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THE WHITE HOUSE

WASHINGTON

August 7, 1987

Dear Chairman Boren:

In my March 31, 1987, message to Congress, I reported on those steps I had taken and intended to take to implement the recommendations of the President's Special Review Board. These included a comprehensive review of Executive Branch procedures concerning presidential approval and notification to Congress of covert action programs -- or so-called special activities. In my message, I noted that the reforms and changes I had made and would make "are evidence of my determination to return to proper procedures including consultation with the Congress."

In this regard, Frank Carlucci has presented to me the suggestions developed by the Senate Select Committee on Intelligence for improving these procedures. I welcome these constructive suggestions for the development of a more positive partnership between the intelligence committees and the Executive Branch.

Greater cooperation in this critical area will be of substantial benefit to our country, and I pledge to work with you and the members of the two committees to achieve it. We all benefit when we have an opportunity to confer in advance about important decisions affecting our national security.

Specifically, I want to express my support for the following key concepts recommended by the Committee:

1. Except in cases of extreme emergency, all national security "Findings" should be in writing. If an oral directive is necessary, a record should be made contemporaneously and the Finding reduced to writing and signed by the President as soon as possible, but in no event more than two working days thereafter. All Findings will be made available to members of the National Security Council (NSC).

2. No Finding should retroactively authorize or sanction a special activity.

3. If the President directs any agency or persons outside of the CIA or traditional intelligence agencies to conduct a special activity, all applicable procedures for approval of a Finding and notification to Congress shall apply to such agency or persons.

4. The intelligence committees should be appropriately informed of participation of any government agencies, private parties, or other countries involved in assisting with special activities.

5. There should be a regular and periodic review of all ongoing special activities both by the intelligence committees and by the NSC. This review should be made to determine whether each such activity is continuing to serve the purpose for which it was instituted. Findings should terminate or "sunset" at periodic intervals unless the President, by appropriate action, continues them in force.

6. I believe we cannot conduct an effective program of special activities without the cooperation and support of Congress. Effective consultation with the intelligence committees is essential, and I am determined to ensure that these committees can discharge their statutory responsibilities in this area. In all but the most exceptional circumstances, timely notification to Congress under Section 501(b) of the National Security Act of 1947, as amended, will not be delayed beyond two working days of the initiation of

a special activity. While I believe that the current statutory framework is adequate, new Executive Branch procedures nevertheless are desirable to ensure that the spirit of the law is fully implemented. Accordingly, I have directed my staff to draft for my signature executive documents to implement appropriately the principles set forth in this letter.

While the President must retain the flexibility as Commander-in-Chief and Chief Executive to exercise those constitutional authorities necessary to safeguard the nation and its citizens, maximum consultation and notification is and will be the firm policy of this Administration.

Sincerely,

Ronald Reagan

cc: The Honorable Louis Stokes
The Honorable Henry J. Hyde

The Honorable David L. Boren
Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510


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100TH CONGRESS
1ST SESSION

# S. 1721

To improve the congressional oversight of certain intelligence activities, and to strengthen the process by which such activities are approved within the executive branch, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

SEPTEMBER 25, 1987

Mr. COHEN (for himself, Mr. BOREN, Mr. INOUYE, Mr. MITCHELL, Mr. BENTSEN, Mr. DECONCINI, Mr. MURKOWSKI, and Mr. RUDMAN) introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

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# A BILL

To improve the congressional oversight of certain intelligence activities, and to strengthen the process by which such activities are approved within the executive branch, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Intelligence Oversight Act of 1987".

SECTION 1. Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is hereby repealed.

★(Star Print)

SEC. 2. Section 501 of title V of the National Security Act of 1947 (50 U.S.C. 413) is amended by striking the language contained therein, and substituting the following new sections:

"GENERAL PROVISIONS

"SEC. 501. (a) The President shall ensure that the Select Committee on Intelligence of the Senate and the Permanent Select Committee of the House of Representatives (hereinafter in this title referred to as the 'intelligence committees') are kept fully and currently informed of the intelligence activities of the United States as required by this title. Such activities shall ordinarily be conducted pursuant to consultations between the President, or his representatives, and the intelligence committees, prior to the implementation of such activities: *Provided, however,* That nothing contained herein shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities: *And provided further, however,* That nothing contained herein shall be construed as a limitation on the power of the President to initiate such activities in a manner consistent with his powers conferred by the Constitution.

"(b) The President shall ensure that any illegal intelligence activity or significant intelligence failure is reported to the intelligence committees, as well as any corrective action

that has been taken or is planned in connection with such illegal activity or intelligence failure.

"(c) The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of this title.

"(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this 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.

"(f) As used in this section, the term 'intelligence activities' includes, but is not limited to, 'special activities,' as defined in subsection 503(e), below.

"REPORTING INTELLIGENCE ACTIVITIES OTHER THAN SPECIAL ACTIVITIES

"SEC. 502. The Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall keep the intelligence committees fully and currently informed of all intelligence activities, other than special activities as defined in subsection 503(e), below, which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity: *Provided,* That such obligation shall be carried out with due regard for the protection of classified information relating to sensitive intelligence sources and methods. In satisfying this obligation, the Director of Central Intelligence and the heads of all departments and agencies and other entities of the United States Government involved in intelligence activities shall furnish the intelligence committees any information or material concerning intelligence activities other than special activities which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

"APPROVING AND REPORTING SPECIAL ACTIVITIES

"SEC. 503. (a) The President may authorize the conduct of 'special activities,' as defined herein below, by departments, agencies, or entities of the United States Government when he determines such activities are necessary to support the foreign policy objectives of the United States and are important to the national security of the United States, which determination shall be set forth in a finding that shall meet each of the following conditions:

"(1) Each finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision is made;

"(2) A finding may not authorize or sanction special activities, or any aspect of such activities, which have already occurred;

"(3) Each finding shall specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any way in such activities: *Provided*, That any employee, contractor, or contract agent of a department,

agency, or entity other than the Central Intelligence Agency directed to participate in any way in a special activity shall be subject either to the policies and regulations of the Central Intelligence Agency, or to written policies or regulations adopted by such department, agency or entity, in consultation with the Director of Central Intelligence, to govern such participation;

"(4) Each finding shall specify, in accordance with procedures to be established pursuant to subsection 501(c), any third party, including any foreign country, which is not an element of, contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, who it is contemplated will be used to fund or otherwise participate in any way in the special activity concerned; and

"(5) A finding may not authorize any action that would be inconsistent with or contrary to any statute of the United States.

"(b) The President, the Director of Central Intelligence and the heads of all departments, agencies, and entities of the United States Government authorized to fund or otherwise participate in any way in a special activity shall keep the intelligence committees fully and currently informed of all special activities which are the responsibility of, are engaged

in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government. In satisfying this obligation, the intelligence committees shall be furnished any information or material concerning special activities which is in the possession, custody or control of any department, agency, or entity of the United States Government and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

"(c) The President shall ensure that any finding issued pursuant to subsection (a), above, shall be reported to the intelligence committees as soon as possible, but in no event later than forty-eight hours after it has been signed; provided, however, that if the President determines it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, such finding may be reported to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. In either case, a certified copy of the finding, signed by the President, shall be provided to the chairman of each intelligence committee. Where access to a finding is limited to the Members of Congress identified herein above, a statement of the reasons for limiting such access shall also be provided.

"(d) The President shall promptly notify th committees, or, if applicable, the Members of Congress specified in subsection (c), above, of any significant change in any previously-approved special activity.

"(e) As used in this section, the term 'special ac means any activity conducted in support of nationa policy objectives abroad which is planned and so that the role of the United States Governmen par- ent or acknowledged publicly, and functions in s..port of such activity, but which is not intended to influence United States political processes, public opinion, policies or media, and does not include activities to collect necessary intelligence, military operations conducted by the armed forces of the United States and subject to the War Powers Resolution (50 U.S.C. 1541–1548), diplomatic activities carried out by the Department of State or persons otherwise acting pursuant to the authority of the President, or activities of the Department of Justice or Federal law enforcement agencies solely to provide assistance to the law enforcement authorities of foreign governments.".

SEC. 3. Section 502 of title V of the National Security Act of 1947 (50 U.S.C. 414) is redesignated as section 504 of such Act, and is amended by adding the following new subsection (d):

"(d) No funds appropriated for, or otherwise available to, any department, agency, or entity of the United States Government, may be expended, or may be directed to be expended, for any special activity, as defined in subsection 503(e), above, unless and until a Presidential finding required by subsection 503(a), above, has been signed or otherwise issued in accordance with that subsection.".

SEC. 4. Section 503 of title V of the National Security Act of 1947 (50 U.S.C. 415) is redesignated as section 505 of such Act.

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"(e) As used in this section, the term "special activity" means any activity conducted in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, but which is not intended to influence United States political processes, public opinion, policies or media, and does not include activities to collect necessary intelligence, military operations conducted by the armed forces of the United States and subject to the War Powers Resolution (50 U.S.C. 1541-1548), diplomatic activities carried out by the Department of State or persons otherwise acting pursuant to the authority of the President, or activities of the Department of Justice or federal law enforcement agencies solely to provide assistance to the law enforcement authorities of foreign governments."

SEC. 3. Section 502 of Title V of the National Security Act of 1947 (50 U.S.C. 414) is redesignated as section 504 of such Act, and is amended by adding the following new subsection (d):

"(d) No funds appropriated for, or otherwise available to, any department, agency, or entity of the United States Government, may be expended, or may be directed to be expended, for any special activity, as defined in subsection 503(e), above, unless and until a Presidential finding required by subsection 503(a), above, has been signed or otherwise issued in accordance with that subsection."

SEC. 4. Section 503 of Title V of the National Security Act of 1947 (50 U.S.C. 415) is redesignated as section 505 of such Act.

## SECTION-BY-SECTION ANALYSIS

### SECTION 1. REPEAL OF HUGHES-RYAN AMENDMENT

Current statutory provisions for intelligence oversight include the general requirements to inform the House and Senate Intelligence Committees in Title V of the National Security Act of 1947, as amended in 1980, and the requirement of Presidential approval for CIA covert action in Section 662 of the Foreign Assistance Act of 1961, as amended (22 USC 2422—the Hughes-Ryan Amendment). The differences in language and scope between these provisions have been a source of unnecessary confusion. Therefore, Section 1 of the bill would repeal the Hughes-Ryan Amendment in order to substitute a new Presidential approval requirement as an integral part of a more coherent and comprehensive statutory oversight framework for covert action (or "special activities") and other intelligence activities. The superceding Presidential approval requirement is contained in the proposed new sections 503 and 504(d) of the National Security Act of 1947, discussed below.

This change is intended to bring current law more closely into line with Executive branch policy which requires Presidential approval for covert action by any component of the U.S. Government, not just by the CIA. Section 3.1 of Executive Order 12333, December 4, 1981, states, "The requirements of section 662 of the Foreign Assistance Act of 1961, as amended (22 USC 2422), and section 501 of the National Security Act of 1947, as amended (50 USC 413), shall apply to all special activities as defined in this Order." Replacing Hughes-Ryan with a comprehensive Presidential approval requirement for covert action (or "special activities") by any U.S. Government entity gives statutory force to a policy that has not been consistently followed in recent years.

### SECTION 2. OVERSIGHT OF INTELLIGENCE ACTIVITIES

Section 2 of the bill would replace the existing Section 501 of the National Security Act of 1947 with three new sections that prescribe, respectively, general provisions for oversight of all intelligence activities, reporting of intelligence activities other than special activities, and approval and reporting of special activities. This revision of current law has three principal objectives.

The first is to clarify and emphasize the general responsibilities of the President to work with the Congress, through the House and Senate Intelligence Committees, to ensure that U.S intelligence activities are conducted in the national interest. Current law does not fully address the obligations of the President. Nor does the existing statute reflect the commitment to consultation with the Congress made by the President as a result of the lessons learned from the Iran-Contra inquiries.

