumstances are those considered by the Court of Appeals for the District of Columbia Circuit in United States v. American Tel. & Tel. Co., 551 F.2d 384 (1976). The litigation involved a congressional investigative committee's request for documents which the executive claimed to be privileged on the basis of national security.

The documents, national security request letters sent by the FBI to A.T.&T. requesting taps on certain telephone lines, were subpoenaed by the House Committee on Interstate and Foreign Commerce for delivery to its Subcommittee on Oversight and Investigations. The subpoena was directed to A.T.&.T. After negotiations between the Subcommittee and the executive branch broke down, the Justice Department sued to restrain A.T.&.T. from complying with the committee's subpoena. The District Court, holding that the determination of the Executive that disclosure would jeopardize sensitive national security and foreign policy matters was entitled to great deference by the courts, enjoined A.T.&.T. from supplying the material to the subcommittee. 419 F. Supp. 454 (D.D.C. 1976).

The Court of Appeals, while leaving in place the injunction, took a novel approach to the case, which it viewed as presenting "nerve center constitutional questions." 551 F.2d at 394. After finding jurisdiction and standing on the part of Congressman Moss to intervene, the court surveyed congressional investigatory power and the executive's national security power. It rejected the District Court's deference to the executive, noting that the cases relied on by the

court "do not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers." 551 F.2d at 392. However, the court outlined problems in balancing the constitutional interests at stake:

> A court seeking to balance the legislative and executive interests asserted here would face severe problems in formulating and applying standards. Granted that the subpoenas are clearly within the proper legislative investigatory sphere, it is difficult to "weigh" Congress's need for the request letters. Congress's power to monitor executive actions is implicit in the appropriations powers. Here, for instance, if the President has the inherent power claimed to block the subpoena, how is Congress to assure that appropriated funds are not being used for illegal warrantless domestic electronic surveillance?
>
> As to the danger to national security, a court would have to consider the Subcommittee's track record for security, the likelihood of a leak if other members of the House sought access to the material. In addition to this delicate and possibly unseemly determination, the court would have to weigh the effect of a leak on intelligence activities and diplomatic relations. Finally, the court would have to consider the reasonableness of the alternatives offered by the parties and decide which would better reconcile the competing constitutional interests. Id. at 394.

Pointing to the fact that the parties had come close to resolving their differences and that a court decision would tend to "tilt the the scales" in a legislative-executive branch dispute in a manner disruptive of the "country's constitutional balance", Ibid, the court remanded the case for further negotiations under the District Court's supervision. These negotiations did not produce a settlement and the case went back to the Court of Appeals. In its second opinion, the Court formally rejected the claims of both branches of unreviewable, absolute power, holding that "neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional

title, and it is or may be possible to establish an effective judicial settlement." 567 F.2d 121 (D.C. Cir. 1977.) The Court outlined the shared role of the President and Congress underlying the information dispute:

> The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. While powers relating to national security, including the functions of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the Senate, consent to treaties and the appointment of ambassadors.
>
> More significant, perhaps, is the fact that the Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security. These powers have been viewed as falling within a "zone of twilight" in which the President and Congress share authority or in which its distribution is uncertain. The present dispute illustrates this uncertainty. The concern of the executive that public disclosure of warrantless wiretapping data may endanger national security is, of course, entirely legitimate. But the degree to which the executive may exercise its discretion in implementing that concern is unclear when it conflicts with an equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative functions. Id. at 128.

The court once again declined to rule in favor of either party, opting "to continue our approach of gradualism." Id. at 133. It suggested a means of sampling and verification with the District Court being available to resolve conflicts and take remedial action. Recognizing that its approach entailed delay and left in place an injunction frustrating a valid congressional investigation, the court nevertheless saw its course of action as supportive of the machinery of government:

> The Separation of Powers often impairs efficiency, in terms of dispatch and the immediate functioning of government. It is the long-term staying power of government that is enhanced by the mutual accommodation required by the Separation of Powers. Id. at 133.

On December 21, 1978, the case was dismissed on the joint motion of both parties, a Memorandum of Understanding having been entered into and implemented which provided the subcommittee with access sufficient to satisfy the subpoena. See, Joint Motion to Dismiss, in United States v. A.T.&T., Civ. No. 76-1372, filed, December 12, 1978.

