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Remarks: Attached copy furnished for your information and file, from Mr. Gates.

STAT

Executive Secretary

21 Mar 88

Date

3637 (10-81)

Washington, D.C. 20505

DDCI would like
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ER 1235X-88

Center for Strategic & International Studies
Washington, DC

March 15, 1988

The Honorable William Webster
The Director of Central Intelligence
Central Intelligence Agency
Washington, D.C. 20505

Dear Judge Webster:

In late January -- at the instigation of Congressman Henry Hyde (R-Ill.), the ranking minority member on the House Permanent Select Committee on Intelligence -- I was called by Tom Smeeton, that committee's Minority Counsel. Mr. Smeeton, at Congressman Hyde's behest, asked me to testify on H.R. 3822 and give my views on that proposed legislation, HPSCI Chairman Stokes' "Intelligence Oversight Act of 1987," at a formal hearing.

Mr. Smeeton initially wanted me to testify at a 4 February hearing, but that date conflicted with an already-scheduled engagement. He then proposed 24 February, but I had to leave for England on that day to give an also previously-scheduled lecture at Oxford. We hence agreed that I would testify at the hearings to be held on Thursday, 10 March.

The more I studied H.R. 3822, the more convinced I became that it was a bad and potentially very dangerous piece of proposed legislation, as was the similar and only slightly less objectionable parallel Senate bill, S. 1721. After consulting with and drawing on the suggestions of various friends and former colleagues -- including Walter Pforzheimer, who was, I believe, the Agency's first Legislative Counsel, former DCI Richard Helms, and my CSIS office suite-mate, James R. Schlesinger, also a former DCI -- I wrote a detailed critique of H.R. 3822 that eventually became 68 double-spaced pages long, in final form. This document was obviously much too long to use as a "statement", but the HPSCI's Republican staff urged me to submit it <u>in toto</u>, and uncut, for the record -- which I did when I testified on 10 March.

For your and the Agency's information and records, I am sending you -- and am also sending your Deputy DCI Robert Gates (who used to work for me) -- a copy of the 10 March hearings witness list, a copy of my full "submission" (the above-mentioned critique), and a copy of my actual statement, most of which was drawn or directly excerpted from the "submission".

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One of the many things I tried to do in the latter, incidentally, was underline and support the objections you very properly and cogently raised with respect to the definition of "special activities" given in H.R. 3822's proposed sub-section 503(e).

To my perhaps slightly less than totally dispassionate eye, your 24 February testimony was excellent, right on the mark, and admirably restrained. I hope the HPSCI's Legislative Sub-committee and the full Committee will take it to heart. I also hope my own submissions have the effect of supplementing and supporting yours.

With best wishes and warmest regards,

Sincerely,

George A. Carver, Jr.
John M. Olin Senior Fellow

Attachments a/s

cc: The DDCI, w/attachments

HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE HEARING

MARCH 10, 1988

WITNESS LIST

The Honorable Frank C. Carlucci
Secretary of Defense

PANEL

Lieutenant General Brent Scowcroft, USAF (Ret.), National Security Adviser to President Ford

Dr. George A. Carver, Jr., John M. Olin Senior Fellow at The Center for Strategic and International Studies

Dr. Gregory Treverton, Senior Fellow, Council on Foreign Relations

STATEMENT OF

GEORGE A. CARVER, JR.

JOHN M. OLIN SENIOR FELLOW

CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES

ON

H.R. 3822

BEFORE THE

SUBCOMMITTEE ON LEGISLATION
OF THE
PERMANENT SELECT COMMITTEE
ON INTELLIGENCE

U.S. HOUSE OF REPRESENTATIVES

March 10, 1988

Mr. Chairman and Distinguished Members:

I am honored by your invitation to appear today to comment not only on the specific bill you are considering, H.R. 3822, but also on the larger issues addressed in that proposed legislation.

These larger issues impinge directly on our nation's security and even its chances of survival in this strife-ridden and now thermonuclear world. As we all know, it is not easy for an open democracy, such as ours, to have the kind of effective intelligence structure our nation needs -- one that is capable of protecting our democratic freedoms but does not curtail or, even worse, subvert them. These are issues to which I devoted the first twenty-six years of my professional life and in which, as a citizen, I have an abiding interest. It is a pleasure, as well as a privilege, to discuss them with this sub-committee. I feel confident that as fellow citizens we have common goals and objectives; for the issues here involved transcend personal, parochial or partisan considerations. Our differences, and your differences among yourselves, will be over the optimum means of achieving these common goals, and the best way of resolving the complex, thorny questions these issues, in a democracy, inevitably pose.

The matters addressed in H.R. 3822 are of enormous importance, as well as complexity. The time you have available

in this hearing for considering them, particularly the time you can allocate to any single witness, is necessarily constrained. I have hence separately submitted, in writing -- for the record and for your consideration, at your convenience -- my detailed comments on H.R. 3822 and the issues with which it deals. In this orally-presented summary statement, I will draw on that fuller submission to highlight some points to which I particularly want to direct your attention.

In no small measure, the stimulus for H.R. 3822 and other proposed bills dealing with intelligence matters, in both Houses, was eminently understandable Congressional concerns generated by what has come to be known as the Iran-Contra Affair. In this context, however, I would respectfully urge this sub-committee to keep constantly in mind the judgments expressed in the two opening paragraphs of the "Recommendations" Chapter of the Report of the Congressional Committees which investigated that unhappy imbroglio:

> "It is the conclusion of these Committees that the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance...Thus the principal recommendations emerging from the investigation are not for new laws but for a renewal of the commitment to Constitutional government and sound processes of decision making."

There is one other thing which, at the outset, I would also respectfully ask you to remember. The primary focus of the specific legislation this sub-committee is considering, H.R. 3822, and of current congressional concerns with respect to

intelligence is, quite understandably, covert action. The primary function of the U.S. intelligence community and of the CIA, however, is to collect information, distill it into intelligence by analysis, and then disseminate the fruits of this collection and analysis to those in our government's executive and legislative branches whom that intelligence will aid in the discharge of their Constitutionally-mandated responsibilities.

Covert action is an important intelligence community and, specifically, CIA responsibility, but an ancillary one. Extreme care should be taken to ensure that any "fixing" of covert action does not unintentionally hamper the Agency's and the intelligence community's ability to perform their primary mission -- for example, by putting sensitive intelligence sources and methods at risk. This is particularly important when arms limitation treaties, especially ones involving strategic arms, are being considered and negotiated; for our compliance-monitoring capabilities, in this critical sphere, hinge on the U.S. intelligence community's overall effectiveness.

COVERT ACTION

"Covert action" is a term with such a broad scope that it is impossible to define with any degree of precision. It encompasses everything from encouraging a foreign journalist to write a story or editorial which that journalist might well have

written anyway to supporting, even guiding, fairly large-scale military activities in foreign lands. The usual euphemism for covert action, employed in the legislation you are considering, is "special activities" -- defined in Executive Order 12333 (and elsewhere) as:

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

As the report of the Iran-Contra Congressional Investigating Committees notes, on page 375,

> "This definition excludes diplomatic activities, the collection and production of intelligence, or related support functions."

Intelligence activities, generally, are not easy for an open, democratic society to conduct effectively, especially in peacetime. For a plethora of reasons, covert action is particularly difficult, for a society such as ours, and raises particularly difficult questions -- ones that have no universally satisfactory resolutions, let alone any simple answers.

To begin with, there is a consideration that is not polite to acknowledge or discuss, but which has to be faced. In most cases, conducting covert action involves contravening, infringing upon or directly violating the laws of some other nation or nations, with which we are not in a state of war and with which, indeed, we may have treaty relations whose spirit, if not letter, such covert actions may also contravene. (The same is also true of espionage, but that is another matter.) This does not mean we

should pass a self-denying ordinance; for covert action is a fact of international life. It is something that virtually every nation in the world engages in, often directed at us; and some of our closest allies are among its most indefatigible practitioners. Covert action, however, should be used very circumspectly, far more circumspectly than it sometimes has been -- as Iran-Contra demonstrates all too clearly. When astutely employed, covert action can be a very useful, effective adjunct to policy; but it can never be a substitute for policy -- or for thought.

Such messy complexities, and the troublesome issues they raise, lead some to argue that the United States should eschew or abandon covert action altogether. In a perfect world, this might be desirable; but in the world in which we have no choice but to live, it would be folly. One point on which members of the Congressional Committees investigating the Iran-Contra Affair were agreed is that, to use their Report's words (on page 383), "Covert operations are a necessary component of our Nation's foreign policy". The real question before Congress, and the American people, is not whether our nation should conduct covert action but, instead, how such operations should be handled, controlled and reviewed to ensure that they are soundly conceived, efficiently executed and effective, but do no injury to any of our democratic polity's fundamental interests or basic values.

Congress was quite understandably distressed by the kinds of covert operations mounted during what we now term "Iran-Contra", by these operations' execution and, particularly, by the way in which Congress was handled with respect to them. No matter how admirable or defensible the administration's motives and objectives may have been, the way in which these operations were developed and run violated every canon and precept of sound professionalism, not to mention common sense. Furthermore, all other considerations apart, the administration's manner of dealing with Congress during this episode was both inept and politically tone-deaf.

Congress has ample reason to be irritated at the administration, and concerned about the way it handled that specific set of covert actions. In dealing with important issues, however, particularly ones as complex as these, all prudent humans -- including distinguished members of Congress, and of both of its intelligence oversight committees -- should avoid acting hastily, with punitive intent, under the stimulus of irritation.

CONSTITUTIONAL DIVISIONS OF AUTHORITY

Our Constitution does not explicitly mention intelligence, let alone covert action, nor does it use the terms "foreign policy" or "foreign affairs". By design, nonetheless, the

Constitution divides authority and responsibility in this sphere as well as in others. Legislative-executive branch debates over roles and primacy in the general field of foreign policy are as old as, or even antedate, our republic. Parallel debates with specific respect to intelligence, however, are of considerably more recent vintage.

Though the word "intelligence" does not appear in the Constitution, how those who framed it viewed the intelligence function is quite forcefully and clearly expounded by John Jay -- who as a co-author of The Federalist Papers and then, under the new Constitution, our nation's first Chief Justice is certainly a reliable, authoritative source regarding "original intent".

In Federalist 64, discussing foreign affairs generally and treaty negotiations specifically, Jay wrote:

> "It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest."

John Jay clearly regarded "the business of intelligence" as being primarily a presidential or executive branch function, not a legislative branch responsibility -- a view shared by all serving presidents from Washington onward.

While in office, our early presidents -- the ones who had been directly and personally involved in the formulation and adoption of our Constitution -- certainly did not act as if they felt that what we would now term covert action required Congressional involvement or, even less, prior Congressional knowledge. Indeed, if Jefferson, the drafter of the Declaration of Independence, or Madison, the principal architect of our Constitution had shown, as President, the diffident deference to Congress that many now claim a President is constitutionally obligated to show, in conducting foreign affairs, our republic would not now have its present territorial extent and probably would not have survived its perilous initial decades.

In these areas -- where the Constitution deliberately divides authority -- our national interests are certainly not furthered by executive-legislative branch squabbles over turf, or attempted raids on each other's prerogatives. At both ends of Pennsylvania Avenue there needs to be a greater recognition than has been notable in recent months of the fact that, especially in the field of foreign affairs, our Constitution yokes the legislative and executive branches in a single harness, and

unless they can pull together, in tandem, the nation suffers.

THE MATTER OF BALANCE

Involved here is one of our Constitution's many delicate balances, a balance carefully and properly acknowledged in the National Security Act of 1947's current Section 501, which H.R.3822 proposes to strike and replace with new language.

As this sub-committee well knows, that 1947 Act, as amended, contains what is still the basic charter of the CIA, the Director of Central Intelligence and, indeed, the U.S. intelligence community. Section 501 of that Act deals with Congressional oversight. It was added to the 1947 Act by Sec. 407(b)(1) of the Intelligence Authorization Act for Fiscal Year 1981 (P.L. 96-450), known informally as the Intelligence Oversight Act of 1980. As it now stands, Sec. 501's sub-section (a) -- before spelling out what, and how, the DCI and all intelligence community component heads are required to report to the Congress -- begins with a preambular clause that reads:

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --

Then follows the list of reporting requirements.

Before this sub-committee or the full oversight committee recommends that the House, and the Congress, jettison the carefully crafted preambular language of the National Security Act of 1947's current Sec. 501(a), I respectfully urge that renewed, careful consideration be given to the cogent arguments presented to this very oversight Committee in September 1983, when it was also considering legislation on "special activities", by Mr.William Miller, who had previously served as the Staff Director of the Church Committee and then of the Senate's intelligence oversight committee. In his statement, Mr. Miller observed:

> "What is now the law of the land in Sec. 501 is the result of the several years experience of both intelligence oversight committees, and that of other House and the Senate Committees that have had responsibilities for intelligence activities since the Second World War. The existing law is the result of discussions, negotiations and give and take with two administrations, including the direct involvement of two Presidents, two Vice Presidents, four Directors of Central Intelligence, three Attorneys-General and a host of other Cabinet officials, Department heads, Senators, Congressmen, Chiefs of Staff, constitutional experts and lawyers and other interested citizens. It is not suprising that many urge caution about amending existing law, given the delicate issues involved and the broad spectrum of perspectives that Sec. 501 had to encompass."

What Mr. Miller said in 1983 applies with equal force in 1988.

SECURITY CONCERNS -- "DUE REGARD"

Striking current Sec. 501 and, hence, 501(a)'s opening clause would not only strike that clause's carefully drafted

reference to the need to keep Congressional oversight authorities and executive branch reporting requirements consistent with the constitutional and "balance" issues here involved. It would also strike the general, tone-setting reference to the need to keep them consistent "with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods".

Similar "due regard" language does twice appear somewhat later in H.R. 3822, in proposed Sections 502(a) and 503(b), but with a very significant modification -- a modification that neatly illustrates some of the problems engendered by the speed with which H.R. 3822 appears to have been drafted.

The final clause of the National Security Act's Sec. 102(d)(3), which H.R. 3822 would not affect, provides:

> "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

This language is repeated, and slightly broadened, in the just-quoted "due regard" text of current Sec. 501(a)'s preambular clause, which H.R. 3822 would strike. H.R. 3822's proposed Sec. 501(d) echoes current Sec. 501(a)'s language and broadens it a bit further by calling for procedures:

> "to protect from unauthorized disclosure <u>all</u> classified information and <u>all</u> information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this title."

On this singularly important topic, however, the "due regard" passages of H.R. 3822's proposed sections 502(a) and 503(a) reverse field sharply, in a confusingly inconsistent way.

With respect both to intelligence activities generally (in 502(a)) and to special activities (in 503(a)), these two proposed new sub-sections, in identical language, require the DCI et. al. "to keep the intelligence committees fully and currently informed",

> "To the extent consistent with due regard for the protection against unauthorized disclosure of classified information relating to sensitive intelligence sources and methods..." (emphasis added)

"Sensitive" is an adjective whose definition, or applicability in any concrete situation, is both imprecise and subjective. H.R. 3822 makes "sensitive" a hallmark characteristic restricting what needs to be protected, but nowhere does H.R. 3822 give this key, limiting adjective a definition governing its use in that particular context. Nor does H.R. 3822 specify who is to decide in any particular case, involving particular intelligence sources and methods, whether those sources and methods, in that case, are "sensitive". Is this determination to be made by the President, by the DCI, by the Congress as a whole, by either or both intelligence oversight committees -- or by whom? These may seem to be pedantic quibbles; but such inconsistencies and ambiguities could easily become enormously important in a complex, real-life situation --

particularly one involving decisions at both ends of Pennsylvania Avenue on what needs to be told to, or can legitimately be divulged by, the Congress, and when.