The second objective is to eliminate unnecessary ambiguities in the law. Experience under the current statute has indicated significant areas where Congressional intent may be subject to misinterpretation by Executive branch officials, as well as gaps in the law where Congress did not adequately anticipate the need for statutory guidance. Examples are the uncertain meaning of the requirement to report "in a timely fashion," the absence of an explicit provision for written Presidential Findings, and the need to specify those responsible for implementing covert actions. The aim is to clarify the intent of Congress with respect to oversight of intelligence activities so as to reduce the possibilities for misunderstanding or evasion. For purposes of clarity, a distinction is made between the detailed provisions for special activities, which are instruments of U.S. foreign policy, and the requirements for other intelligence activities (i.e., collection, analysis, counterintelligence) that are less controversial.

A third objective is to provide statutory authority for the President to employ special activities to implement U.S. foreign policy by covert means. Congress has not previously done so, except to the extent that the CIA was authorized by the National Security Act of 1947 "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." Current law requires Presidential approval and the reporting to Congress of "intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence. This does not provide affirmative statutory authority to employ covert means as a supplement to overt instruments of U.S. foreign policy. Nor does it specify what types of activity are intended to be covered by the legal requirements for covert action. This has called into question the legality of covert actions, such as arms transfers, undertaken as alternatives to overt programs with express statutory authority. Congress should expressly authorize covert action as a legitimate foreign policy instrument, subject to clearly defined approval and reporting requirements.

The overall purpose of this bill is to use the lessons of recent experience to establish a more effective statutory framework for executive-legislative cooperation in the field of intelligence. Such legislation is not a guarantee against conflicts between the branches or abuses of power. It can, however, help minimize such conflicts and abuses by emphasizing the mutual obligations of the President and Congress and by eliminating unnecessary legal ambiguities that invite misunderstanding on both sides.

### SECTION 501. GENERAL PROVISIONS

The new Section 501 of Title V of the National Security Act of 1947 would specify the general responsibilities of the President and the Congress for oversight of intelligence activities.

*(a) Presidential Duties and Prior Consultation*

Subsection (a) would place a statutory obligation upon the President to ensure that the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (referred to in the bill as the "intelligence committees") are kept fully and currently informed of the intelligence activities of the United States as required by this title. Current law imposes such duties on the DCI and agency heads, but not on the President himself. Overall responsibility should be vested in the President because of the importance and sensitivity of secret intelligence activities that may affect vital national interests and because the President may have unique knowledge of those activities that he is best suited to ensure is imparted to the intelligence committees. The terms and conditions for keeping the committees "fully and currently informed" are those set forth in Sections 502 and 503, discussed below.

In addition, subsection (a) would provide that U.S. intelligence activities shall ordinarily be conducted pursuant to consultations between the President, or his representatives, and the intelligence committees, prior to the implementation of such activities. This is consistent with the intentions of the President as stated in his letter of August 8, 1987, to the Chairman and Vice Chairman of the Senate Intelligence Committee. It applies to all U.S. intelligence activities, including collection, analysis, counterintelligence, and special activities. Additional Presidential reporting requirements for special activities are set forth in Section 503, discussed below. This new general provision for prior consultation with the intelligence committees would supplement current requirements for keeping the committees informed of "significant anticipated intelligence activities." The requirement for prior consultations is a more complete reflection of the need for executive-legislative cooperation in the formulation of intelligence policies. For example, the President or his representatives should ordinarily consult the intelligence committees on proposed Presidential Findings prior to their approval by the President.

Subsection (a) would also retain the qualification in current law that nothing contained in the prior consultation or prior notice requirements shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities. The parallel provision of existing law is clause (A) of paragraph 501(a)(1).

*(b) Illegal Activities and Significant Failures*

Subsection (b) would require the President to ensure that any illegal intelligence activity or significant intelligence failure is reported to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity or failure. Under current law, paragraph 501(a)(3) imposes this duty on the DCI and agency heads, subject to certain conditions. The purpose is to place an unqualified statutory obligation on the President to ensure reporting of such matters to the committees. The President should establish procedures for review within the Executive branch of intelligence activities that may have been illegal and for

reporting to the intelligence committees when a determination is made that there are reasonable grounds to believe that the activity was a violation of the Constitution, statutes, or Executive orders of the United States. The President should establish procedures for the reporting of activities determined to be significant intelligence failures. The current provision requires the reporting of an illegal activity or significant failure "in a timely fashion." This language is deleted because of its ambiguity. The intent is that the committees should be notified immediately whenever a determination is made under procedures established by the President in consultation with the intelligence committees.

Another difference from existing law is that the requirement to report illegal activities or significant failures would not be subject to the preambular clauses in the current subsection 501(a) which could be interpreted as qualifying the statutory obligation to inform the intelligence committees.

*(c)-(f) Other General Provisions*

Subsections (c) through (e) would retain provisions of existing law. Subsection (c) is identical to the current subsection 501(c) that authorizes the President and the intelligence committees to establish procedures to carry out their oversight obligations. Subsection (d) is the same as the current subsection 501(d) that requires the House and Senate to establish procedures to protect the secrecy of information furnished under this title and to ensure that each House and its appropriate committees are advised promptly of relevant information. Subsection (e) repeats the current subsection 501(e) which makes clear that information may not be withheld from the intelligence committees under this Act on the grounds that providing the information to the intelligence committees would be unauthorized disclosure of classified information or information relating to intelligence sources and methods.

Subsection (f) states that the term "intelligence activities," as used in this section, includes, but is not limited to, "special activities," as defined in subsection 503(e), discussed below.

SECTION 503. REPORTING INTELLIGENCE ACTIVITIES OTHER THAN SPECIAL ACTIVITIES

The new section 502 is intended to be substantially the same as the current requirements of subsections 502(a)(1) and (2) insofar as they apply to intelligence activities other than special activities. This distinction between special activities and other intelligence activities is discussed more fully with respect to section 503, below.

*Fully and Currently Informed*

Section 502 would require the Director of Central Intelligence (DCI) and the heads of all departments, agencies and other entities of the United States involved in intelligence activities to keep the intelligence committees fully and currently informed of all intelligence activities, other than special activities as defined in subsection 503(e), which are the responsibility of, are engaged in by, or are carried out for or on behalf of any department, agency, or entity of the United States, including any significant anticipated intelligence activity. The special procedure for prior notice to eight leaders in the current clause (B) of paragraph 501(a)(1) would be deleted, since it was intended to apply to special activities, to be governed by section 503, discussed below.

Section 502 also would provide that, in satisfying the obligation to keep the committees fully and currently informed, the DCI and the heads of all departments and agencies and other entities of the United States involved in intelligence activities shall furnish the intelligence committees any information or material concerning intelligence activities (other than special activities) which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities. This requirement is subject to the provision for protection of sensitive intelligence source and methods, discussed below.

*Protection of Sensitive Sources and Methods*

The obligation to keep the intelligence committees fully and currently informed under this section is to be carried out with due regard for the protection of classified information relating to sensitive intelligence sources and methods. This provision is similar to the second preambular clause in the current subsection 501(a) which imposes duties "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 proposed new language more accurately reflects and is intended to have the same meaning as the legislative history of the similar preambular clause in existing law.

The first preambular clause in the current subsection 501(a) would be deleted. It imposes obligations "[t]o the extent consistent with all applicable authorities and duties, including those conferred upon the executive and legislative branches of the Government." This clause creates unnecessary ambiguity in the law, because it has been interpreted by some as Congressional acknowledgement of an undefined constitutional authority of the Executive branch to disregard the statutory obligations. Recent experience indicates that legislation qualifying its terms by reference to the President's constitutional authorities may leave doubt as to the will of Congress and thus invite evasion. Legitimate Executive branch concerns are adequately met by the provision for due regard for protection of sensitive intelligence sources and methods, discussed above

SECTION 503. APPROVING AND REPORTING SPECIAL ACTIVITIES

Special activities (or covert actions) raise fundamentally different policy issues from other U.S. intelligence activities because they are an instrument of foreign policy. Indeed, constitutional authorities draw a distinction between Congressional power to restrict the gathering of information, which may impair the President's ability to use diplomatic, military, and intelligence organizations as his "eyes and ears," and Congressional power to regulate covert action that goes beyond information gathering. There is little support for the view that such special activities are an exclusive Presidential function. Congress has the constitutional power to refuse to appropriate funds to carry out special activities and may impose conditions on the use of any funds appropriated for such purposes.

Under current law, however, the Congressional mandate is ambiguous, confusing and incomplete. There is no express statutory authorization for special activities; the requirement for Presidential approval of special activities applies only to the CIA; and Presidential approval procedures are not specified. There is a question whether Congress has intended that the President have authority to conduct special activities which are inconsistent with or contrary to other statutes. The statutory requirements for informing the intelligence committees of special activities are subject to misinterpretation, and the scope of activities covered by the law is undefined. This bill seeks to remedy these deficiencies so that covert actions are conducted with proper authorization in the national interest as determined by the elected representatives of the American people—the President and the Congress—through a process that protects necessary secrecy.

*(a) Presidential Findings*

Subsection (a) would provide statutory authority for the President to authorize the conduct of special activities by departments, agencies or entities of the United States when he determines such activities are necessary to support the foreign policy objectives of the United States and are important to the national security of the United States. This determination must be set forth in a "Finding" that meets certain conditions. The importance of this requirement is underscored by Section 3 of the bill, discussed later, which prohibits expenditure of funds for any special activity unless and until such a presidential Finding has been issued.

The current Presidential approval provision in the Hughes-Ryan Amendment (22 USC 2422) requires a finding by the President "that each such operation is important to the national security of the United States." The proposed new subsection 503(a) would require the President to make an additional determination that the activities "are necessary to support the foreign policy objectives of the United States." This conforms the statute to the Executive branch definition of "special activities" in section 3.4(h) of Executive Order 12333 which refers to "activities conducted in support of national foreign policy objectives abroad." The President should determine not only that the operation is important to national security, but also that it is consistent with and in furtherance of established U.S. foreign policy objectives.

In addition to reflecting these presidential determinations, Findings must meet five conditions. First, paragraph 503(a)(1) would require that each Finding be in writing, unless immediate action is required of the United States and time does not permit the preparation of a written Finding, in which case a written record of the President's decision would have to be contemporaneously made and reduced to a written Finding as soon as possible but in no event more than 48 hours after the decision is made. This requirement should prevent a President's subordinate from later claiming to have received oral authorization without further substantiation than the subordinate's undocumented assertion. It is also consistent with the President's current policy of requiring written Findings.

Second, paragraph 503(a)(2) would restate emphatically the current legal ban on retroactive Findings. It would provide that a Finding may not authorize or sanction special activities, or any aspects of such activities, which have already occurred. This is also consistent with the President's current policy.

Third, paragraph 503(a)(3) would require that each Finding specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any way in the special activities authorized in the Finding. This requirement is consistent with section 1.8(e) of Executive Order 12333 which states that no agency except the CIA in peacetime may conduct any special activity "unless the President determines that another agency is more likely to achieve a particular objective."

Fourth, paragraph 503(a)(4) would require that each Finding specify, in accordance with procedures to be established, any third

party, including any third country, which is not an element of, contractor of, or contract agent of the U.S. Government, or is not otherwise subject to U.S. Government policies and regulations, whom it is contemplated will be used to fund or otherwise participate in any way in the special activity concerned. The purpose is to require the President's approval and notice to the intelligence committees when third countries, or private parties outside normal U.S. government controls, are used to help implement a covert action operation. The intent is that procedures be established in consultation with the intelligence committees to determine when the involvement of a third party constitutes use "to fund or otherwise participate" in a special activity and to determine when a private party is not "subject to U.S. Government policies and regulations."

Fifth, paragraph 503(a)(5) would establish that a Finding may not authorize any action that would be inconsistent with or contrary to any statute of the United States. This is similar to section 2.8 of Executive Order 12333, which states that nothing in that Order "shall be construed to authorize any activity in violation of the Constitution or statutes of the United States." Current CIA policy is to conform its operations to any federal statutes which apply to special activities, either directly or as laws of general application. This provision is not intended to require that special activities authorized in Presidential Findings comply with statutory limitations which, by their terms, apply only to another U.S. Government program or activity. For example, a statutory restriction on the overt Defense Department arms transfer program would not apply to covert CIA arms transfers authorized in a Finding, even if the CIA obtained the arms from the Defense Department under the Economy Act. When the Congressional concerns that led to the restriction on the Defense Department program are relevant to the similar covert CIA activity, those factors should be taken into account by the intelligence committees.