Obviously, while the cases indicate the considerations to be taken into account in resolving an interbranch dispute, these are the beginning, not the end, of the inquiry. As respects information concerning covert activities undertaken by the Central Intelligence Agency, the respective interests of the political branches present "nerve-center constitutional questions." For these reasons the court in the American Tel. & Tel. Case strove mightly to effect a voluntary settlement and thus avoid difficult constitutional questions with assumedly unsettling political implications.

There is no gainsaying that the President has power to maintain the secrecy of information pertaining to national security as an aspect of his responsibility for foreign and military affairs. This power is at zenith, as indicated in United States v. Nixon, 418 U.S. at 706, when it regards a claim of need, "to protect military, diplomatic or sensitive national security secrets." Whether an executive claim to absolute discretion in the case of such information would prevail over a statutory requirement of prior notice to the congressional intelligence committees has not been clearly decided. In United States v. Nixon, the asserted privilege was a general confidentiality privilege which while important was subordinate to the requirements of due process in criminal proceedings. As noted, the Court did not answer what the consequences of Executive Privilege involving national security information might be on either judicial or legislative activities.

Traditionally, the courts have deferred to the executive in areas of military and foreign affairs. However, these cases have involved governmental clashes with private interests wherein the contested executive action has been in accord, not at variance, with the congressional will. These cases do not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers. In other words, the effect of sustaining execlusive presidential control in such a case is to disable the Congress from acting upon the subject.

Wide as the President's powers may be in this regard, the Constitution confers upon Congress other powers equally inseparable from the national security, including the power to declare war, raise and support armed forces and, in the case of the Senate consent to treaties and the appointment of ambassadors. The Congress cannot discharge any of these responsiblities without information. "The Constitution does not subject [the] lawmaking power of Congress to presidential or military supervision or control." Youngstown Co. v. Sawyer, 343 U.S. at 588. "That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history," Id., Jackson J., concurring, 343 U.S. at 644.

Ultimately at issue in a statutory requirement of prior notice are fundamental concerns of war and peace. In brief, the broadest of all constitutional powers -- "the power to wage war is the power to wage war successfully"-- underlies the whole subject. Insofar as the corresponding congressional - presidential powers in this area are concerned, it is given to Congress to make the fundamental policy decision that converts the Nation from peace to a war footing. Accordingly, congressional demands for information in advance of covert activities,

would seem reasonable to discharge this all important responsibility. An additional element inveighing in favor of the congressional side of an interbranch dispute referred to American Tel. & Tel. Case is the demanding committee's "track record" for security. Both the Senate and House Intelligence Committees have developed elaborate procedures governing public disclosures of sensitive information and their respective records to date seem good.

In our view, it follows from the foregoing that whether the Director of Central Intelligence can withhold information from a duly constituted committee of Congress under his statutory authority to protect intelligence sources and methods is a matter for Congress to determine. ~~As indicated,~~ the Director's present authority to withhold information on the mentioned grounds derives from statute. See 50 U.S.C. § 403g. Although "[t]he legislative history of section 403g is scant," Baker v. Central Intelligence Agency, 580 F.2d 664, 668 (C.A.D.C. 1978), both in terms of its language (e.g., "provided, that in furtherance of this section the Director of the Bureau of the Budget [now Office of Management and Budget] shall make no reports to the Congress in connection with the Agency...") and seeming deference by Congress since the adoption of the Act in 1949, it constitutes arguable support for the view that the Director may withhold information from Congress. However, this result, in our view, is more a matter of congressional policy than constitutional compulsion and Congress in 1980 is not perpetually bound by the judgment of the Congress which adopted the Central Intelligence Agency Act of 1949. In other words, Congress can modify section 403g to make it clear that this authority does not apply to requests for information from a duly constituted oversight committee of Congress whose procedures (as those of the current Senate and House Intelligence

Committees) guarantee the security of such information. See United States v. American Tel. & Tel. Co., 551 F.2d 384, 394 (C.A.D.C. 1976).

To some extent, Congress has effectively modified section 403g by the adoption of the so-called Hughes-Ryan Amendment, 22 U.S.C. § 2422, which limits the use of funds appropriated under any act, "by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless ... the President ... reports ... such operation to the appropriate committees of the Congress...." Although differences of opinion exist regarding the timing of the specified reports as between coming before or after implementation of an intelligence operation, no one seems to have questioned Congress' right thereto. In any event, assuming arguendo that the President may invoke Executive Privilege to withhold specific information from a duly constituted oversight committee of Congress, Congress can condition appropriations in such a manner as to either obtain desired information or prohibiting the expenditure of public moneys for that purpose.

