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THE FOLLOWING DOCUMENTS
ARE ATTACHED:
(Please do not remove)

OCA 1872 88

OCA 2132 88

ER 2648 X 88

SUBJECT:

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ROUTING SLIP

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Remarks

STAT

Executive Secretary

30 Jun '88
Date

3637 (10-81)

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Information Agency

Washington, D.C. 20547

88-2648X

USIA

June 24, 1988

Dear Bill:

Enclosed for your information is a copy of an article on your June 14 speech before the House Foreign Affairs Committee, as carried on our Wireless File the same day.

This article was transmitted to 206 posts in 127 countries. It will be translated where appropriate and released to the media in each country. Thank you for this contribution to our public affairs efforts overseas.

Best regards.

Sincerely,

Charlie

Charles Z. Wick
Director

The Honorable
William Webster
Director
Central Intelligence Agency

B-808-R

DCI EXEC REG

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U S I A W I R E L E S S F I L E

THIS IS THE "HOUSEWIRE," THE CENTRAL EDITION OF THE USIA WIRELESS FILE. IT IS PREPARED DAILY BY THE AGENCY'S PRESS AND PUBLICATIONS SERVICE. ARTICLES FROM THE HOUSEWIRE ARE COMBINED WITH OTHERS OF SPECIAL REGIONAL INTEREST TO FORM THE FIVE REGIONAL EDITIONS -- AFRICA, EAST ASIA/PACIFIC, EUROPE, LATIN AMERICA, NEAR EAST/SOUTH ASIA -- THAT ARE TRANSMITTED OVERSEAS.

TUESDAY, JUNE 14, 1988 PAGE

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*GLP210 06/14/88
CONGRESSIONAL REPORT, TUESDAY, JUNE 14 (390)
(Covert activity bill)

ARMACOST, WEBSTER ASSAIL BILL ON COVERT REPORTING --

Under Secretary of State Michael Armacost and Central Intelligence Agency Director William Webster told the House Foreign Affairs Committee June 14 that a law requiring the president to notify congressional leaders within 48 hours of any covert intelligence operation would be both unconstitutional and unwise.

Armacost told the committee that a bill under consideration to mandate notifying the speaker of the House and the Democratic and Republican leaders of the House and Senate in that time limit is too rigid, and that President Reagan's senior advisers would recommend a veto if the measure were passed by the Congress.

"In our view, the...requirement may not be reasonable in those very rare instances where extremely sensitive operations require the tightest possible security to protect the lives of U.S. and foreign nationals," Armacost said.

"It is possible that the success of the operation may depend on the cooperation of a foreign government that has conditioned its support on delaying notification of an operation," Armacost declared. "The 1980 Iran rescue mission and the role of the Canadian embassy in assisting our people in Iran are specific cases where advance notification could not be given.

"In addition," he continued, "the Justice Department has concluded that the 48-hour requirement would infringe upon the president's constitutional authority."

Webster also said the bill unnecessarily codifies reporting procedures already in place at the White House. "While a presidential directive is not the same as legislation, I am not persuaded that new legislation at this time is the best way to address the concerns that members (of Congress) have," he asserted.

Democratic Representative Lee Hamilton -- who chaired the House Iran-contra investigating committee -- disagreed sharply. He said that notifying a few key members of Congress offers minimal chance of a damaging security leak.

"That risk appears to me to be extremely small," Hamilton said. "If this bill said that the president must notify 535 members of the Congress, then I would agree with you.

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"But, what you are saying, in effect, is that you don't trust the leaders of the Congress," he said. "That is an extraordinary claim.

"The benefit here outweighs what I see as the risks," Hamilton said.

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OCA 2132-88
14 June 1988

MEMORANDUM FOR THE RECORD

SUBJECT: Intelligence Oversight Legislation - DCI Appearance Before the House Foreign Affairs Committee (HFAC)

1. On 14 June 1988, the Director appeared before HFAC to testify on H.R. 3822, the Intelligence Oversight Bill. The Director was accompanied by Mike Armacost, Under Secretary of State for Political Affairs. Attached is a copy of the opening statement by the Director and Mike Armacost. A transcript of the hearing was taken. Members attending the hearing included Dante Fascell, Lee Hamilton, William Broomfield, Stephen Solarz, Howard Berman, Henry Hyde, Jim Leach, Mel Levine, Ted Weiss, Doug Bereuter, Robert Torricelli, James Bilbray, and Michael Dewine.

2. Most of the discussion in the hearing centered around the requirement in the bill to notify Congress of a Finding within 48 hours. Hamilton and the other Democrats completely rejected the argument that the President needs flexibility to delay notice when lives are at stake, or when a foreign power conditions its cooperation on the promise that the President not inform Congress of the operation. Hamilton argued that leadership of the Congress could be trusted not to disclose operations where lives were at stake and that it would be improper to succumb to the wishes of other countries who seek to dictate our constitutional process. The Republicans were just as united in contending that the 48-hour provision was unconstitutional and would not give the President the flexibility to act to prevent the substantial loss of American lives. It appears that Members have already made up their minds on this issue, and the hearing did not result in Members changing their view on this issue. However, it is significant that liberal Republicans, such as Jim Leech, have come out in opposition to the bill. This will make a veto override much harder.

3. There are several followup responses promised by the Director. The Director stated he would provide the Committee information on whether NSDDs are provided to the Intelligence committee. The Director initially stated that NSDDs are provided to the Intelligence committee, but he was challenged on this point by Lee Hamilton. The Director also promised to provide the committee our views on whether it is wise to have the President sign Findings and transmit signed Findings to Congress. Finally, the Director promised to submit for the record an answer on

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whether there has been any instance in which covert action information had been leaked by the intelligence committees prior to the initiation of the covert action. Solarz attempted, without success, to extract a commitment from the Director to have the Department of Justice (DoJ) provide the Committee its views on whether the President would comply with the 48-hour notification requirement if it were enacted into law. The Director referred the Committee to a DoJ letter to the House Permanent Select Committee on Intelligence (HPSCI) that touched on this issue. Members also indicated that they would submit additional questions for the record.

4. Clark Clifford followed the Director and Mike Armacost testifying strongly in favor of the 48-hour notification requirement. Mr. Clifford recommended that the bill be amended to impose criminal sanctions on officials who participate in a covert action for which the required notice has not been given. Several members indicated they would support such an amendment in the Committee markup.

STAT

Legislation Division
Office of Congressional Affairs

Attachment
(Opening Statements)

Distribution:
Original - OCA/Leg/Subject File: Congressional Oversight
1 - /Signer STAT
1 - OCA/Registry
1 - D/OCA
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OCA/Leg (23 June 1988) STAT

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STATEMENT OF THE DIRECTOR OF CENTRAL INTELLIGENCE
BEFORE THE FOREIGN AFFAIRS COMMITTEE
HOUSE OF REPRESENTATIVES

14 JUNE 1988

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MR. CHAIRMAN AND MEMBERS OF THE FOREIGN AFFAIRS COMMITTEE, I AM PLEASED TO BE HERE TODAY TO SHARE SOME OF MY THOUGHTS ON H.R. 3822, THE INTELLIGENCE OVERSIGHT ACT OF 1988. SINCE THIS IS THE FIRST TIME I HAVE APPEARED BEFORE THIS COMMITTEE AS DIRECTOR OF CENTRAL INTELLIGENCE, I ALSO WANT TO TAKE THIS OPPORTUNITY TO PROVIDE YOU WITH MY VIEWS ON THE RELATIONSHIP BETWEEN THIS COMMITTEE AND THE CIA.

THE VIEWS EXPRESSED IN THIS STATEMENT ON H.R. 3822 REFLECT THE POSITION OF THE ADMINISTRATION. I DRAW YOUR ATTENTION AT THE OUTSET TO THE ADMINISTRATION POSITION, AS CONVEYED TO CONGRESS IN THE PRESIDENT'S LEGISLATIVE MESSAGE, THAT A BILL WHICH FAILS TO PRESERVE THE FLEXIBILITY AND AUTHORITY THE PRESIDENT NEEDS TO CONDUCT INTELLIGENCE ACTIVITIES EFFECTIVELY WILL NOT BE ACCEPTABLE TO THE PRESIDENT.

MR. CHAIRMAN, MY TESTIMONY TODAY WILL BE THE THIRD TIME I HAVE TESTIFIED ON INTELLIGENCE OVERSIGHT LEGISLATION. I APPEARED LAST NOVEMBER BEFORE THE SENATE INTELLIGENCE COMMITTEE TO TESTIFY ON SIMILAR LEGISLATION AND IN FEBRUARY BEFORE THE HOUSE INTELLIGENCE COMMITTEE ON H.R. 3822. IN MY TESTIMONY BEFORE THOSE COMMITTEES, I FOCUSED PRIMARILY ON WHETHER THE LEGISLATION WAS TRULY NECESSARY, AND ON THE PRACTICAL IMPACT OF THE OVERSIGHT BILL ON THE

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INTELLIGENCE COMMUNITY. I INTEND TO ADDRESS BOTH POINTS IN MY TESTIMONY TODAY ON THE HOUSE BILL.

THE NEED FOR LEGISLATION

IN MY REMARKS BEFORE THE SENATE AND HOUSE INTELLIGENCE COMMITTEES I QUESTIONED THE NEED FOR THIS TYPE OF LEGISLATION. ALTHOUGH BOTH INTELLIGENCE COMMITTEES SUBSEQUENTLY DECIDED TO RECOMMEND APPROVAL OF THE LEGISLATION, I STILL BELIEVE THAT THIS LEGISLATION IS NOT A NECESSARY RESPONSE TO THE CONCERNS MEMBERS OF THE CONGRESS HAVE EXPRESSED ABOUT THE OVERSIGHT OF COVERT ACTION.

AS YOU KNOW, THE PRESIDENT RECOGNIZED LAST YEAR THAT THERE WAS ROOM FOR IMPROVEMENT IN THE WAY THE TWO BRANCHES WERE MEETING THEIR RESPONSIBILITIES. AS A RESULT, HE TOOK CONCRETE, SUBSTANTIAL STEPS TO ESTABLISH IMPROVED PROCEDURES TO ENSURE THAT CONGRESS IS GIVEN THE OPPORTUNITY TO PLAY ITS APPROPRIATE OVERSIGHT ROLE. THESE NEW PROCEDURES, IN THE FORM OF A NATIONAL SECURITY DECISION DIRECTIVE ON SPECIAL ACTIVITIES (NSDD-286), MUCH OF WHICH HAS BEEN DECLASSIFIED, CLARIFY THE RULES BY WHICH COVERT ACTIONS ARE REVIEWED, APPROVED, AND REPORTED TO CONGRESS. IN FACT, MANY OF THE PROPOSALS CONTAINED IN H.R. 3822 ARE ALREADY CONTAINED IN NSDD-286. THIS CAN BE ILLUSTRATED BY MAKING A FEW COMPARISONS BETWEEN THE BILL AND THE PRESIDENTIAL DIRECTIVE.

--THE BILL REQUIRES THAT FINDINGS BE IN WRITING, CANNOT BE

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MADE RETROACTIVE, AND MUST BE CONSISTENT WITH EXISTING LAW. SIMILAR REQUIREMENTS ARE CONTAINED IN THE NSDD.