*(b) Fully and Currently Informed*

Subsection 503(b) would place a statutory obligation on Executive branch officials to keep the intelligence committees fully and currently informed of special activities and furnish the intelligence committees any information or material concerning special activities which they possess and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities. This subsection differs in four respects from the parallel provisions of Section 502 that apply to other intelligence activities.

The first difference is that the obligation would be placed on the President, as well as on the DCI and the heads of departments, agencies, and entities of the U.S. Government. The President may have unique information concerning a special activity that should be imparted to the committees.

The second difference is that the obligation would be placed on the heads of departments, agencies, and entities of the U.S. Government "authorized to fund or otherwise participate in a special activity"—rather than just those directly involved in the activity. This conforms to the terms of the presidential Finding requirement in subsection 503(a)(3).

The third difference is that the requirement to inform the committees of "any significant anticipated intelligence activity" would be deleted. In the case of special activities, that requirement would be superceded by the requirements in subsections 503(c) and (d), discussed below, for reporting presidential Findings and significant changes in special activities, as well as by the general provision in subsection 501(a) for prior consultations with the intelligence committees.

The fourth difference is that the obligation to inform the committees would not be subject to a general proviso that such obligation shall be carried out with due regard for the protection of classified information relating to sensitive intelligence sources and methods. Instead, a specific statutory procedure would be established in subsection 503(c) for limiting the number of Members of Congress to whom information would be imparted in exceptionally sensitive cases. Moreover, sensitive sources and methods would also be protected under the procedures established by the President and the intelligence committees pursuant to subsection 501(c) and by the House of Representatives and the Senate pursuant to subsection 501(d).

*(c) Notice of Findings*

Subsection 503(c) would require the President to ensure that any Findings issued pursuant to subsection (a), above, shall be reported to the intelligence committees as soon as possible, but in no event later than 48 hours after it has been signed. If, however, the President determines it is essential to limit access to the Finding to meet extraordinary circumstances affecting vital interests of the United States, such Finding may be reported to 8 Members of Congress—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. This procedure is similar to the existing provision in clause (B) of the current paragraph 501(a)(1) for limiting prior notice of "significant anticipated intelligence activities" to the same 8 congressional leaders.

The principal differences from existing law are the elimination of the preambular clauses in the current subsection 501(a) that qualify clause (1)(b) and the deletion of the separate provision in the current subsection 501(b) for "timely" notice when prior notice is not given. These current provisions have created confusion because they appear, on the one hand, to require notice of Findings to at least the 8 leaders while, on the other hand, leaving open the possibility of postponement of notice until some time after a Finding is implemented. The proposed new subsection 503(c) changes the point of reference in the law from notice prior to the initiation of an activity to the more logical point of notice immediately upon the issuance of a Finding.

Subsection 503(b) would also require that in all cases a certified copy of the Finding signed by the President shall be provided to the chairman of each intelligence committee and that, if access is limited, a statement of the reasons for limiting access to the Finding concerned shall accompany the copy of the Finding.

*(d) Notice of Significant Changes*

Subsection 503(d) would require the President to ensure that the intelligence committees, or, if applicable, the 8 leaders specified in subsection (c), are promptly notified of any significant change in any previously-approved special activity. The intent is that such changes should be reported insofar as practicable prior to their implementation, in accordance with procedures agreed upon by the intelligence committees and the President. Such procedures currently exist in the form of agreements entered into between the DCI and the Chairman and Vice Chairman of the Senate Intelligence Committee in 1984 and 1986. Any change in the actual terms and conditions of a Finding would have to be reported in accordance with subsection 503(c).

*(e) Definition of "Special Activities"*

Section 503(e) sets forth a definition of the term "special activities". Not heretofore used or defined in statute, the term has nevertheless been used since 1978 in two Executive orders as a euphemism for the more colloquial term "covert actions". The term is adopted here not only because of its previous use within the Executive branch but as a more appropriate designation of such activity by the United States.

As stated, the definition of "special activities" set forth in section 503(e) is based upon the definition of the term now set forth in section 3.4(h) of Executive order 12333, issued by President Reagan on December 4, 1981. Indeed, the first and principal clause of the definition is taken verbatim from the definition in the Executive order. The exclusionary clauses, exempting certain activities from the scope of the definition, are for the most part modifications of, or additions to, the exclusions contained in the Executive order definition.

As defined in section 503(e), a "special activity" is any activity conducted in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity. The definition covers all covert activities undertaken by the United States to support its foreign policy objectives towards other countries regardless of the department, agency, or element of the United States Government used to carry out such activities. While it applies to those activities conducted in support of national foreign policy objectives abroad, the term encompasses those activities conducted by the United States Government within the territory of the United States, so long as they are intended to support U.S. objectives abroad. The definition applies only to activities in which the role of the U.S. Government is not apparent or acknowledged to the public. Thus, activities of the United States Government conducted in support of national foreign policy objectives which are made known to the public, or which would be made known to the public or press if the Government were asked, are not covered by the definition.

The definition also makes clear that special activities shall not be intended to influence U.S. political processes, public opinion, policies or media. The purpose of this language is to preclude the use of the authority contained in this bill to plan or execute special activities for the purpose of influencing U.S. public opinion. While it is recognized that some special activities may occasionally have an indirect effect on U.S. public opinion, no such activity may be instituted for this purpose, and to the extent such indirect effect can be minimized in the planning and execution of special activities, it should be done. This portion of the definition reiterates what has been longstanding policy and practice within the Executive branch.

The definition further specifies four broad areas of activity undertaken by the United States Government in support of foreign policy objectives which are not included within the definition of special activities even if planned and conducted so that the role of the United States Government is not apparent or acknowledged publicly. These include activities to collect necessary intelligence, military operations conducted by the armed forces of the United States and subject to the War Powers Resolution (50 U.S.C. 1541-1548), diplomatic ac-

tivities carried out by the Department of State or persons otherwise acting pursuant to the authority of the President, or activities of the Department of Justice or federal law enforcement agencies solely to provide assistance to the law enforcement authorities of foreign governments. An explanation of each of these exclusions follows.

The exclusion of U.S. activities to collect necessary intelligence is intended to cover all activities of the United States Government undertaken for the purpose of obtaining intelligence necessary for the national security of the United States. While such activities clearly require oversight by the Congress, they are excluded from the definition of "special activities", inasmuch as they are subject to separate authorization and oversight, and often do not require specific approval by the President. This exclusion reiterates the longstanding policy contained in the Hughes-Ryan amendment (24 U.S.C. 2422) (1974) and in subsequent Executive orders.

The exclusion of military operations conducted by the armed forces of the United States and subject to the War Powers Resolution (50 U.S.C. 1541-1548) is new, appearing in neither statute or Executive order heretofore. The purpose of this exclusion is to clarify a problem of interpretation namely, when is a military operation undertaken by the United States reportable as a "special activity" or covert action? The definition sets forth a clear dividing line: if the military operation concerned is carried out covertly by U.S. military forces and it is not required to be reported to the Congress under the War Powers Resolution, then it is a "special activity" which is reportable to the intelligence committees under this statute. The exclusion would not apply to covert assistance given by the United States to the military forces, or to support the military operations, of a third party, either governmental or to private entities.

The third area excluded from the definition of special activities is diplomatic activities carried out by the Department of State or persons otherwise acting pursuant to the authority of the President. This represents a modification of the comparable exclusion in Executive order 12333. Although most diplomatic activities of the United States are publicly acknowledged, it is recognized that there are many diplomatic contacts and deliberations which are necessarily secret. The definition of special activities excludes these activities so long as they are undertaken by the Department of State, or by persons—either government officials or private citizens—who are acting pursuant to the authority of the President. It would not exclude diplomatic activities which are carried out by persons who are not employees of the Department of State—either governmental or private—whose authority to carry out such activities on behalf of the United States is not already established by law or Executive branch policy.

The fourth and final area excluded from the definition of special activities are activities of the Department of Justice or federal law enforcement agencies solely to provide assistance to law enforcement authorities of foreign governments. This exclusion is also new, reflected neither in law nor Executive order heretofore. Its incorporation here is intended to clarify a problem of interpretation which has existed under the current framework, namely, do law enforcement activities undertaken covertly by U.S. Government agencies outside the United States qualify as special activities? The formulation contained in the proposed definition would exclude assistance provided covertly to third countries by U.S. law enforcement agencies. It would not exclude law enforcement activities actually carried out covertly and unilaterally by such agencies outside the United States. It would also not exclude either assistance to law enforcement agencies of third countries, or carrying out law enforcement activities outside the United States, by elements of the U.S. Government which do not have law-enforcement functions.

SECTION 3. LIMITATION ON USE OF FUNDS FOR SPECIAL ACTIVITIES

Section 3 of the bill redesignates section 502 of the National Security Act of 1947, which concerns the funding of intelligence activities, as section 504 of the Act and adds a new subsection (d) which deals with the use of funds for special activities.

This provision is intended to carry forward and expand the limitation currently contained in 22 U.S.C. 2422 (the Hughes-Ryan Amendment), which would be repealed by Section 1 of the bill. The Hughes-Ryan amendment restricts the use of funds appropriated to CIA to carry out actions outside the United States "other than the collection of necessary intelligence", unless and until the President had determined that such actions were important to the national security.

Section 504(d) would similarly provide that appropriated funds could not be expended for special activities until the President had signed, or otherwise approved, a Finding authorizing such activities, but it would expand this limitation to cover the funds appropriated for any department, agency, or entity of the Government, not solely CIA. It would also cover non-appropriated funds which are available to such elements from any source, over which the agency involved exercises control. These might include funds offered or provided by third parties, funds produced as a result of intelligence activities (i.e. proprietaries), or funds originally appropriated for an agency other than the agency who wishes to expend the funds. The limitation contained in section 504(d) would also apply whether or not the agency concerned actually came into possession of the funds at issue. So long as the agency concerned had the ability to direct such funds be expended by third parties—governmental or private—it could not do so until a presidential Finding had been signed, or otherwise approved, in accordance with the requirements of section 503(a).

SECTION 4. REDESIGNATION OF SECTION 503 OF NATIONAL SECURITY ACT OF 1947

Section 4 redesignates section 503 of the National Security Act of 1947 as section 505, to conform to the changes made by the bill.

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TEXT OF THE PRESIDENT'S LETTER ON NEW GUIDELINES FOR COVERT OPERATIONS

Hon. DAVID L. BOREN,
Chairman, Senate Select Committee on Intelligence, U.S. Senate, Washington, DC.
cc: The Honorable Louis Stokes and the Honorable Henry J. Hyde.

DEAR CHAIRMAN BOREN: In my March 31, 1987, message to Congress, I reported on those steps I had taken and intended to take to implement the recommendations of the President's Special Review Board. These included a comprehensive review of executive branch procedures concerning Presidential approval and notification to Congress of covert-action programs—or so-called special activities.

In my message, I noted that the reforms and changes I had made and would make "are evidence of my determination to return to proper procedures including consultation with the Congress."

In this regard, Frank Carlucci has presented to me the suggestions developed by the Senate Select Committee on Intelligence for improving these procedures. I welcome these constructive suggestions for the development of a more positive partnership between the intelligence committees and the executive branch.

Greater cooperation in this critical area will be of substantial benefit to our country, and I pledge to work with you and the members of the two committees to achieve it. We all benefit when we have an opportunity to confer in advance about important decisions affecting our national security.

Specifically, I want to express my support for the following key concepts recommended by the committee:

1. Except in cases of extreme emergency, all national security "findings" should be in writing. If an oral directive is necessary, a record should be made contemporaneously and the finding reduced to writing and signed by the President as soon as possible, but in no event more than two working days thereafter. All findings will be made available to members of the National Security Council (N.S.C.).

2. No Finding should retroactively authorize or sanction a special activity.

3. If the President directs any agency or persons outside of the C.I.A. or traditional intelligence agencies to conduct a special activity, all applicable procedures for approval of a finding and notification to Congress shall apply to such agency or persons.

4. The intelligence committees should be appropriately informed of participation of any Government agencies, private parties, or other countries involved in assisting with special activities.