The appropriation of funds is clearly a legislative function. It derives from the constitutional provision which states that "no money shall be drawn from the treasury but in consequence of appropriations made by law." U.S. Const. Art. I, § 9, cl. 7. The Executive, except for recommendation and veto, has no legislative power. U.S. Cont. Art. I, Sec. 7 Cl. 2; Art. II, Sec. 3. Youngstown Co. v. Sawyer, 343 U.S. 519, 587-588 (1952). "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to a lawmaker. The Constitution limits his function in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither

silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'all legislative powers herein granted shall be vested in a Congress of the United States ...' After granting many powers to the Congress, Article I goes on to provide that Congress may 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof'... The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control." (Emphasis added.)

The absolute control of the moneys of the United States is in the Congress which is responsible for exercise of this power only to the people. Hart's Case, 16 Ct. Cl. 484 (1880), aff'd 118 U.S. 62 (1886). Thus, it has been said that -

> Congress in making appropriations has the power and authority to designate the purpose of the appropriation, but also the terms and conditions under which the executive department of the government may expend the appropriation. ...
>
> The purpose of the appropriations, the terms and conditions under which said appropriations were made is solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same. Any attempt by the judicial branch of our government to interfere with the exclusive powers of Congress would be a plain invasion of the powers of said body conferred upon it by the Constitution of the United States. Spaulding v. Douglas Aircraft Co., 60 F.2d 419 (9th Cir. 1946). (Emphasis added.)

Another court has said:

> That the power to appropriate federal funds has been exclusively entrusted to Congress is too well established to be question or argued. It is equally well settled that Congress has the power to attach to its appropriations any legitimate conditions.

State of Ohio v. United States Civil Service Com'n, 65 F. Supp. 776, 780 (S.D. Ohio, 1946).

The fact that in the exercise of one of its constitutionally delegated powers Congress narrows the range of presidential options in his role as Commander-in-Chief does not render it infirm. Indeed, only two express executive powers, the power to pardon "offenses against the United States" and the power to "receive ambassadors and other public ministers", are autonomous and hence not subject to the legislative power. Otherwise, the President is dependent upon Congress for authority and money. In the words of an outstanding scholar on the American Presidency:

> Two points are worth remembering [re. the real power of Congress over the President], first, that no great policy, domestic or foreign, can be maintained effectively by a President without the approval of Congress in the form of laws and money, and second, that there is no way under our Constitution for a President to force Congress to pass a law or spend money against its will. Rossiter, The American Presidency 47 (1963).

As observed by Mr. Justice Jackson, concurring, Youngstown Co. v. Sawyer, 343 U.S. at 641, the words Commander-in-Chief "imply something more than an empty title."

> ... But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.
>
> The Constitution expressly places in Congress power "to raise and support Armies" and "to provide and maintain a Navy." This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what

means they shall be spent for military and naval procurement.

There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him any army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.

That military power of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Thus, even in war time, his seizure of needed military housing must be authorized by Congress. It also was expressly left to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions ...." Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of war power as an instrument of domestic policy. Fulfilling that function, has authorized the President to use the army to enforce certain civil rights. On the other hand, Congress has forbidden him to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress.

His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the presidential office. 343 U.S. at 641-646. (Emphasis added.)

In sum while the President's military authority (i.e., commanding the armed forces) is supreme under the Constitution, he discharges his responsibilities within the confines of implementing legislation and appropriation of funds.

Does the President's duty to execute the laws enable him to disregard a statutory requirement calling for advance information of convert activities because of asserted unconstitutionality? The argument in opposition to such a proposition was stated by Willoughby, 3 The Constitutional Law of the United States § 983 (1299) as follows:

> That the President has the right to veto an act of Congress because he believes it to be an unconstitutional measure, even though he thus substitutes his judgment as to this for that of Congress, is beyond doubt. The objection which has sometimes been made that in so doing the President arrogates to himself a judicial function is without weight.
>
> In placing a veto upon a congressional enactment, the President is exercising, not a judicial, but a legislative function. His veto is of the nature of a powerful vote, and his decision as to the way his vote is to be cast must be formed from his own views and opinions. The Constitution gives him the power and he has a right to use it; indeed, it is his duty to use it. He has the right to use his veto upon the ground of unconstitutionality even when a measure of similar character has received previous interpretation by the Supreme Court, and has been sustained. His constitutional right or even duty of thus using his veto power has not been impaired by the manner in which any previous act has been treated. In 1832 Jackson vetoed the bill providing for a recharter of the National Bank. This he did mainly on the ground of unconstitutionality, notwithstanding the fact that in the case of McCulloch v. Maryland this institution had been carefully examined by the Supreme Court and pronounced constitutional. In support of his action, Jackson, in his veto message, said: "The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the constitution. Each public officer who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it is understood by others.

It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Court when it may be brought before them for a judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." Jackson was no lover of the Supreme Court, and in this instance certainly stated the case strongly, but in his action he was undoubtedly correct.[88] Whether he acted wisely, or even with proper respect toward the other branches of the government is another question.

Whether the President has the right to refuse to execute a law, passed during the term of a predecessor, or over his veto, because he deems it unconstitutional, is an entirely different question from that just considered. Here the President has to deal not with a measure in the process of enactment, as is the case when the veto is exercised, but with a bill that has passed through all the constitutional forms of enactment, and has become a law, and it would seem that he has no option but to enforce the measure. The President has not been given the power to defeat the will of the people or of the legislature as embodied in law. The reasons for maintaining a contrary opinion, as usually stated, are these: The Constitution of the United States is the supreme law of the President as well as of the private citizen. It is his duty to "take care that the laws be faithfully executed," but he is also sworn to "preserve, protect and defend the Constitution," and this he must do upon his own interpretation of the Constitution, and not upon that of others. The Constitution is but a law of high degree, and is, therefore, one of the very laws that he must take care are faithfully executed. Says one writer:[89] "If the President must execute all laws, he must execute an *ex post facto* law or any other law flying in the teeth of the constitution; a partisan statute passed over his veto can rob him of the right to be commander-in-chief, to nominate or remove from office, or of any other right expressly conferred upon him; and it is at once evident that in these cases Congress would be quite as plainly taking away from the President the power which the constitution has expressly given. A two-thirds majority could alter at will many important provisions of the constitution, and the members could only be called to account at a reëlection. That instrument in these cases would not be self-supporting, and would furnish none of those checks of which we have all heard so much. But if the contrary view is true, the check system comes into perfect play; for then the President's right to refuse his assistance to an unconstitutional law will check Congress, while the risk of impeachment will check the President."

[88] Van Holst holds a contrary view. *Constitutional History*, I, 46.

[89] *American Law Review*, XXIII, 375.

The errors in this argument are sufficiently plain. In the first place, the President does not stand upon the same footing as regards the Constitution, as does the private citizen. The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If, upon his own judgment, he refuse to execute a law and thus nullifies it, he is arrogating to himself controlling legislative functions, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President. That there is danger that Congress may by a chance majority, or through the influence of sudden great passion, legislate unwisely or unconstitutionally, was foreseen by those who framed our form of government, and the provision was drawn that the President might at his discretion use a veto, but this was the entire extent to which he was allowed to go in the exercise of a check upon the legislation. It was expressly provided that if, after his veto, two-thirds of the legislature should again demand that the measure become a law, it should thus be, notwithstanding the objection of the Chief Executive. Surely there is here left no further constitutional right on the part of the President to hinder the operation of a law.

It is the duty or privilege of a private citizen to refuse obedience to a law, if, upon careful consideration and investigation, he considers it to be unconstitutional, but he does so at his own risk, and if he is wrong he must abide by the legal consequences. Then, too, only his particular interest is directly involved. If, however, it be said that the President also refuses his obedience at his own risk, namely, the danger of impeachment and possible subsequent civil or criminal prosecution, the reply is that, in the first place, a refusal on his part to execute the law nullifies it in all its applications for all people; and in the second place, that impeachment is not a check. As an instrument for checking unconstitutional action on the part of the President, impeachment has been found too cumbersome. If, in the case of the extreme opposition and contest between both Houses of Congress and President Johnson, an impeachment was not successful, it must be admitted that as a means of future restraint upon the Chief Executive it will not be greatly feared.