--THE BILL MAKES CLEAR THAT A PRESIDENTIAL FINDING MUST BE OBTAINED BEFORE ANY AGENCY OR DEPARTMENT CAN CONDUCT A COVERT ACTION. THE PRESIDENTIAL DIRECTIVE AFFIRMS THIS PRINCIPLE.

--THE BILL REQUIRES THAT A PRESIDENTIAL FINDING SPECIFY THE NAMES OF EACH DEPARTMENT OR AGENCY OF THE U.S. GOVERNMENT THAT IS FUNDING OR PARTICIPATING IN A SIGNIFICANT WAY IN A COVERT ACTION, AND WHETHER IT IS CONTEMPLATED THAT ANY THIRD PARTY WILL BE USED TO FUND OR OTHERWISE PARTICIPATE IN A SIGNIFICANT WAY IN THE COVERT ACTION. AGAIN, THE PRESIDENTIAL DIRECTIVE CONTAINS THE SAME REQUIREMENT.

IT IS NOT SURPRISING OR COINCIDENTAL THAT PROVISIONS OF THE BILL ARE SIMILAR TO THE PRESIDENTIAL DIRECTIVE. THE PROCEDURES THE PRESIDENT HAS INSTALLED WERE DEVELOPED FOLLOWING CLOSE AND PROLONGED CONSULTATION WITH MEMBERS AND STAFFS OF THE INTELLIGENCE COMMITTEES.

WHILE A PRESIDENTIAL DIRECTIVE IS NOT THE SAME AS LEGISLATION, I AM NOT PERSUADED THAT NEW LEGISLATION AT THIS TIME IS THE BEST WAY TO ADDRESS THE CONCERNS THAT MEMBERS HAVE WITH THE CONGRESSIONAL ROLE REGARDING SPECIAL ACTIVITIES. IN MY VIEW, A LEGISLATIVE REMEDY SHOULD BE EMPLOYED ONLY IF IT IS CLEAR THAT

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THERE IS A BASIC DEFICIENCY IN THE OVERSIGHT PROCESS. THAT IS DOUBLY THE CASE WHEN THE LEGISLATIVE REMEDY PROPOSED RAISES CONSTITUTIONAL ISSUES THAT THREATEN TO DIVIDE THE TWO BRANCHES IN AN AREA WHERE EFFECTIVE WORK PLACES A PREMIUM ON COOPERATION.

THE IRAN/CONTRA MATTER, WHILE SERIOUS, HAS NOT IN MY VIEW DEMONSTRATED THAT THE SYSTEM OF CONGRESSIONAL OVERSIGHT OF THE INTELLIGENCE COMMUNITY ESTABLISHED UNDER CURRENT STATUTES IS SERIOUSLY FLAWED. MANY OF THE PROBLEMS EXPOSED WERE THE RESULT OF OFFICIALS FAILING TO FOLLOW EXISTING PROCEDURES AND RULES. AS YOU MAY BE AWARE, I HAVE TAKEN STEPS WITHIN THE CIA TO DISCIPLINE THOSE EMPLOYEES WHO FAILED TO FOLLOW CIA PROCEDURES OR WHO TESTIFIED TO CONGRESS IN A MANNER THAT WAS NOT CANDID OR COMPLETE. THOSE ACTIONS, TAKEN IN LIGHT OF THE REQUIREMENTS DEFINED BY CURRENT STATUTE, IN MY VIEW HAVE ADEQUATELY ADDRESSED THE PROBLEMS WE FOUND. SIMILARLY, TO THE EXTENT THAT THERE WERE ANY PROCEDURAL SHORTCOMINGS DEMONSTRATED BY THE IRAN/CONTRA MATTER, THEY HAVE ALREADY BEEN ADDRESSED BY THE NEW PRESIDENTIAL DIRECTIVE WITHIN THE PRESENT STATUTORY FRAMEWORK.

I WOULD LIKE TO EMPHASIZE THAT ANY LEGISLATION THAT IS ENACTED SHOULD NOT ADVERSELY AFFECT THE INTELLIGENCE COMMUNITY'S ABILITY TO DO ITS JOB. IN THIS CONNECTION, MR. CHAIRMAN, THE BILL PASSED BY THE SENATE IN MARCH AND THE BILL MARKED UP BY THE HOUSE INTELLIGENCE COMMITTEE HAVE ADDRESSED CONSTRUCTIVELY SOME OF THE IMPORTANT SUBSTANTIVE CONCERNS I AND OTHER ADMINISTRATION

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OFFICIALS RAISED WITH THE ORIGINAL SENATE BILL INTRODUCED IN THAT BODY. BOTH THE HOUSE AND SENATE BILLS, FOR EXAMPLE, RECOGNIZE THE NEED TO REPORT ON SPECIAL ACTIVITIES AND INTELLIGENCE COLLECTION IN A MANNER CONSISTENT WITH DUE REGARD FOR THE PROTECTION OF SENSITIVE INTELLIGENCE SOURCES AND METHODS. I AM ALSO PLEASED THAT NEITHER BILL REQUIRES THAT THE FINDING SPECIFY THE IDENTITY OF FOREIGN COUNTRIES ASSISTING THE AGENCY IN THE CONDUCT OF COVERT ACTION. THESE IMPORTANT SAFEGUARDS WILL IN MY VIEW GO A LONG WAY IN ASSURING FRIENDLY INTELLIGENCE SERVICES AND POTENTIAL AGENTS THAT SOURCE-IDENTIFYING INFORMATION WILL NOT BE WIDELY DISSEMINATED AND POSSIBLY COMPROMISED.

I AM ALSO VERY PLEASED WITH THE CHANGES IN THE ORGINAL HOUSE VERSION OF THE BILL MADE BY THE HOUSE INTELLIGENCE COMMITTEE IN RESPONSE TO CONCERNS I RAISED BEFORE THAT COMMITTEE. MY RESERVATIONS REGARDED THE DEFINITION OF COVERT ACTION, THE EXPENDITURE OF NON-APPROPRIATED FUNDS AND THE REPORTING OF THE TRANSFER OF DEFENSE ARTICLES OR SERVICES. IN PARTICULAR, THE NEW DEFINITION OF COVERT ACTION REMOVES MUCH OF THE AMBIGUITY OVER WHAT CONSTITUTES A COVERT ACTION AND IS IN MY VIEW A DISTINCT IMPROVEMENT OVER THE CURRENT DEFINITIONS.

PRIOR NOTICE OF SPECIAL ACTIVITIES

WHILE THE INTELLIGENCE COMMITTEES HAVE ADDRESSED SEVERAL CONCERNS PREVIOUSLY RAISED IN MY TESTIMONY BEFORE THOSE

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COMMITTEES, THERE IS ONE AREA OF THE BILL THAT REMAINS PARTICULARLY TROUBLESOME. THIS AREA OF DIFFICULTY INVOLVES THE PROVISION OF THE BILL THAT REQUIRES NOTIFICATION OF A COVERT ACTION TO CONGRESS, WITHOUT EXCEPTION, WITHIN 48 HOURS AFTER THE SIGNING OF A FINDING. LAST SUMMER, THE DEPARTMENT OF JUSTICE PROVIDED THE CONGRESS WITH ITS VIEWS ON THE CONSTITUTIONALITY OF SUCH A PROVISION, SO I WILL NOT ADDRESS THAT ISSUE HERE. I HAVE TWO SEPARATE CONCERNS ABOUT THIS PROVISION.

FIRST, THE FACT THAT THERE IS A SHARP DIFFERENCE OF INTERPRETATION BETWEEN THE VIEW OF THE ADMINISTRATION AND THE POSITION EMBODIED IN THIS BILL REGARDING THIS PROVISION'S CONSTITUTIONAL VALIDITY WILL PROMOTE TENSION BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES FOR YEARS TO COME. IN THE INTELLIGENCE AREA SUCH TENSION HAS THE POTENTIAL TO DISRUPT THE COOPERATION AND TRUST THAT EFFECTIVE NATIONAL SECURITY POLICY REQUIRES.

SECOND, I BELIEVE THAT AS A PRACTICABLE MATTER ALLOWANCE MUST BE MADE FOR THAT RARE CASE WHERE A LIMITED DELAY IN CONGRESSIONAL NOTIFICATION IS CRITICAL TO PRESERVE THE ABSOLUTE SECURITY OF AN OPERATION WHEN, FOR EXAMPLE, LIVES ARE AT STAKE. IN SUCH A RARE CASE, THE SUCCESS OF AN OPERATION MAY DEPEND ON THE COOPERATION OF A FOREIGN GOVERNMENT THAT HAS CONDITIONED ITS SUPPORT ON THE PRESIDENT DELAYING CONGRESSIONAL NOTIFICATION UNTIL THE OPERATION IS COMPLETED. AN INFLEXIBLE NOTIFICATION REQUIREMENT COULD FORCE A PRESIDENT TO CHOOSE BETWEEN PROVIDING THE CONGRESSIONALLY

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REQUIRED NOTIFICATION WITHIN 48 HOURS AND JEOPARDIZING THE LIVES OF INNOCENT AMERICANS, OR DELAYING THAT NOTIFICATION TO PROTECT THOSE LIVES. I CAN UNDERSTAND WHY ANY PRESIDENT WOULD BE RELUCTANT TO AGREE TO A LAW THAT WOULD REQUIRE SUCH CHOICES.

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

IF THE COMMITTEE SHOULD NEVERTHELESS DECIDE THAT LEGISLATION IS NECESSARY TO LIMIT THE PRESIDENT'S AUTHORITY TO DELAY NOTIFICATION, I WOULD URGE MEMBERS TO GIVE SERIOUS CONSIDERATION TO LANGUAGE CONTAINED IN A BILL PROPOSED BY RANKING MINORITY MEMBER BROOMFIELD THAT WOULD ALLOW THE PRESIDENT TO DELAY NOTIFICATION IF HE DETERMINES THAT AN EMERGENCY CONSTITUTING A GRAVE AND IMMEDIATE THREAT TO THE NATIONAL SECURITY OF THE UNITED STATES EXISTS. WHILE SUCH A STANDARD MAY NOT COVER ALL SITUATIONS WHERE LIVES ARE AT STAKE, IT WOULD ALLOW THE PRESIDENT THE

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FLEXIBILITY TO DELAY NOTIFICATION IN CIRCUMSTANCES WHERE THE GOVERNMENT FACES A GRAVE AND IMMEDIATE THREAT TO ITS SECURITY.

ACCESS BY FOREIGN AFFAIRS COMMITTEE TO INTELLIGENCE INFORMATION

ALTHOUGH NOT DIRECTLY RELEVANT TO THE LEGISLATION BEFORE THIS COMMITTEE, I THOUGHT THIS WOULD BE AN APPROPRIATE TIME TO ADDRESS A CONCERN I UNDERSTAND SOME MEMBERS HAVE WITH RESPECT TO ACCESS BY THE FOREIGN AFFAIRS COMMITTEE TO INTELLIGENCE INFORMATION. IN MY VIEW, THE FOREIGN AFFAIRS COMMITTEE DOES HAVE A LEGITIMATE NEED FOR INFORMATION ABOUT DEVELOPMENTS AROUND THE WORLD. SOME OF THIS INFORMATION IS CLASSIFIED. OUR BEST INTELLIGENCE ANALYSIS ABOUT THE SIGNIFICANCE AND IMPLICATIONS OF SUCH DEVELOPMENTS CAN PLAY AN IMPORTANT PART IN THE COMMITTEE DOING ITS WORK PROPERLY.