5. There should be a regular and periodic review of all ongoing special activities both by the intelligence committees and by the N.S.C. This review should be made to determine whether each such activity is continuing to serve the purpose for which it was instituted. Findings should terminate or "sunset" at periodic intervals unless the President, by appropriate action, continues them in force.

6. I believe we cannot conduct an effective program of special activities without the cooperation and support of Congress. Effective consultation with the intelligence committees is essential, and I am determined to ensure that these committees can discharge their statutory responsibilities in this area. In all but the most exceptional circumstances, timely notification to Congress under Section 501(b) of the National Security Act of 1947, as amended, will not be delayed beyond two working days of the initial, of a special activity. While I believe that the current statutory framework is adequate, new executive branch procedures nevertheless are desirable to ensure that the spirit of the law is fully implemented. Accordingly, I have directed my staff to draft for my signature executive documents to implement appropriately the principles set forth in this letter.

While the President must retain the flexibility as Commander in Chief and chief executive to exercise those constitutional authorities necessary to safeguard the nation and its citizens, maximum consultation and notification is and will be the firm policy of this Administration.

Sincerely,

RONALD REAGAN.●

● Mr. BENTSEN. Mr. President. I am pleased today to join my colleagues in introducing the "Intelligence Oversight Act of 1987." This legislation continues the pattern of statutory strengthening of the intelligence oversight process that was established 40

years ago by the National Security Act of 1947. In the ensuing years, Congress has enacted other legislation in this area, including most recently the Foreign Intelligence Surveillance Act of 1978, the Intelligence Oversight Act of 1980, and the Intelligence Identities Protection Act of 1982. Each of these pieces of legislation responded to a requirement that was identified at the time, ranging from the need to strengthen our counterintelligence capabilities in the first instance to a life-and-death situation where CIA agents' identities were being publicly revealed in the past. The legislation we are introducing today, too, grows out of our own recent experience.

One of the lessons that we learned during the investigation of the Iranian arms sales and diversion of profits to the Contras is that current oversight statutes, particularly in the area of covert action reporting, are simply not specific enough. Indeed, it had become obvious during the preliminary investigation conducted by the Select Committee on Intelligence late last year that there were gaps and loopholes in our oversight laws and that there were some individuals within the executive branch who exploited these loopholes as a means of avoiding congressional notification of a covert operation.

To be specific, there is currently a statutory requirement that the oversight committees of Congress be notified in advance of covert actions, or must be notified "in a timely fashion" after the fact. This loophole of "timely fashion" was broad enough to allow the administration not to report the Iranian arms sales for some 18 months. I doubt they would have reported them even then, except that a small newspaper in the Middle East broke the story in November of last year.

The legislation that we are introducing today closes that loophole by requiring that the President provide written notification to the Oversight Committees of the Congress within for 48 hours after he has authorized a covert action. If he believes that the action is too sensitive to reveal to the entire membership of the Intelligence Committees, he would be authorized to limit notification to the chairmen and ranking members of those committees, the majority and minority leaders of the Senate and the Speaker and minority leader of the House. Notification of these eight individuals would insure that we do not have another situation where our country is embarked on a course of action with potentially grave foreign policy implications without notifying the Congress that such was about to be done.

Unlike present law, which does not require Presidential approval for covert activities conducted by agencies other than the CIA, this legislation spells out for the first time that the President must personally approve each covert action or "special activity," as they are sometimes called. So that there will be no doubt as to what the President has authorized and when he authorized it, our legislation requires that a Presidential finding be in writing and that a copy of each finding must be transmitted to the Intelligence Committees within 48 hours after it is signed. Retroactive findings such as were used in the Iran arms sales would be prohibited.

In other sections, this legislation would spell out for the first time the statutory power of the President to authorize covert actions. It also provides that no finding which authorizes a covert action can operate contrary to statute and that no funds can be used for a covert action unless there is a finding. Taken together, it seems to me that these requirements represent a reasonable approach to the problem of regaining control over covert actions, while at the same time not in any way harming or endangering our Nation's ability to conduct such operations.

Mr. President, I would like to close this statement on a more personal note. I have been a member of the Select Committee on Intelligence for almost 7 years now. In time of service on the committee I am the senior member on the Democratic side. During these years it has been my privilege to have had weekly, and sometimes almost daily, contact with the men and women of our Nation's intelligence services. The work that they do for our country is absolutely invaluable, and many of them routinely put their lives on the line with little or no public recognition.

Indeed, when public recognition does occur, it can sometimes mean death, as in the case of William Buckley who was CIA station chief in Beirut. Buckley was taken hostage, tortured, and killed because of what he was doing for his country—our country. There are similar men and women all over the world doing their jobs in silence and without public praise. In the lobby of the CIA headquarters building in Langley, VA, there are rows of gold stars carved into the wall. Each of those stars represents a CIA employee who was killed serving his country. Beneath the stars is a display case in which has been placed an open book. There are names in the book representing most of the stars on the wall, but there are blank lines as well, for some of these CIA employees still cannot be publicly identified, even 35 years later.

Mr. President, I end with these sentiments because I want to make it clear that in sponsoring this legislation today, I am not aiming it at the men and women of the intelligence community. I am not criticizing them for the job they do for us each and every day. No, I am not introducing this legislation as a way of strengthening the oversight process, continuing the pattern of the past 40 years, and making our Nation's partnership between the legislative and executive branches in this area a stronger and even more productive one.●

Mr. MURKOWSKI. Mr. President, events of recent months have highlighted the importance of congressional oversight of intelligence activities. The oversight function, performed by the two Select Intelligence Committees—one in the House and one in the Senate—is the means by which this democracy reconciles the people's right to know with the intelligence agencies need for secrecy.

Under existing law the intelligence agencies are obliged to keep the two communities currently informed of significant intelligence activities, including covert action. However, ambiguities inherent in existing statutes were dramatically highlighted during the recently concluded congressional investigation of the Iran-Contra affair. It is important that these ambiguities are eliminated so that the ground rules are clearly understood in both the Executive and the Congress and the temptation to look for loopholes is reduced.

As an outgrowth of painstaking negotiations on these issues between the staffs of the Senate Intelligence Community and the National Security Council, the committee sent a letter to the President's National Security Adviser. The legislation closely follows the provisions contained in that letter.

This bill does not impose new and more onerous burdens upon the intelligence agencies. Rather, it clarifies and rationalizes existing law. For example, this bill will, for the first time, explicitly empower the President to authorize covert actions and establish a Presidential "finding" as the authorizing document.

I am pleased to join with my distinguished colleague from Maine, the vice chairman of the Senate Select Committee on Intelligence, in cosponsoring this legislation.

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By Mr. INOUYE (for himself, Mr. EVANS, Mr. BYRD, Mr. CRANSTON, Mr. SIMPSON, Mr. DECONCINI, Mr. BURDICK, Mr. DASCHLE, Mr. MURKOWSKI, Mr. MCCAIN, Mr. BINGAMAN, Mr. BOSCHWITZ, Mr. COCHRAN, Mr. CONRAD, Mr. DOMENICI, Mr. GORE, Mr. GRAMM, Mr. LEVIN, Mr. MATSUNAGA, Mr. PELL, Mr. REID, Mr. RIEGLE, Mr. ROCKEFELLER, Mr. RUDMAN, Mr. STAFFORD, Mr. SANFORD, Mr. SIMON, Mr. WIRTH, Mr. BOREN, and Mr. MELCHER):

S. 1722. A bill to authorize the establishment of the National Museum of the American Indian, Heye Foundation within the Smithsonian Institution, and to establish a memorial to the American Indians, and for other purposes; by unanimous consent, referred jointly to the Committee on Rules and Administration and the Select Committee on Indian Affairs.

amendments to

## FOREIGN ASSISTANCE ACT OF 1961

### (Hughes-Ryan Amendment)

[88 Stat. 1795 Pub. L. 93-559, December 30, 1974, 22 U.S.C.A. 2422;
94 Stat. 1981, Pub. L. 96-450, October 14, 1980]

**§ 2422. Intelligence activities**

No funds appropriated under the authority of 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.

CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES

SEC. 407. (a) Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is amended—

(1) by striking out "(a)" before "No funds";

(2) by striking out "and reports, in a timely fashion" and all that follows in subsection (a) and inserting in lieu thereof a period and the following: "Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947."; and

(3) by striking out subsection (b).

(b)(1) The National Security Act of 1947 (50 U.S.C. 401 et seq.) is amended by adding at the end thereof the following new title:

"TITLE V—ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES

"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 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) 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.".

(2) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

"TITLE—ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES

"Sec. 501. Congressional oversight.".


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Office of the Assistant Attorney General

*Washington, D.C. 20530*

The Honorable David L. Boren
Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Chairman Boren:

This letter presents the views of the Department of Justice on the constitutional issues raised by S. 1721, a bill relating to the system of congressional oversight of intelligence activities.[1] The Department of Justice opposes enactment of this legislation in its present form because we believe that it would unconstitutionally intrude upon the President's authority to conduct the foreign relations of the United States.

S. 1721 would repeal the Hughes-Ryan Amendment, which requires Presidential approval of covert action by the CIA. See Section 662 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2422. It would be replaced by a new presidential approval requirement, which would become part of the National Security Act of 1947. As amended by S. 1721, the National Security Act would require that the President authorize all "special activities" (i.e., covert actions)[2] conducted by any department, agency, or

[1] Because S. 1721 would also preserve and compound certain ambiguities in current law, the Department of Justice will submit objections to S. 1721 of a nonconstitutional nature by a separate letter.

[2] A sponsor of S. 1721 has said that "special activity" is simply another term to describe "covert action." 133 Cong. Rec. S12852 (Sept. 25, 1987) (remarks of Sen. Cohen). The bill itself defines "special activity" as:

> any activity conducted in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, but which is not

entity of the United States government.[3] Proposed section 503(a). The Presidential approval would take the form of a "finding," which would be reduced to writing within forty-eight hours after a decision regarding covert actions is made. Id. Moreover, there would be an additional requirement that the finding name any foreign country that would participate in any way in the covert action. Proposed Section 503(a)(4).[4]

S. 1721 also would require that intelligence agencies disclose to Congress whatever information concerning intelligence activities, other than "special activities," that Congress deems necessary to fulfill its responsibilities. Proposed Section 502. Proposed Section 503 has a similar provision concerning information relating to covert actions. Neither of the provisions addressing congressional requests for documents enumerates any situations under which the Executive branch may decline to provide the requested documents.

The first constitutional problem with the bill arises not from the requirement of a Presidential finding, per se, but from

[2] (Cont.) intended to influence United States political processes, public opinion, policies or media, and does not include activities to collect necessary intelligence, military operations conducted by the armed forces of the United States and subject to the War Powers Resolution (50 U.S.C. 1541-1548), diplomatic activities carried out by the Department of State or persons otherwise acting pursuant to the authority of the President, or activities of the Department of Justice or federal law enforcement agencies solely to provide assistance to the law enforcement authorities of foreign governments.

Proposed section 503(e). The Hughes-Ryan Amendment, of course, refers to "operations in foreign countries, other than activities intended solely for obtaining intelligence." 22 U.S.C. 2422.

[3] The presidential approval requirement set forth in S. 1721, then, would be broader than Hughes-Ryan in that it would apply not just to covert actions conducted by the CIA, but also to covert actions conducted by other agencies or entities of the United States.

[4] The presidential approval mechanism of S. 1721, unlike the Hughes-Ryan Amendment, would require that all findings be in writing. Proposed section 503(a)(1). We do not, however, interpret this to mean that signed copies of the finding must be provided to Congress or to subordinate executive branch officials.

the requirement that the finding, under all circumstances, be reported to the congressional intelligence committees within 48 hours of the time that it is signed.[5] Currently, of course, the Act recognizes that there may be some circumstances in which Congress is not given prior notice of a finding. See 50 U.S.C. 413(b).[6] In such situations, the President is required only to inform the intelligence committees in "a timely fashion" of the covert action. The proposed amendment to the National Security Act of 1947 would eliminate the flexibility that the current act provides by requiring that notice always be given within 48 hours of the time that a finding is signed.[7]

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[5] Proposed Section 503(c) provides in pertinent part:

> The President shall ensure that any finding issued pursuant to subsection (a), above, shall be reported to the intelligence committees as soon as possible, but in no event later than forty-eight (48) hours after it has been signed.