Such ambiguities and inconsistencies set the stage for future legislative-executive branch squabbles over security which ill-serve our national interests. Such squabbles will become almost inevitable if the Congress and its oversight committees deem themselves the arbiters of what information is, or is not, "sensitive" -- in ways that future administrations, of whatever party, are bound to balk at, for very good reasons, if these administrations or their DCIs define "sensitive" in a different fashion.

Though the executive branch is not, and never has been, any paragon of perfection with respect to discretion, it is worth noting that concerns about Congressional security are not only as old as our republic but, in fact, antedate our Constitution. Speaking of France's willingness to provide essential covert assistance to the revolutionary cause, Benjamin Franklin and Robert Morris -- in their capacity as members of the Committee of Secret Correspondence of the Continental Congress, America's first intelligence organization -- noted, on 1 October 1776:

> "We agree in opinion that it is our indespensable duty to keep [this important intelligence] a secret, even from Congress ... We find, by fatal experience, the Congress consists of too many members to keep secrets."

This prickly subject is addressed in some detail in my supplementary submission. I will not explore it further in this summary statement but, instead, will turn to the by no means unrelated issue of "findings".

THE MATTER OF FINDINGS: MORE SECURITY CONCERNS

Presidents since Washington, certainly since Jefferson, have conducted covert actions or "special activities," or directed that they be conducted, whenever they felt the interests of the United States would be served by, or required, such activities -- without feeling any particular need for Congressional involvement or, often, knowledge, let alone Congressional direction or legislatively-conferred authority. H.R. 3822's proposed Sec. 503(a), would seem to break new Constitutional ground by stipulating, in a statute, that a President

> "may authorize the conduct of a special activity by departments, agencies, or entities of the United States Government only when he determines such an activity is necessary to support the foreign policy objectives of the United States and is important to the national security of the United States"

Proposed Sec. 503(a) then goes on to add "which determination shall be set forth in a finding that shall meet each of the following conditions," of which there are five. Every one of them raises potentially serious problems -- starting with the first, which stipulates that every finding shall be in writing, or reduced to writing "in no event more than forty-eight hours after the decision [to initiate the special activity in question]

is made. In my supplementary submission, I comment on all five of these conditions. Here, in the interests of time, I will address only the fourth -- using it as a paradigm.

This fourth condition (Sec. 503(a)(4)) is that:

> "Each finding shall specify whether it is contemplated that any third party which is not an element of, or a contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the special activity concerned, or be used to undertake the special activity concerned on behalf of the United States;"

As do the other conditions, this one has a clear, eminently understandable Iran-Contra inspiration; but no matter how reasonable and defensible this condition's intent may be, its language contains the potential for more problems, of greater severity, than those engendered by all of the other conditions combined. As it stands, this fourth condition's language can be construed as being either trivial or as being extraordinarily dangerous, on security grounds.

Virtually no foreign intelligence operation, certainly no covert action operation or "special activity", can be successfully conducted without the cooperation and utilization of foreigners -- including individuals, entities or organizations, such as intelligence services, governments, or some combination of any or all of these. No sensible U.S. intelligence officer or service could plan a "special activity" without, at a minimum,

"contemplating" that one or more foreign individuals, organizations, services or governments might be used "to fund or otherwise participate", in some significant way, "in the special activity concerned on behalf of the United States".

In this whole matter, indeed, H.R. 3822 attempts to draw a distinction which may sound very simple, neat and tidy in a proposed statute; but which in the real world is very difficult to draw, and often does not exist. In the actual conduct of intelligence activities abroad, the cooperating institutional and individual assets ("agents", if you will) used in "special activities" and those used in normal, albeit sensitive, intelligence collection activities are often the same -- the same institutions, the same organizations, and the same people. Given the real world's exigencies and complexities, consequently, there is often no way you can meaningfully distinguish -- for purposes of reporting to Congress -- betweeen foreign institutions and individuals who assist in the conduct of "special activities" and those who assist in the conduct of intelligence activities in general.

If proposed sub-section 503(a)(4) is construed as requiring only a general statement, then it is virtually meaningless; for if so construed, it can be satisfied by a standard, boiler plate sentence mechanically incorporated in every finding and saying something along the lines of "The special activity herein

described of course contemplates the use and participation of one or more non-U.S. individuals, persons, organizations or entities." If sub-section (4) is supposed to mean more than that, however, particularly if it is intended to require giving some specific indication of what types of non U.S. government "third parties" will be participating, and in what ways, in the "special activity" covered by a particular finding, then that condition lays down a security minefield impossible to traverse unscathed.

The language of the final sentence of H.R. 3822's proposed sub-section 503(e) could easily be read as supporting a broad construction of this fourth condition of sub-section 503(a). That sentence says (in language evoking Gertrude Stein):

> "A request by any agency or department of the United States to a foreign country or a private citizen to conduct a special activity on behalf of the United States shall be deemed to be a special activity."

If H.R. 3822 is enacted, as currently drafted, this sentence could easily be construed as meaning that the executive branch is required to write and submit a separate finding on each and every request to a foreign government, and each and every recruitment pitch to a foreign national, for assistance in a U.S. covert action operation.

Should proposed Sec. 503(a)(4) ever be given this type of broad construction, now or in the future, satisfying its requirements would inevitably involve security risks so grave

that no prudent U.S. President, administration, or Director of Central Intelligence -- not to mention foreign individual, entity or government -- would want to run them.

In this context, please remember that less than one year ago, on 8 April 1987 -- in testifying before the full House oversight committee in a hearing that at least some distinguished members of this sub-committee doubtless attended -- Representative Norman Y. Mineta, a staunch proponent of strict Congressional intelligence oversight, confirmed and acknowledged that the Canadian government did not want its 1980 role in hiding, protecting and safely exfiltrating American hostages from Iran to be reported to Congress by President Carter in a finding, at least while that operation was in train -- a matter to which I shall return in a moment.

I know from my own experience as Chairman of the U.S. Intelligence Co-ordinating Committee in Germany, from 1976-1979, how skittish my West German, Israeli, and other friendly foreign service counterparts were about sharing sensitive information, especially operational information, on common concerns and targets -- such as terrorism -- because of their worries about how such information, after I reported it, would be handled back in Washington, particularly if it was passed to Congress. The strong, almost universal perception of my foreign counterparts was that in the United States, we were manifestly incapable of

protecting even our own secrets, hence we could hardly be relied on to protect theirs. We may consider such foreign perceptions unwarranted and inaccurate, but their widespread existence and their force are facts that American intelligence professionals can not ignore or brush aside when planning operations -- of any nature -- in which cooperative foreign participation is essential.

Such foreign perceptions and concerns would be inflamed and exponentially increased if H.R. 3822's proposed sub-section 503(a)(4) should ever be enacted into law, and then broadly construed. Should it ever come to be widely believed abroad that U.S. law required -- or even that there was a serious risk that U.S. law might require -- the identification in a written document, of which at least two copies would be sent to Congress, of all non-U.S. individuals and entities, including governments, cooperatively participating in any U.S. "special activity", our pool of essential foreign assistance and support would swiftly evaporate. The extent and speed of that pool's evaporation, furthermore, would be increased by the fact that few foreigners would note, and even fewer would pay attention to, any American legal distractions between "special activities" and other intelligence activities. In this sphere, foreign perceptions and beliefs -- not our assessment of their accuracy or validity -- would be controlling.

From the perspective of 26 years' experience in the profession of intelligence, I can state flatly that should H.R. 3822's proposed sub-section 503(a)(4), or anything like it, ever be enacted into law, few foreign individuals or entities, governments again included, whose cooperation and assistance we would need to conduct "special activities" -- or, for that matter, any intelligence activities of any consequence -- would be willing to put their fortunes, reputations or, in the case of individuals, their freedom and even their lives hostage to the discretion and secret-keeping capability of the Congress of the United States.

NOTIFICATION TIMING PROBLEMS

Quite apart from the nature and format of "findings", there is an important, also illustrative semantic problem in H.R. 3822's treatment of the time frame within which -- under that bill -- Congress must be notified of "special activities". Proposed Sec. 503(c)(2) says that:

> "In circumstances where time is of the essence and the President determines that it is important to the national security interests of the United States to initiate a special activity before the notice required by paragraph (1) can be given, such activity may be initiated without such notice."

Proposed Sec. 503(c)(3), however, says:

> "The President shall ensure that notice of a special activity undertaken pursuant to paragraph (2) is provided to the intelligence committees, or to the Members of Congress identified in paragraph (1), as soon as possible, but in no event later than forty-eight hours after the special activity has been authorized pursuant to subsection (a)."

(emphasis added in both of the above quotations.)

There is a latent contradiction between (2) and (3) which could become very important in certain situations. In the real world, there is frequently a delay of at least 48 hours, often longer, between the authorization -- in Washington -- of a complex covert action operation or "special activity", and its initiation half a world away. In such a situation, the short-term tactical flexibility given the President by proposed 503(c)(2), "in circumstances where time is of the essence", is taken away by proposed 503(c)(3).

This is by no means a purely hypothetical problem. The previously mentioned 1980 exfiltration from Tehran of six American Embassy personnel, who hid for several weeks in the Canadian Embassy there, provides a perfect illustration of a real world situation that would put a President directly in the cross-fire between proposed 503(c)(2) and proposed 503(c)(3).

Exfiltrating American citizens -- in this case, U.S. government employees who had escaped from a U.S. Embassy seized by hostile local elements who were holding, as prisoners, the other U.S. personnel in that embassy -- might not be what the term "covert action" would normally suggest or denote to most people. Nonetheless, at least for the CIA, this would clearly be a "special activity" within the definition given in H.R. 3822's proposed section 503(e); for such an operation would patently be something "other than" an activity "intended solely for obtaining

necessary intelligence".

In the 1980 Tehran situation, however -- as Representative Mineta explained to this very sub-committee's parent committee on 8 April 1987 -- the Canadians, for their own security and protection, made their essential cooperation contingent on Congress' not being told about what was in train, or what the Canadians were doing, until after the operation was concluded. In the 1980 Tehran situation, furthermore, the period between the "authorization" and the "initiation" of the "special activity" in question -- exfiltrating the endangered Americans -- was measured in weeks, not hours.

Had H.R. 3822, as presently phrased, been on the statute books in 1980, President Carter -- not President Reagan -- would have been directly impaled on the horns of a very difficult dilemma. He would have had to either:

(a) ignore the law, or

(b) tell the Canadians that he could not lawfully meet the conditions they imposed on their essential assistance, even though declining that assistance clearly put American lives at risk.

I can not believe that any member of this sub-committee, or of the full House oversight committee, or, for that matter, of Congress would want to put any American President, of whatever party, in such a situation. This is far from the least of the reasons why I respectfully urge this sub-committee to reconsider the language of H.R. 3822, and all of that language's

implications, before recommending that this proposed bill, as it now stands, be enacted into law.

LARGER COMPLEXITIES: THE RISK OF "REFORMS"

In its conduct of Iran-Contra, the Reagan administration clearly abused the discretionary latitude afforded any administration of any party, in conducting covert operations, by the flexibility and ambiguity of some of the language in current statutes dealing with these matters. H.R. 3822 would remove the ambiguity and virtually eradicate the flexibility of the relevant statutes. Doing that, however, could easily prove procrustean and generate serious problems in future contingencies or situations not now forseen.

By reducing the permissible exceptions to a bare minimum, not always in consistent ways, H.R. 3822 would also push Congress far deeper into the "prior notification" thicket. In the light of Iran-Contra, this might seem desirable; but it is a punitive move that would probably be rued by future Congresses, as well as by future Presidents -- regardless of party.

As President Carter's, not President Reagan's, Deputy Assistant for National Security Affairs, David Aaron, put the matter quite neatly when testifying before the House intelligence oversight committee in September 1983 in connection with "special

activities" legislation that would also have altered the National Security Act of 1947's current section 501:

> "It was the purpose of [current] Sec. 501 to ensure that the Congress had sufficient access to information, in a timely way, to be able to exercise [its proper] functions in the field of intelligence activities. It was not [one of] the goals of Sec. 501 to make the Congress a co-decision-maker on covert action operations."

Drafted in the immediate aftermath of the Iran-Contra Report's preparation, H.R. 3822's language, at least to this reader's eye, reflects an eminently understandable desire to rap Ronald Reagan's knuckles and tie his hands. But Ronald Reagan leaves the Oval Office, permanently, in January 1989 -- less than a year hence -- and none of his successors, of whatever party, is likely to forget or ignore the lessons of Iran-Contra. Furthermore, if H.R. 3822 or any similar bill gets enacted, there is no way of telling what future President's hands that law may tie, under what particular circumstances, with what adverse impact on U.S. interests.

Legislation affecting Congressional oversight of intelligence activities, particularly "special activities", is invariably complicated; for it inevitably involves the judicious weighing and balancing of a myriad important, complex and often conflicting considerations and equities. Such legislation should not be drafted or enacted in haste or under the influence of strong emotions, including pique. Nor is it wise to draft,

debate and enact such legislation amid the distractions and pressures of a Presidential election year, including an election year's temptations to adopt or endorse positions, on controversial issues, that are poll or popularity-enhancing in the short run, but not necessarily in the long-term best interests of the United States. Such considerations apply with particular force to issues involving "reforms"; for reforms drafted and adopted under such conditions almost invariably prove to have unintended, undesired consequences.

During my own career in government, I was privileged to develop a close association with the Honorable Birch Bayh, the Senate Select Committee on Intelligence's second Chairman. We differed on many issues, as we still do, but became and remain good friends. He visited me in Germany, as a guest in my home -- where he was a great favorite with my children -- while I had overall responsibility for the U.S. intelligence community there and he was Chairman of the Senate oversight committee. On one evening during that visit, I assembled a representative, cross-sectional group of my abler young officers who were deeply and personally involved in our efforts to combat terrorism and other threats to the security of the United States. We sat up all night (literally) having a frank, suitably lubricated, no-holds-barred, give-and-take discussion. During that discussion, my front-line colleagues endeavored to explain, by citing a succession of concrete examples, how difficult it was to apply on

the banks of the Rhine -- and of other rivers around the world -- the sweeping, "thou shalt not, ever, under any circumstances" reform restrictions of the mid-1970, which sounded so splendid when proclaimed, passed, issued or endorsed along the banks of the Potomac.

As my young colleagues kept recounting their frustrating first-hand experiences with the results or consequences of these "reforms", the good Senator kept repeating, like an antiphonal response in a High Church Anglican service, "But this was never the intent of Congress!" My equally antiphonal response was that in the field, we did not have the luxury of trying to divine Congressional intent. Instead, we had to be guided, and were circumscribed, by what the government's lawyers, including the CIA's, construed to be the meaning of the language in statutes Congress enacted, such as the Foreign Intelligence Surveillance Act, or in Executive Orders and internal CIA regulations strongly influenced by Congressional attitudes.