I BELIEVE THE RECORD WILL SHOW THAT THE CENTRAL INTELLIGENCE AGENCY HAS, IN FACT, BEEN RESPONSIVE TO THE REQUEST OF THE COMMITTEE FOR SUCH INFORMATION. SOME RECENT STATISTICS HELP TO ILLUSTRATE THIS POINT. DURING THE PERIOD FROM 1986 TO THE PRESENT, THERE HAVE BEEN 48 STAFF BRIEFINGS, 68 MEMBER BRIEFINGS, AND 14 APPEARANCES BEFORE THE COMMITTEE INVOLVING FORMAL TESTIMONY. TO THE CONGRESS AS A WHOLE, CIA NOW PROVIDES MORE THAN 1,000 BRIEFINGS PER YEAR. LISTENING TO THESE BRIEFINGS TAKES A GREAT DEAL OF VALUABLE TIME ON YOUR PART, SO I GATHER YOU FIND THEM USEFUL.

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THE SUBSTANCE OF THE INFORMATION CONVEYED BY THE AGENCY TO THE CONGRESS HAS RANGED FROM PRETRIP BRIEFINGS ON PARTICULAR COUNTRIES FOR MEMBERS TO FORMAL TESTIMONY ON THE DISASTER AT CHERNOBYL OR TERRORISM IN GENERAL. IN ADDITION, THE COMMITTEE HAS ACCESS TO THE NATIONAL INTELLIGENCE DAILY, OUR NATIONAL INTELLIGENCE ESTIMATES AND A VARIETY OF OTHER INTELLIGENCE PUBLICATIONS. I WOULD URGE MEMBERS OF THIS COMMITTEE WHO ARE INTERESTED IN OBTAINING MORE INTELLIGENCE INFORMATION TO TAKE ADVANTAGE OF THE ACCESS OF THE COMMITTEE TO THIS WEALTH OF INFORMATION.

WHILE I BELIEVE WE HAVE BEEN RESPONSIVE TO THE COMMITTEE'S REQUEST FOR INTELLIGENCE INFORMATION, I HOPE THAT YOU WILL UNDERSTAND MY NEED TO PROTECT FROM DISCLOSURE OPERATIONAL INTELLIGENCE INFORMATION THAT MIGHT JEOPARDIZE OUR SOURCES AND METHODS FOR GATHERING THIS INFORMATION. WHEN THIS INFORMATION IS COMPROMISED, NOT ONLY IS THE PARTICULAR SOURCE OF INTELLIGENCE LOST TO THE U.S. GOVERNMENT, BUT OTHERS BECOME RELUCTANT TO COOPERATE FOR FEAR THEIR IDENTITIES WILL ALSO BE DISCLOSED. IN SOME CASES IT MAY BE ADVISABLE TO DISCLOSE SENSITIVE OPERATIONAL INFORMATION IN ORDER FOR CONGRESS TO CONDUCT EFFECTIVE OVERSIGHT. A DECISION WAS MADE BY CONGRESS ITSELF IN 1980 TO LIMIT THIS TYPE OF INFORMATION TO THE INTELLIGENCE COMMITTEES. THIS DECISION WAS A WISE ONE, AND I WOULD STRONGLY OPPOSE ANY PROPOSAL TO EXPAND THE NUMBER OF CONGRESSIONAL COMMITTEES DIRECTLY INVOLVED IN INTELLIGENCE OVERSIGHT.

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ACCESS TO COVERT ACTION INFORMATION

IN ADDITION TO THE QUESTION OF ACCESS TO INTELLIGENCE INFORMATION IN GENERAL, I UNDERSTAND SOME MEMBERS ARE CONCERNED THAT THE THE FOREIGN AFFAIRS COMMITTEE IS NOT BEING BRIEFED ON COVERT ACTIONS THAT HAVE SIGNIFICANT FOREIGN POLICY IMPLICATIONS. UNDER EXISTING LAW AND THE INTELLIGENCE OVERSIGHT BILL BEING CONSIDERED BY THIS COMMITTEE, ACCESS TO COVERT ACTION INFORMATION IS CONFINED TO THE INTELLIGENCE OVERSIGHT COMMITTEES AND THE DEFENSE SUBCOMMITTEES OF THE APPROPRIATIONS COMMITTEES. I DO NOT BELIEVE IT IS NECESSARY OR WISE TO EXPAND THE NUMBER OF COMMITTEES TO WHICH WE MUST REPORT COVERT ACTIONS. TO DO SO WOULD SIMPLY RETURN US TO THE SITUATION EXISTING BEFORE THE INTELLIGENCE OVERSIGHT ACT OF 1980 WHEN WE HAD TO PROVIDE COVERT ACTION INFORMATION TO EIGHT COMMITTEES OF CONGRESS. THIS SITUATION MADE IT ALMOST IMPOSSIBLE TO CONDUCT COVERT ACTION COVERTLY.

I BELIEVE THAT THE CONCERN EXPRESSED BY SOME REGARDING THE LACK OF COMMITTEE ACCESS TO COVERT ACTION INFORMATION MAY BE THE RESULT OF A MISPERCEPTION AS TO HOW COVERT ACTION RELATES TO OUR FOREIGN POLICY. COVERT ACTION IS IMPLEMENTATION BY CLANDESTINE MEANS OF THE FOREIGN POLICY OF THE UNITED STATES GOVERNMENT. OUR FOREIGN POLICY IS FORMULATED BY THE PRESIDENT AND THE SECRETARY OF STATE.

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THE DIRECTOR OF CENTRAL INTELLIGENCE SHOULD NOT MAKE FOREIGN POLICY OR USE COVERT ACTION AS A VEHICLE FOR CREATING A SECRET FOREIGN POLICY. BECAUSE THE SECRETARY OF STATE IS OBLIGATED TO KEEP THE FOREIGN AFFAIRS COMMITTEE INFORMED OF OUR FOREIGN POLICY, I BELIEVE THAT THE COMMITTEE DOES HAVE THE NECESSARY MEANS TO MAKE ITS VIEWS KNOWN REGARDING FOREIGN POLICY, INCLUDING THOSE SPECIFIC POLICIES BEING IMPLEMENTED BY A COVERT ACTION.

IF YOU BELIEVE THAT THE ARRANGEMENT I HAVE DESCRIBED IS NOT ADEQUATE TO ENSURE THAT THE VIEWS OF THE FOREIGN AFFAIRS COMMITTEE ARE REPRESENTED IN THE OVERSIGHT OF COVERT ACTION, I WOULD SUGGEST CONGRESS CONSIDER GREATER USE OF CROSS-OVER MEMBERSHIP BETWEEN THE FOREIGN AFFAIRS COMMITTEE AND THE HOUSE INTELLIGENCE COMMITTEE. SUCH CROSS-OVER MEMBERS ARE IN THE BEST POSSIBLE POSITION TO EXPRESS THE VIEWS OF THE FOREIGN AFFAIRS COMMITTEE IN DELIBERATIONS CONDUCTED BY THE HOUSE INTELLIGENCE COMMITTEE. SOME OF YOU NOW SERVE OR HAVE IN THE PAST SERVED VERY EFFECTIVELY IN THIS WAY.

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

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

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

THIS CONCLUDES MY STATEMENT. I AM PREPARED TO ANSWER YOUR QUESTIONS.

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UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON FOREIGN AFFAIRS

June 14, 1988

STATEMENT OF THE HONORABLE CLARK M. CLIFFORD

Chairman Fascell and members of the Committee:

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

As the Committee knows, covert activities have become numerous and widespread, practically constituting a routine component of our foreign policy. And with these activities have come repeated instances of embarrassing failure -- where the goals of the operations themselves were not fulfilled and unforeseen setbacks occurred instead. I believe that on balance covert activities have harmed this country more than they have helped us. Certainly, efforts to control these activities, to keep them within their intended scope and purpose, have failed.

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

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

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

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

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

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

In the Iran-contra affair, the President displayed an attitude that is antithetical to the oversight process. You will recall that the President signed a finding that explicitly instructed the Director of the CIA not to notify the Congress of the activity. For ten months, the Director and others involved abided by this instruction. In fact, the President finally notified the Congress only after the activity had become public knowledge. Much later, after the

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

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

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

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

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

I wish to lend my full support to H.R. 3822, the legislation that the Committee is considering today. Late last year, I testified before the Senate Intelligence Committee and supported S. 1721, the companion bill to H.R. 3822, and earlier this year, I testified before the House Intelligence Committee concerning H.R. 3822. I understand that all of the committees have worked together on these bills, and I commend your cooperation, as well as its result. The legislation that you have crafted meets the need for change that exists in the important area of notification to the Congress.

H.R. 3822 would require the President to sign a written finding, setting forth the particulars of a covert activity, normally when approving it but in no event more than forty-eight hours afterwards. The legislation would require the President to provide the intelligence committees with the signed finding normally before the activity begins but in no event more than forty-eight hours after it is approved. The President could limit notification to the so-called Group of Eight, but he would have to explain why he was doing so.

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Findings that purported to validate past activities or authorize illegal measures would violate the law.

I view these provisions as welcome and worthwhile improvements in the oversight process. And the Senate's approval of the legislation and the House intelligence committee's favorable report of it are positive steps that I encourage this committee to follow.

I would note that I recommended to the intelligence committees in my earlier testimony that the legislation be strengthened by including criminal sanctions for failure to notify Congress within the required period. Specifically, I proposed that a provision be added to H.R. 3822 prohibiting the continued expenditure of funds for any covert activity where proper notice was not given, and penalizing any government employee who knowingly and willfully violated or conspired to violate this prohibition. While the intelligence committees did not adopt this proposal, it should remain an important consideration for the future.

Finally, there are two questions concerning H.R. 3822 that arose during my previous testimony before the House and Senate committees and that you also may wish answered.

First, is H.R. 3822, particularly the specific-notice requirement, consistent with the Constitution? I have studied this question extensively. I am convinced of the constitutionality of requiring the President to provide notice of covert activities within forty-eight hours of approving them. There

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is no basis in the Constitution for the Administration's claim of plenary Presidential power in foreign affairs; rather, Congress and the President share concurrent authority in this area according to the Constitutional system of checks and balances. It is entirely consistent with Congress' legislative and other, enumerated powers to establish reasonable procedural regulation of covert activities.

On this score, it bears emphasizing that the specific-notice requirement in H.R. 3822 is strictly procedural, not substantive. It does not dictate or limit what covert activity the President may approve or how or when the activity may occur. It simply says that the President must provide notice within a time certain. As the Committee knows, the oversight process does not give Congress a veto, but only a voice.

Notice is an obvious and essential component of oversight, and it is the least of what Congress may require in fulfilling its oversight function. After all, it was by act of Congress -- the National Security Act of 1947 -- that the CIA was established and exists today; and it was by this same act of Congress that covert activities were authorized and continue to occur. H.R. 3822 represents a refinement of Congress' previous reasonable procedural regulation of covert activity.

Second, is this the appropriate time to enact this legislation? Absolutely. Indeed, I believe that the

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legislation is long overdue. We have gone through the agony of covert activity gone awry all too often. Change is essential.