The time, then, begins to run not when a Presidential decision is made, but when a finding is signed. Because proposed section 503(a)(1) indicates that under extreme circumstances, a finding need not be reduced to writing for 48 hours, there will be situations in which the President would not be required by the bill to report the finding to the intelligence committees until 96 hours after a decision had been made.

[6] The current act also provides that in "extraordinary circumstances affecting the vital interests of the United States," the President, rather than notifying the full congressional committees of the covert action, may notify 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. The proposed amendment to the Act retains a provision permitting the President to notify only the congressional leadership in "extraordinary circumstances." The only substantive change would be a requirement that the President state the reasons for limiting access to the findings.

[7] The sponsors of the proposed amendment apparently have attempted to eliminate the flexibility of the current act in another manner as well. The current act provides that it is to be interpreted as "consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government." The amendment proposed by S. 1721 would eliminate this language. This change, of course, would have no substantive effect because all statutes must be interpreted in a manner consistent with the Constitution.

This Administration, like prior Administrations, is anxious to work with Congress in devising arrangements to satisfy the legitimate interests in legislative oversight. For that reason, 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 reaffirmed his commitment 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. He has stated that "[i]n all but the most exceptional circumstances, timely notification to Congress under Section 501(b) of the National Security Act will not be delayed beyond two working days of the initiation of a special activity." See letter from President Ronald Reagan to Senator David L. Boren, Chairman of the Senate Select Committee on Intelligence, 23 Weekly Comp. Pres. Docs. 910 (Aug. 7, 1987). Nevertheless, we believe that there is a point beyond which the Constitution will not permit congressional encumbering of the President's ability to initiate, direct, and control the sensitive national security activities at issue here. Stated simply, S. 1721 transcends this point by purporting to oblige the President, under all circumstances, to notify Congress of a covert action within a fixed period of time.

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 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 requirement that Congress be notified within a fixed period after the time that a finding is signed is 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, too, have recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, the Supreme 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 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." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-320 (1936) (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.[8] The Supreme Court's

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[8] A fact noted by John Jay in The Federalist:

> It seldom happens in the negotiations of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases when the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehension of discovery. Those apprehensions will operate on those person whether they be 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.
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> . . . . 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 so they tend to facilitate the attain men of the objects of the negotiations.

The Federalist No. 64, supra at 392-393 (J. Jay). Jay's reference to treaties "of whatever nature" and his explicit discussion of intelligence operations makes it clear that he was not speaking of treaty negotiations in the narrow sense, but of

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 S. 1721. 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 within a fixed period after the time that the President signs an order authorizing its 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 notice to Congress within a fixed period of time after signing a finding, in certain exceptional circumstances, is not appropriate.[9]

We also must object to the proposed requirement that the Executive branch furnish to the intelligence committees any information or material that the committees deem necessary to carry out their authorized responsibilities. This requirement would apply to any information concerning intelligence

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[8] (Cont.) the whole process of diplomacy and intelligence gathering.

[9] The requirement that the President invariably report to Congress within 48 hours of signing a finding is made even more pernicious by the fact that the finding must list any foreign country that will participate in any way in the covert action. In diplomatic dealings with foreign powers secrecy is often essential. See note 8, supra.

activities, regardless of whether it related to covert actions.[10] We believe that this blanket statutory requirement of disclosure may conflict with the President's right to withhold confidential documents in instances where such action is necessary to the performance of the Executive's constitutional responsibilties. First, documents retained by intelligence agencies may constitute "state secrets," i.e., matters the disclosure of which endanger the nation's governmental requirements or its relation of friendship and profit with other nations." 8 Wigmore on Evidence, 2212a (McNaughton revision 1961)[emphasis added]. The Supreme Court has recognized the authority of the Executive branch to prtoect "state secrets." See United States v. Nixon, 418 U.S. 683, 706, 710 (1974); United States v. Curtiss-Wright Export Corp., 299 U.S. at 319-321 (1936). Indeed, in commenting on President Washington's refusal to comply with a congrssional request for documents relating to relations with foreign countries, the Supreme Court stated that it was "a refusal the wisdom of which was recognized by the House itself and has never since been doubted." United States v. Curtiss-Wright Export, supra, at 320.

Other documents retained by intellligence agencies may constitute interagency communications. We believe that the Executive branch may also legitimately refuse to provide these documents to Congress. The Supreme Court has recognized that there is a "valid need for protection of communications between

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[10] Proposed Section 502, which deals with information relating to intelligence activities other than covert actions provides:

> [T]he Director of Central Intelligence and the heads of all departments and agencies and other entities of the United States Government in intelligence activities shall furnish the intelligence committees any information or material concerning intelligence activities other than special activities which is within their custody and control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

Proposed Section 503(b), which deals with information relating to covert actions provides:

> [T]he intelligence committees shall be furnished any information or material concerning special activities which is in the possession, custody or control of any department, agency, or entity of the United States Government and which is requested by either of the intelligence committees in order to carry out its authorized

high government officials and those who advise and asssist them." 418 U.S. at 705. While this decision was rendered in the context of Presidential communications, the same principles would apply with respect to communications containing the policy deliberations of other executive officials. The need to protect deliberative communications derives from the need for candor and objectivity in the policymaking decisions of the government. See United States v. Nixon, supra, at 705-706. This need exists not only at the Preidential level, but also at other levels in the government. We thus believe that the constitutional principle reflected in Nixon can extend to lower officials' deliberative communications whose disclosure would harm the decisionmaking process of the Executive branch.

Of course, the Executive branch will attempt to cooperate with Congress in fulfillment of its legitimate responsiblities. Frequently, this cooperation may take the form of providing information to Congress. We cannot agree, however, that a blanket requirement of disclosure in all cases in which Congress sees fit to request disclosure is appropriate, because the President must retain the discretion to withhold information that will impair his ability to fulfill his own constitutional responsibilities.

In closing, the Department notes that when proposals similar to those in S. 1721 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

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[10] (Cont.) responsibilities.

# 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

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[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

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[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

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[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

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[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 reviewing 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

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[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 Stater 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." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803).[22]

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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)

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[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 nov be settled, contrary to the Executive's position, by reference to the statements of individual Congressmen who had a narrov 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

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[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.

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OIPR

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]

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[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.

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


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Excerpt from Statement of Conferees, Conference Report to Intelligence Authorization Act for FY 1981



PRESIDENTIAL FINDINGS AND CONGRESSIONAL OVERSIGHT FOR INTELLIGENCE ACTIVITIES (SEC. 407)

The Senate bill contained provisions (Sec. 405 and Sec. 409) providing for comprehensive oversight of all intelligence activities by the intelligence committees of the House and Senate, including a revision of the so-called Hughes-Ryan amendment to the Foreign Assistance Act (22 U.S.C. 2224) which requires reporting to Congress of certain CIA activities conducted abroad.

The House bill contained no comparable provisions.

The congressional oversight provisions of the Senate bill establish a permanent statutory basis for the oversight procedures that have been developed by the select committees and the executive branch over the past four years. They are predicated on two general principles. The first is respect for the authorities and duties of both the Congress and the executive branch, including the constitutional authorities of each branch. The second is the duty of both branches through mutual consultation to ensure that sensitive information is securely handled so that the interests of the United States are protected.

Both of these principles are to be taken into account as limitations on the obligations imposed by the statute. For example, the statute would not preclude an executive branch assertion of constitutional authority to take actions to defend the nation, nor does the statute limit the congressional power of inquiry under the Constitution. Moreover, since both branches agree upon their duty to protect intelligence sources and methods, the select committees have worked out procedures and practices under which by agreement certain information is usually not sought by the committees. Examples of such information may include the identities of agents or other sources of intelligence collection.

It is agreed by both the committees and the executive branch that the protection of intelligence sources and methods is not to be used as a device to place one branch in a position of advantage. By agreement both branches recognize that particular circumstances will require the exercise of unusual care and discretion. The protection of sources and methods is a means to protect the vital interests of the U.S. and is not an end in itself. Consequently, over the past four years the intelligence oversight committees have consulted with the executive branch to determine those areas where, on the basis of past experience and a reasonable sense of future needs, there might be good and sufficient reason to withhold information when some compelling reasons arise from extraordinary circumstances where the vital interests of the U.S. are involved.

The clear intent of these two principles is to ensure that the legitimate concerns of both branches and the interests of the nation as a whole are respected. Neither the executive branch nor the legislative branch is giving up any powers, authorities or rights it may have; rather, both branches recognize the powers, rights, authorities and duties of the other. Through this legislation there are established procedures by which both branches may carry out their separate and joint responsibilities and duties to protect the nation through the use of intelligence information.

Four duties are imposed upon executive branch officials. First, they are to keep the select committees "fully and currently in-

formed" of intelligence activities.[1] Second, they are to provide advance information to the select committees regarding "significant anticipated intelligence activities," such as covert operations and certain other intelligence activities specified in consultation with the executive branch. Third, they are to furnish any information or material concerning intelligence activities requested by the select committees in order to carry out the select committees' authorized responsibilities. Fourth, they are to provide timely reports on illegal intelligence activities and significant intelligence failures.

Provision is also made for procedures to be followed in those rare, extraordinary and compelling circumstances when advance information might be withheld from the select committees. If the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital national interests, such prior notice is to be given to eight congressional leaders. If prior notice of a covert operation is not given, the president must fully inform the select committees in a timely fashion and provide a statement of the reasons for not giving prior notice.

The statute authorizes the President and the select committees to establish the procedures necessary for carrying out these requirements. In addition, each House is to establish procedures for protecting sensitive information furnished under the statute from unauthorized disclosure, and for notifying each House and other appropriate committees of matters requiring their attention.

Concern was expressed by the House conferees that the provisions for the protection of information from "unauthorized disclosure" might be construed as authority to withhold information from the select committees on the grounds that providing the information to the select committees would constitute unauthorized disclosure of classified information or information relating to intelligence sources and methods. Therefore, a final provision is included to make clear that nothing in the statute may be construed in such a manner.

As stated in the report to accompany S. 2284, a separate Senate-passed bill the provisions of which are identical to the Senate oversight provisions (S. Rept. 96-730), the select committees "are authorized to receive such information." The authority of the select committees to receive highly sensitive information is reflected in other contexts as well. For example, the recently reported House and Senate versions of the Intelligence Identities Protection Act, which provides criminal penalties for disclosing identities of covert agents to any individual not authorized to receive classified information, defines the term "authorized" to include "having authority, right, or permission pursuant to the provisions of . . . any rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities." The conferees expect that mutual agreement on the need to protect vital intelligence sources and methods may result in decisions that certain information, such as the identities of covert agents, need not be furnished to the select committees in particular circumstances. Although differences have occasionally arisen under the current procedures, and

[1] The conferees agree that the term "intelligence activities" is intended to encompass the full range of intelligence and intelligence-related activities within the jurisdiction of the two select committees.

may arise on future occasions after the enactment of this statute, it is the view of the conferees that, as in the past such differences must be resolved on the basis of comity and mutual understanding Moreover, both branches agree that the select committees continue to have the right to obtain information they require by subpoena As stated in the Senate report accompanying S. 2284, the statute does not provide a statutory right to withhold information from Congress when subpoenaed by Congress.

The House agreed to the Senate provision with an amendment.

TITLE OF THE BILL

The conferees agreed to the title of the House bill which reads: An Act to authorize appropriations for fiscal year 1981 for the intelligence and intelligence-related activities of the United States Government, for the Intelligence Community Staff, and for the Central Intelligence Agency Retirement and Disability System, and for other purposes.