No sensible person would contend, and I certainly do not, that our current laws dealing with covert action, and its oversight, can not be improved. This sub-committee and its staff are to be commended on the thought, care and effort that have clearly gone into the consideration and discussions of H.R. 3822. For reasons I have tried to explain, however, I do not believe that the end results this distinguished sub-committee or its full

parent Committee wants to achieve, in the discharge of Congress' Constitutionally-mandated responsibilities, are most likely to be attained by moving forward with H.R. 3822 or any similar legislation, unavoidably drafted in some haste in the wake of the issuance of the Iran-Contra Report and under the influence of emotions which that unhappy affair inevitably engendered on Capitol Hill -- particularly when any such legislation would have to be debated and enacted amidst the mounting, divisive and partisan pressures of a Presidential election year.

In my opinion, which I offer with diffident respect, our nation's interests would be far better served if, instead, a small group of knowledgeable, senior administration officials, past or present, could be convened to meet quietly with a corresponding, and correspondingly small, bi-partisan group of appropriate Congressional leaders, from both Houses; and then, over the course of several months' frank, private discussion, this joint body, working together, could develop a set of agreed principals regarding covert action, work out a viable system for resolving executive-legislative branch disputes, and supervise the measured, careful drafting of any new legislation thought to be warranted -- for formal introduction, debate, consideration and enactment after the 1988 electoral season, with its attendant demands and pressures, has passed. This may be a utopian dream, but as a concerned citizen who has devoted over a quarter century

to serving our nation as an intelligence professional, I would relish seeing this dream become a reality.

Thank you very much for your time and attention.

SUBMISSION OF

GEORGE A. CARVER, JR.

JOHN M. OLIN SENIOR FELLOW

CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES

ON

H.R. 3822

TO THE

SUBCOMMITTEE ON LEGISLATION
OF THE
PERMANENT SELECT COMMITTEE
ON INTELLIGENCE

U.S. HOUSE OF REPRESENTATIVES

March 10, 1988

CONTENTS

Mr. Chairman and Distinguished Members:

I am honored by your invitation to appear today to comment not only on the specific bill you are considering, H.R. 3822, but also on the larger issues addressed in that proposed legislation and in the parallel, very similar Senate bill, S. 1721.

These larger issues impinge directly on our nation's security and even its chances of survival in this strife-ridden and now thermonuclear world. As we all know, it is not easy for an open democracy, such as ours, to have the kind of effective intelligence structure our nation needs -- one that is capable of protecting our democratic freedoms but does not curtail or, even worse, subvert them. These are issues to which I devoted the first twenty-six years of my professional life and in which, as a citizen, I have an abiding interest. It is a pleasure, as well as a privilege, to discuss them with this sub-committee. I feel confident that as fellow citizens we have common goals and objectives; for the issues here involved transcend personal, parochial or partisan considerations. Our differences, and your differences among yourselves, will be over the optimum means of achieving these common goals, and the best way of resolving the complex, thorny questions these issues, in a democracy, inevitably pose.

To supplement my orally presented summary comments, I am submitting this fuller statement for the record. To this statement, I am also appending an essay entitled "A Needed Capability Jeapordized: Covert Action in the Wake of the Iran-Contra Hearings", which I wrote soon after the hearings ended and was published in The San Diego Union (on 16 August 1987), in The Washington Times (on 17 August 1987), and in various other newspapers around the country.

This statement begins with a conceptual analysis of covert action, its complexities, and the problems its employment poses for an open, democratic society such as ours. I then touch on the Constitution's division of authority and responsibility in the fields of foreign affairs and, particularly, intelligence, and the resultant need for our government's executive and legislative branches to recognize each other's Constitutional roles and to work harmoniously together, if our nation's interests are to be protected and well served.

Within that context, an analysis is made of H.R. 3822's provisions and, especially, the language in which they are phrased, to assess the impact of these provisions, and this language, on a number of topics germane to the conduct of covert action and of intelligence operations in general. In sequence, this statement examines certain security concerns, reporting requirements and flexibility, the matter of "findings", and some

of that complex issue's various ramifications. A look is then taken at questions involved in the timing of congressional notification and, in particular, "prior notification". My submission concludes by noting some of the risks inherent in emotion-impelled "reforms", especially ones drafted in haste, and then respectfully offering, for this sub-committee's consideration, a few of my own thoughts on what ought to be done, in light of our total national interests, with regard to the important matters you are addressing.

COVERT ACTION: ITS IMPORTANCE, COMPLEXITIES AND OVERSIGHT RAMIFICATIONS

The primary focus of the specific legislation this sub-committee is considering, H.R. 3822, and of current congressional concerns with respect to intelligence is, quite understandably, covert action. Here, however, I most respectfully ask you to be careful, and not allow justified concerns to skew an essential sense of proportion.

The primary function of the U.S. intelligence community is to collect information, distill it into intelligence by analysis, and then disseminate the fruits of this collection and analysis to those in our government's executive and legislative branches whom that intelligence will aid in the discharge of their Constitutionally-mandated responsibilities. The CIA is charged with all of these roles, plus that of being the U.S. intelligence

community's central coordinating linch-pin -- a role highlighted by the fact that there is no Director of the CIA (alone). Its administrative head, the Director of Central Intelligence, is also -- concurrently -- the President's senior intelligence advisor and head of the U.S. intelligence community.

Covert action is an important CIA responsibility but an ancillary one. Extreme care should be taken to ensure that any "fixing" of covert action does not unintentionally hamper the Agency's and the intelligence community's ability to perform their primary mission -- for example, by putting sensitive intelligence sources and methods at risk. This is particularly important when arms limitation treaties, especially ones involving strategic arms, are being considered and negotiated; for our compliance-monitoring capabilities, in this critical sphere, hinge on the U.S. intelligence community's overall effectiveness.

"Covert action" is a term with such a broad scope that it is impossible to define with any degree of precision. It encompasses everything from encouraging a foreign journalist to write a story or editorial which that journalist might well have written anyway to supporting, even guiding, fairly large-scale military activities in foreign lands. Covert action's purpose is to influence the behavior or policies of key foreign individuals, groups and nations, and the course of events in key foreign areas, in ways that further the interests of the nation mounting

the covert action in question, but also in ways that mask that nation's hand and enables its involvement to be denied or, at least, officially disavowed. Perhaps the best way to understand covert action is to think of it as a form of international lobbying that is, ideally, discreet and unadvertised.

The usual euphemism for covert action, employed in the legislation you are considering, is "special activities" -- defined in Executive Order 12333 (and elsewhere) as:

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

As the report of the Iran-Contra Congressional Investigating Committees notes, on page 375,

> "This definition excludes diplomatic activities, the collection and production of intelligence, or related support functions."

Intelligence activities, generally, are not easy for an open, democratic society to conduct effectively, especially in peacetime. For a plethora of reasons, covert action is particularly difficult, for a society such as ours, and raises particularly difficult questions -- ones that have no universally satisfactory resolutions, let alone any simple answers.

To begin with, there is a consideration that is not polite to acknowledge or discuss, but which has to be faced. In most cases, conducting covert action involves contravening, infringing upon or directly violating the laws of some other nation or

nations, with which we are not in a state of war and with which, indeed, we may have treaty relations whose spirit, if not letter, such covert actions may also contravene. (The same is also true of espionage, but that is another matter.) This does not mean we should pass a self-denying ordinance; for covert action is a fact of international life. It is something that virtually every nation in the world essays, frequently targeted at us; and some of our closest allies, such as Israel, are among its most indefatigible practitioners. Such considerations do mean, however, that covert action should be used very circumspectly, far more circumspectly than it sometimes has been -- as Iran-Contra demonstrates all too clearly. When astutely employed, covert action can be a very useful, effective adjunct to policy; but it can never be a substitute for policy -- or for thought.

In this context, there is a salient feature of our political system whose consequences are frequently ignored or brushed aside. Our Constitution combines in one individual, our President, two distinct offices and functions that most other nations divide: the government's chief executive and administrative officer, and the nation's Chief of State. The former is a partisan political figure chosen (in America) by election; the latter, a symbolic focus of national unity supposedly, in that capacity, above the fray of political partisanship. As chief executive officer, a President should certainly be accountable for his and his administration's

actions. Nonetheless, it is by no means necessarily in our national interest for our Chief of State to sign "findings" or any other documents directing agencies or officers of the U.S. Government to infringe upon or violate the laws of other nations with which we are not in a state of declared war. NSC staff members, national security advisors, cabinet officers and Directors of Central Intelligence are all expendable; but in our government, Presidents are not. As Chief of State, an American President should be able to distance himself or herself from, even disavow, a covert action that he or she approved, even ordered, as chief executive. This may sound complicated, but so is the real world and, hence, effective diplomacy that runs with the grain of its complex reality.

Such messy complexities, and the troublesome issues they raise, lead some to argue that the United States should eschew or abandon covert action altogether. In a perfect world, this might be desirable; but in the world in which we have no choice but to live, it would be folly. One point on which members of the Congressional Committees investigating the Iran-Contra Affair were agreed is that, to use their Report's words (on page 383), "Covert operations are a necessary component of our Nation's foreign policy". The real question before Congress, and the American people, is not whether our nation should conduct covert action but, instead, how such operations should be handled, controlled and reviewed to ensure that they are soundly

conceived, efficiently executed and effective, but do not do injury to any of our democratic polity's fundamental interests or basic values.

Congress was quite understandably distressed by the kinds of covert operations mounted during what we now term "Iran-Contra", by these operations' execution and, particularly, by the way in which Congress was handled with respect to them. No matter how admirable or defensible the administration's motives and objectives may have been, the way in which these operations were developed and run violated every canon and precept of sound professionalism, not to mention common sense. Furthermore, all other considerations apart, the administration's manner of dealing with Congress during this episode was both inept and politically tone-deaf.

Congress has ample reason to be irritated at the administration, and concerned about the way it handled that specific covert action. In dealing with important issues, however, particularly ones as complex as these, all prudent humans -- including distinguished members of Congress, and of both of its intelligence oversight committees -- should avoid acting hastily, with punitive intent, under the stimulus of irritation.

In its 24th Chapter of their Report -- "Covert Action in a Democratic Society" -- the Congressional Committees investigating Iran-Contra posed the fundamental question:

> "Is it possible for an open society such as the United States to conduct such secret activities effectively? And if so, by what means can these operations be controlled so as to meet the requirements of accountability in a democratic society?"

In answering that question, the report noted the laws and procedures adopted after the investigations and debates of the mid-1970s, and then went on to observe (also on page 375) that

> "Experience has shown that these laws and procedures, if respected, are adequate to the task."

Amplifying this theme, the Iran-Contra Report's "Recommendations" chapter (28) opens with two paragraphs which read:

> It is the conclusion of these Committees that the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance. This is an important lesson to be learned from these investigations because it points to the fundamental soundness of our constitutional processes.
>
> Thus, the principal recommendations emerging from the investigation are not for new laws but for a renewal of the commitment to constitutional government and sound processes of decisionmaking.

That chapter does go on to recommend "some changes in law, particularly relating to oversight of covert operations", and some of those recommended changes are reflected in the bill this hearing was convened to address. Most respectfully, however, I hope that this Sub-committee's -- and the entire Congress' --

discussion and decision about the details of such suggested changes will be framed within the judicious context set by the two paragraphs just quoted.

The reference in the second quoted paragraph's concluding sentence to "the commitment to constitutional government and sound decisionmaking" raises a whole new set of important, complex issues.

FOREIGN AFFAIRS AND INTELLIGENCE: THE CONSTITUTION'S DIVISION OF RESPONSIBILITY AND AUTHORITY

Our Constitution does not explicitly mention intelligence, let alone covert action, nor does it use the terms "foreign policy" or "foreign affairs". By design, nonetheless, the Constitution divides authority and responsibility in this sphere as well as in others.

For example, the Constitution gives Congress the "Power...to regulate Commerce with foreign Nations" and "To declare War"; In addition to being named "Commander in Chief", however, the President is given "Power, by and with the Advice and Consent of the Senate, to make Treaties."

Most of our nation's Founding Fathers did not regard the Constitution's division of authority over foreign affairs quite so extensive, or ambiguous, as many would now argue. At the time

the Constitution was adopted, the general view was that Congressional authorities in the foreign policy sphere were exceptions to the stipulation in the first sentence of Section 1 of the Constitution's Article II: "The executive Power shall be vested in a President of the United States of America". One of the few things on which Jefferson, Hamilton and Madison were all in agreement was that these exceptions should be construed "strictly".

As Jefferson put the matter, in 1790:

> "The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly."

Hamilton expressed almost identical thoughts in his first Pacificus letter, published three years later:

> "It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution."

Indeed, Jefferson -- with Madison in general concurrence -- extended this line of reasoning to cover the executive's obligation, which he considered quite limited, to account for the expenditure of funds appropriated by Congress for the conduct of foreign affairs. Jefferson, as President, put his thoughts on this matter quite succinctly in an 1804 letter to his Treasury secretary, Albert Gallatin:

> "The Constitution has made the Executive the organ for managing our intercourse with foreign nations.... The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties....[I]t has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the president."

Legislative-executive branch debates over roles, and primacy, in the general field of foreign policy are as old as, or even ante-date, our republic. Parallel debates with specific respect to intelligence, however, are of considerably more recent vintage.

Though the word "intelligence" does not appear in the Constitution, how those who framed it viewed the intelligence function is quite forcefully and clearly expounded by John Jay -- who as a co-author of the Federalist Papers and then, under the new Constitution, our nation's first Chief Justice is certainly a reliable, authoritative source regarding "original intent".

In Federalist 64, discussing foreign affairs generally and treaty negotiations specifically, Jay wrote:

> "It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in

> that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest." (emphasis in original)

John Jay clearly regarded "the business of intelligence" as being primarily a presidential or executive branch function, not a legislative branch responsibility -- a view shared by all serving presidents from Washington onward.

With regard to what is now called covert action, Senator Cohen -- in a 25 September 1987 statement introducing S.1721 -- has contended that his bill and hence, by extension, H.R. 3822 as well: "would, for the first time, provide explicit statutory authority for the President to authorize covert actions, or 'special activities', in support of U.S. foreign policy objectives, provided they are authorized in accordance with the requirements set forth in the bill."

Oval Office incumbents and many others would argue strongly, however, that a President's authority to conduct covert action is not a gift from Congress and requires no Congressionally-enacted statute. Instead, they would contend, it derives directly from Article II of the Constitution itself, specifically, from the previously quoted first sentence of that article's Section 1 -- "The executive power shall be vested in a President of the United States of America." -- and from the first sentence of that

article's Section 2, which explicitly names the President "Commander in Chief". In appropriating funds for covert activities, furthermore, Congress has certainly acknowledged -- by its own actions -- the right of sucessive Presidents to initiate, or commission, the specific covert activities for which such funds have been appropriated.

While in office, our early presidents -- who had been directly and personally involved in the formulation and adoption of our Constitution -- certainly did not act as if they felt that what we would now term covert action required Congressional involvement or, even less, prior Congressional knowledge. Indeed, if Jefferson, the drafter of the Declaration of Independence, or Madison, the principal architect of our Constitution had shown, as President, the diffident deference to Congress that many now claim a President is constitutionally obligated to show, in conducting foreign affairs, our republic would not now have its present territorial extent and probably would not have survived its perilous initial decades.

In these areas -- where the Constitution delibertely divides authority -- our national interests are certainly not furthered by executive-legislative branch squabbles over turf, or attempted raids on each other's prerogatives. At both ends of Pennsylvania Avenue there needs to be a greater recognition than has been notable in recent months of the fact that, especially in the field of foreign affairs, our Constitution yokes the legislative

and executive branches in a single harness, and unless they can pull together, in tandem, the nation suffers.

