First Principles
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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 fleeing 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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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 operation, 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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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 emergencies where notifying the committees was inconsistent with the need 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 accepted 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 herein 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 when time does not permit prior notice; in such a case the committee could 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 chairman and ranking minority membrs 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 onyl 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 skirt. 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 intende 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. ■

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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 embark 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.