EDWARD P. BOLAND,
BILL D. BURLISON,
CLEMENT J. ZABLOCKI,
NORMAN Y. MINETA,
J. K. ROBINSON,
G. WILLIAM WHITEHURST,

For consideration of matters within the jurisdiction of the Armed Services Committee under clause 1(c) of Rule X:

MELVIN PRICE,
RICHARD H. ICHORD,
BOB WILSON,

Solely for consideration of such provisions of sections 408 and 409 and modifications thereof as fall within the jurisdiction of the Foreign Affairs Committee under clause 1(h) of Rule X:

DANTE B. FASCELL,
WM. S. BROOMFIELD,
EDWARD J. DERWINSKI,
*Managers on the part of the House.*

BIRCH BAYH,
ADLAI E. STEVENSON,
WALTER D. HUDDLESTON,
DANIEL K. INOUYE,
HENRY M. JACKSON,
DANIEL PATRICK MOYNIHAN,
JOSEPH R. BIDEN, JR.,
BARRY GOLDWATER,
CHARLES McC. MATHIAS, JR.,
JOHN H. CHAFEE,
MALCOLM WALLOP,
DAVID DURENBERGER,
RICHARD G. LUGAR,

S. 2284, Intelligence Oversight Act of 1980



cluding those words] is to require prior consultation between the Committee and the intelligence community, but not prior consent or approval."[2]

*Section 501 (a) (1) (B)—Limited Prior Notice*

Provision has been made in (a) (1) (B) 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 Chairmen and ranking minority members of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, the Speaker and the minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

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. This limited prior notice calls only for prior consultation, and in no way suggests prior approval.

*Section 501 (a) (2)—Access to Information*

"SEC. 501. (a) . . . the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall—

* * * * * * *

(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 Select Committees in order to carry out its authorized responsibilities;"

Section 501 (a) (2) states that agency heads are to furnish the committee any document or information which the agency has in its possession, custody, or control. The purpose of this section is to supplement subsection (a) (1), which requires that the committees be kept fully and currently informed, by permitting the committees to obtain information upon request that is relevant to its authorized responsibilities.

Many of the mandated duties of the Committee do not require access to sources and methods, but some do. In the usual course of the Committee work, the identities of human sources are not needed, nor have they been requested. A hypothetical case would serve to illustrate the point. An ally of the United States has a source highly placed in the cabinet of Ruritania. This ally is willing to give the information to the United States provided that the nature of the source is disclosed to the President and the Director of Central Intelligence only and no one else. The information is of critical importance to the United States. The President therefore would agree to such a condition, and the commit-

[2] Congressional Record, 94th Cong., 2d session, May 13, 1976, v. 122, p. 7261.

tees would not seek nor expect to receive the source of such information. However, in the event that the information turned out to be spurious and was actually contrived by the Ruritanian government and caused harm to the United States in some way, the intelligence oversight committees would, in the course of their proper inquiries, have every right to learn the identity of the source. This underlines the general approach of the oversight committee. The right of full access to any intelligence information implies some measure of discretion. It does not mean trucking the entire product of the intelligence community each day to the Committee offices. It does mean, however, that should the Committee believe it necessary, in the conduct of its mandated duties, all the information it desires shall be supplied consistent with subsection (a). The occasions when any information including sources and methods might be sought are almost always confined to abuse or misuse situations or in the case of intelligence failures. The Committee has exercised this authority on a number of occasions over the past five years without any unauthorized disclosure of classified information or sensitive sources and methods.

*Section 501(a)(3)—Reports on Illegal Activities or Significant Intelligence Failures*

"SEC. 501. (a) . . . The Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall—

* * * * * * *

(3) report in a timely fashion to the Select 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."

Section 501(a)(3) provides that the head of each intelligence agency is to report any intelligence activity that violates any law of the United States, including violation of any Executive Order or Presidential Directive, or significant violation of an entity rule or regulation issued pursuant to law. A report would be made to the intelligence oversight committees upon confirmation of any violation, and would include a description of what corrective action has been taken or is expected to be taken by the entity with respect to such violations.

This requirement parallels similar language in section 11(c) of Senate Resolution 400 for reporting activities which "constitute violations" and in section 3-403 of Executive Order 12036 for reporting activities that "are illegal." It is not intended in any way to affect or alter the responsibilities and practices of the Executive branch for reporting to appropriate authorities, including the Attorney General, evidence of possible violations and activities which raise questions of legality. (See, *inter alia*, sections 1-706, 1-709, 3-102, 3-2, and 3-3 of Executive Order 12036.)

The Director of Central Intelligence and the head of each agency are also to report to the intelligence oversight committees each significant intelligence failure in the work of that entity or for which that entity is responsible; this report would likewise contain a description of any corrective actions which have been taken or which are planned to ensure that such a failure does not recur. Significant fail-

THE WHITE HOUSE

WASHINGTON

November 4, 1982

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Procedures Governing Responses to Congressional Requests for Information

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities. Legitimate and appropriate claims of privilege should not thoughtlessly be waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties, with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be followed whenever Congressional requests for information raise concerns regarding the confidentiality of the information sought:

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or

other aspects of the performance of the Executive Branch's constitutional duties.

2. If the head of an executive department or agency ("Department Head") believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.

3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney General and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.

4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.

5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, and that the request itself does not constitute a claim of privilege.

6. If the President decides to invoke executive privilege, the Department Head shall advise the

requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

Any questions concerning these procedures or related matters should be addressed to the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, and to the Counsel to the President.

Ronald Reagan


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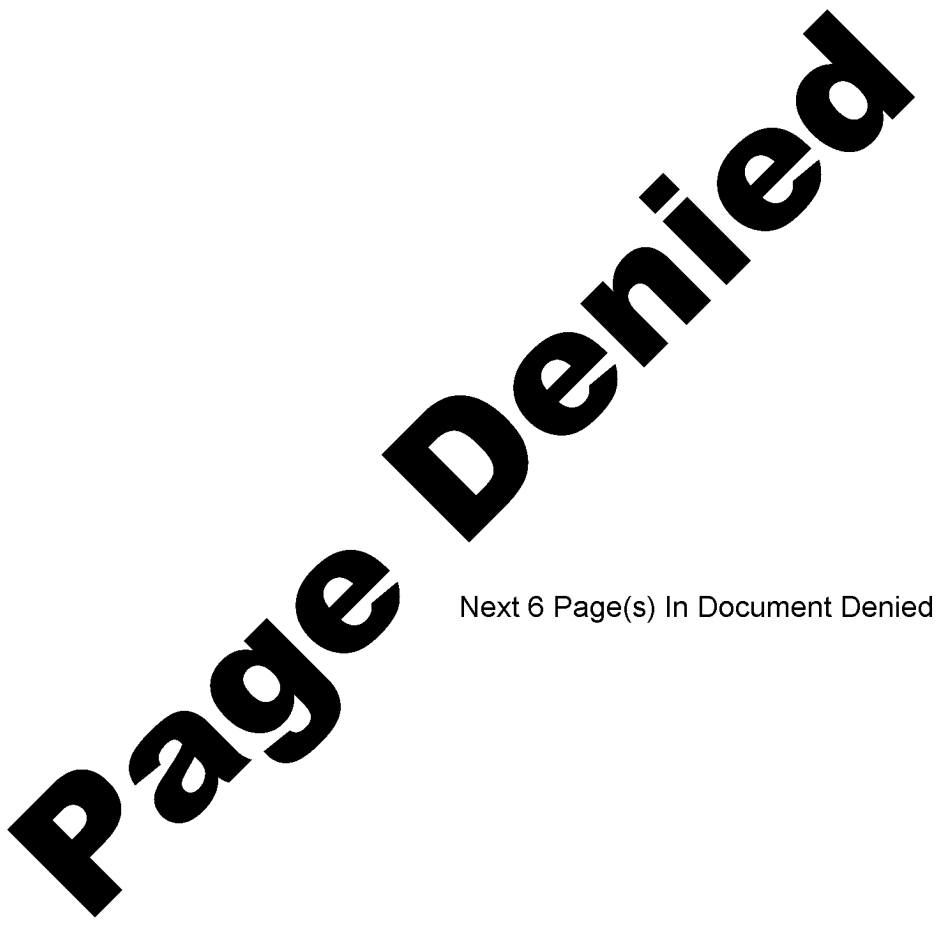


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100TH CONGRESS
1ST SESSION

# S. 1818

To make requirements for the preparation, and transmittal to the Congress, of Presidential findings for certain intelligence operations; to provide mandatory penalties for deceiving Congress; and to establish an independent inspector general for the Central Intelligence Agency.

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IN THE SENATE OF THE UNITED STATES

OCTOBER 27 (legislative day, OCTOBER 16), 1987

Mr. SPECTER introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

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# A BILL

To make requirements for the preparation, and transmittal to the Congress, of Presidential findings for certain intelligence operations; to provide mandatory penalties for deceiving Congress; and to establish an independent inspector general for the Central Intelligence Agency.

*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 "National Security Reform Act of 1987".

**SEC. 2. PRESIDENTIAL FINDINGS ON CERTAIN INTELLIGENCE OPERATIONS.**

Subsection (b) of section 501 of the National Security Act of 1947 is amended to read as follows:

"(b)(1) No covert operations in foreign countries, other than operations intended solely for obtaining necessary intelligence, may be approved, conducted, or funds appropriated or expended for, by or on behalf of the executive branch, unless and until the President makes a finding that each such covert operation is important to the national security of the United States. Operations by or on behalf of the executive branch include action by any officer or employee of the United States Government or any foreign government or individual acting at the request of or with the concurrence of any officer or employee of the United States Government. Each such covert operation shall be considered a significant anticipated intelligence activity for the purposes of this section.

"(2) Each finding of the President under paragraph (1)—

"(A) shall immediately be reduced to writing and signed by the President, except that the President may make such finding orally if the President determines that immediate action by the United States is required to deal with an emergency situation affecting vital

United States interests and that time does not permit the drafting of a written finding;

"(B) any oral finding as provided for under (A) shall be reduced to writing immediately after the action is orally approved with the written finding to be completed no later than twenty-four hours after the making of the oral finding;

"(C) the written version of the oral finding shall include a statement of the reasons of the President for having first proceeded with an oral finding;

"(D) shall be effective only with respect to operations beginning after the finding was made by the President.

"(3) The President shall contemporaneously, but in no event later than twenty-four hours after the making of a written finding, inform the intelligence Committees of, and provide a copy of, any such finding which authorizes covert action unless the President determines it is essential to limit such notification to meet extraordinary circumstances affecting vital interests of the United States in which event oral notice shall contemporaneously, but in no event later than twenty-four hours after the making of an oral or written finding, be given 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.".

SEC. 3. DECEIVING CONGRESS OR ITS COMMITTEES.

Whoever being an officer or employee of the United States, in any matter within the jurisdiction of the Senate or the House of Representatives of the United States, or any committee or subcommittee thereof, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statement or misrepresentation, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement of entry shall be imprisoned for not less than one year nor more than five years and may be fined not more than $10,000. Liability under the provisions of this section may be avoided by anyone who notifies in writing the committee or subcommittee of the Senate or House of Representatives of the United States of any violation hereof and provides the truthful information in its place within five days.

SEC. 4. INSPECTOR GENERAL FOR THE CENTRAL INTELLIGENCE AGENCY.

(a)(1) PURPOSE; ESTABLISHMENT.—In order to create an independent, objective and congressionally accountable unit to conduct and supervise investigations and audits relating to programs and operations of the Central Intelligence

Agency, there is hereby established in the Central Intelligence Agency or Office of Inspector General.

(2) APPOINTMENT AND REMOVAL.—There shall be at the head of the Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate. The inspector general shall report to and be under the general supervision of the Director of Central Intelligence or the officer next below in rank but not any other officer of the Central Intelligence Agency.

(3) The Director may prohibit the inspector general from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena, only concerning ongoing operations, and only if he determines that such prohibition is necessary to protect vital national security interests of the United States.

(4) If the Director exercises any power under subsection (a)(3) of this section, he shall submit a classified statement of the reasons for the exercise of the power within seven days to the Select Committee on Intelligence of the Senate and Permanent Select Committee on Intelligence of the House of Representatives.

(5) The inspector general may be removed from office only by the President. The President shall immediately communicate in writing to both Houses of Congress the reasons for any such removal.

(6) DUTIES AND POWERS.—It shall be the duty and responsibility of the inspector general appointed under this Act—

(A) to provide policy direction for and to conduct, supervise, and coordinate investigations and audits relating to the programs and operations of the Central Intelligence Agency to assure they are conducted efficiently and in accordance with applicable law and regulations;

(B) to keep the Director and the Congress fully and currently informed, by means of reports required by subsection (8) and otherwise, concerning violations of laws and regulations, fraud, and other serious problems, abuses, and deficiencies and to report the progress made in implementing corrective action.