In this context, I commend to all members of this sub-committee -- and to all citizens interested in these vitally important subjects -- an essay co-authored by the Chairman of the Senate Intelligence Committee, Senator David Boren, and his colleague Senator John Danforth. Their perceptive analysis was published in the 1 December 1987 edition of The Washington Post, under the headline title: "Why This Country Can't Lead". All of it is germane to the matters this sub-committee is addressing, but the following comments of these two distinguished senators are particularly relevant:

> Since we arrived in the Senate about a decade ago, partisanship within the institution has increased alarmingly. Some partisan one-upmanship may be expected in domestic matters, but it has spilled over into foreign affairs. In consequence, the stable and resolute foreign policy one should expect from the leader of the free world has been undermined by ongoing antagonism and turmoil between Congress and the executive branch of our government.
>
> On one hand, Congress is alarmed at the freebooting adventurism of a go-it-alone executive, as exemplified by the Iran-contra affair. On the other hand, the executive branch complains that Congress consists of 535 secretaries of state who cannot resist any opportunity to interfere with arms negotiations and to micromanage foreign relations. The result is that mutual suspicion and a state of flux have supplanted the predictability and sense of purpose which characterize a leadership position in world affairs.
>
> Unlike parliamentary systems, our Constitution divides foreign policy responsibility between two independent branches of government. The president is

the commander in chief, but Congress gives its advice and consent to treaties and to the appointment of ambassadors. In recent times, Congress has confused this shared responsibility for foreign affairs with incessant and irresponsible tinkering.

Though Senator Boren would doubtless not consider a bill of which he is a co-sponsor, S.1721, or its House counterpart, H.R. 3822, to be an example of the Congressional tinkering he and Senator Danforth decry, I would respectfully suggest that a major defect in both bills, particularly H.R. 3822, is too little acknowledgment of the fact that the President and the Congress do indeed share responsibility for foreign affairs and, by extension, intelligence, and that particularly with respect to intelligence, as John Jay argues in Federalist 64, the Constitution confers some powers directly on the President, not on Congress.

Involved here is one of our Constitution's many delicate balances, a balance carefully and properly acknowledged in the National Security Act of 1947's current Section 501, which both S.1721 and H.R.3822 propose to strike and replace with new language.

As this Committee well knows, that 1947 Act contains what is still the basic charter of the CIA, the Director of Central Intelligence and, indeed, the U.S. intelligence community. Section 501 of that Act deals with Congressional oversight. It was added to the 1947 Act by Sec. 407(b)(1) of the Intelligence

Authorization Act for Fiscal Year 1981 (P.L. 96-450), known informally as the Intelligence Oversight Act of 1980. As it now stands, Sec. 501's sub-section (a) -- before spelling out what, and how, the DCI and all intelligence community component heads are required to report to the Congress -- begins with a preambular clause that reads:

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --

Then follows the list of reporting requirements (which, together with the full text of the current Sec. 501, are appended to this statement).

Both S. 1721 and H.R. 3822, as mentioned above, would strike the current Sec. 501, including sub-section 501(a), in its entirety, substituting new language for some of the text so stricken and repeating some of the former text in various places in several of the proposed new sections. The carefully crafted lead or "preambular" clause of current Sec. 501(a), quoted above, would disappear, though some of it is echoed in parts of S. 1721.

Speaking of intelligence activities, for example, S. 1721's proposed new Sec. 501(a) says "that nothing contained herein

shall be construed as a limitation on the power of the President to initiate such activities in a manner consistent with his powers conferred by the Constitution." H.R. 3822, however, makes no reference to any Presidential powers of any description, let alone any conferred by the Constitution -- either in H.R.3822's proposed new Sec. 501(a) or anywhere else. The bill this sub-committee is now considering, instead, speaks only of restrictions and requirements levied on the President, the DCI and the intelligence community, and of the obligations and responsibilities of all three with respect to reporting to Congress on current and anticipated intelligence activities.

This approach inevitably gets into very murky Constitutional waters, for the Constitution can not be ammended or abrogated by a simple statute. The fact that one or more Members of Congress, if any of them were President, might not exercise Constitutionally-conferred discretionary latitude in the same way as it was exercised by some particular President -- including Ronald Reagan -- does not of itself mean that the Presidency, as an institution, does not not have the discretionary powers in question.

The "preambular" clause of the National Security Act of 1947's current Sec. 501(a) is considerably more forthright than S.1721 about what the Chairman of the Senate Select Committee on Intelligence has himself termed the executive and legislative branches' "shared responsibility"; but S.1721's passing mention

of the powers that the Constitution confers on the President, and of the fact that Congress should not attempt to limit or curtail them, is better than no mention at all of this Constitutionally weighty consideration -- about which, H.R. 3822 is deafeningly silent.

Before this sub-committee or the full oversight committee recommends that the House, and the Congress, jettison the carefully crafted preambular language of the National Security Act of 1947's current Sec. 501(a), I respectfully urge that renewed, careful consideration be given to the cogent arguments presented to this very Committee in September 1983, when it was also considering legislation on "special activities", by two highly knowledgeable witnesses -- neither of whom is an opponent of strict congressional oversight of all intelligence activities or, for that matter, a Reagan administration supporter.

In those September 1983 hearings, Mr. David Aaron -- a member of the Church Committee's staff and then, from 1977-81, President Carter's Deputy Assistant for National Security Affairs -- remarked in his statement:

> "I start from the premise that the delicate balance struck in Sec. 501 most appropriately reflects the Constitutional ambiguity and tension in the relationship between the Congress and the Executive Branch, resulting from their differing responsibilities.... It was the purpose of Sec. 501 to ensure that the Congress had sufficient access to information, in a timely way, to be able to exercise these [oversight and foreign policy] functions in the field of intelligence activities. It was not the

intended goals of Sec. 501 to make the Congress a co-decision-maker on covert action operations."

Similar ground was covered, in those same hearings, by Mr. William Miller, who had previously served as the Staff Director of the Church Committee and then of the Senate's intelligence oversight committee. In his statement, Mr. Miller observed:

> "What is now the law of the land in Sec. 501 is the result of the several years experience of both intelligence oversight committees, and that of other House and the Senate Committees that have had responsibilities for intelligence activities since the Second World War. The existing law is the result of discussions, negotiations and give and take with two administrations, including the direct involvement of two Presidents, two Vice Presidents, four Directors of Central Intelligence, three Attorneys-General and a host of other Cabinet officials, Department heads, Senators, Congressmen, Chiefs of Staff, constitutional experts and lawyers and other interested citizens. It is not suprising that many urge caution about amending existing law, given the delicate issues involved and the broad spectrum of perspectives that Sec. 501 had to encompass."

SECURITY CONCERNS

Striking current Sec. 501 and, hence, 501(a)'s opening clause would not only strike that clause's carefully drafted reference to the need to keep Congressional oversight authorities and executive branch reporting requirements consistent with the constitutional and "balance" issues here involved. It would also strike the general, tone-setting reference to the need to keep them consistent "with due regard for the protection from unauthorized disclosure of classified information and information

relating to intelligence sources and methods".

Similar "due regard" language does twice appear somewhat later in H.R. 3822, in proposed Sections 502(a) and 503(b), but with a very significant modification. There is also a statement in proposed 501(d) that

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

Not having these security concerns reflected at the outset, however, attenuates their importance. Furthermore, neither the current Sec. 501 nor H.R. 3822, nor S.1721, makes any mention -- in the oversight context -- of the fact that another passage in the National Security Act of 1947, Sec. 102(d)(3), imposes a statutory obligation on the Director of Central Intelligence, with respect to security, by stipulating that the DCI "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

In addition, H.R. 3822's treatment of these critically important matters is inconsistent, in a way perhaps overlooked by H.R. 3822's drafters but which is of enormous potential significance.

The just-quoted final clause of the National Security Act's Sec. 102(d)(3) provides:

> "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

This language is repeated, and slightly broadened, in the "due regard" text of current Sec. 501(a)'s preambular clause -- which H.R. 3822 would strike:

> "To the extent consistent ... with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods ...". (emphasis added)

H.R. 3822's proposed Sec. 501(d), quoted above, echoes this language and broadens it a bit further by calling for procedures:

> "to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this title."

On this singularly important topic, however, the proposed (and identical) "due regard" passages of H.R. 3822's Sec.502(a) and 503(a) reverse field sharply, in a confusingly inconsistent way.

H.R. 3822's proposed Sec. 502 deals with "Reporting Intelligence Activities other than Special Activities"; proposed Sec. 503 deals with "Presidential Approval and Reporting of Special Activities". With respect to the activities covered in each section, both proposed 502(a) and proposed 503(b), in

identical language, require the DCI et. al. "to keep the intelligence committees fully and currently informed",

> "To the extent consistent with due regard for the protection against unauthorized disclosure of classified information relating to sensitive intelligence sources and methods..." (emphasis added)

Involved here are two semantic shifts, one is minor; the other, decidedly not.

In the minor shift, all other variations on the "due regard" and "protection" theme speak of protecting intelligence sources and methods, or information relating to them, or classified information from unauthorized disclosure. Proposed Sec. 502(a) and 503(b), instead, speak of protection against unauthorized disclosure. This inconsistency is slightly confusing but of no great consequence.

The other, important shift is a very different matter. In Sec. 102(d)(3), which H.R. 3822 would not alter, what is to be protected from unauthorized disclosure is "intelligence sources and methods". In current Sec. 501(a), it is "classified information and information relating to intelligence sources and methods" (emphasis added). In H.R. 3822's proposed Sec. 501(d), it is "all classified information and all information relating to intelligence sources and methods" (emphasis added). H.R. 3822's proposed Sec. 502(a) and 503(b), however, speak only of

> "due regard for the protection against unauthorized disclosure of classified information relating to sensitive

intelligence sources and methods" (emphasis added).

"Sensitive" is an adjective whose definition, or applicability in any concrete situation, is both imprecise and subjective. H.R. 3822 makes "sensitive" a hallmark characteristic restricting what needs to be protected, but nowhere does H.R. 3822 give this key, limiting adjective a definition governing its use in that particular context. Nor does H.R. 3822 specify who is to decide in any particular case, involving particular intelligence sources and methods, whether those sources and methods, in that case, are "sensitive". Is this determination to be made by the President, by the DCI, by the Congress as a whole, by either or both intelligence oversight committees -- or by whom? These may seem to be pedantic quibbles; but such inconsistencies and ambiguities could easily become enormously important in a complex, real-life situation -- particularly one involving decisions at both ends of Pennsylvania Avenue on what needs to be told to, or can legitimately be divulged by, the Congress, and when.

These potential pitfalls are deepened if proposed Sec. 502(a) and 503(b) are read in conjunction with proposed Sec. 501(e):

> "Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods".

Taken in tandem, these three proposed sections of H.R. 3822 set the stage for and, indeed, make almost inevitable future legislative-executive branch cat fights which ill-serve our national interests. In tandem, these three proposed sections give Congressional oversight committees a virtually unrestricted fishing license -- particularly if the Committees deem themselves the arbiters of what information is, or is not, "sensitive" -- that future administrations, of whatever party, are bound to balk at, for very good reasons, if these administrations or their DCIs define "sensitive" in a different fashion.

Though the executive branch is not, and never has been, any paragon of perfection with respect to discretion, it is worth noting that concerns about Congressional security are not only as old as our republic but, in fact, antedate our Constitution. Speaking of France's willingness to provide essential covert assistance to the revolutionary cause, Benjamin Franklin and Robert Morris -- in their capacity as Members of the Committee of Secret Correspondence of the Continental Congress, America's first intelligence organization -- noted, on 1 October 1776:

> "We agree in opinion that it is our indespensable duty to keep [this important intelligence] a secret, even from Congress ... We find, by fatal experience, the Congress consists of too many members to keep secrets."

As the Iran-Contra Affairs Minority Report mentions, on page 469, when Joel Poinsett (for whom the flower is named) was

conducting covert action missions in South America for then-President James Madison -- our Constitution's principal architect -- Poinsett was under instructions to communicate in code, and all his important communications were witheld from Congress.

Much more recent events unfortunately demonstrate a continuing justification for the kind of concerns that troubled Franklin and Madison.. In March 1987, the former Chairman of the Senate Select Committee on Intelligence -- who had relinquished his chairmanship only two months earlier -- spoke to a group of potential supporters convened, in Florida, by the America Israel Public Affairs Committee. In the wake and in the context of the Pollard affair, the former Chairman alleged to that audience that the Pollard case had been preceded, in 1982, by a similar U.S. intelligence operation targeted against Israel -- an allegation that both the U.S. and the Israeli governments immediately and emphatically denied. If there was any such operation, the former Chairman committed a serious security breach. If no such operation existed, his indiscretion was still grossly irresponsible particularly since many -- in Israel, America, and elsewhere -- would presume that the former Chairman's comments, on such subjects, must be authoritative.

In the intelligence field -- to American professionals and, even more, to foreign individuals and services co-operating with U.S. intelligence -- these public remarks of the former Chairman

of the Senate's intelligence oversight committee sent a shock wave around the world. They doubtless caused acute private distress to many of the former Chairman's Congressional colleagues, and to many Hill staffers; but the former Chairman is not likely to be called to account for his actions by anyone save, perhaps, the voters of Minnesota -- something else the intelligence world has not failed to notice.

REPORTING REQUIREMENTS AND FLEXIBILITY

H.R. 3822 would repeal Sec. 662 of the Foreign Assistance Act of 1961 -- the so-called "Hughes-Ryan Amendment" -- and strike the National Security Act of 1947's current Sec. 501. H.R. 3822 would replace the latter with a new 501 ("General Provisions"), a new 502 ("Reporting Intelligence Activities Other than Special Activities"), and a new 503 ("Presidential Approval and Reporting of Special Activities"). The 1947 Act's current Sec. 502 would be re-designated Sec. 504, and amended to include the essence of "Hughes-Ryan" -- whose original (1974) language on reporting covert action operations "in a timely fashion" was shifted in 1980 to current Sec. 501(b) and would now be eliminated. Current Sec. 503 would be slightly amended and re-designated Sec. 505. The companion Senate bill, S.1721 would effect the same section shifts in the National Security Act of 1947 with, in certain places, a few differences in proposed alternate language. Some of these differences are significant, but I will not take the time to address them here.

For reasons previously discussed, I believe the consequences of striking the current Sec. 501(a)'s lead or "preambular" clause altogether, and not replacing it, would be unfortunate. Also, H.R. 3822's alternate language -- in its proposed new Sections 501, 502 and 503 -- makes changes in current Sec. 501's tone and content that I respectfully urge this sub-committee to consider carefully before endorsing them for enactment into law.

Current Sec. 501 places on "the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities" the responsibility for keeping the intelligence oversight committees in both Houses of Congress "fully and currently informed" of all U.S. intelligence activities "including any significant anticipated intelligence activity" -- among other things, a euphemism for "special activity" or covert action. As spelled out in current Sec. 501(a)'s sub-paragraphs (2) and (3), this includes the responsibility for furnishing information requested by either intelligence committee and for reporting "in a timely fashion", to these committees, any "illegal intelligence activity or significant intelligence failure" -- plus "any corrective action" taken.