I can recall some thirteen years ago testifying before the Select Committee to Study Governmental Operations -- the Church Committee -- regarding the gross abuses in covert activities that were the concern of that committee. In my testimony in 1975, I said:

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

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

Now, the nation has endured yet another devastating blow to our stature and effectiveness. The Iran-contra affair demonstrated convincingly that the flexible requirement of the 1980 Act -- that Congress be notified of covert activity in a "timely fashion" -- is too easily eluded by expedience. The law must be made explicit and firm so that the oversight process functions and the nation benefits.

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In my view, there is no excuse for failure to notify the Congress according to the law, and there should be no exception to compliance with such law. The purpose of this legislation is not to assume good faith but to ensure good government.

For many years the United States has offered leadership to the world because of our character as a nation and our devotion to freedom and the liberty of man.

We have great economic power.

We have unparalleled military power. But our standing in the world community rests mainly upon the confidence and trust that other nations have in us.

We do not hold the free world together at gunpoint.

It is mutual trust that binds us. And the vital element of that trust is our credibility.

Unfortunately, our credibility has been grieviously damaged this past year in many parts of the world.

It is incumbent upon all who are in positions of authority to take the necessary steps toward restoring our former position. This legislation is a splendid move in this direction, and will be of vital importance in reducing the possibility of another similar disaster.

Thank you.

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OCA 1872 88

BRIEFING BOOK ON INTELLIGENCE OVERSIGHT LEGISLATION

FOR THE DIRECTOR OF CENTRAL INTELLIGENCE APPEARANCE

BEFORE THE FOREIGN AFFAIRS COMMITTEE

HOUSE OF REPRESENTATIVES

14 JUNE 1988

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DCI APPEARANCE BEFORE FOREIGN AFFAIRS COMMITTEE ON LEGISLATION TO REVISE THE INTELLIGENCE OVERSIGHT ACT

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OCA 1872-88
10 JUN 1988

NOTE FOR: The Director

FROM: John L. Helgerson

SUBJECT: Upcoming Testimony Before the House Foreign Affairs Committee on Intelligence Oversight Legislation

Attached is your briefing book in preparation for your 14 June appearance at an open House Foreign Affairs Committee hearing on the Intelligence Oversight bill. Mike Armacost is also scheduled to testify, and the Department of State has requested that he appear with you in a panel. Clark Clifford will make a separate appearance on the same day. Senator Cohen and perhaps Secretary Carlucci will testify on 16 June before the Committee. The Committee will mark up the legislation on 21 June.

This will be the third time you have appeared to testify on this type of legislation. You previously appeared before the House Intelligence Committee and the Senate Intelligence Committee.

The Foreign Affairs Committee staff has informed us that some Members are concerned that they do not receive sufficient intelligence information and covert action information. Because this is the first time you have appeared before the Committee, it is likely you will get questions on this subject even though the hearing is technically on the Oversight Legislation. In order to dispel certain misperceptions that may have led to this concern, my staff has prepared an opening statement that addresses the issue of access by the Foreign Affairs Committee to intelligence information and covert action information. The statement also, of course, addresses whether the legislation is necessary and the practical problems with the mandatory requirement to notify Congress, without exception, of a covert action within 48 hours of the President signing the Finding. We have included Q & As that cover these issues.

The Committee staff has also informed us that there is a good chance that you will receive other questions that have

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absolutely nothing to do with the Intelligence Oversight Legislation, e.g., embassy security. Because some questions may come out of "left field", I suggest you attempt to defer answering those questions on the grounds that it would be inappropriate to discuss the answer in an open hearing.

There are extreme ideological differences among Members of the House Foreign Affairs Committee, and it is likely that these differences will manifest themselves during the course of the hearing. Because you may not be familiar with some of these Members, my staff has prepared short profiles of each Member of the Foreign Affairs Committee for your information.

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STATEMENT OF THE DIRECTOR OF CENTRAL INTELLIGENCE
BEFORE THE FOREIGN AFFAIRS COMMITTEE
HOUSE OF REPRESENTATIVES

14 JUNE 1988

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MR. CHAIRMAN AND MEMBERS OF THE FOREIGN AFFAIRS COMMITTEE, I AM PLEASED TO BE HERE TODAY TO SHARE SOME OF MY THOUGHTS ON H.R. 3822, THE INTELLIGENCE OVERSIGHT ACT OF 1988. SINCE THIS IS THE FIRST TIME I HAVE APPEARED BEFORE THIS COMMITTEE AS DIRECTOR OF CENTRAL INTELLIGENCE, I ALSO WANT TO TAKE THIS OPPORTUNITY TO PROVIDE YOU WITH MY VIEWS ON THE RELATIONSHIP BETWEEN THIS COMMITTEE AND THE CIA.

THE VIEWS EXPRESSED IN THIS STATEMENT ON H.R. 3822 REFLECT THE POSITION OF THE ADMINISTRATION. I DRAW YOUR ATTENTION AT THE OUTSET TO THE ADMINISTRATION POSITION, AS CONVEYED TO CONGRESS IN THE PRESIDENT'S LEGISLATIVE MESSAGE, THAT A BILL WHICH FAILS TO PRESERVE THE FLEXIBILITY AND AUTHORITY THE PRESIDENT NEEDS TO CONDUCT INTELLIGENCE ACTIVITIES EFFECTIVELY WILL NOT BE ACCEPTABLE TO THE PRESIDENT.

MR. CHAIRMAN, MY TESTIMONY TODAY WILL BE THE THIRD TIME I HAVE TESTIFIED ON INTELLIGENCE OVERSIGHT LEGISLATION. I APPEARED LAST NOVEMBER BEFORE THE SENATE INTELLIGENCE COMMITTEE TO TESTIFY ON SIMILAR LEGISLATION AND IN FEBRUARY BEFORE THE HOUSE INTELLIGENCE COMMITTEE ON H.R. 3822. IN MY TESTIMONY BEFORE THOSE COMMITTEES, I FOCUSED PRIMARILY ON WHETHER THE LEGISLATION WAS TRULY NECESSARY, AND ON THE PRACTICAL IMPACT OF THE OVERSIGHT BILL ON THE

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INTELLIGENCE COMMUNITY. I INTEND TO ADDRESS BOTH POINTS IN MY TESTIMONY TODAY ON THE HOUSE BILL.

THE NEED FOR LEGISLATION

IN MY REMARKS BEFORE THE SENATE AND HOUSE INTELLIGENCE COMMITTEES I QUESTIONED THE NEED FOR THIS TYPE OF LEGISLATION. ALTHOUGH BOTH INTELLIGENCE COMMITTEES SUBSEQUENTLY DECIDED TO RECOMMEND APPROVAL OF THE LEGISLATION, I STILL BELIEVE THAT THIS LEGISLATION IS NOT A NECESSARY RESPONSE TO THE CONCERNS MEMBERS OF THE CONGRESS HAVE EXPRESSED ABOUT THE OVERSIGHT OF COVERT ACTION.

AS YOU KNOW, THE PRESIDENT RECOGNIZED LAST YEAR THAT THERE WAS ROOM FOR IMPROVEMENT IN THE WAY THE TWO BRANCHES WERE MEETING THEIR RESPONSIBILITIES. AS A RESULT, HE TOOK CONCRETE, SUBSTANTIAL STEPS TO ESTABLISH IMPROVED PROCEDURES TO ENSURE THAT CONGRESS IS GIVEN THE OPPORTUNITY TO PLAY ITS APPROPRIATE OVERSIGHT ROLE. THESE NEW PROCEDURES, IN THE FORM OF A NATIONAL SECURITY DECISION DIRECTIVE ON SPECIAL ACTIVITIES (NSDD-286), MUCH OF WHICH HAS BEEN DECLASSIFIED, CLARIFY THE RULES BY WHICH COVERT ACTIONS ARE REVIEWED, APPROVED, AND REPORTED TO CONGRESS. IN FACT, MANY OF THE PROPOSALS CONTAINED IN H.R. 3822 ARE ALREADY CONTAINED IN NSDD-286. THIS CAN BE ILLUSTRATED BY MAKING A FEW COMPARISONS BETWEEN THE BILL AND THE PRESIDENTIAL DIRECTIVE.

--THE BILL REQUIRES THAT FINDINGS BE IN WRITING, CANNOT BE

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MADE RETROACTIVE, AND MUST BE CONSISTENT WITH EXISTING LAW. SIMILAR REQUIREMENTS ARE CONTAINED IN THE NSDD.

--THE BILL MAKES CLEAR THAT A PRESIDENTIAL FINDING MUST BE OBTAINED BEFORE ANY AGENCY OR DEPARTMENT CAN CONDUCT A COVERT ACTION. THE PRESIDENTIAL DIRECTIVE AFFIRMS THIS PRINCIPLE.

--THE BILL REQUIRES THAT A PRESIDENTIAL FINDING SPECIFY THE NAMES OF EACH DEPARTMENT OR AGENCY OF THE U.S. GOVERNMENT THAT IS FUNDING OR PARTICIPATING IN A SIGNIFICANT WAY IN A COVERT ACTION, AND WHETHER IT IS CONTEMPLATED THAT ANY THIRD PARTY WILL BE USED TO FUND OR OTHERWISE PARTICIPATE IN A SIGNIFICANT WAY IN THE COVERT ACTION. AGAIN, THE PRESIDENTIAL DIRECTIVE CONTAINS THE SAME REQUIREMENT.

IT IS NOT SURPRISING OR COINCIDENTAL THAT PROVISIONS OF THE BILL ARE SIMILAR TO THE PRESIDENTIAL DIRECTIVE. THE PROCEDURES THE PRESIDENT HAS INSTALLED WERE DEVELOPED FOLLOWING CLOSE AND PROLONGED CONSULTATION WITH MEMBERS AND STAFFS OF THE INTELLIGENCE COMMITTEES.

WHILE A PRESIDENTIAL DIRECTIVE IS NOT THE SAME AS LEGISLATION, I AM NOT PERSUADED THAT NEW LEGISLATION AT THIS TIME IS THE BEST WAY TO ADDRESS THE CONCERNS THAT MEMBERS HAVE WITH THE CONGRESSIONAL ROLE REGARDING SPECIAL ACTIVITIES. IN MY VIEW, A LEGISLATIVE REMEDY SHOULD BE EMPLOYED ONLY IF IT IS CLEAR THAT

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THERE IS A BASIC DEFICIENCY IN THE OVERSIGHT PROCESS. THAT IS DOUBLY THE CASE WHEN THE LEGISLATIVE REMEDY PROPOSED RAISES CONSTITUTIONAL ISSUES THAT THREATEN TO DIVIDE THE TWO BRANCHES IN AN AREA WHERE EFFECTIVE WORK PLACES A PREMIUM ON COOPERATION.