That the President and all other officers of the government have not the right to refuse obedience to a judgment of the Supreme Court, because he or they believe such judgment to be based upon an incorrect interpretation of the Constitution, scarcely needs argument. This case is stronger than the former one by the additional support of the judiciary. To refuse now to execute the command of the court is to assume the judicial power of a court of appeals as well as legislative functions.

APPENDIX P

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

February 11, 1987

TO : House Permanent Select Committee on Intelligence
Attn: Bernard Raimo

FROM : American Law Division

SUBJECT: Analysis of Constitutionality of Proposal Enhancing Congressional Oversight of Intelligence Activities

Reference is made to your inquiry of February 5, 1987 requesting a constitutional analysis of H.R. 1013, legislation intended to strengthen the system of congressional oversight of the intelligence activities of the United States.

Consistent with the objective of giving Congress a more effective voice in the conduct of foreign covert operations for other than information gathering purposes, H.R. 1013 amends two key legal provisions regarding intelligence activities and the conduct of congressional oversight of those activities: Section 662 of the Foreign Assistance Act of 1961 (FAA), 22 U.S.C. § 2422, and Section 501 of the National Security Act of 1947 (NSA), 50 U.S.C. § 413.

Section 662 of the FAA provides 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 operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947.

At the present time, before any appropriated funds may be expended by or on behalf of the CIA for foreign covert operations (other than intelligence gathering activities), the President is required to find that each individual operation is important to the national security of the United States. Moreover, each operation is deemed to be a significant anticipated intelligence activity for purposes of section 501 of the NSA, which, in turn, means that the Director of Central Intelligence has to keep the House and Senate Select Intelligence Committees "fully and currently informed of" that operation. The obligation imposed on the Director of Central Intelligence as well as the heads of other U.S. entities involved in intelligence activities by section 501 of the NSA and incorporated by section 662 of the FAA as it stands does not mean that congressional oversight committees have to approve an anticipated intelligence activity before it may be initiated. Moreover, if the President determines that it is essential to limit prior notice to meet extraordinary circumstances affecting vital interest of the United States, he may notify the chairmen and ranking minority members of the oversight committees, the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate. The latter is clearly an alternative procedure available in appropriate circumstances to avoid giving prior notice to the full intelligence committees.

By necessary implication, subsection (b) indicates that the President must fully inform the intelligence committees "in a timely fashion" of foreign intelligence operations for which no prior notice was given in the manner required by section 501(a).

Section 2 of H.R. 1013 proposes two significant changes to section 662 of the FAA. First it requires that the presidential finding which is essential to go ahead with a foreign covert operation has to be "in writing". Second, it requires that a copy of the written finding be given in advance of the conduct of the operation to the congressional oversight committees, or to the previously described eight persons identified in section 501(a)(1)(B) of the NSA, and to the Vice President, the Secretary of State, the Secretary of Defense and the Director of Central Intelligence. Briefly, section 662 as amended by section 2 of the proposal would retain its broad reporting features except that the report would have to be a written one and would have to be given to the four specified executive officers in addition to either the intelligence committees or the chairmen and ranking minority members of those committees and the House and Senate leaders.

Section 3 of H.R. 1013 amends section 501 of the NSA, portions of which have been just discussed because of the connection between significant anticipated intelligence activities and foreign covert operations under section 662 of the FAA. Section 501 provides that ---

(a) Reports to Congressional Committees of current and proposed activities

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—

(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence 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, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) 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 chairman 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;

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(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

(b) Failure to inform; reasons

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.

(c) Establishment of procedures for relaying information

The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b) of this section.

(d) Protection from unauthorized disclosure

the [1] 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 the Congress under this section. 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) Construction of authority conferred

Nothing in this chapter 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.

Section 501 of the NSA, as added in 1980, is the basic congressional oversight provision of U.S. intelligence activities whether performed by the CIA or departments, agencies and other federal entities. The Director of Central Intelligence and the heads of any of the mentioned units of government that are involved in intelligence activities are required to keep the intelligence committees "fully and currently informed" of those activities, "including any significant anticipated intelligence activity." This reporting function is to be performed in a manner that is "consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches ..., and ... with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods ..."

Although section 501 clearly requires the intelligence committees to be informed in advanced (e.g., significant anticipated intelligence activity) committee "approval" is not a condition precedent to the initiation of any such anticipated intelligence activity. As previously noted, section 501 additionally provides that if the President determines that vital interests require it, notice concerning a significant anticipated intelligence activity can instead be given to the chairmen and ranking members of the intelligence committees, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate.