Prompted, I suspect, by quite understandable, legitimate Iran-Contra-fueled irritation at President Reagan, H.R. 3822's

proposed new language would divide this reporting responsibility and fix part of it on the President, by requiring him -- in new Sec. 501 -- to "ensure" that this reporting is done. In H.R. 3822's text, however, this change is effected in language that in places is redundant, and hence confusing. New Sec. 501(a) assigns "ensuring" responsibility to the President; but new Sec. 502(a) and new Sec. 503(b) -- the former with respect to "intelligence activities other than special activities", the latter with specific reference to "special activities" -- both pick up and repeat, with only minor changes, the language of old Sec. 501(a), which assigns the reporting responsibility to the DCI and other intelligence community component heads.

Since the actual reporting requirement and responsibility is clearly fixed in law, as it has been since 1980, there seems little reason to burden the President, formally, with "ensuring" that his intelligence community subordinates discharge their statutory responsibilities, in this regard. This is doubly so if one acknowledges any force or merit in the argument that a President's -- i.e. Chief of State's -- public connection with covert action should be minimized, not enhanced. In any event, the redundancy of H.R. 3822's language on this point produces a measure of inelegant confusion that strongly suggests hasty drafting. For obvious reasons, intelligence oversight legislation should not be prompted by pique, or punitive intent. Nor should it be drafted in haste, or with anything but

consummate, considered care and dispassionate craftmanship.

Present Sec. 501's language has a measure of flexibility and creative ambiguity that may offend the tidy-minded, legalistic purist, but is enormously useful in any statute dealing with a subject as complex and important as intelligence, especially covert action, conducted by an open, democratic society. Unquestionably, the administration abused this flexibility throughout the Iran-Contra imbroglio. In current Sec. 501, for example, the denotation of "timely" may be a bit imprecise, by design, but it is clearly not intended to denote an interval measured in months. One can readily understand why some in Congress, both members and staff -- prompted by Iran-Contra irritation -- would want to curtail this flexible ambiguity. In any delicate sphere, however, people impelled by understandable emotions and admirable motives should be very careful of over-reaction.

Current Sec. 501 requires the DCI and his intelligence community colleagues to keep the Congressional intelligence committees "fully and currently informed" of all manner of intelligence activities and information, especially "significant anticipated activities," but it is fairly delphic about whether this need be done before or after the fact. In addition, current Sec. 501 gives the President considerable discretionary latitude with respect to "prior notice" -- latitude that was also clearly

abused during Iran-Contra. In erecting unambiguous barriers against any recurrence of that particular abuse, however, H.R. 3822's proposed alternative for current Sec. 501 sets the stage -- perhaps inadvertently -- for other, future problems of equal if not greater magnitude.

THE MATTER OF "FINDINGS" -- PERTINENT CONSIDERATIONS, INCLUDING SECURITY AND GERMANE FOREIGN ATTITUDES

Presidents since Washington, certainly since Jefferson, have conducted covert actions or "special activities," or directed that they be conducted, whenever they felt the interests of the United States would be served by, or required, such activities -- without feeling any particular need for Congressional involvement or, often, knowledge, let alone Congressional direction or legislatively-conferred authority. H.R. 3822's proposed Sec. 503(a), would seem to break new Constitutional ground by stipulating, in a statute, that a President

> "may authorize the conduct of a special activity by departments, agencies, or entities of the United States Government only when he determines such an activity is necessary to support the foreign policy objectives of the United States and is important to the national security of the United States"

Proposed Sec. 503(a) then goes on to add "which determination shall be set forth in a finding that shall meet each of the following conditions," of which there are five.

The National Security Act of 1947's current Sec. 501(a) requires the Director of Central Intelligence (et al.) to keep

the intelligence committees "fully and currently informed of all intelligence activities .... including any significant anticipated special activity" -- i.e. covert action -- but does not stipulate how this is to be done. Current Sec. 501(a)(1)(B) adds that:

> "if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;" (the so-called Gang of Eight)

How this notice is to be given, however, is not specified. Current Sec. 501(b) says:

> "The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice."

But once again, current Sec. 501 does not prescribe any particular form or manner for doing this, though the phrase "provide a statement" certainly suggests something in writing.

Section 662 of the Foreign Assistance Act of 1961, the "Hughes-Ryan Amendment" -- which H.R. 3822 would repeal, then incorporate in that bill with slightly modified language -- stipulates that:

> "No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operations is important to

the national security of the United States."[1]

Hughes-Ryan, however, does not specifically say that the President's finding, itself, must be given to Congress, nor does it specify how the "description and scope" of each such operation is to be reported.[2]

H.R. 3822 would change all that. The first of its proposed Section 503(a)'s five conditions is that:

> "(1) Each finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in

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[1] As mentioned above, "Hughes-Ryan" orginally continued "and reports, in timely fashion, a description, and scope of each operation to the appropriate committees of Congress"; but this thought, and most of this language, was shifted in 1980 to the National Security Act of 1947's current subsection 501(b). The 1980 change also pared the number of committees to whom these reports must be made from "Hughes-Ryan's" eight to the two intelligence committees specified in current Sec. 501(b).

[2] Hughes-Ryan was originally added to the 1961 Foreign Assistance Act, as Section 662, in 1974. Section 654 of that Act, added in 1971 -- "Presidential Findings and Determinations" -- does say that:

> "In any case in which the President is required to make a report to the Congress, or to any committee or officer of either House of Congress, concerning any finding or determination under any provision of this Act, the Foreign Military Sales Act, or the Foreign Assistance and Related Programs Appropriation Act for each fiscal year, that finding or determination shall be reduced to writing and signed by the President."

Section 654, however, deals primarily with unclassified "findings and determinations", to be published in the Federal Register. It was part of a package of provisions directed at controlling re-programming (prompted by irritation at the way aid to Cambodia had been handled). Prior to Iran-Contra, no one ever thought of applying Section 654 to Section 662 intelligence findings, or to the informing and reporting required by the National Security Act of 1947's current section 501.

which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision is made."

I will pass over the fact that a written, permanent record account of a decision that may have been taken in a complex, fluid situation and that affects a range of significant U.S. interests is not a document that should be slapped together in haste. Care and thought should go into any such permanent document's drafting, a degree of internal coordination within the executive branch may be required, and properly preparing such a document for the President's approval and signature within 48 hours or, indeed, within two working days -- even if the President and the Congress are in Washington -- may simply not be possible. I would like the sub-committee to focus, instead, on considerations more important than operational details.

While an internal, written record of such decisions -- showing precisely who was directed or authorized to do what, and why -- should be made and kept, at least within the executive branch, whether the official accounts of such decisions, i.e. "findings", should be personally signed by the President of the United States is far more debatable than some who participated in the drafting of H.R. 3822 might be willing to acknowledge.

Particularly in the wake of Iran-Contra, the desire of many members of Congress, including members of this Committee, to hold

a President personally accountable for all covert action operations which that President directs or authorizes is eminently understandable; but germane here are two considerations previously mentioned -- one, of extraordinary delicacy.

First, under our Constitution and governmental system, our President is not only the chief executive, a political figure chosen in an inevitably partisan, contested election. Our President is also our nation's ceremonial, symbolic Chief of State -- all of whose actions, particularly with respect to foreign affairs, are hence our nation's, in a very important symbolic sense. In most parliamentary governments, partly for this very reason, chiefs of state -- whether put in office by heredity or some other form of selection -- are supposedly apolitical, "above politics". Chiefs of state can disavow or even, at least technically, depose prime ministers and confer their office on others, but not vice versa. In our system, conversely, a single individual, during that individual's presidential term, simultaneously plays both roles.

Secondly, covert action is a very delicate tool of statecraft, though one that all other nations employ -- many of them, against us -- and we hence should feel no compunction about using it, judiciously and deftly, to protect or further our own national interests. Covert action's delicacy derives in no small measure from the awkward but inescapable fact that its employment almost invariably involves infringing upon, or directly

violating, the laws of some other nation or nations, usually those of the nation at which a specific covert action operation is targeted.

A covert action "finding", as that term is employed in H.R. 3822, thus easily can be a document authorizing or directing some component of the U.S. intelligence community to ignore the laws of a nation with which we are not in a state of war and with which, indeed, we may have treaty relations whose spirit, at least, the "special activity" in question unarguably violates.

In my opinion, it is highly debatable whether it is in our national interest for any such document to be personally signed by our symbolic, ceremonial Chief of State -- the President of the United States -- thus laying an undeniable paper trail that runs directly into the Oval Office. Though all other nations, including our closest allies, frequently engage in covert action, few -- if any -- are imprudent enough to make covert action authorizations or directives a matter of written record, and none would ever consider having any such authorization or directive carry the personal signature of its ceremonial chief of state.

In any event, such a document -- particularly one signed by the President -- is clearly a document of the highest delicacy and sensitivity. Particularly in this age of Xerox machines, having more than one record copy of such a document -- let alone circulating plural copies, to anyone -- is an enormous security

risk. H.R. 3822, however, would require not only that such a document be prepared, in writing, for every special activity, and personally signed by the President, it would also require -- in its proposed Section 503(c), which I will address in a moment -- that in every instance, two copies of each "finding", signed by the President, be provided to Congress, one to the Chairman of each intelligence oversight committee.

I am not for a moment defending all that was done, or not done, during the course of Iran-Contra -- when the spirit of current Section 501 was clearly ignored by the administration, and its letter arguably violated. Furthermore, I am not denying that in the complex, highly delicate sphere of covert action, close -- though discreet -- cooperation between <u>any</u> administration and at least the leadership in Congress is essential if our national interests are to be well served. Nonetheless, I do most respectfully urge this Committee to weigh and ponder the considerations I have just discussed before moving forward with proposed sub-section 503(a)(1) of H.R. 3822, as that proposed sub-section is currently phrased.

The fifth condition which H.R. 3822 stipulates that every finding "shall meet" (Sub-section 503(a)(5)) is:

> "A finding may not authorize any action that would violate any statute of the United States."

This relates to the extraordinarily delicate considerations just discussed in connection with the first condition (503(a)(1)). A treaty is not a statute, but H.R. 3822 is here skating where the

legal ice gets very thin; for some findings are going to direct or authorize actions that certainly impinge on treaty relationships. Whether all this should be spelled out in open legislation is, to my mind, a very debatable question.

H.R. 3822's second condition (Sec. 503(a)(2)) is:

> "A finding may not authorize or sanction special activities, or any aspect of such activities, which have already occurred."

This has an obvious Iran-Contra impetus, and Congressional distaste for retroactive findings is quite understandable. This condition's phrasing, implications and consequences, however, merit further consideration; for as it stands, this condition could easily be construed as a King Canute-like directive. Actions that have already taken place can not be undone, any more than waves can be rolled back, by decree. Also, this condition, proposed Sec. 503(a)(2), is not entirely consistent with the immediately preceding one, proposed Sec. 503(a)(1), which explicitly addresses situations in which "immediate action by the United States is required and time does not permit the preparation of a written finding". A later finding, even one only 48 hours later, is still retroactive.

This particular inconsistency is not serious, but it is yet another indication of hasty drafting -- something that should not mark intelligence oversight legislation, especially such legislation dealing with the complex, complicated subject of covert action. All in all, proposed Sec. 503(a)(2) might perhaps

best be dropped.

The third of H.R. 3822's five necessary conditions for a valid finding (Sec. 503(a)(3)) is:

> "Each finding shall specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such activities: Provided, That any employee, contractor, or contract agent of a department, agency, or entity of the United States Government other than the Central Intelligence Agency directed to participate in any way in a special activity shall be subject either to the policies and regulations of the Central Intelligence Agency, or to written policies or regulations adopted by such department, agency or entity, in consultation with the Director of Central Intelligence, to govern such participation;" (emphasis in original)

This is obviously another Iran-Contra inspired ratchet-tightener, intended to prevent covert action free-wheeling by U.S. Government groups or entities, such as Lt. Colonel North's NSC staff office, which are not under the CIA's direction, or under guidance in which the DCI has formally concurred, and thus potentially outside the oversight jurisdiction of the Congressional intelligence committees.

The fourth of H.R. 3822's five conditions for a valid finding (Sec. 503(a)(4)) is that:

> "Each finding shall specify whether it is contemplated that any third party which is not an element of, or a contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the special activity concerned, or be used to undertake the special activity concerned on behalf of the United States;"

This also has a clear, eminently understandable Iran-Contra

inspiration; but no matter how reasonable and defensible this condition's intent may be, its language contains the potential for more problems, of greater severity, than those engendered by all of the other conditions combined. As it stands, this fourth condition's language can be construed as being either trivial or extraordinarily dangerous, on security grounds, or both.

Virtually no foreign intelligence operation, certainly no covert action operation or "special activity", can be successfully conducted without the cooperation, and utilization, of foreigners -- including individuals, entities or organizations, such as intelligence services, governments, or some combination of any or all of these. No sensible U.S. intelligence officer or service could plan a "special activity" without, at a minimum, "contemplating" that one or more foreign individuals, organizations, services or governments might be used "to fund or otherwise participate", in some significant way, "in the special activity concerned on behalf of the United States".

Foreign individuals or organizations who cooperate with a U.S. intelligence service might be styled "agents" of the United States or even, if there is some compensation agreement for providing that cooperation, as "contract agents". Also, by forcing language a bit, it might be argued that such "contract agents" are, to some extent -- under their "contracts" -- "subject to United States Government policies and regulations." But these are exercises in irrelevant casuistry. Few if any of

the foreign individuals or entities -- "third parties" -- bound to be participating in some "significant way" in any given "special activity" could be meaningfully or accurately described as "an element of, or a contractor or contract agent of, the United States Government... subject to United States Government policies".

If sub-section (4) is construed as requiring only a general statement, then it is virtually meaningless; for if it is so construed, it can be satisfied by a standard, boiler plate sentence mechanically incorporated in every finding and saying something along the lines of "The special activity herein described of course contemplates the use and participation of one or more non-U.S. individuals, persons, organizations or entities." If sub-section (4) is supposed to mean more than that, however, particularly if it is intended to require giving some specific indication of what types of non U.S. government "third parties" will be participating, and in what ways, in the "special activity" covered by a particular finding, then that condition lays down a security minefield impossible to traverse unscathed.

The language of the final sentence of H.R. 3822's proposed sub-section 503(e) could easily be read as supporting a broad construction of this fourth condition of sub-section 503(a). That sentence says (in language evoking Gertrude Stein):

> "A request by any agency or department of the United States to a foreign country or a private citizen to

> conduct a special activity on behalf of the United States shall be deemed to be a special activity."

If H.R. 3822 is enacted, as currently drafted, this sentence could certainly be construed as meaning that the executive branch is required to write and submit a separate finding on each and every request to a foreign government, and each and every recruitment pitch to a foreign national, for assistance in a U.S. covert action operation.[3]

Should proposed Sec. 503(a)(4) ever be given this type of broad construction, now or in the future, satisfying its requirements would inevitably involve security risks so grave that no prudent U.S. President, administration, or Director of Central Intelligence -- not to mention foreign individual, entity or government -- would want to run them.

Consider, for a moment, the position in which a broadly-construed Sec. 503(a)(4) would place any Director of Central Intelligence. The National Security Act of 1947's Sec. 102(d)(3), as mentioned earlier, makes the DCI "responsible for protecting intelligence sources and methods from unauthorized

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[3] A broad construction of proposed sub-section 503(a)(4) of the National Security Act of 1947 goes directly against the grain of the clause in section 6 of the CIA Act of 1949 which reads:

> the Agency [i.e., CIA] shall be exempted from ... the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency. (emphasis added)

This, however, is a complication that may have escaped the drafters of proposed 503(a)(4).

disclosure". H.R. 3822's proposed Section 501(e), repeating the language of current 501(e), stipulates that:

> "Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods."