THE IRAN/CONTRA MATTER, WHILE SERIOUS, HAS NOT IN MY VIEW DEMONSTRATED THAT THE SYSTEM OF CONGRESSIONAL OVERSIGHT OF THE INTELLIGENCE COMMUNITY ESTABLISHED UNDER CURRENT STATUTES IS SERIOUSLY FLAWED. MANY OF THE PROBLEMS EXPOSED WERE THE RESULT OF OFFICIALS FAILING TO FOLLOW EXISTING PROCEDURES AND RULES. AS YOU MAY BE AWARE, I HAVE TAKEN STEPS WITHIN THE CIA TO DISCIPLINE THOSE EMPLOYEES WHO FAILED TO FOLLOW CIA PROCEDURES OR WHO TESTIFIED TO CONGRESS IN A MANNER THAT WAS NOT CANDID OR COMPLETE. THOSE ACTIONS, TAKEN IN LIGHT OF THE REQUIREMENTS DEFINED BY CURRENT STATUTE, IN MY VIEW HAVE ADEQUATELY ADDRESSED THE PROBLEMS WE FOUND. SIMILARLY, TO THE EXTENT THAT THERE WERE ANY PROCEDURAL SHORTCOMINGS DEMONSTRATED BY THE IRAN/CONTRA MATTER, THEY HAVE ALREADY BEEN ADDRESSED BY THE NEW PRESIDENTIAL DIRECTIVE WITHIN THE PRESENT STATUTORY FRAMEWORK.

I WOULD LIKE TO EMPHASIZE THAT ANY LEGISLATION THAT IS ENACTED SHOULD NOT ADVERSELY AFFECT THE INTELLIGENCE COMMUNITY'S ABILITY TO DO ITS JOB. IN THIS CONNECTION, MR. CHAIRMAN, THE BILL PASSED BY THE SENATE IN MARCH AND THE BILL MARKED UP BY THE HOUSE INTELLIGENCE COMMITTEE HAVE ADDRESSED CONSTRUCTIVELY SOME OF THE IMPORTANT SUBSTANTIVE CONCERNS I AND OTHER ADMINISTRATION

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OFFICIALS RAISED WITH THE ORIGINAL SENATE BILL INTRODUCED IN THAT BODY. BOTH THE HOUSE AND SENATE BILLS, FOR EXAMPLE, RECOGNIZE THE NEED TO REPORT ON SPECIAL ACTIVITIES AND INTELLIGENCE COLLECTION IN A MANNER CONSISTENT WITH DUE REGARD FOR THE PROTECTION OF SENSITIVE INTELLIGENCE SOURCES AND METHODS. I AM ALSO PLEASED THAT NEITHER BILL REQUIRES THAT THE FINDING SPECIFY THE IDENTITY OF FOREIGN COUNTRIES ASSISTING THE AGENCY IN THE CONDUCT OF COVERT ACTION. THESE IMPORTANT SAFEGUARDS WILL IN MY VIEW GO A LONG WAY IN ASSURING FRIENDLY INTELLIGENCE SERVICES AND POTENTIAL AGENTS THAT SOURCE-IDENTIFYING INFORMATION WILL NOT BE WIDELY DISSEMINATED AND POSSIBLY COMPROMISED.

I AM ALSO VERY PLEASED WITH THE CHANGES IN THE ORGINAL HOUSE VERSION OF THE BILL MADE BY THE HOUSE INTELLIGENCE COMMITTEE IN RESPONSE TO CONCERNS I RAISED BEFORE THAT COMMITTEE. MY RESERVATIONS REGARDED THE DEFINITION OF COVERT ACTION, THE EXPENDITURE OF NON-APPROPRIATED FUNDS AND THE REPORTING OF THE TRANSFER OF DEFENSE ARTICLES OR SERVICES. IN PARTICULAR, THE NEW DEFINITION OF COVERT ACTION REMOVES MUCH OF THE AMBIGUITY OVER WHAT CONSTITUTES A COVERT ACTION AND IS IN MY VIEW A DISTINCT IMPROVEMENT OVER THE CURRENT DEFINITIONS.

PRIOR NOTICE OF SPECIAL ACTIVITIES

WHILE THE INTELLIGENCE COMMITTEES HAVE ADDRESSED SEVERAL CONCERNS PREVIOUSLY RAISED IN MY TESTIMONY BEFORE THOSE

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COMMITTEES, THERE IS ONE AREA OF THE BILL THAT REMAINS PARTICULARLY TROUBLESOME. THIS AREA OF DIFFICULTY INVOLVES THE PROVISION OF THE BILL THAT REQUIRES NOTIFICATION OF A COVERT ACTION TO CONGRESS, WITHOUT EXCEPTION, WITHIN 48 HOURS AFTER THE SIGNING OF A FINDING. LAST SUMMER, THE DEPARTMENT OF JUSTICE PROVIDED THE CONGRESS WITH ITS VIEWS ON THE CONSTITUTIONALITY OF SUCH A PROVISION, SO I WILL NOT ADDRESS THAT ISSUE HERE. I HAVE TWO SEPARATE CONCERNS ABOUT THIS PROVISION.

FIRST, THE FACT THAT THERE IS A SHARP DIFFERENCE OF INTERPRETATION BETWEEN THE VIEW OF THE DEPARTMENT OF JUSTICE AND THE POSITION EMBODIED IN THIS BILL REGARDING THIS PROVISION'S CONSTITUTIONAL VALIDITY WILL PROMOTE TENSION BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES FOR YEARS TO COME. IN THE INTELLIGENCE AREA SUCH TENSION HAS THE POTENTIAL TO DISRUPT THE COOPERATION AND TRUST THAT EFFECTIVE NATIONAL SECURITY POLICY REQUIRES.

SECOND, I BELIEVE THAT AS A PRACTICABLE MATTER ALLOWANCE MUST BE MADE FOR THAT RARE CASE WHERE A LIMITED DELAY IN CONGRESSIONAL NOTIFICATION IS CRITICAL TO PRESERVE THE ABSOLUTE SECURITY OF AN OPERATION WHEN, FOR EXAMPLE, LIVES ARE AT STAKE. IN SUCH A RARE CASE, THE SUCCESS OF AN OPERATION MAY DEPEND ON THE COOPERATION OF A FOREIGN GOVERNMENT THAT HAS CONDITIONED ITS SUPPORT ON THE PRESIDENT DELAYING CONGRESSIONAL NOTIFICATION UNTIL THE OPERATION IS COMPLETED. AN INFLEXIBLE NOTIFICATION REQUIREMENT COULD FORCE A PRESIDENT TO CHOOSE BETWEEN PROVIDING THE CONGRESSIONALLY REQUIRED NOTIFICATION WITHIN 48 HOURS AND JEOPARDIZING THE

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LIVES OF INNOCENT AMERICANS, OR DELAYING THAT NOTIFICATION TO PROTECT THOSE LIVES. I CAN UNDERSTAND WHY ANY PRESIDENT WOULD BE RELUCTANT TO AGREE TO A LAW THAT WOULD REQUIRE SUCH CHOICES.

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

IF THE COMMITTEE SHOULD NEVERTHELESS DECIDE THAT LEGISLATION IS NECESSARY TO LIMIT THE PRESIDENT'S AUTHORITY TO DELAY NOTIFICATION, I WOULD URGE MEMBERS TO GIVE SERIOUS CONSIDERATION TO LANGUAGE CONTAINED IN A BILL PROPOSED BY RANKING MINORITY MEMBER BROOMFIELD THAT WOULD ALLOW THE PRESIDENT TO DELAY NOTIFICATION IF HE DETERMINES THAT AN EMERGENCY CONSTITUTING A GRAVE AND IMMEDIATE THREAT TO THE NATIONAL SECURITY OF THE UNITED STATES EXISTS. WHILE SUCH A STANDARD MAY NOT COVER ALL SITUATIONS WHERE LIVES ARE AT STAKE, IT WOULD ALLOW THE PRESIDENT THE FLEXIBILITY TO DELAY NOTIFICATION IN CIRCUMSTANCES WHERE THE GOVERNMENT FACES A GRAVE AND IMMEDIATE THREAT TO ITS SECURITY.

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ACCESS BY FOREIGN AFFAIRS COMMITTEE TO INTELLIGENCE INFORMATION

ALTHOUGH NOT DIRECTLY RELEVANT TO THE LEGISLATION BEFORE THIS COMMITTEE, I THOUGHT THIS WOULD BE AN APPROPRIATE TIME TO ADDRESS A CONCERN I UNDERSTAND SOME MEMBERS HAVE WITH RESPECT TO ACCESS BY THE FOREIGN AFFAIRS COMMITTEE TO INTELLIGENCE INFORMATION. IN MY VIEW, THE FOREIGN AFFAIRS COMMITTEE DOES HAVE A LEGITIMATE NEED FOR CLASSIFIED INFORMATION ABOUT DEVELOPMENTS AROUND THE WORLD, AND FOR OUR BEST INTELLIGENCE ANALYSIS ABOUT THE SIGNIFICANCE AND IMPLICATIONS OF SUCH DEVELOPMENTS IN ORDER TO DO ITS JOB PROPERLY.

I BELIEVE THE RECORD WILL SHOW THAT THE CENTRAL INTELLIGENCE AGENCY HAS, IN FACT, BEEN RESPONSIVE TO NEEDS OF THE COMMITTEE FOR SUCH INFORMATION. SOME RECENT STATISTICS HELP TO ILLUSTRATE THIS POINT. DURING THE PERIOD FROM 1986 TO THE PRESENT, THERE HAVE BEEN 48 STAFF BRIEFINGS, 68 MEMBER BRIEFINGS, AND 14 APPEARANCES BEFORE THE COMMITTEE INVOLVING FORMAL TESTIMONY. TO THE CONGRESS AS A WHOLE, CIA NOW PROVIDES MORE THAN 1,000 BRIEFINGS PER YEAR. LISTENING TO THESE BRIEFINGS TAKES A GREAT DEAL OF VALUABLE TIME ON YOUR PART, SO I GATHER YOU FIND THEM USEFUL.

THE SUBSTANCE OF THE INFORMATION CONVEYED BY THE AGENCY TO THE CONGRESS HAS RANGED FROM PRETRIP BRIEFINGS ON PARTICULAR COUNTRIES FOR MEMBERS TO FORMAL TESTIMONY ON THE DISASTER AT CHERNOBYL OR TERRORISM IN GENERAL. IN ADDITION, THE COMMITTEE HAS ACCESS TO

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THE NATIONAL INTELLIGENCE DAILY, OUR NATIONAL INTELLIGENCE ESTIMATES AND A VARIETY OF OTHER INTELLIGENCE PUBLICATIONS. I WOULD URGE MEMBERS OF THIS COMMITTEE WHO ARE INTERESTED IN OBTAINING MORE INTELLIGENCE INFORMATION TO TAKE ADVANTAGE OF THE ACCESS OF THE COMMITTEE TO THIS WEALTH OF INFORMATION.

WHILE I BELIEVE WE HAVE BEEN RESPONSIVE TO THE COMMITTEE'S REQUEST FOR INTELLIGENCE INFORMATION, I HOPE THAT YOU WILL UNDERSTAND MY NEED TO PROTECT FROM DISCLOSURE OPERATIONAL INTELLIGENCE INFORMATION THAT MIGHT JEOPARDIZE OUR SOURCES AND METHODS FOR GATHERING THIS INFORMATION. WHEN THIS INFORMATION IS COMPROMISED, NOT ONLY IS THE PARTICULAR SOURCE OF INTELLIGENCE LOST TO THE U.S. GOVERNMENT, BUT OTHERS BECOME RELUCTANT TO COOPERATE FOR FEAR THEIR IDENTITIES WILL ALSO BE DISCLOSED. IN SOME CASES IT IS NECESSARY TO DISCLOSE SENSITIVE OPERATIONAL INFORMATION IN ORDER FOR CONGRESS TO CONDUCT EFFECTIVE OVERSIGHT. A DECISION WAS MADE BY CONGRESS ITSELF IN 1980 TO LIMIT THIS TYPE OF INFORMATION TO THE INTELLIGENCE COMMITTEES. THIS DECISION WAS A WISE ONE, AND I WOULD STRONGLY OPPOSE ANY PROPOSAL TO EXPAND THE NUMBER OF CONGRESSIONAL COMMITTEES DIRECTLY INVOLVED IN INTELLIGENCE OVERSIGHT.