(7) The inspector general shall have the power to issue subpoenas to carry out his work.

(8) REPORTS.—The inspector general shall not later than April 30 and October 30 of each year, prepare a classified semiannual report summarizing the activities of the Office during the immediately preceding six-month periods ending March 31 and September 30.

(9) Classified semiannual reports of the inspector general shall be furnished to the Director not later than April 30 and October 30 of each year and shall be transmitted by

him to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives within thirty days after receipt, together with any comments he deems appropriate.

(10) The inspector general shall report immediately, serious problems, violations of law or regulations or serious deficiencies relating to the administration of programs and operations of the Agency. The Director shall transmit any such report to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives within seven calendar days, together with any comments he deems appropriate.

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100TH CONGRESS
1ST SESSION

# S. 1820

To improve the objectivity, reliability, coordination and timeliness of national foreign intelligence through a reorganization of positions, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

OCTOBER 27 (legislative day, OCTOBER 16), 1987

Mr. SPECTER introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

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# A BILL

To improve the objectivity, reliability, coordination and timeliness of national foreign intelligence through a reorganization of positions, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SHORT TITLE

SECTION 1. This Act may be cited as the "National Intelligence Reorganization Act of 1987".

SEC. 2. Section 101(a) of the National Security Act of 1947 is amended in the fourth undesignated paragraph—

(1) by striking out "and" at the end of clause (6);

(2) by striking out the period at the end of clause (7) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following:

"(8) The Director of National Intelligence in his role as primary adviser on intelligence.".

SEC. 3. Title I of the National Security Act of 1947 is amended by inserting new section 102.

"DIRECTOR OF NATIONAL INTELLIGENCE

"SEC. 102. (a)(1) There are hereby established the positions of Director of National Intelligence (hereafter in this Act referred to as the "DNI") and the Deputy Director of National Intelligence who shall each be appointed by, serve at the pleasure of, the President, by and with the advice and consent of the Senate.

"(2) The principal role of foreign intelligence and of the agencies which provide such intelligence is to ensure the provision of objective, reliable, coordinated, and timely information upon which the President and other senior foreign policy makers may base sound foreign policy decisions. To ensure such provision, the DNI shall serve as the nation's senior intelligence officer and primary adviser to the President on foreign intelligence matters. Accordingly, the DNI shall be freed from any duties involving the formulation of foreign policy and the implementation of special activities except as may be specifically authorized by this Act. The Deputy Director of National Intelligence shall act for, and exercise the powers of, the Director during his absence or disability.

"(3) The DNI shall be responsible directly to the President and the National Security Council.

"(4) Upon request, any department, agency, or other component of the United States Government involved in intelligence or intelligence-related activities shall detail for the use of the DNI such staff as may be necessary to carry out the duties of the DNI under this section.

"(b) To carry out his responsibilities under this section, the DNI shall—

"(1) ensure that such objective, reliable and coordinated national foreign intelligence is provided to the President and officials in the executive and legislative branches in a timely manner;

"(2) oversee and provide direction to the national foreign intelligence activities of all agencies, departments, offices, and other entities of the intelligence community.

"(3) develop such strategy, objectives and guidance for the intelligence community as will enhance capabilities for responding to expected future needs for national foreign intelligence;

"(4) provide guidance for national foreign intelligence program and budget development to program managers, heads of agencies, departments, offices, and other entities of the intelligence program and budget;

"(5) review, evaluate, approve, and submit, to the Congress through the President, a national foreign intelligence program and budget;

"(6) review and approve all requests for reprogramming national foreign intelligence funds;

"(7) develop collection strategies, objectives, and targets in the intelligence community for national foreign intelligence requirements and priorities established by the National Security Council;

"(8) direct, control, and manage the tasking of national foreign intelligence collection activities;

"(9) coordinate, produce, and disseminate all national foreign intelligence and, levy analytic tasks on all intelligence community production organizations and entities in consultation with those organizations and entities. Intelligence of the departments and agencies of the Government relating to the national security shall be open to the audit of the DNI, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government, shall be made available to the DNI for correlation, evaluation, and dissemination;

"(10) ensure that appropriate mechanisms for competitive analysis are developed so that diverse

views and judgments within the intelligence community are brought to the attention of national policymakers;

"(11) conduct jointly with the Secretary of Defense and the Chairman of the Joint Chiefs of Staff, military net assessments which allow for independent judgments by the DNI on areas critical to United States national security, strategy, tactics, or specific weapon systems;

"(12) oversee special activities on a periodic basis for compliance with established laws and regulations.

"(13) promote the development and maintenance of services of common concern by designated intelligence organizations on behalf of the intelligence community;

"(14) formulate policies concerning foreign intelligence and counterintelligence arrangements with foreign governments, coordinate foreign intelligence and counterintelligence relationships between agencies of the intelligence community and the intelligence or internal security services of foreign governments, and establish procedures governing the conduct of liaison by any agency, department, office or other entity of the United States Government with such services;

"(15) establish security countermeasure standards for the safeguard of foreign intelligence systems and information;

"(16) protect intelligence sources and methods from unauthorized disclosure;

"(17) establish appropriate staffs, committees, or other advisory groups to assist in the execution of the Director's responsibilities; and

"(18) monitor national foreign intelligence program implementation and conduct program and performance audits and evaluations.".

SEC. 4. (a) Title I of the National Security Act of 1947 is amended by changing old section 102 to be new section 102A with the following changes:

(1) by inserting the words "DIRECTOR OF THE" before the caption "CENTRAL INTELLIGENCE AGENCY".

(b) Section 102A, subsection (a) of the National Security Act of 1947 is amended—

(1) by inserting after the words" . . . National Security Council", the words "and Director of National Intelligence";

(2) by striking out "Director of Central Intelligence" and inserting in lieu thereof "Director of the Central Intelligence Agency"; and

(3) by striking out "Deputy Director of Central Intelligence" and inserting in lieu thereof "Deputy Director of the Central Intelligence Agency".

(c) Section 102A subsection (a) of such Act is further amended—

(1) by inserting "(1)" immediately after "(a)";

(2) by striking out the proviso and the colon immediately proceding such proviso at the end of the second sentence and inserting in lieu thereof a comma and the following:

"except that at no time shall the two positions of the Director and Deputy Director be occupied simultaneously by—

"(a) commissioned officers of the armed services, whether in an active or retired status; or

"(b) individuals not having previously served in career positions in the Intelligence Community;

"(c) the term of service of the Director shall be seven years. The Director may not be reappointed and may be removed by the President only for cause; and

"(d) the provisions of 102A subsections (a)(1) shall apply to the service of the first Director and the first Deputy Director of the Central Intelligence Agency appointed after the date of enactment.".

(d) Section 102A, subsections (b) and (c). References in these sections to the Director or Deputy Director of Central

Intelligence shall be deemed to be references to the Director or Deputy Director of the Central Intelligence Agency.

(e) Section 102A subsection (d) of such Act is amended to read as follows:

"(d) For the purpose of carrying out of the Agency's intelligence activities in the interests of national security, it shall be the duty and responsibility of the Agency, under the management direction of the Director of the Central Intelligence Agency:

"(1) to collect, produce, and disseminate foreign intelligence and counterintelligence, including information not otherwise obtainable, and to coordinate the collection of foreign intelligence or counterintelligence within the United States with the Federal Bureau of Investigation as authorized by law or procedures established by the Attorney General: *Provided*, That the Central Intelligence Agency shall have no police, subpoena, law enforcement powers, or internal security functions;

"(2) to conduct counterintelligence activities outside the United States and, without assuming or performing any internal security functions, conduct counterintelligence activities within the United States in coordination with the Federal Bureau of Investigation, as

authorized by law and procedures established by the Attorney General;

"(3) to coordinate counterintelligence activities and the collection of information not otherwise obtainable when conducted outside the United States by other departments and agencies;

"(4) to conduct special activities approved by the President;

"(5) to conduct services of common concern for the Intelligence Community as directed by the National Security Council and the DNI;

"(6) to carry out or contract for research, development, and procurement of technical systems and devices relating to authorized functions;

"(7) to protect the security of its installations, activities, information, property, and employees by appropriate means, including such investigations of applicants, employees, contractors, and other persons with similar associations with the Central Intelligence Agency as are necessary; and

"(8) to conduct such administrative and technical support activities within and outside the United States as are necessary to perform the functions described in paragraphs (1) through (7), including procurement and essential cover and proprietary arrangements.".

SEC. 5. (a) Section 5313 of title 5, United States Code, is amended by—

(1) changing Director of Central Intelligence to read Director of National Intelligence;

(2) adding at the end thereof the following:

"Director of the Central Intelligence Agency.".

(b) Section 5314 of title 5, United States Code, is amended by adding at the end thereof the following:

"Deputy Director of the Central Intelligence Agency.".

SEC. 6. The provision of section 102a of the Act relating to the Director of the Intelligence Community staff is repealed.

SEC. 7. The Central Intelligence Act of 1949 is amended by changing references to the Director or Deputy Director of Central Intelligence to mean the Director or Deputy Director of the Central Intelligence Agency.

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**1962 Amendment.** Pub.L. 87-420, § 17(d), Mar. 20, 1962, 76 Stat. 42, added item 1027.

**1951 Amendment.** Act Oct. 31, 1951, c. 653, § 25, 65 Stat. 720, substituted, in item 1012, "Public Housing Administration" for "United States Housing Authority".

**1949 Amendment.** Act May 24, 1949, c. 139, §§ 18, 19, 63 Stat. 92, corrected spelling of "1016. Acknowledgement etc.", and substituted "officers" for "offices" in "1019. Certificates by consular officers".

**Cross References**

Alien registration, fraud and false statements, see section 1306 of Title 8, Aliens and Nationality.

Carriers' reports to Interstate Commerce Commission, false entries, section 20(7) of Title 49, Transportation.

China Trade, false or fraudulent statements prohibited, see section 155 of Title 15, Commerce and Trade.

## § 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 749.

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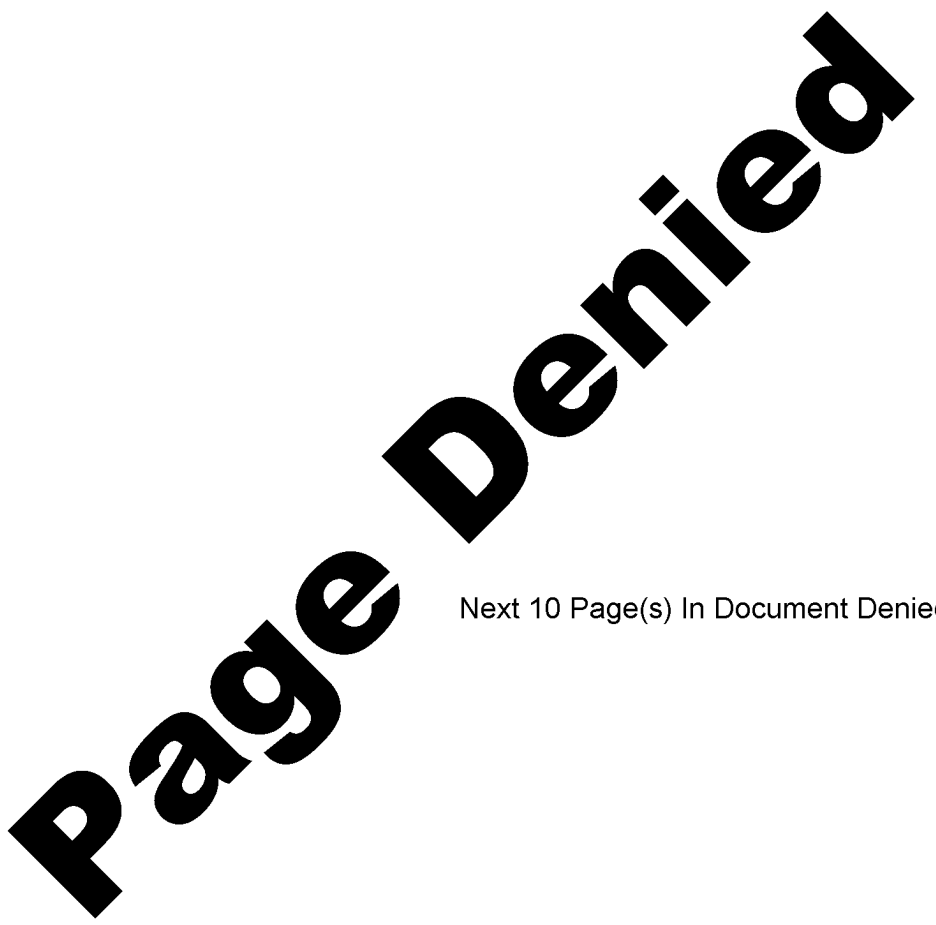


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100TH CONGRESS
1ST SESSION

# S. 1852

IN THE SENATE OF THE UNITED STATES

Mr. FOWLER introduced the following bill; which was referred to the SELECT COMMITTEE ON INTELLIGENCE

# A BILL

To amend the National Security Act of 1947, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the "Intelligence Activities Oversight Improvement Act".