In addition to engendering difficulties already discussed, however, this sentence does not solve the problem a broadly construed 503(a)(4), as proposed, would create; because subtle but very important semantic distinctions here come into play.

The National Security Act's Sec. 102(d)(3) makes the DCI "responsible for protecting intelligence sources and methods from unauthorized disclosure" (emphasis added). Note that Sec. 102(d)(3), furthermore, is quite specific. It makes the DCI responsible for protecting intelligence sources and methods themselves -- not just "information relating to intelligence sources and methods" -- from unauthorized disclosure.

Section 501(e), both current and proposed, does not absolve a DCI of this responsibility. It only denies a DCI the authority to withhold information "on the grounds that providing the information to the intelligence committees would" -- i.e., of itself -- "constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods." (Again, emphasis added.)

If broadly construed, proposed Sec. 503(a)(4) would require a DCI, in the case of each "special activity", to approve or, at a minimum, concur in a written "finding", to be signed by the President, specifying the fact and nature of all non-U.S. participation in that "special activity", with a minimum of two copies of that document being sent to Congress for permanent retention on Capitol Hill. Such a written reporting requirement could easily put a conscientious DCI in an impossible position. In a given case or in connection with any particular covert action operation, a DCI might feel that the very existence of the document required under a broad construction of Sec. 503(a)(4) would put specific, sensitive intelligence sources and methods at unacceptable risk. In such an instance, the DCI would have no authority to block the preparation or transmission of that particular document, even if that DCI felt his or her responsibility for protecting the intelligence sources or methods in question made it mandatory for that DCI to do so.

In this whole context, I respectfully urge this Committee to consider over two centuries of relevant American reflection, experience and precedents.

As John Jay observed in the previously quoted passage in Federalist 64:

> "There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would

> rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly."

Just over a half century later, President James Polk, in refusing to disclose confidential intelligence expenditures to Congress, forcefully argued in a letter to the House of Representatives:

> "In no nation is the application of such sums ever made public. In time of war or impending danger the situation of the country may make it necessary to employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they entertained the least apprehension that their names or their agency would in any contingency be divulged."

Only a year ago, on 8 April 1987, in testifying before this very committee, Representative Norman Y. Mineta -- a staunch proponent of strict Congressional intelligence oversight -- confirmed and acknowledged that the Canadian government did not want its 1980 role in hiding, protecting and safely exfiltrating American hostages from Iran to be reported to Congress by President Carter in a finding -- at least while that operation was in train.

In this whole matter, furthermore, H.R. 3822 attempts to draw a distinction which may sound very simple, neat and tidy in a proposed statute; but which in the real world is very difficult to draw, and often does not exist. In the actual conduct of intelligence activities abroad, the cooperating institutional and individual assets ("agents", if you will) used in "special activities" and those used in normal, albeit sensitive,

intelligence collection activities are often the same -- the same institutions, the same organizations, and the same people. Given the real world's exigencies and complexities, consequently, there is often no way you can meaningfully distinguish -- for purposes of reporting to Congress -- betweeen foreign institutions and individuals who assist in the conduct of "special activities" and those who assist in the conduct of intelligence activities in general.

I know from my own experience as Chairman of the U.S. Intelligence Co-ordinating Committee in Germany, from 1976-1979, how skittish my West German, Israeli, and other friendly foreign service counterparts were about sharing sensitive information, especially operational information, on common concerns and targets -- such as terrorism -- because of their worries about how such information, after I reported it, would be handled back in Washington, particularly if it was passed to Congress. The strong, almost universal perception of my foreign counterparts was that in the United States, we were manifestly incapable of protecting even our own secrets, hence we could hardly be relied on to protect theirs. We may consider such foreign perceptions unwarranted and inaccurate, but their widespread existence and their force are facts that American intelligence professionals can not ignore or brush aside when planning operations -- of any nature -- in which cooperative foreign participation is essential.

Such foreign perceptions and concerns would be inflamed and exponentially increased if H.R. 3822's proposed sub-section 503(a)(4) should ever be enacted into law, and then broadly construed. Should it ever come to be widely believed abroad that U.S. law required -- or even that there was a serious risk that U.S. law might require -- the identification in a written document, of which at least two copies would be sent to Congress, of all non-U.S. individuals and entities, including governments, cooperatively participating in any U.S. "special activity", our pool of essential foreign assistance and support would swiftly evaporate. The extent and speed of that pool's evaporation, furthermore, would be increased by the fact that few foreigners would note, and even fewer would pay attention to, any American legal distractions between "special activities" and other intelligence activities. In this sphere, foreign perceptions and beliefs -- not our assessment of their accuracy or validity -- would be controlling.

From the perspective of 26 years' experience in the profession of intelligence, I can state flatly that should H.R. 3822's proposed sub-section 503(a)(4), or anything like it, ever be enacted into law, few foreign individuals or entities, governments again included, whose cooperation and assistance we would need to conduct "special activities" -- or, for that matter, any intelligence activities of any consequence -- would be willing to put their fortunes, reputations or, in the case of individuals, their freedom and even their lives hostage to the

discretion or secret-keeping capability of the Congress of the United States.

NOTIFICATION TIMING; PERTINENT ISSUES AND PROBLEMS

In H.R. 3822, "findings" are the official mechanisms by which Congress, through its intelligence oversight committees, is apprised of "special activities" -- i.e., covert action operations -- conducted by the executive branch, the intelligence community generally and, specifically, the CIA. Let us now put aside the mechanics of notification and turn back to the matter of precisely who in Congress must be notified, and when: At what point in a covert action operation's planning, development or execution must that operation's existence, nature and scope be reported, must a "finding" about it be submitted, and to whom?

As mentioned earlier, these are matters about which there is a measure of flexibility and creative ambiguity in current practice and legislation, including "Hughes-Ryan" and the National Security Act of 1947's current section 501. During Iran-Contra, the administration patently abused this flexibility and ambiguity, provoking amply justified ire in Congress generally and in the intelligence oversight committees, including -- specifically -- this sub-committee's parent committee. To prevent these particular abuses from recurring, H.R. 3822 would curtail that flexibility and clarify the relevant ambiguities; but as also mentioned earlier, H.R. 3822's proposed solutions to

what are perceived as current problems would create new ones of at least equal gravity.

H.R. 3822 would repeal "Hughes-Ryan" and strike current 501, thus eliminating the "in a timely fashion" flexibility, of which the administration took such politically inept advantage during Iran-Contra. That done, H.R. 3822's proposed language would nail shut all such "loopholes" and move briskly, purposefully and rigidly in the direction of "prior notification."

H.R. 3822's proposed subsection 503(c)(1) begins:

> "The President shall ensure that any finding approved pursuant to subsection (a) shall be reported to the intelligence committees as soon as possible after such approval and prior to the initiation of the special activity authorized by the finding." (Emphasis added.)

This is somewhat attenuated, in the next sentence, by the proviso:

> "That if the President determines it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, such finding may be reported to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate." (The so-called Gang of Eight.)

This proviso is immediately followed, however, by a sentence stipulating:

> "In either case, a copy of the finding, signed by the President, shall be provided to the chairman of each intelligence committee." (Emphasis added.)

Thus are mandated the two Capitol Hill copies, of each finding, referred to and discussed above. 503(c)(1) then concludes:

> "Where access to a finding is limited to the Members of Congress identified above, a statement of the reasons for limiting such access shall also be provided."

Section 503 continues:

(c)(2) "In circumstances where time is of the essence and the President determines that it is important to the national security interests of the United States to initiate a special activity before the notice required by paragraph (1) can be given, such activity may be initiated without such notice.

(c)(3) "The President shall ensure that notice of a special activity undertaken pursuant to paragraph (2) is provided to the intelligence committees, or to the Members of Congress identified in paragraph (1), as soon as possible, but in no event later than forty-eight hours after the special activity has been authorized pursuant to subsection (a). Such notice shall be accompanied by a statement of the President setting forth why time was of the essence and why proceeding pursuant to paragraph (2) is important to the national security interests of the United States. (emphasis added)

(d) "The President shall ensure that the intelligence committees, or, if applicable, the Members of Congress specified in subsection (c), are notified of any significant change in a previously-approved special activity, or any significant undertaking pursuant to a previously approved funding, in the same manner as findings are reported pursuant to subsection (c).

(e) "As used in this section, the term 'special activity' means, with respect to the Central Intelligence Agency, operations in foreign countries other than activities intended solely for obtaining necessary intelligence, and, with respect to any other department or agency of the United States, any activity conducted in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, and does not include activities to collect necessary intelligence, or diplomatic activities carried out by the Department of State or persons otherwise acting pursuant to the authority of the President. A request by any agency or department of the United States to a foreign country or a private citizen to conduct a special activity on behalf of the United States shall be deemed to be a special activity.

(f) "No special activity may be conducted if it is intended to influence United States political processes, public opinion, policies, or media."

All of these stipulations merit some comment, starting with the last one. On quick reading, proposed Sec. 503(f) might seem only to repeat, in almost identical language, a thought inherent in sub-section 3.4(h) of Executive Order 12333:

"but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions." (emphasis added)

Actually, however, an easily overlooked shift in mood -- from declarative to imperative -- produces a potentially very significant shift in meaning between H.R. 3822's proposed 503(f) and E.O. 12333's 3.4(h).

Executive Order 12333's Section 3.4 is titled "Definitions", its sub-section 3.4(h) is a definition of "special activities", and the words following "but which are not intended to" are simply part of that definition.

H.R. 3822's proposed Sec. 503(f), conversely, is a prohibition -- not part of a definition. It says, as quoted above,

"No special activity may be conducted if it is intended to influence United States political processes, public opinion, policies or media." (emphasis added)

This mood shift makes the intent of the special activity in question a threshold test of permissibility in H.R. 3822's

proposed Sec. 503(f), not simply one defining characteristic of "special activities" as is the case in sub-section 3.4(h) of E.O. 12333.

A properly conceived, soundly managed and effectively run covert action operation or "special activity" -- by definition -- will attempt to influence the course or evolution of events, in some important foreign region, in a manner beneficial to U.S. interests. If that operation is successful, its results are bound to be widely reported in the media -- even if the U.S. hand or the full extent of U.S. involvement in helping bring about those results can be concealed. If such concealment proves impossible -- as, in time, will usually prove to be the case -- the fact of U.S. involvement will become a major part of the story or, indeed, the major story itself. If a covert action operation is successful, furthermore, its success is bound to be politically advantageous to the U.S. administration then in office -- and even more so if that administration's role in that success becomes a matter of public knowledge (something any such administration, of any party, would be strongly tempted to ensure). If the operation in question is a failure, conversely, or publicity about the U.S. hand in it becomes an embarrassment, this is bound to have at least some adverse impact on the political fortunes of the administration which planned and launched that operation.

Whether a success or a failure, in sum, a covert action operation or "special activity" of any consequence -- even if it was planned, approved and run with only foreign objectives in mind -- is bound to have some degree of effect or influence on "United States political processes, public opinion, policies, or media". This being the case, in real world life, proposed sub-section 503(f) -- as presently drafted, (without any legal penalties for its violation) -- would be very hard to construe and apply (or enforce) in concrete situations, and could be employed by opponents of covert action in an effort to block "special activities" altogether. This was doubtless not the drafters' purpose. Indeed, their objective seems reasonably clear; but when this passage is couched in the imperative mood, as a prohibition, the verb "intend" has to carry more weight than it may prove capable of bearing.

Where definitions are concerned, there is also a serious problem in proposed Sec. 503(e) -- one addressed and discussed in some detail by DCI William Webster in his testimony before this sub-committee, and its parent full Committee, on 24 February (1988). Proposed Sec. 503(e) defines "special activity" in one way with respect to Central Intelligence Agency "operations in foreign countries" and a different way with respect to the activities of "any other department or agency of the United States". This produces precisely the confusion and difficulties that the DCI forcefully and accurately described.

There is another semantic problem, also an important one, a bit earlier in proposed section 503. Proposed Sec. 503(c)(2) says that:

> "In circumstances where time is of the essence and the President determines that it is important to the national security interests of the United States to initiate a special activity before the notice required by paragraph (1) can be given, such activity may be initiated without such notice."

Proposed Sec. 503(c)(3), however, says:

> "The President shall ensure that notice of a special activity undertaken pursuant to paragraph (2) is provided to the intelligence committees, or to the Members of Congress identified in paragraph (1), as soon as possible, but in no event later than forty-eight hours after the special activity has been authorized pursuant to subsection (a)."
>
> (emphasis added in both of the above quotations.)

There is a latent contradiction between (2) and (3) which could become very important in certain situations. In the real world, there is frequently a delay of at least 48 hours, often longer, between the authorization -- in Washington -- of a complex covert action operation or "special activity", and its initiation half a world away. In such a situation, the short-term tactical flexibility given the President by proposed 503(c)(2), "in circumstances where time is of the essence", is taken away by proposed 503(c)(3).

This is by no means a purely hypothetical problem. The previously mentioned 1980 exfiltration from Tehran of six American Embassy personnel, who hid for several weeks in the

Canadian Embassy there, provides a perfect illustration of a real world situation that would put a President directly in the cross-fire between proposed 503(c)(2) and proposed 503(c)(3).

Exfiltrating American citizens -- in this case, U.S. government employees who had escaped from a U.S. Embassy seized by hostile local elements who were holding, as prisoners, the other U.S. personnel in that embassy -- might not be what the term "covert action" would normally suggest or denote to most people. Nonetheless, at least for the CIA, this would clearly be a "special activity" within the definition given in proposed 503(e); for such an operation would patently be something "other than" an activity "intended solely for obtaining necessary intelligence".

In the 1980 Tehran situation, however -- as mentioned earlier and as Representative Mineta explained to this very sub-committee's parent committee on 8 April 1987 -- the Canadians, for their own security and protection, made their essential cooperation contingent on Congress' not being told about what was in train, or what the Canadians were doing, until after the operation was concluded. In the 1980 Tehran situation, furthermore, the period between the "authorization" and the "initiation" of the "special activity" in question -- exfiltrating the endangered Americans -- was measured in weeks, not hours.

Had H.R. 3822, as presently phrased, been on the statute books in 1980, President Carter -- not President Reagan -- would have been directly impaled on the horns of a very difficult dilemma. He would have had to either:

(a) ignore the law, or

(b) tell the Canadians that he could not lawfully meet the conditions they imposed on their essential assistance, even though declining that assistance clearly put American lives at risk.

I can not believe that any member of this sub-committee, or of the full House oversight committee, would want to put any American President, of whatever party, in such a situation. This is far from the least of the reasons why I respectfully urge this sub-committee to reconsider the language of H.R. 3822, and all of that language's implications, before recommending that this proposed bill, as it now stands, be enacted into law.

SOME RAMIFICATIONS OF "PRIOR NOTIFICATION"

In its conduct of Iran-Contra, as previously stressed, the Reagan administration clearly abused the discretionary latitude afforded any administration of any party, in conducting covert operations, by the flexibility and ambiguity of some of the language in current statutes dealing with these matters. As the legislative history of the pertinent statutes quite clearly demonstrates, however, much of this flexibility and ambiguity was

deliberately inserted into the statutes in question, for excellent reasons. Particularly where matters as complex as covert action are involved, even the most astute, discerning legislators and staff drafters of legislation can not possibly foresee, or codify in advance, all the concrete contingencies and difficult real life dilemmas that are bound to arise. Sound legislation in such spheres, consequently, has to give both the executive and the legislative branches of our government some measure of wiggle-room.