ACCESS TO COVERT ACTION INFORMATION

IN ADDITION TO THE QUESTION OF ACCESS TO INTELLIGENCE INFORMATION IN GENERAL, I UNDERSTAND SOME MEMBERS ARE CONCERNED

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THAT THE THE FOREIGN AFFAIRS COMMITTEE IS NOT BEING BRIEFED ON COVERT ACTIONS THAT HAVE SIGNIFICANT FOREIGN POLICY IMPLICATIONS. UNDER EXISTING LAW AND THE INTELLIGENCE OVERSIGHT BILL BEING CONSIDERED BY THIS COMMITTEE, ACCESS TO COVERT ACTION INFORMATION IS CONFINED TO THE INTELLIGENCE OVERSIGHT COMMITTEES AND THE DEFENSE SUBCOMMITTEES OF THE APPROPRIATIONS COMMITTEES. I DO NOT BELIEVE IT IS NECESSARY OR WISE TO EXPAND THE NUMBER OF COMMITTEES TO WHICH WE MUST REPORT COVERT ACTIONS. TO DO SO WOULD SIMPLY RETURN US TO THE SITUATION EXISTING BEFORE THE INTELLIGENCE OVERSIGHT ACT OF 1980 WHEN WE HAD TO PROVIDE COVERT ACTION INFORMATION TO EIGHT COMMITTEES OF CONGRESS. THIS SITUATION MADE IT ALMOST IMPOSSIBLE TO CONDUCT COVERT ACTION SECRETLY.

I BELIEVE THAT THE CONCERN EXPRESSED BY SOME REGARDING THE LACK OF COMMITTEE ACCESS TO COVERT ACTION INFORMATION MAY BE THE RESULT OF A MISPERCEPTION AS TO HOW COVERT ACTION RELATES TO OUR FOREIGN POLICY. COVERT ACTION IS IMPLEMENTATION BY CLANDESTINE MEANS OF THE FOREIGN POLICY OF THE UNITED STATES GOVERNMENT. OUR FOREIGN POLICY IS FORMULATED BY THE PRESIDENT AND THE SECRETARY OF STATE.

IN MY VIEW, THE DIRECTOR OF CENTRAL INTELLIGENCE SHOULD NOT MAKE FOREIGN POLICY OR USE COVERT ACTION AS A VEHICLE FOR CREATING A SECRET FOREIGN POLICY. BECAUSE THE SECRETARY OF STATE IS OBLIGATED TO KEEP THE FOREIGN AFFAIRS COMMITTEE INFORMED OF OUR FOREIGN POLICY, I BELIEVE THAT THE COMMITTEE DOES HAVE THE

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NECESSARY MEANS TO MAKE ITS VIEWS KNOWN REGARDING FOREIGN POLICY, INCLUDING THOSE SPECIFIC POLICIES BEING IMPLEMENTED BY A COVERT ACTION.

IF YOU BELIEVE THAT THE ARRANGEMENT I HAVE DESCRIBED IS NOT ADEQUATE TO ENSURE THAT THE VIEWS OF THE FOREIGN AFFAIRS COMMITTEE ARE REPRESENTED IN THE OVERSIGHT OF COVERT ACTION, I WOULD SUGGEST CONGRESS CONSIDER GREATER USE OF CROSS-OVER MEMBERSHIP BETWEEN THE FOREIGN AFFAIRS COMMITTEE AND THE HOUSE INTELLIGENCE COMMITTEE. SUCH CROSS-OVER MEMBERS ARE IN THE BEST POSSIBLE POSITION TO EXPRESS THE VIEWS OF THE FOREIGN AFFAIRS COMMITTEE IN DELIBERATIONS CONDUCTED BY THE HOUSE INTELLIGENCE COMMITTEE. SOME OF YOU NOW SERVE OR HAVE IN THE PAST SERVED VERY EFFECTIVELY IN THIS WAY.

IN CLOSING, I WOULD LIKE TO REEMPHASIZE TO EACH OF YOU MY PERSONAL COMMITMENT TO MAKING THE OVERSIGHT PROCESS WORK. IT HAS ALWAYS BEEN CLEAR, AND RECENT EXPERIENCE HAS AGAIN DEMONSTRATED, THAT THE IMPLEMENTATION OF THE FOREIGN POLICY OF OUR GOVERNMENT, INCLUDING COVERT ACTION, CAN ONLY BE SUCCESSFUL WHEN THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT WORK TOGETHER IN AN ATMOSPHERE OF MUTUAL RESPECT AND TRUST. THIS SPIRIT OF COOPERATION CAN ONLY OCCUR IF THE CONGRESS RECEIVES THE APPROPRIATE INFORMATION NEEDED TO REVIEW AND MAKE INFORMED JUDGMENTS ON COVERT ACTION, WHILE AT THE SAME TIME ENSURING THAT THIS INFORMATION IS PROTECTED FROM UNAUTHORIZED DISCLOSURE. THE

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LAW SHOULD REFLECT NOT ONLY THE NEED FOR COOPERATION, BUT ALSO THE PRESIDENT'S RESPONSIBILITY FOR THE CONDUCT AND MANAGEMENT OF OUR INTELLIGENCE AND THE IMPORTANCE TO THE NATION OF ENSURING THAT THE PRESIDENT HAS THE NECESSARY FLEXIBILITY AND AUTHORITY TO EMPLOY OUR INTELLIGENCE CAPABILITY EFFECTIVELY.

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

THIS CONCLUDES MY STATEMENT. I AM PREPARED TO ANSWER YOUR QUESTIONS.

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The Need for Legislation

Question: Why should Congress rely on a Presidential Directive to fix the various problems exposed during the Iran/Contra hearings regarding congressional oversight? Isn't legislation better than a Directive since this President or a future President could rescind without consultation with Congress the safeguards built into the NSDD on special activities?

Answer: Legislative reforms should be enacted only when there has been a demonstration that the existing statutory framework is inadequate. I do not believe that the Iran/Contra matter has demonstrated that statutory framework which governs oversight activities is inadequate. I believe that a fair reading of the record of the past six years--and of the notifications, reports, briefings and testimony on covert action provided by CIA for the benefits of the intelligence committees--is evidence that Congress, with the exceptions of the Iran initiative and the hostage rescue mission in 1980, has been kept informed in detail of special activities. While I agree that the failure to inform the Intelligence Committee of the Iran Finding for over 10 months was inappropriate, I do not believe the single instance under the Oversight Act in which Congress did not receive prior notice of a special activity warrants altering in a significant way the balance established in the Oversight Act between preserving essential secrecy and providing sufficient information to the intelligence committees so that Congress can perform its oversight functions.

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I must also point out that there are a couple of practical reasons why a Presidential Directive is preferable to legislation. First, a Presidential Directive serves to avoid a potential constitutional confrontation that might occur if Congress were to enact legislation to restrict the President's prerogatives as Commander-in-Chief with respect to the conduct of foreign affairs. I am sure the Justice Department will have something to say on this point.

Second, a Presidential Directive affords greater flexibility to all concerned parties to the oversight process in that it can be more easily modified to meet unanticipated problems that require adjustments in the procedures whereby covert actions are reviewed in the Executive Branch and reported to Congress. While it it true that such flexibility could allow the President to rescind the order, I can assure the Committee that the Administration intends to abide scrupulously by the terms of the Directive and that significant changes in the Directive will not be made without prior consultation with the Intelligence Committee.

Note to DCI: It is unlikely that most Committee members will accept the rationale that no legislation is needed in view of the Iran/Contra report calling for tougher laws on reporting of covert action activities to Congress.

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Question: Does the Administration oppose any attempt to amend the current oversight laws? Do they think these laws are perfect?

Answer: The laws on Congressional Oversight are not perfect. For example, the Hughes/Ryan Amendment for determining when a Finding is required could be made more clear. The House bill does that. Nevertheless, on the whole, the Administration views any change in the oversight laws as premature. Most of the possible shortcomings in the system have been addressed by the new Presidential Directive on special activities/covert action.

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Question: How does the new Presidential Directive prevent a repetition of the situation we had in the Iran/Contra scandal with respect to the issue of private citizens making their own foreign policy for the U.S. Government?

Answer: The new Directive specifies that the Finding state whether it is anticipated that private individuals will participate in a significant way in a special acitivity and that the Finding be distributed to all Members of the National Security Planning Group. This requirement will flag such participation for senior government officials, and will allow them to set strict parameters on what these private officials will do to facilitate the special activity/covert action. The new requirement means that private citizens who participate in a covert action will not be making their own foreign policy for the U.S. Government.

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Prior Notice of a Covert Action

Question: Do you believe the decision to withhold notice of the Iran Finding for over 10 months was correct?

Answer: As I indicated in my confirmation hearing, I do not believe it was appropriate or wise to have withheld notice of the Iran Finding for 10 months from the Congress.

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Question: Is not legislation that requires the President to notify Congress of a covert action within 48 hours after he signs the Finding the best way to ensure that there will never again be a repetition of the President delaying notice of a Finding for 10 months?

Answer: Enacting a statutory requirement to inform Congress within 48 hours is not the only way to ensure that a President would not withhold notice for such a long period of time. The new Presidential Directive on special activities sets up a mechanism whereby the National Security Planning Group must review every 10 days any decision to delay congressional notification. This mechanism will ensure that any delay in notification will be kept to the absolute minimum length of time. Such a mechanism was not in place when the original decision was made to withhold prior notice of the Iran Finding. If it had been, I doubt strongly that the delay would have gone on nearly as long as it did.

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Question: Describe the circumstances under which you could possibly justify delaying notification of Congress of a covert action for more than 48 hours?

Answer: As I stated in my confirmation hearing, it is difficult for me to conjure up situations where prior notice would be withheld. However, I simply cannot categorically rule out the possibility of that rare instance where, for instance, lives would be placed in severe jeopardy if there was premature disclosure. Under such circumstances, delaying notification for a brief period would be justified. As I said in my confirmation hearing, I would not recommend to the President a delay of longer than a few days. By requiring notification, without exception, within 48 hours, the bill thus does not permit any flexibility to allow an additional short delay in truly extraordinary circumstances.

Note to the DCI: The proposed answer could lead to questions on whether you could live with a statute that requires 72-hour notification, or notification within a week. Obviously, the longer the period of time given the President to delay notification, the harder it will be for you to resist opposing the provision. Nevertheless, we suggest that you avoid agreeing to a provision that would require notification, without exception, within a certain length of time. If pressed on this point, you

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Note Continued:

can always point out that you are in no position to make a commitment on notification that only the President can truly make.

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Question: Describe to the Committee a hypothetical situation where you could justify delaying notice of a Presidential Finding for longer than 48 hours?