SEC. 2. Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is repealed.

SEC. 3. (a) Section 501(a)(1) of the National Security Act of 1947 (50 U.S.C. 413(a)(1)) is amended to read as follows:

"(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 the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity;".

(b) Section 501(b) of the National Security Act of 1947 (50 U.S.C. 413(b)) is amended to read as follows:

"(b)(1) No special activity may be initiated by any department, agency, or entity of the United States, or by any private entity acting on behalf of the United States, unless and until the activity has been approved by the President and the President has made a written finding that, in the President's opinion—

"(A) such activity is essential to the national defense or the conduct of the foreign policy of the United States;

"(B) such activity is consistent with, and in support of, the publicly avowed foreign policy of the United States;

"(C) the anticipated benefits of such activity justify the foreseeable risks and likely consequences of its disclosure to a foreign power;

"(D) overt or less sensitive alternatives would not be likely to achieve the intended objectives; and

"(E) the circumstances require the use of extraordinary means.

Such written finding shall also designate the department, agency, or entity of the United States, or the private entity acting on behalf of the United States, which is to carry out the special activity, and shall specify the authorized duration (not to exceed 1 year) of the special activity.

"(2) No department, agency, or entity of the United States, or private entity acting on behalf of the United States, may conduct any special activity which is not within a category of special activities authorized by the President under paragraph (5) unless and until the President submits a report to the intelligence committees containing the written finding required by paragraph (1), a description of the nature, scope, and specific objectives of the activity, and a statement of the facts and reasoning supporting each element of the finding.

"(3) If the President determines that limiting the prior notice required by paragraph (2) is essential in order to meet extraordinary circumstances affecting vital interests

of the United States, and that time is of the essence in initiating the special activity, such notice may be limited to the chairmen and ranking minority members of the intelligence committees, the Speaker and the minority leader of the House of Representatives, and the majority and minority leaders of the Senate, but in no case shall such limited notice take place later than 48 hours after the written finding required by paragraph (1). In all such cases the President shall provide a statement of the reasons for not giving prior notice to the intelligence committees.

"(4) After the submission of a report referred to in paragraphs (2) and (3), the President shall provide either intelligence committee such additional information as such committee may request concerning the activity which is the subject of such report, and the National Security Council (or a committee thereof designated by the President) shall be responsible for the supervision of the activity, and shall ensure that such activity remains consistent with the nature, scope, and objectives of the activity as authorized by the President.

"(5) Special activities other than those which involve or may involve elements of high risk, major resources, or serious political consequences may be authorized by the President by category, but such a category of activities may not be authorized unless the President—

"(A) personally finds that activities falling within the category are important to the national security of the United States; and

"(B) reports, before any activity within the category is commenced, a description of the nature and scope of the category and a justification for conducting activities within the category to the intelligence committees.

No funds may be expended for any activity falling within a category authorized under this paragraph until the President has made the finding required under subparagraph (A) and submitted the report required under subparagraph (B).

"(6) After a category of special activities has been authorized by the President and such category has been reported to the intelligence committees pursuant to paragraph (5), the National Security Council (or a committee thereof designated by the President) shall be responsible for the supervision of each activity falling within such category and shall ensure that each such activity remains consistent with the nature and scope of the category as authorized by the President.

"(7) The President shall provide to either intelligence committee such additional information pertaining to specific special activities undertaken within a category of ac-

tivities authorized by the President under paragraph (5) as such committee may request.

"(8) For the purposes of this subsection, the term 'special activity' means any activity conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media, and do not include diplomatic activities or the collection and production of intelligence or related support functions.

"(9) No intelligence activity abroad, other than special activities as defined by paragraph (8) or activities intended solely for obtaining necessary intelligence, may be initiated by any department, agency, or entity of the United States, or by a private entity acting on behalf of the United States, 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 of the nature and scope of the activity to the intelligence committees.

"(10) This subsection shall not apply to activities initiated by the United States pursuant to a declaration of war approved by the Congress.

"(11) The National Security Council shall not engage in or carry out special activities, except for the supervisory role provided for in paragraphs (4) and (6).".

SEC. 4. No funds appropriated for any department, agency, or entity of the United States, may be expended for the purpose, or which will have the effect of supporting, directly or indirectly, any special activity as defined by section 501(b)(8) of the National Security Act of 1947, unless such activity is carried out in accordance with the provisions of section 501 of such Act.


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100TH CONGRESS
1ST SESSION

# S. 1458

To clarify and restate the Comptroller General's authority to audit the financial transactions and evaluate the programs and activities of the Central Intelligence Agency, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JULY 1 (legislative day, JUNE 23), 1987

Mr. GLENN introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

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# A BILL

To clarify and restate the Comptroller General's authority to audit the financial transactions and evaluate the programs and activities of the Central Intelligence Agency, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "General Accounting Office-Central Intelligence Agency Audit Act of 1987".

SEC. 2. Title 31, United States Code, is amended by inserting after section 3523 the following new section:

**§ 3523a. Audit of Central Intelligence Agency activities**

"(a) Notwithstanding any other provision of law, the Comptroller General shall audit the financial transactions and shall evaluate the programs and activities of the Central Intelligence Agency—

"(1) on the initiative of the Comptroller General; or

"(2) when requested by the Chairman or the ranking minority member of the Select Committee on Intelligence of the Senate or the Permanent Select Committee on Intelligence of the House of Representatives.

"(b) Whenever the Comptroller General conducts an audit or evaluation pursuant to subsection (a), the Comptroller General shall provide the results of such audit or evaluation only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Director of Central Intelligence.

"(c) Notwithstanding any other provision of law, the Comptroller General may inspect and copy any relevant books, documents, papers, records, other information, including written or recorded information of all kinds, and property which belongs to, or is in the possession or control of, the Central Intelligence Agency in order to perform audits and evaluations pursuant to subsection (a). The Comptroller Gen-

eral shall also be provided access to the officers and employees of the Central Intelligence Agency at such reasonable times as the Comptroller General considers necessary to carry out such audits and evaluations. Notwithstanding the preceding sentence, the Comptroller General shall not be provided access to any officer or employee of the Central Intelligence Agency if the President determines that access to any such officer or employee is not in the national interest. The President shall prepare and transmit a report to the Comptroller General and the chairman and ranking minority member of each committee referred to in subsection (a)(2) of this section setting forth his determination. The President may not delegate the making of a determination under this subsection to any officer or employee of the Executive Branch.

"(d)(1) After consultation with the Select Committee on Intelligence of the Senate and with the Permanent Select Committee on Intelligence of the House of Representatives, the Comptroller General shall establish procedures to protect from unauthorized disclosure all classified and other sensitive information furnished to the Comptroller General or his representatives under this section.

"(2) All workpapers of the Comptroller General and all records and property of the Central Intelligence Agency that the Comptroller General uses during an audit or evaluation

under this section shall remain in facilities provided by the Central Intelligence Agency. Procedures established by the Comptroller General pursuant to paragraph (1) of this subsection shall include provisions specifying the method and duration of any temporary removal of workpapers from facilities provided by the Central Intelligence Agency.

"(3) Before initiating an audit or evaluation under this section, the Comptroller General shall provide the Director of Central Intelligence with the names and other relevant information concerning each officer and employee of the General Accounting Office who may have access to, or otherwise be provided with, classified or other sensitive information in connection with an audit or evaluation for purposes of security clearance reviews. The Director of Central Intelligence shall complete the necessary security clearance reviews on an expedited basis.

"(4) The Comptroller General shall provide the Director of Central Intelligence with the name of each officer and employee of the General Accounting Office who has obtained a security clearance from the Central Intelligence Agency and to whom, upon proper identification, the officers, employees, records, and property of the Central Intelligence Agency shall be made available in carrying out this section.

"(e) This section may be superseded only by a law enacted after the date of enactment of this section specifically repealing or amending this section.

"(f) The authority provided in this section is in addition to the authority that the Comptroller General has to investigate, audit, and evaluate the financial transactions, programs, and activities of any other establishment or agency of the Government of the United States.".

SEC. 3. (a) Section 3524 of title 31, United States Code, is amended—

(1) in the first sentence of subsection (a)(1), by striking out "The" and inserting in lieu thereof the following: "Except with respect to audits or evaluations of the Central Intelligence Agency as provided in section 3523a of this title, the";

(2) in subsection (c), by inserting "(other than activities conducted by the Central Intelligence Agency)" after "activities";

(3) by amending subsection (d) to read as follows:

"(d) This section does not apply to expenditures under section 102, 103, 105(d)(1), (3), or (5), or 106(b)(2) or (3) of title 3."; and

(4) in subsection (e), by striking out "or a financial transaction under section 8(b) of the Central Intelligence Act of 1949 (50 U.S.C. 403j(b))".

(b) Section 8(b) of the Central Intelligence Act of 1949 is amended—

(1) by inserting "(other than section 3523a. of title 31, United States Code)" after "Government funds"; and

(2) by adding at the end thereof the following new sentence: "The Comptroller General shall audit expenditures made for objects of a confidential, extraordinary, or emergency nature to be accounted for solely on the certificate of the Director.".

(c) Section 716(d)(1)(A), title 31, United States Code, is amended by inserting "(other than activities conducted by the Central Intelligence Agency)" after "activities" the first place it appears.

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100TH CONGRESS
1ST SESSION

# S. 1235

To amend the National Security Act of 1947 to provide that the term of service of the Director of Central Intelligence shall be seven years, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

MAY 19 (legislative day, MAY 13), 1987

Mr. BYRD introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

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# A BILL

To amend the National Security Act of 1947 to provide that the term of service of the Director of Central Intelligence shall be seven years, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a), section 102(a) of the National Security Act of 1947 (50 U.S.C. 403(a)) is amended—

(1) by inserting "(1)" immediately after "(a)";

(2) by striking out the proviso and the colon immediately preceding such proviso at the end of the second sentence and inserting in lieu thereof a comma and the following: "except that at no time shall the

two positions of the Director and Deputy Director be occupied simultaneously by—

"(A) commissioned officers of the armed services, whether in an active or retired status, or

"(B) individuals who were in the employ of the Agency for any period of time during the seven-year period immediately preceding the date on which they are nominated by the President for such positions."; and

(3) by adding at the end thereof the following new paragraph:

"(2)(A) The term of service of the Director of Central Intelligence shall be 7 years. The Director may not serve more than one seven-year term.

"(B) The term of service of the Deputy Director of Central Intelligence shall be 7 years, except that, in the absence or disability of the Director of Central Intelligence, the Deputy Director shall continue to serve until an individual has been appointed Director.".

(b)(1) The amendment made by subsection (a)(3), insofar as it relates to the Director of Central Intelligence, shall apply to the service of the first Director appointed after the date of enactment of this Act.

(2) The amendment made by subsection (a)(3), insofar as it relates to the Deputy Director of Central Intelligence,

shall apply to the service of the first Deputy Director appointed after the date of enactment of this Act.

(3) The amendment made by subsection (a)(2) shall apply with the first appointment of a Director or Deputy Director of Central Intelligence after the date of enactment of this Act.

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