For reasons that are quite understandable but nonetheless, I respectfully submit, seem focussed on an event (Iran-Contra) unlikely to re-occur, H.R. 3822 would remove the ambiguity and virtually eradicate the flexibility of the relevant current statutes. Doing that, however, could easily prove procrustean and generate serious problems in future contingencies or situations not now forseen.

By reducing the permissible exceptions to a bare minimum, not always in consistent ways, H.R. 3822 would also push Congress far deeper into the "prior notification" thicket. In the light of Iran-Contra, this might seem desirable; but it is a punitive move that would probably be rued by future Congresses, as well as by future Presidents -- regardless of party.

For one thing, making "prior notification" the required norm for all but the most time-urgent "special activities", and then adding an inflexible 48 hour notification strait jacket for them, would exponentially increase the difficulty of keeping covert actions covert. As the witting circle on Capitol Hill widens, with respect to staffers as well as actual members of Congress, there would be a concomitant increase in any given "special activity's" vulnerability to being torpedoed by a pre-emptive leak, even if a majority of both oversight committees endorsed the "special activity" in question.

In the preceding sentence, the verb "endorse" was used advisedly, for here involved is an irony to which I respectfully direct this Committee's attention. The risk in question -- of a pre-emptive leak torpedo -- is increased, not diminished, by the last sentence proviso in H.R. 3822's proposed 501(a), which repeats, in slightly altered language, the thought of current 501(a)(1)(A):

> "Provided, That nothing contained in this title shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities." (emphasis in original)

The clear intent of this proviso is Constitutionally admirable; but its practical effect, in the real world, is likely to be complex.

Most "special activities" will be controversial. The more

important or significant those activities potentially are, and ditto the regions of the world on which they focus, the more controversial they are likely to be. In any given instance -- particularly with respect to an activity that, for any reason, is highly controversial -- no matter how many members, or staffers, of either or both intelligence oversight committees may think the operation in question is wise, even necessary, there are bound to be some members, and staffers, who have reservations about it or oppose it strongly.

As we all know, in real world situations -- personal, professional and political -- informed silence is frequently construed, by others, as tacit assent. If a given, controversial "special activity" goes sour or retrospectively becomes politically unpopular, the argument that "Yes, I knew about it and yes, I kept silent about it, but I really didn't approve of it -- honest!" is not likely to carry much weight in debates with opponents or (perhaps even less) with friends, in the voting booth, or in some cases, with the individual consciences of certain members or staffers of an oversight committee.

Even if legally impeccable, the language of proposed Sec. 501(a)'s last sentence proviso is pragmatically ambiguous. It purports to buttress executive branch authority, or at least to refrain, explicitly, from derogating that authority; but what it actually -- or also -- tries to do is absolve Congress of

responsibility.

As is unfortunately the case with all of us, however, members of Congress, and of Congressional staffs, simply can not have it both ways. They can not insist on prior knowledge of, in this instance, special activities but disclaim responsibility for the consequences of activities, or of actions, that they knew about in advance and did not demonstrably try to prevent. Particularly in a charged, partisan atmosphere such as that now prevailing with respect to many important issues (e.g. Central American policy), this is a consideration that members of Congress or staffers, strongly opposed to any given proposed "special activity", would be disinclined to brush aside. It would always provide a handy, conscience-salving rationale for breaking discipline, ignoring secrecy pledges and attempting to sandbag, by a leak, a contemplated, reported special activity that Congress or an intelligence oversight committee, institutionally, was not inclined or willing to oppose.

By insisting on almost universal prior knowledge of projected "special activities", in short, Congress inevitably assumes responsibilities it may not wish to assume -- including a responsibility for increased security hazards. While it may disclaim responsibility for the consequences of special activities it did not explicitly approve, furthermore, Congress can not altogether avoid or deny that responsibility and must

assume at least some of it if Congress is going to insist on being informed, in writing, of virtually all such activities in advance of their initiation. All of this, in turn takes Congress into constitutionally murky waters, getting it deeply involved in tasks it is not structured to perform and can ill-spare the time to undertake, particularly when Congress has demonstrable difficulty in discharging some of the responsibilities that the Constitution clearly does assign to it -- such as passing appropriations bills.

Once again, as President Carter's, not President Reagan's, Deputy Assistant for National Security Affairs, David Aaron, put the matter quite neatly when testifying before the House intelligence oversight committee in September 1983 in connection with "special activities" legislation:

> "It was the purpose of [current] Sec. 501 to ensure that the Congress had sufficient access to information, in a timely way, to be able to exercise [its proper] functions in the field of intelligence activities. It was not [one of] the goals of Sec. 501 to make the Congress a co-decision-maker on covert action operations."

THE DANGERS OF HASTY, EMOTION-IMPELLED REFORMS

Drafted in the immediate aftermath of the Iran-Contra Report's preparation, H.R. 3822's language, at least to this reader's eye, reflects an eminently understandable desire to rap Ronald Reagan's knuckles and tie his hands. But Ronald Reagan leaves the Oval Office, permanently, in January 1989 -- less than

a year hence -- and none of his successors, of whatever party, is likely to forget or ignore the lessons of Iran-Contra. Furthermore, if H.R. 3822 or any similar bill gets enacted, there is no way of telling what future President's hands that law may tie, under what particular circumstances, with what adverse impact on U.S. interests.

Legislation affecting Congressional oversight of intelligence activities, particularly "special activities", is invariably complicated; for it inevitably involves the judicious weighing and balancing of a myriad important, complex and often conflicting considerations and equities. Such legislation should not be drafted or enacted in haste or under the influence of strong emotions, including pique. Nor is it wise to draft, debate and enact such legislation amid the distractions and pressures of an election year, including an election year's temptations to adopt or endorse positions, on controversial issues, that are poll or popularity-enhancing in the short run, but not necessarily in the long-term best interests of the United States.

Such considerations apply with particular force to issues involving "reforms"; for reforms drafted and adopted under such conditions almost invariably prove to have unintended, undesired consequences. Also, they frequently get those who implement the reforms in question, or supervise their implementation, emeshed

in the micro-management of others' responsibilities -- such as the Presidency's.

During my own career in government, I was privileged to develop a close association with the Honorable Birch Bayh, the Senate Select Committee on Intelligence's second Chairman. We differed on many issues, as we still do, but became and remain good friends. He visited me in Germany, as a guest in my home -- where he was a great favorite with my children -- while I had overall responsibility for the U.S. intelligence community there and he was Chairman of the Senate oversight committee. On one evening during that visit, I assembled a representative, cross-sectioned group of my abler young officers who were deeply and personally involved in our efforts to combat terrorism and other threats to the security of the United States. We sat up all night (literally) having a frank, suitably lubricated, no-holds-barred, give-and-take discussion. During that discussion, my front-line colleagues endeavored to explain, by citing a succession of concrete examples, how difficult it was to apply on the banks of the Rhine -- and of other rivers around the world -- the sweeping, "thou shalt not, ever, under any circumstances" reform restrictions of the mid-1970, which sounded so splendid when proclaimed, passed, issued or endorsed along the banks of the Potomac.

As my young colleagues kept recounting their frustrating first-hand experiences with the results or consequences of these "reforms", the good Senator kept repeating, like an antiphonal response in a High Church Anglican service, "But this was never the intent of Congress!" My equally antiphonal response was that in the field, we did not have the luxury of trying to divine Congressional intent. Instead, we had to be guided, and were circumscribed, by what the government's lawyers, including the CIA's, construed to be the meaning of the language in statutes Congress enacted, such as the Foreign Intelligence Surveillance Act, or in Executive Orders and internal CIA regulations strongly influenced by Congressional attitudes.

WHAT OUGHT TO BE DONE

Despite their often vexing complexity, Mr. Chairman, and the inordinate difficulty of conducting them effectively, let alone securely, in an open, democratic society such as ours, I doubt if any member of this sub-committee, or its parent, would want to take serious issue with the conclusion of the Congressional Committees investigating the Iran-Contra Affair that "Covert operations are a necessary component of our nation's foreign policy".

In this regard, let me also redirect your attention to the lead paragraphs in the "Recommendations" chapter (28) of those

Committees' Report:

> "It is the conclusion of these Committees that the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance. This is an important lesson to be learned from these investigations because it points to the fundamental soundness of our constitutional processes.
>
> Thus, the principal recommendations emerging from the investigation are not for new laws but for a renewal of the commitment to constitutional government and sound processes of decisionmaking."

No sensible person would contend, and I certainly do not, that our current laws dealing with covert action, and its oversight, can not be improved. This sub-committee and its staff are to be commended on the thought, care and effort that have clearly gone into the consideration and discussions of H.R. 3822. For reasons I have tried to explain, however, I do not believe that the end results this distinguished sub-committee or its full parent Committee wants to achieve, in the discharge of its Constitutionally-mandated responsibilities, are most likely to be attained by moving forward with H.R. 3822 or any similar legislation, unavoidably drafted in some haste in the wake of the issuance of the Iran-Contra Report and under the influence of emotions which that unhappy affair inevitably engendered on Capitol Hill -- particularly when any such legislation would have to be debated and enacted amidst the mounting, divisive and partisan pressures of an election year.

Most respectfully, I commend an alternative course of action to your consideration -- one suggested by the distinguished Chairman of the Senate's oversight committee, even though he is a co-sponsor of H.R. 3822's Senate counterpart, S. 1721.

In the thoughtful, previously mentioned 1 December 1987 Washington Post essay, co-authored with Senator Danforth, Senator Boren addresses foreign policy, generally, but his and his co-author's comments and suggestions have an obvious, direct applicability to the specific matter of covert action as well. To underscore this point "covert action" is substituted for the orginal's "foreign policy" in the lines from that essay quoted below.

> "What is needed is both a general statement of covert action principles in the manner of the Vandenberg Resolution and an ongoing process for working out specific differences as they arise, but before they are ripe for legislative action.
>
> "If the views we have expressed make sense, then the question remains: Where do we go from here? The answer depends on what response, if any, we evoke from the administration and members of Congress. We would hope for an informal meeting of no more than a handful of administration representatives and interested members of Congress for the purposes of 1) drafting a statement of agreed covert action principles, and 2) exploring a system for resolving covert action disputes. If the call is for volunteers to convene such a meeting, then count us in."[4]

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4 "Foreign policy" is used in the original in the three places where "covert action" appears in these two quoted paragraphs.

With respect to covert action, as well as foreign policy in general, I hope the Reagan administration, in its final months, has the wit and vision to take up the distinguished Senators' admirable suggestion. If it does, I hope you and other members of this Committee will also be willing to be "counted in".

The nation's essential covert action capabilities, along with their proper oversight, will stand a far better chance of being lastingly improved by some procedure such as these two Senators suggest than by any legislation quickly drafted in the Iran-Contra Report's immediate aftermath, then considered and debated amidst the steadily mounting pressures and distractions of an election year.

The nation's interests would be far better served if, instead, a small group of knowledgeable, senior administration officials, past or present, could be convened to meet quietly with a corresponding, and correspondingly small, bi-partisan group of appropriate Congressional leaders, from both Houses; and then, over the course of several months' frank, private discussion, this joint body, working together, could not only draft "a statement of agreed principals" regarding covert action and explore "a system for resolving disputes", but also supervise the measured, careful drafting of any new legislation thought to be warranted -- for formal introduction, debate, consideration and enactment after the 1988 electoral season, with its attendant

demands and pressures, has passed. This may be a utopian dream, but as a concerned citizen who has devoted a quarter century to serving our nation as an intelligence professional, I would relish seeing this dream become a reality.

Thank you very much for your time and attention.

NATIONAL SECURITY ACT OF 1947, AS AMENDED

TITLE V - ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES

CONGRESSIONAL OVERSIGHT

Sec. 501. [50 U.S.C. 413] (a) To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --

(1) keep the Select Committee on Intelligence of the Senate and 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 ot 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 leaders of the Senate;

(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

(b) The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not

given under subsection (a) and shall provide a statement of the reasons for not giving prior notice.

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

(d) the[1] House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods funished 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.

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[1] As in original.

A Needed Capability Jeopardized:
Covert Action in the Wake of the Iran-Contra Hearings

by George A. Carver, Jr.*

The Iran-contra hearings, now mercifully ended, make one think of Shakespeare. To paraphrase Mark Antony (in Julius Caesar), the evil men do lives after them, the good is oft interred with their reports. Even more pertinent, particularly in the hearings' aftermath, is Lady Macduff's plaint (in Macbeth) at being,

> "... in this earthly world, where to do harm
> Is often laudable; to do good, sometime
> Accounted dangerous folly ..."

These Shakespearean aphorisms apply with particular force to something much-debated but little understood, inside or outside the hearing room or even, alas, in the Reagan White House: covert action.

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This essay was published, in its entirety, in the Opinion section of the Sunday, 16 August 1987 edition of The San Diego Union, in the Commentary section of the Monday, 17 August 1987 edition of The Washington Times, and was nationally syndicated by the Copley News Service.

Successful foreign policy, as de Toqueville observed, requires secrecy and patience. Washington abounds in neither, at either end of Pennsylvania Avenue, which is far from the least reason why many of our foreign policy ventures are notably unsuccessful. Covert action is a special, often useful and sometimes essential form of secret diplomacy, practiced from time immemorial by all manner of tribes, kingdoms and nations to further their interests and those of their friends or allies, or thwart the designs of their adversaries, in situations where it is deemed desirable or necessary to mask the hand of the action in question's true instigator or sponsor. Before we condemn this as invariably sinister, we should remember that we would never have won our War of Independence and become a free nation without French and Spanish covert action support, initially handled with great secrecy to keep the donors from becoming openly embroiled, themselves, in a direct conflict with George III's Britain. We should also remember that for similar reasons, private individuals often act in a similar fashion. A benign mother or aunt who tries "to bring two young people together" without being an obvious matchmaker is engaging in covert action, as is anyone who tries to break up an alliance which that person considers ill-advised, without getting counter-productively caught in the process.

There are many similarities between covert action and a scalpel. Neither can be successfully wielded by a committee. Like covert action, a scalpel is useful, even essential in certain situations, though disaster can quickly result if it is not skillfully employed, with a deft and sure hand, by someone who knows what he or she is doing. Surgeons do not forgo scalpels because if inappropriately or clumsily used they can inflict great injury, even cause death. Similarly, covert action -- despite the risks its employment engenders -- is a tool of statecraft no nation should forgo, and very few do. In dealing with the United States, for example, virtually every nation in the world supplements its open diplomacy with various forms of covert action -- or unadvertised, unacknowledged lobbying -- attempting, with varying degrees of success, to influence our opinions and actions in ways congenial to the nation in question's perception of its interests. Our adversaries are by no means the only ones to essay this game; indeed, no one plays it more indefatigably, or successfully, than one of our closest allies -- Israel.

To stand any reasonable chance of being successful, a proposed or contemplated covert action must meet several tests. Conceptually, it should reflect a sense of proportion and perspective. Immediate desires and objectives, such as freeing hostages, should never be allowed to obscure or put at risk larger, long-term national

interests, such as punishing and curbing terrorism. It should also be sensible, running with -- never against -- the grain of local reality in the area in which the operation in question is to be attempted.