In addition to keeping the oversight committees "fully and currently" informed of intelligence activities, affected executive branch heads have to provide additional relevant information which is requested by the committees. Futhermore, these persons have to inform the committees "in a timely fashion" of "any illegal intelligence activity or significant intelligence failure" and corrective action taken or contemplated.

Section 501(b) is intended to apply to those situations when prior notice of intelligence operations has not been given to the oversight committees. In these situations the President is to "fully" inform them "in a timely fashion" of foreign covert operations and justify noncompliance with the prior notice requirement.

Section 501(c) directs the President and the intelligence committees to establish procedures for relaying sensitive information between them.

Section 501(d) requires the House and Senate to establish procedures to protect sensitive information given to the intelligence committees from unauthorized disclosure and directs the committees to keep committees and members of their respective houses advised of intelligence activities that require their attention.

Section 501(e) makes it clear that the intelligence committees may not be denied information because it is classified or relates to intelligence sources and methods.

Section 3 of H.R. 1013 affects directly or indirectly and to a greater or lesser extent all of the subsections of section 501 of the NSA. Symbolizing the bill's fundamental purpose of reducing the opportunities for evading the obligation of keeping the intelligence committees "fully and currently informed", the proposal eliminates the injunction that executive branch officials inform the committees 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 ...." The elimination of the quoted language — which connotes more than it denotes and likely reflects an excess of caution on the part of its drafters — leaves only one statutory standard to guide executive branch officials in furnishing information concerning intelligence activities to the oversight committees, namely, to do it "with due regard for ... protect[ing] [it] from unauthorized disclosure".

Possessed of more than symbolic value, however, is the proposal's repeal of section 501(b) which allows the President to give subsequent notice to the intelligence committees when prior notice of an intelligence activity has not been given. This change largely but not totally eliminates the occasions for departing from the requirement of prior congressional notice.

The legislation makes a number of conforming changes required by elimination of section 501(b); it redesignates the subsections and corrects internal references to the redesignated subsections.

Finally, the proposal would add a new subsection (e) to section 501 of the NSA, which admits of a singular occasion for not giving prior notice of a significant anticipated intelligence activity. The exceptional circumstance is one "affecting the vital interest of the United States, and only where time is of the essence." Furthermore, unlike existing section 501(b) which allows reporting in analogous circumstances "in a timely fashion", the proposal's new subsection (e) provides that notice to Congress in the extraordinary circumstances that it postulates "may be deferred for not more than 48 hours after the initiation of such an activity or the signing of a finding pursuant to section 662 of the [FAA] of 1961." Briefly, the legislation in this regard narrows the circumstances for the conduct of foreign covert operations before informing Congress and effectively spells out "in timely fashion" by allowing only a two day deferral.

H.R. 1013 raises a number of constitutional issues, chief among which are whether Congress may compel the Executive Branch to provide it with advance information concerning intelligence operations and whether it violates separation of powers or other principles to require that similar information be given to such highly placed constitutional or executive officials as the Vice President of the United States, the Secretary of State, the Secretary of Defense, and the Director of Central Intelligence.

The first of these two issues, i.e., whether and to what extent the assumed constitutional power of the President to assure secrecy of sensitive national security information is assertable against Congress, was examined at some length in a report which was prepared in 1980. A copy of that report, which coincidentally was requested in connection

with consideration at that time of proposals which led to enactment of section 501 of the NSA, is annexed hereto. 126 Congressional Record 13096-1310 (1980). Decisional and other legal developments in the intervening six years do not appear to affect the general conclusion that intelligence activities are a joint responsibility of the President and Congress and, therefore, the latter is entitled to obtain advance notice of those activities. The congressional powers immediately implicated, among others, are the war powers, the power of the purse, and the fact that the authority of the Director of Central Intelligence to safeguard information is authorized by statute.

For related developments regarding the Nixon case approach of balancing the interests in a congressional demand for information from the Executive. United States v. Nixon, 418 U.S. 683 (1974). See, generally, Congressional Access to Information from the Executive: A Legal Analysis, CRS Rept. No. 86-50A, March 10, 1986.