Answer: As I indicated in my opening statement, a foreign intelligence service could require as a condition of their cooperation on a covert action that the President delay congressional notification of the covert action until it is completed. Such an operation could conceivably be designed to save innocent American hostages who are being held captive by terrorists.

If the President does not have the flexibility in law to delay congressional notification for longer than 48 hours after approval of the operation, he would face three alternatives. The first alternative would be to meet the conditions the foreign intelligence service have imposed and not inform Congress within 48 hours, thereby violating the law. The second alternative would be to inform the foreign service that the President could not legally comply with their conditions. The hostages would then remain prisoners and continue to suffer at the hands of their tormentors. The third alternative would be for the President to lie to the foreign intelligence service by promising not to inform Congress and then to inform the

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Committee within 48 hours. If, for whatever reason, it was later disclosed that the President had informed Congress, it would be likely that this particular foreign intelligence service and other services would severely curtail further cooperation with U.S. intelligence agencies. No President or DCI should be forced to face these alternatives by Congress legislating a mandatory 48-hour notice requirement.

Note to the DCI: This hypothetical is based in part on the real situation faced by President Carter when Canada conditioned their help in exfiltrating several Americans in Iran on condition that Congress be told after the fact.

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Question: As you noted, Congressman Broomfield has introduced a bill that would allow the President to delay notification in situations where he determines that an emergency constituting a grave and immediate threat to the national security interest of the U.S. exists. How would you define an "emergency constituting a grave and immediate threat to the national security interest of the U.S.?

Answer: It would appear to cover situations in which the covert action is designed to prevent a significant loss of American lives, or where the disclosure of the covert action could result in violent action being taken against the U.S. Government. I do not believe it would normally cover situations involving the rescue of innocent Americans held hostage or efforts to improve our relations with a foreign power. Thus, if this standard had been in effect during the Iran initiative it would have, in my view, precluded a delay in congressional notification of the Iran Finding.

Note for the DCI: A copy of the Broomfield bill is contained at Tab D of your briefing book.

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Question: What is the outer time limit beyond which you would not delay notification?

Answer: The current law requires the Committee to be notified in "a timely fashion" when the Committee has not been given prior notification of a special activity. As I stated in my confirmation hearing, notice is timely at the moment when the circumstance which the President believed required a deferral in notice has ceased to be as compelling as the interest in this Committee knowing about the activity. In terms of how long this period would be, I have already stated that I would only recommend to the President the withholding of notice for a few days.

Note to the DCI: The Committee staff is likely to have retrieved your statements made in your confirmation hearing on delayed notification. An extract of those statements is attached at Tab E of background briefing book. Our suggested answers on this issue tracks with the responses you made at that time. Any perceived attempts to back away from those commitments will probably be brought immediately to your attention.

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Question: In arguing for flexibility to delay notification for longer than 48 hours where lives are at stake, aren't you really saying that there may be situations where you cannot trust the Intelligence Committee or the senior leadership of Congress to keep the fact of the covert action secret and therefore need the authority to delay notification until after the completion of the activity? If this is the case, show us just one instance under the Intelligence Committee's current leadership where there has been a leak of sensitive information about a covert action.

Answer: I believe the Intelligence Committee has a good record in protecting the secrets entrusted to it. However, it is sometimes essential to limit knowledge of an operation to the absolute minimum number of people. This does not mean that we do not trust the people who are not told of the activity. Instead, we are following common sense in keeping knowledge of a sensitive activity to an absolute minimum to ensure the security of the project. Having said this, let me add that in almost all cases the security needs of the project would not outweigh the legitimate needs of Congress for prior notice of a covert action.

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Question: Give us an analysis of the constitutionality of limiting the President's power to delay notification of a special activity to just 48 hours.

Answer: I would prefer to defer to the Department of Justice on this issue.

Note to the DCI: If pressed by the Committee because of your former role as an appellate judge, we recommend that you express to the Committee doubts on the constitutionality of the provision. See DoJ viewsletter on the provision, which is included in the background briefing book at Tab G.

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Question: Do you agree with the conclusions reached by the December 1986 Department of Justice memorandum that the President's action in failing to notify the Committee of the Iran Finding for 10 months was consistent with his Constitutional powers?

Answer: I again defer to the Department of Justice on the President's constitutional authorities to delay notice of a Finding. Apart from the legal issue of the President's constitutional authorities, I believe it was inappropriate to withhold notice of the Iran finding for such a long period of time.

Note to the DCI: We recommend that this answer be handled so as not to give any appearance of any division between Justice and the Agency on the issue of the President's constitutional power with respect to delaying notification.

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Question: How can the provision on limiting the authority of the President to delay notice be amended to make it acceptable?

Answer: As I indicated in my testimony, I believe that a step in the right direction is the provision contained in a bill proposed by Ranking Minority Member Broomfield that provides for delayed notification in circumstances where the President determines that an emergency constituting a grave and immediate threat to the national security exists.

Note to the DCI: This answer clearly will be unacceptable to a majority of the Committee because it would, in their view, potentially allow the Administration indefinitely to delay notification to Congress on politically unpopular special activities. At its core, this concern really comes down to members not trusting the President to carry out his obligation to keep Congress informed on covert action. It will be difficult to reestablish this sense of trust in a short time. We suggest emphasizing your personal commitment to keep Congress informed of covert action activities as the best way to head off legislation requiring notice within a certain period of time.

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Question: Do you support the proposal in the Senate bill or the Broomfield bill that would allow the President to limit notification of Congress to just the four congressional leaders?

Answer: In general, I think it is a good idea to restrict access to extremely sensitive covert action programs to a small group to protect the security of the program. However, I will defer to the Congress on deciding whether notification should be restricted to the congressional leadership or the chairman and ranking minority members of the oversight committees.

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Question: Would this bill be acceptable to the Administration if it was amended to allow the President to defer notice of a Presidential Finding for longer than 48 hours in rare cases?

Answer: Yes.

Note to the DCI: Colin Powell has sent a letter to the House Intelligence Committee which states that the only remaining problem with the bill is the requirement for notification within 48 hours. A copy of the letter is attached at Tab C of your background briefing book.

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Access By Foreign Affairs Committee to Intelligence Information

Question: Will you make available to this Committee raw intelligence reports?

Answer: It is our policy not to make available unevaluated intelligence reports. Such reports are sometimes misleading and could reveal the identity of the particular source who provided the information.

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Question: Will you make available operational information to the Committee when there has been allegation of wrongdoing?

Answer: It is our policy to provide such information to the intelligence oversight committees, which are the Congressional bodies charged with reviewing evidence of wrongdoing in the Agency. I do not believe it would be appropriate to provide such information to the Foreign Affairs Committee.

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Question: Will enactment of this bill restrict access by the Foreign Affairs Committee to intelligence information that the Committee currently receives?

Answer: No.

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Access by Foreign Affairs Committee to Covert Action Information

Question: Didn't your predecessor, Bill Casey, make his own foreign policy in secret? Shouldn't this Committee have been kept apprised of these secret foreign policy initiatives? How can we be sure that a future Director will not decide to again use covert action as a tool to further secret foreign policy initiatives?

Answer: I do not think it useful to comment in this forum on the actions of Bill Casey, who made many useful contributions to building a solid intelligence collection and analytical capability. Nor can I predict what the views of some future Director will be on this issue. What I can provide you today are my views. As I indicated in my statement, I do not believe the Director of CIA should make foreign policy or use covert action as a means to implement a secret foreign policy not approved through the established processes of government.

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Question: How can this Committee fully understand the foreign policy of the United States if part of it is being secretly implemented through covert action?

Answer: The policies being implemented by covert action are the same policies being implemented by other actions of the government. The Department of State briefs the Congress, especially this Committee, on U.S. foreign policy. Your Committee is not briefed on covert actions themselves. Other than through increased use of cross-over Members, who also sit on the Intelligence Committee, I see no way to remedy your concern without increasing the number of people aware of a covert action and thereby increasing the risks that the covert action will be disclosed.

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Question: The House recently passed legislation sponsored by Congressman Berman that would impose new restrictions on providing defense articles or services to "terrorist" countries, but exempted those transactions which would be reported to the intelligence committees. What procedures do you have to ensure that this type of information will be reported to the intelligence committees?

Answer: Under existing law, a Finding would be required for the transfer of defense articles or services pursuant to a covert action. The Intelligence Committees would be notified of the Finding. If the transfer of defense articles or services was done for intelligence collection purposes, the Intelligence Committees would be notified if the value of the defense article or service exceed $1,000,000. Under the Intelligence Oversight legislation as passed by the House, the Agency would also be required to report in advance on the transfer to a particular country of any defense article or service that individually was worth less than $1,000,000 but which aggregated to over $1,000,000 in a fiscal year. These requirements will ensure that the Intelligence Committees will be able to closely monitor such transfers.

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Miscellaneous

Question: Do you support an amendment to the Intelligence Oversight bill that would criminalize unauthorized disclosure of classified information received under the authority of the Intelligence Oversight Act?

Answer: I understand such a proposal was offered as an amendment to the Intelligence Oversight bill when it was being considered by the House Intelligence Committee. I believe such a proposal has merit because it would remove any doubt that the intentional disclosure of classified information without proper authorization is a serious offense which should be punished by a fine or jail sentence.

Note to the DCI: A copy of the proposal offered by Representative Livingston is attached at Tab D of your background briefing book.

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Question: Didn't you fire CIA officials because they were found to have violated the law barring assistance to the Contras?

Answer: No. The officials were dismissed for failing to follow CIA's own internal guidelines on assistance to the Contras or for misleading Congress. It is for a court to determine whether they were guilty of violating the law.

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Question: Will the new definition of covert action contained in the bill approved by the House Intelligence Committee narrow what activities must be reported to the Congress?

Answer: The new definition removes the ambiguity in existing law as to what activities require a Finding. The new definition is intended to reflect current practice as it has developed under the Hughes-Ryan Amendment and the Executive Order definition for determining whether an activity requires a Finding. The new definition is somewhat complicated, but I believe it covers those activities that have traditionally been considered covert action. I suggest you read the House Intelligence Committee report on the definition for a more detailed explanation of what the definition covers.

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Question: A section of the bill provides that if the U.S. request another country to conduct a covert action, that request should be treated as a covert action for purposes of the bill. I am concerned that this could infringe on the President's power to conduct purely diplomatic activity. Wouldn't you agree that if a covert action by another country were not actually subject to the control or direction of the U.S. it would not fall within the scope of this provision.

Answer: Without any further clarifying language, it is difficult to determine the scope of this provision. I would be troubled if this provision were interpreted to require that the President or Secretary of State obtain a Finding before making a purely diplomatic request for assistance and that country responds by undertaking an activity which would fit within the definition of covert action if carried out by the U.S. For example, the President could ask the British to do everything they could to free American hostages and the British might, without any support from the U.S., undertake an activity to free our hostages which we would consider to be a covert action. The initial general request for help by the President should not require a Finding.

On the other hand, in my view a Finding would be required if we were to request another country to undertake a specific covert

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action on our behalf and we monitored that activity and had some degree of control over the activity. Furthermore, it is my view that we should not request another country to undertake an activity that we would be prohibited by law from undertaking ourselves.

Note for the DCI: Staff informs us that Representative Broomfield will ask you this question in order to build support to narrow the scope of the provision of the bill at issue here. The White House has not been particularly worried about this section of the bill so we do not recommend you oppose this section of the bill in your answer to the question. Rather, legislative history can do the trick to narrow the application of this section.