Like surgery, covert action should be conducted by trained, experienced professionals, not entrusted to zealous, well-meaning amateurs with more energy than judgment, whose warheads are better than their guidance systems. By definition, no covert action should be undertaken unless there is a reasonable chance of keeping it secret, and no such action should be conducted in a way that increases its risk of exposure. Secrecy being hard to maintain under the best of circumstances, however, the political and other costs of exposure should be carefully assessed before a final decision is made to launch any given covert action operation.

Though covert action operations -- again, by definition -- inevitably involve at least some dissimulation and deception, no such operation should be basically inconsistent or incompatible with any important, publicly proclaimed governmental policy. Covert action functions at the margins of policy -- ideally, in a quietly supportive way. It can contribute, sometimes significantly, to a policy's success, but it can never be an effective substitute for policy -- or for thought. Furthermore, the most brilliantly conceived and skillfully executed covert action operation cannot salvage or redeem a policy that is fundamentally unsound or flawed.

Providing U.S. arms to Iran, by the planeload, in a bootless effort to negotiate the release of American hostages for these already-provided arms failed every test and violated every precept just outlined. From an American perspective (though not necessarily from an Israeli one), the Iranian exercise was a disasterous fiasco -- particularly as a covert action operation. At its end, Iran's stock of weapons and resultant military capabilities were markedly increased (which may well have been Israel's primary objective), the Reagan administration and the United States were gravely embarrassed, the sound American policy of not negotiating with terrorists was badly undercut, and the net number of American hostages held in or near Lebanon by Shi'ite militant factions presumably responsive to Iranian influence, such as Hezbollah, had not diminished but, instead, had increased by half (from six in the summer of 1985 to nine in the summer of 1987).

In the process, matters were worsened by grafting the Iran exercise onto the <u>contra</u> support and re-supply endeavor (another Israeli suggestion) -- thus violating every professional canon of compartmentation and sound security in running covert action operations, with the inevitable result any professional could have predicted. This was doubly unfortunate since the <u>contra</u> endeavor was far more sensible and defensible, on its merits, than the Iran quadrille and should never have been tarred with the latter's brush.

As a candidate for election, then re-election, and as President, Ronald Reagan has never made any secret of the fact that he considers the establishment of a Cuban and Soviet supported Communist dictatorship in Central America, in Nicaragua, a potential threat to America's vital interests. Whatever its defects in detailed conception and in execution, the contra-aid endeavor directly supported -- and unlike the Iran exercise, did not undercut or contravene -- well-known, often-ennunciated Reagan administration policy. In retrospect, it was nonetheless clearly not wise, or politically astute, to handle contra aid as a covert action operation. Indeed, 20/20 hindsight strongly suggests that the country and the Congress, as well as the administration, would have been far better served if Lt. Col. North -- in open session, with appropriate publicity -- had given Congress his forceful presentation of the case for contra aid in 1982, before the passage of the first of the five "Boland amendments", not at a post-Iran-contra disaster hearing in 1987.

We can not go back, however, only forward. We should do so, furthermore, in the realization that ample mistakes have already been made, at both ends of Pennsylvania Avenue. Mining these errors for partisan political advantage should not be anyone's primary objective. Instead, the American people and their elected representatives in Washington should focus on protecting our nation's interests, and the capabilities -- including covert action capabilities -- that any administration, of any party, will need to safeguard those interests in years ahead.

Unfortunately, no such focus is currently evident on Capitol Hill, or in the White House. Instead, there is only sharp skirmishing in the unending legislative-executive branch struggle for foreign policy primacy, a struggle as old as our republic and ingrained in our Constitution -- which, by design, divides this power as well as others. Perceiving Presidential weakness, a partisan Congress is pressing to extend its prerogatives, while an embarrassed, beleaguered White House seems willing, even eager, to placate Congress by voluntarily accepting self-imposed restrictions that Ronald Reagan and his Oval Office successors may one day bitterly regret. In this situation, both Congress and the White House -- as well as America's media and public -- would profit from recalling some pertinent history.

With little Congressional knowledge and even less Congressional input, President Thomas Jefferson's representatives -- Robert Livingston and James Monroe -- negotiated the purchase of "Louisiana" from Napoleon, who shrewdly sold them land he could not defend. The treaty consumating this purchase was signed, in Paris, on 30 April 1803 and ratified by a somewhat surprised Senate the following November. Thus, for an eventual total price of $27,267,622, Thomas Jefferson -- without any explicit constitutional warrant to do so -- acquired a block of territory five times the size of France, in area, and extended America's frontier westward to the Rockies. With equally minimal Congressional knowledge or input, Jefferson's successor James Madison directed the covert action

operations that brought "West Florida" into the Union -- i.e. the land extending to the east bank of the Mississippi, encompassing what is now Alabama and Mississipi, plus part of Louisiana, as well as Florida proper. If Jefferson, the drafter of our Declaration of Independence, or Madison, the principal architect of our Constitution had shown -- as President -- the diffident deference to Congress it is now fashionable to claim that a President is constitutionally obligated to show, in conducting foreign affairs, our republic would not now have its present territorial extent and probably would not have survived its perilous initial decades.

Precedents even older than our republic are germane to current concerns and debates about covert action, and about secrecy. Our first foreign intelligence and covert action directorate -- the Committee of Secret Correspondence -- was established by the Continental Congress in November 1775. That Committee negotiated and handled the covert French support without which we could never have won our struggle for independence. Speaking of that support, two of the Committee's members -- Benjamin Franklin and Robert Morris -- commented: "We agree in opinion that it is our indespensable duty to keep it a secret, even from Congress ... We find, by fatal experience, the Congress consists of too many members to keep secrets." In this regard, little has changed in over two centuries.

During the past two decades, the endemic, perpetual legislative-executive branch struggle over foreign policy has perceptibly sharpened -- especially as Democratic-controlled Congresses, partly out of pique and frustration, have tried to hobble Republican presidents, elected by landslides, and curtail their discretionary latitude. In the process, Congress has attempted to insert itself into the managment, even micro-management, of foreign affairs, asserting authority without accepting responsibility and essaying a role for which Congress not only has little constitutional warrant but is also ill-suited -- by organization and temperament -- to perform.

One example of this phenomenon is the 1973 War Powers Resolution, which President Nixon should have immediately challenged, on constitutional grounds, and probably would have so challenged had he not been mired in Watergate. It still needs to be challenged and, if possible, rescinded or struck down before a situation arises in which this act's potential for damage-causing mischief is fully realized. Indeed, the Capitol Hill Democrats now filing suit to force the administration to place its Persian Gulf operations under the War Powers Act may be doing the republic a great, if unintended, service by subjecting that act to judicial scrutiny and review.

Other obvious examples are the five "Boland amendments" (one each in 1982, 1983, and 1984, then two in 1985), each of which was attached to an omnibus, veto-proof "continuing resolution" or spending bill made necessary by Congress' inability to complete its

work on time. Not one of these five amendments is clearly or precisely drafted, no two are consistent with each other, and the Reagan administration should have forcefully challenged every one, particularly the first, when it was initially proposed -- not tried to finesse or evade it after it was passed.

The Boland amendments symptomize and highlight a decidedly disquieting turn that legislative-executive branch struggles over foreign policy have recently taken: the attempt by Democratic Congressional leaders and their media supporters to criminalize foreign policy differences. This effort set a tone that permeated the Iran-contra hearings, as evidenced by The Washington Post's headline over its wrap-up story: "Three Months of Hearings Fail to Crack the Case". Nothing but bitter divisiveness, damaging to a whole range of national interests, is likely to result from any continued effort to make differences of opinion over foreign policy criminal matters to be resolved by the courts, rather than the subject of political debates to be settled at the ballot box.

The phenomenon of Congressional assertiveness, with an attendant penchant for detailed, legalistic documentation, has been particularly pronounced in the sphere of covert action. In 1974, the Hughes-Ryan amendment to the Foreign Assistance Act of 1961 stipulated that the CIA could spend no funds "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". This requirement for reporting to the Congressional intelligence oversight committees was broadened and tightened in the Intelligence Authorization Act for Fiscal Year 1981, though that act did leave the President the discretionary option of reporting sensitive covert action activities "in a timely fashion" -- an option the Reagan administration clearly abused in its handling of the Iran-contra matter, quite understandably irritating Congress in the process.

Not surpisingly, given Congress' current mood and temper, several bills to tighten these restrictions even further are already in the hopper, including H.R. 1013 -- sponsored by House Intelligence Committee Chairman Stokes and former Chairman Boland, among others -- which would require the circulation of additional copies of written Presidential findings, eliminate the "in a timely fashion" provision, and require advance notice, to Congress, of all contemplated covert action operations with but one, 48 hour, exception to be used "only in extraordinary circumstances affecting the vital interests of the United States, and only where time is of the essence". Similar ideas were reflected in "suggestions" given the White House by the Senate's oversight committee, to which President Reagan responded in a

disquieting 7 August letter that the White House took pains to publicize. In the present situation, the White House's timorous defensiveness may be as understandable as Congressional assertiveness, but both need to be curbed if the national interest is not to suffer.

Those who wrote, passed or issued the restrictions on covert action now in force forgot or ignored a unique, very important feature of our Constitution, which all those considering new restrictions should remember. Our Constitution combines in one individual, our President, two distinct offices and functions that virtually all other nations divide: the government's chief executive and administrative officer -- a partisan political figure chosen (in America) by election -- and the nation's Chief of State -- a symbolic focus of national unity supposedly, in that capacity, above the fray of political partisanship. As chief executive officer, a President should certainly be accountable for his and his administration's actions. Nonetheless, it is by no means necessarily in our national interest for our Chief of State to sign "findings" or any other documents directing agencies or officers of the U.S. Government to infringe upon or violate the laws of other nations with which we are not in a state of declared war. NSC staff members, national security advisors, cabinet officers and directors of central intelligence are all expendable; but in our government, presidents are not. As Chief

of State, an American President should be able to distance himself or herself from, even disavow, a covert action that he or she approved, even ordered, as chief executive. This may sound complicated, but so is the real world and, hence, effective diplomacy that runs with the grain of its complex reality.

With respect to covert action, in all its forms and ramifications, many mistakes have clearly been made over the past several years -- at, again, both ends of Pennsylvania Avenue. With the White House taking the lead, the airinistration obviously needs to reform and improve its relevant structures and mechanisms, and then use them -- not ignore them or supplant them with hip pocket, ad hoc arrangements. The administration's relations and manner of dealing with Congress also manifestly need to be improved; for no matter who may or may not like this arrangement, our Constitution yokes the legislative and executive branches in a single harness and unless they can pull together, in tandem, the nation suffers.

To be effective, however, this kind of tandem-harness partnership requires reciprocal confidence and trust which both partners must work to build and maintain -- even when the White House is controlled by one party and the Congress by another. Here, though the White House clearly needs to clean up and improve its act, so too

does Congress. For example, Congress should curb its itch to exploit its power over the purse to exercise negative, blocking authority over the administration's conduct of foreign affairs unless, at a minimum, Congress is also willing to accept responsibility for its actions, and their consequences.

Additionally, there is much that Congress needs to do in the field of secrecy protection. The current Senate and House intelligence oversight committees, to cite another example, have a total of thirty two members, plus four honorary members (the majority and minority leaders in each house), plus about sixty more people on the two committee staffs (combined). That makes a total of around a hundred people on Capitol Hill who, under existing arrangements, are formally, officially apprised of covert action operations -- and no matter how these Committees' majorities may rule, any of these 100-odd people, members or staffers, can kill by a pre-emptive leak any covert action operation of which he or she personally disapproves. That is not a workable situation if a true covert action capability is to be preserved. At a minimum, Congress should give serious consideration to combining these two separate oversight committees into one joint committee -- with an appreciably smaller membership and a much smaller combined staff.

In the wake of the Iran-<u>contra</u> hearings, the concerns and emotions that prompted them, and the additional emotions they engendered, there is a great danger that the covert action

capabilities our nation urgently needs -- for its security and perhaps even its survival -- will be crimped, emasculated or erased by a new spate of restrictive laws and regulations hastily written in a fit of moralistic pique. This might suffuse the drafters and enacters of such laws and regulations with a transient glow of self-righteous virtue; but for the country, it would be disasterous. If this were to happen, harking back to Mark Antony, the Iran-contra committee -- whatever its intent may have been -- would have done evil that would live long after that committee was disbanded and its various reports interred in files.

Particularly for an open, democratic society such as ours, the issues here involved are thorny and complex. They need to be carefully, coolly and dispassionately weighed, not hastily decided under emotional or political pressure. Effective covert action not only needs to be covert, by definition, it also needs to be imaginative, flexible, and quickly responsive to concrete challenges, problems or situations that can not be predicted, let alone codified, in advance. The kinds of additional restrictions now being discussed, in the White House as well as on Capitol Hill, would not only make effective covert action much more difficult, they could easily make it impossible.

-- White House-Capitol Hill consultation on covert action clearly needs improvement, but an automatic advance notice requirement, with only rare exceptions, would put Congress directly into the approval loop, on individual operations, in ways that would inevitably increase Congress' already pronounced penchant for micro-management and would have profound constitutional implications.

-- "Timely" should mean just that, and any month-measured interval clearly stretches "timely's" meaning beyond reasonable bounds, but a rigid 48 hour or "two working day" stipulation would be a strait-jacket too confining for the real world's exigencies.

-- Key Congressional leaders and all the cabinet-level members of the National Security Council itself (not the NSC staff), including the Vice-President, should be apprised of all covert action operations, but in ways that minimize -- not maximize -- security risks. Oral briefings to principals (only) can not be xeroxed. Spreading additional copies of highly sensitive "findings" around Capitol Hill and the Executive Branch would increase security risks exponentially, along with the attendant risk that anyone, anywhere who personally disapproved of a given covert action -- even one that had successfully surmounted all formal approval hurdles -- could kill it by a leak.

-- If present restrictions were broadened and tightened, cautious bureaucrats could easily become skittish about even attempting to obtain approval for covert action operations that badly needed to be undertaken.

-- Simultaneously, conscientious intelligence professionals could easily become very reluctant to embark on an approval process that could clearly imperil the security and safety of their indispensable foreign contacts and assets.

-- Additional Congressional involvement in a more formalized approval process, furthermore, could understandably make foreign organizations and individuals, whose co-operative assistance we need, very loathe to put themselves, their futures and even their lives hostage to our willingness and ability to protect their secrets when we are demonstrably incapable of protecting our own.

In our nation's conduct of covert action, the patently necessary improvements and reforms can not be produced by additional verbiage, written in legalese. Instead, the leaders of Congress, on both sides of both aisles, should meet quietly and privately with senior officials in the administration, including the President, to ascertain the best way, under our Constitution, to give any President -- of either (or any) party -- the covert action capabilities, and the discretionary flexibility, he or she will need in this dangerous, strife-ridden and now thermonuclear world to "provide for the common defence", as that Constitution's Preamble puts it, and "secure the blessings of Liberty to ourselves and our Posterity."

In the current climate of political and public opinion, writing new legislative or executive branch restrictions on covert action would doubtless be considered laudable, but -- harking back to Lady Macduff -- would actually do great harm. Quiet, executive-legislative branch leadership discussions that produce only sensible compromises and agreements on future procedures -- some of which could well be secret and not published, even if written -- might be "accounted dangerous folly", particularly by the media; but for the nation, that is the approach that would truly do good.

10 August 1987