The 1980 report concludes with an extended excerpt from Prof. Willoughby rejecting the notion that the President possesses power to refuse to execute laws which he deems unconstitutional. Litigation involving the Competition in Contracting Act (CICA), 31 U.S.C.A. § 3553 et seq. has occasioned judicial commentary in accord with Willoughby's views. Typical of these remarks is that of the Third Circuit in Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F. 2d 875, 889 (1986):

> This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best.[11]

11. *See Kendall v. United States*, 12 Pet. 524, 613, 37 U.S. 524, 613, 9 L.Ed. 1181 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissable.") The President's job is to execute law, not to create it. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S.Ct. 863, 866, 96 L.Ed. 1153 (1952). Moreover, "it is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). Absent a patently unconstitutional law or one infringing liberty interests or other fundamental rights of individuals, the President's asserted power and "duty" not to execute laws he finds to be unconstitutional is questionable. *See Hearings* at 39, 44 (testimony of Prof. Sanford Levinson); *id.* at 46-47 (testimony of Prof. Eugene Gressman).

Although the decision in Bowsher v. Synar, 106A Ct. 3181 (1986), invalidating the Gramm-Rudman-Hollings budget reduction law may have some adverse implications for the CICA, these do not detract from the conclusion, expressed immediately above, that "[t]he President's job is to execute law, not to create it."

Insofar as the second issue is concerned, the Supreme Court in Nixon v. Administration of General Services, 433 U.S. 425, 445 (1977) indicated that laws calling for the exchange of information within the Executive Branch do not violate the separation of powers doctrine. At issue in the case was the Presidential Recording and Materials Preservation Act which directed the Administrator of General Services, an official of the Executive Branch, to take custody of former President Nixon's papers and tape recordings and separate purely personal and private materials from public materials; the latter to be retained and made available for public access. The Court gave short shrift to appellant's separation of powers challenge to the Act. Noting that the latter was intended to maintain the proper balance between the coordinate branches; the Court found highly

relevant that the Act provided for the custody of materials in officials of the Executive Branch and that employees of that branch have access only for lawful Government use, subject to regulations. Id. at 445. The Court concluded that the "regulation of materials generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." Id. at 445.

The Court's observations on the separation of powers are reproduced in their entirety as follows:

A

Separation of Powers

We reject at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality. Moreover, the control over the materials remains in the Executive Branch. The Administrator of the General Services Administration, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees. Appellant's argument is in any event based on an interpretation of the separation-of-powers doctrine inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system. True, it has been said that "each of the three general departments of government [must remain] entirely free from the control or

coercive influence, direct or indirect, of either of the others . . . ," *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629 (1935), and that "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." *Id.*, at 630. See also *O'Donoghue* v. *United States*, 289 U. S. 516 (1933); *Springer* v. *Philippine Islands*, 277 U. S. 189, 201 (1928).

But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story[*] was expressly affirmed by this Court only three years ago in *United States* v. *Nixon*, *supra*. There the same broad argument concerning the separation of powers was made by appellant in the context of opposition to a subpoena *duces tecum* of the Watergate Special Prosecutor for certain Presidential tapes and documents of value to a pending criminal investigation. Although acknowledging that each branch of the Government has the duty initially to interpret the Constitution for itself, and that its interpretation of its powers is due

[*] Madison in The Federalist No. 47, reviewing the origin of the separation-of-powers doctrine, remarked that Montesquieu, the "oracle" always consulted on the subject,

"did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, pp. 325–326 (J. Cooke ed. 1961) (emphasis in original).

Similarly, Mr. Justice Story wrote:

"[W]hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree." 1 J. Story, Commentaries on the Constitution § 525 (M. Bigelow, 5th ed. 1905).

great respect from the other branches, 418 U. S., at 703, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952).

> "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, *but the separate powers were not intended to operate with absolute independence.*" 418 U. S., at 707 (emphasis supplied).

Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight departments of government," 408 F. Supp., at 342.[6] Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States* v. *Nixon*, 418 U. S., at 711–712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Ibid.*

It is therefore highly relevant that the Act provides for custody of the materials in officials of the Executive Branch and that employees of that branch have access to the materials only "for lawful Government use, subject to the [Adminis-

[6] See also, *e. g.*, 1 K. Davis, Administrative Law Treatise § 1.09 (1958); G. Gunther, Cases and Materials on Constitutional Law 400 (9th ed. 1975); L. Jaffe, Judicial Control of Administrative Action 28–30 (1965); Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1387–1391 (1974); Ratner, Executive Privilege, Self Incrimination, and the Separation of Powers Illusion, 22 U. C. L. A. L. Rev. 92–93 (1974).

trator's] regulations." § 102 (d); 41 CFR §§ 105–63.205, 105–62.206, and 105–63.302 (1976). For it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function. While the materials may also be made available for use in judicial proceedings, this provision is expressly qualified by any rights, defense, or privileges that any person may invoke including, of course, a valid claim of executive privilege. *United States* v. *Nixon, supra.* Similarly, although some of the materials may eventually be made available for public access, the Act expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege," § 104 (a)(5), and to return purely private materials to appellant, § 104 (a)(7). These provisions plainly guard against disclosures barred by any defenses or privileges available to appellant or the Executive Branch.[7] And appellant himself concedes that the Act "does not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it." Brief for Appellant 119. The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch.

Thus, whatever are the future possibilities for constitutional

[7] The District Court correctly interpreted the Act to require meaningful notice to appellant of archival decisions that might bring into play rights secured by § 104 (a)(5). 408 F. Supp., at 340 n. 23. Such notice is required by the Administrator's regulations, 41 CFR § 105–63.205 (1976), which provide: "The Administrator of General Services or his designated agent will provide former President Nixon or his designated attorney or agent prior notice of, and allow him to be present during, each authorized access."

conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face. And, of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, *e. g.*, the Freedom of Information Act, 5 U. S. C. § 552 (1970 ed. and Supp. V); the Privacy Act of 1974, 5 U. S. C. § 552 (a) (1970 ed., Supp. V); the Government in the Sunshine Act, 5 U. S. C. § 552b (1976 ed.); the Federal Records Act, 44 U. S. C. § 2101 *et seq.*; and a variety of other statutes, *e. g.*, 13 U, S. C. §§ 8–9 (census data); 26 U. S. C. §6103 (tax returns). Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy. Cf. *EPA* v. *Mink*, 410 U. S. 73, 83 (1973); *FAA Administrator* v. *Robertson*, 422 U. S. 255 (1975).[8] Similar congressional power

> to regulate Executive Branch documents exists in this instance, a power that is augmented by the important interests that the Act seeks to attain. See *infra*, at 452–454.

[8] We see no reason to engage in the debate whether appellant has legal title to the materials. See Brief for Appellant 90. Such an inquiry is irrelevant for present purposes because § 105 (c) assures appellant of just compensation if his economic interests are invaded, and, even if legal title is his, the materials are not thereby immune from regulation. It has been accepted at least since Mr. Justice Story's opinion in *Folsom* v. *Marsh*, 9 F. Cas. 342, 347 (No. 4,901) (CC Mass. 1841), that regardless of where legal title lies, "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers." Appellant's suggestion that the *Folsom* principle does not go beyond materials concerning national security and current Government business is negated by Mr. Justice Story's emphasis that it also extended to materials "embracing *historical* . . . information." *Ibid.* (Emphasis added.) Significantly, no such limitation was suggested in the Attorney General's opinion to President Ford. Although indicating a view that the materials belonged to appellant, the opinion acknowledged that "Presidential materials" without qualification "are peculiarly affected by a public interest" which may justify subjecting "the absolute ownership rights" to certain

As an aspect of separation of powers intended to maintain the proper balance between coordinate branches the relevance of executive privilege to deny access to national security information to the chief national security officials of the Executive Branch seems both questionable and paradoxical.

Raymond J. Celada
mc

Raymond J. Celada
Senior Specialist In
American Public Law

APPENDIX Q

TITLE V OF THE NATIONAL SECURITY ACT OF 1947 (50 U.S.C. 413) (ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES)

TITLE V—ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES [1]

CONGRESSIONAL OVERSIGHT

SEC. 501. (a) 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—

(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence 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, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) 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 chairman 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;

(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

(b) 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) and shall provide a statement of the reasons for not giving prior notice.

(c) The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b).

(d) the [1] 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 protection from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under this section. 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.

APPENDIX R

SECTION 662 OF THE FOREIGN ASSISTANCE ACT OF 1961 (22 U.S.C. 2422) (THE "HUGHES-RYAN AMENDMENT")

SEC. 662. LIMITATION ON INTELLIGENCE ACTIVITIES.—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 operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947.

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