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STRIKE ALL AFTER THE ENACTING CLAUSE AND INSERT IN LIEU THEREOF:

SEC. 1. This Act may be cited as the "Intelligence Oversight Act of 1988".

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

SEC. 3. Section 501 of title V of the National Security Act of 1947 (50 U.S.C. 413) is amended by striking the language contained therein, and substituting the following new sections:

"GENERAL PROVISIONS

"SEC. 501. (a) The President shall ensure that the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this title referred to as the 'intelligence committees') are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activities, as required by this title: Provided, That nothing contained in this title shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities.

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"(b) The President shall ensure that any illegal intelligence activity is reported promptly to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.

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

"(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this title. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

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

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

"REPORTING INTELLIGENCE ACTIVITIES OTHER THAN COVERT ACTION

"SEC. 502. To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall (1) keep the intelligence committees fully and currently informed of all intelligence activities, other than a covert action as defined in section 503(e), which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and any significant intelligence failure; and (2) furnish the intelligence committees any information or material concerning intelligence activities, other than covert actions, which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

"PRESIDENTIAL APPROVAL AND REPORTING OF COVERT ACTIONS

"SEC. 503. (a) The President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government

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unless he determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States, which determination shall be set forth in a finding that shall meet each of the following conditions:

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

"(2) Except as permitted by paragraph (1), a finding may not authorize or sanction covert actions, or any aspect of such actions, which have already occurred.

"(3) Each finding shall specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such actions: 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 covert action 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, to govern such participation.

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

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

"(b) To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a covert action shall keep the intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency or entity of the United States Government, and shall furnish to the intelligence committees any information or material concerning covert actions which is in the possession, custody or control of any department, agency, or entity of the United States Government and which is requested by either of the intellience committees in order to carry out its authorized responsibilities.

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"(c)(1) The President shall ensure that any finding approved pursuant to subsection (a) shall be reported to the intelligence committees as soon as possible after such approval and prior to the initiation of the covert action authorized by the finding: Provided, That if the President determines it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, such finding may be reported to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. In either case, a copy of the finding, signed by the President, shall be provided to the chairman of each intelligence committee. Where access to a finding is limited to the Members of Congress identified above, a statement of the reasons for limiting such access shall also be provided.

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

"(3) The President shall ensure that notice of a covert action 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 covert action 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.

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"(d) The President shall ensure that the intelligence committees, or, if applicable, the Members of Congress specified in subsection (c)(1), are notified of any significant change in a previously-approved covert action, or any significant undertaking pursuant to a previously approved finding, in the same manner as findings are reported pursuant to subsection (c).

"(e) As used in this title, the term 'covert action' means an activity or activities conducted by an element of the United States Government to influence political, economic, or military conditions abroad so that the role of the United States Government is not intended to be apparent or acknowledged publicly, but does not include--

"(1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;

"(2) traditional diplomatic or military activities or routine support to such activities;

"(3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or

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"(4) activities to provide routine support to the overt activities (other than activities described in paragraphs (1), (2), or (3)) of other United States Government agencies abroad.

A request by any department, agency, or entity of the United States to a foreign government or a private citizen to conduct a covert action on behalf of the United States shall be deemed to be a covert action.

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

SEC. 4. Section 502 of title V of the National Security Act of 1947 (50 U.S.C. 414) is redesignated as section 504 of such Act, and is amended by deleting "501" in subsection (a)(2) of such section and inserting in lieu thereof "503" and by adding at the end the following:

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

"(e) Except as provided in section 204(b) (appearing under the heading 'General Provisions--Department of Justice') of the Department of Justice Appropriations Act, 1988 (contained in P.L. 100-202) and in Section 423 of

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Title 10, United States Code, funds available to an intelligence agency which are not appropriated funds may be obligated or expended for an intelligence or intelligence-related activity only if they are used for activities reported to the appropriate congressional committees pursuant to procedures jointly agreed upon by such committees, the Director of Central Intelligence or the Secretary of Defense, which identify types of activities for which nonappropriated funds may be expended and under what circumstances an activity must be reported as a significant anticipated intelligence activity before such funds can be expended.".

SEC. 5. Section 503 of title V of the National Security Act of 1947 (50 U.S.C. 415) is redesignated as section 505 of such Act, and subsection (a)(1) of such section is amended by adding, ", or the anticipated transfer in any fiscal year of any aggregation of defense articles or defense services," after "service".

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I

100TH CONGRESS
1ST SESSION

H. R. 3611

To provide for executive branch notification to the legislative branch of sensitive foreign intelligence activities in a manner consistent with the constitutional authorities and duties of both branches, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 5, 1987

Mr. BROOMFIELD introduced the following bill; which was referred to the Committee on the Permanent Select Committee on Intelligence

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A BILL

To provide for executive branch notification to the legislative branch of sensitive foreign intelligence activities in a manner consistent with the constitutional authorities and duties of both branches, and for other purposes.

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

SEC. 2. (a) Paragraph 501(a)(1) of the National Security Act of 1947 (50 U.S.C. 413 (a)(1)) is amended by—

(1) striking "(A)";

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(2) inserting a semicolon after "any such significant anticipated intelligence activity"; and

(3) striking the remainder of the paragraph.

(b) Section 501 of the National Security Act of 1947 is amended by adding at the end thereof the following new subsection:

"(f)(1) No funds appropriated or otherwise available to any department, agency, or entity of the United States may be obligated or expended for any intelligence activity, including any significant anticipated intelligence activity, unless the Director of Central Intelligence or the head of the department, agency or entity—

"(A) has notified the intelligence committees of such activity; or

"(B) has notified the Speaker and minority leader of the House of Representatives and the majority leader and the minority leader of the Senate of such activity, if the President has determined in writing that it is essential to limit the number of persons given prior notice of the activity to meet extraordinary circumstances affecting vital interests of the United States.

"(2) The President may waive in writing the applicability of paragraph (1) with respect to a particular intelligence activity, including a particular significant anticipated intelli-

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gence activity, if he determines in writing that an emergency constituting a grave and immediate threat to the national security of the United States requires such a waiver.

"(3) This subsection shall not apply with respect to an intelligence activity, including a significant anticipated intelligence activity, for which funds were specifically authorized by the Congress (as defined in Section 502(c)(3))."

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SECRET/SENSITIVE

I. INTRODUCTION

A. The Policy Context

In discharging his constitutional responsibility for the conduct of foreign relations and for ensuring the security of the United States, the President may find it necessary that activities conducted in support of national foreign policy objectives abroad be planned and executed so that the role of the United States Government is not apparent or acknowledged publicly. Such activities, the failure or exposure of which may entail high costs, must be conducted only after the President reaches an informed judgment regarding their utility in particular circumstances. To the extent possible, they should be conducted only when we are confident that, if they are revealed, the American public would find them sensible.

This Directive... sets forth revised procedures for presidential approval and review, through the National Security Council (NSC) process, of all "special activities" as defined by section 3.4(h) of Executive Order No. 12333 (December 4, 1981).

These procedures are designed, inter alia, (1) to ensure that all special activities conducted by, or at the direction of, the United States are consistent with national defense and foreign policies and applicable law; (2) to provide standards ensuring the secrecy of such activities even when the results become publicly known or the activities themselves are the subject of unauthorized disclosure; and (3) to implement section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), concerning notification to Congress of such activities.

B. The Role of the Assistant to the President for National Security Affairs and the National Security Council Staff

Within the framework and in accordance with the requirements set forth in NSDD 266, the Assistant to the President for National Security Affairs (the "National Security Advisor") shall serve as manager of the NSC process and as principal advisor on the President's staff with respect to all national security affairs, including special activities. The NSC staff, through the Executive Secretary of the NSC, shall assist the National Security Advisor in discharging these responsibilities. The National Security Advisor and the NSC staff themselves shall not undertake the conduct of special activities.

Partially Declassified/Released on 12/15/97
under provisions of E.O. 12356
by D. Sirko, National Security Council

Extract from NSDD 286

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II. APPROVAL AND REVIEW OF SPECIAL ACTIVITIES

A. Presidential Findings and Memoranda of Notification

1. Presidential Findings

In all cases, special activities of the Central Intelligence Agency (CIA) in foreign countries require, under the terms of section 662 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2422), Findings by the President that such activities are important to the national security of the United States. Presidential Findings shall be obtained with respect to all CIA activities abroad, other than those activities that are intended solely for obtaining necessary intelligence within the meaning of section 662 of the Foreign Assistance Act of 1961, as amended.

No special activity may be conducted except under the authority of, and subsequent to, a Finding by the President that such activity is important to the national security of the United States. In all but the rarest of circumstances, no special activity may be undertaken prior to the President's having signed a written Finding. In cases in which the President determines that time is of the essence and that the national security requires that a special activity be undertaken before a written Finding can be presented for signature, and that oral authorization therefore is required, ...a contemporaneous record of the President's authorization shall be made in writing, and... a corresponding Finding shall be submitted for signature by the President as soon as possible, but in no event more than two working days thereafter. No Finding may retroactively authorize or sanction a special activity.

2. Memoranda of Notification

In the event of any proposal to change substantially the means of implementation of, or the level of resources, assets, or activity under, a Finding; or in the event of any significant change in the operational conditions, country or countries significantly engaged, or risks associated with a special activity, a written Memorandum of Notification (MON) shall be submitted to the President for his approval. All actions to be authorized by means of an MON must be important to U.S. national security as set forth in a previously-approved Finding. An MON also shall be submitted to the President for his approval in order to modify a Finding in light of changed circumstances or passage of time; or to cancel a Finding because the special activity authorized has been completed or for any other reason.

The procedures for approval by the President of an MON shall be the same as those established by this Directive for approval of a Finding.

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3. Con nts and Accompanying Docum nts

Each Finding and MON submitted to the President for approval shall be accompanied by or include a statement setting forth, inter alia, the following:

(a) the policy objectives the special activity is intended to serve and the goals to be achieved thereby;

(b) the actions authorized, resources required, and Executive departments, agencies, and entities authorized to fund or otherwise participate significantly in the conduct of such special activity;

(c) consistent with the protection of intelligence sources and methods, whether it is anticipated that private individuals or organizations will be instrumental in the conduct of the special activity;

(d) consistent with the protection of intelligence sources and methods, whether it is anticipated that a foreign government or element thereof will participate significantly in the special activity; and

(e) an assessment of the risks associated with the activity.

B. NSC Review of Proposals for Special Activities

Prior to its submission to the President, each proposed Finding and MON shall be reviewed within the NSC process as provided below. The results of such review shall be submitted to the President prior to his determination with regard to each proposed Finding or MON.

1. The National Security Planning Group

Each proposed Finding and MON shall be reviewed by the National Security Planning Group (NSPG), a committee of the NSC... The National Security Advisor shall be responsible for the agenda and conduct of such meetings, at the President's direction. Unless exceptional circumstances dictate otherwise, the National Security Advisor shall circulate the agenda for, and papers to be considered at, NSPG meetings four (4) days in advance thereof.

NSPG members shall review each proposed Finding and MON; their comments, recommendations, and dissents, if any, shall be provided to the President orally, or in writing through the National Security Advisor. The National Security Advisor shall transmit all proposed Findings and MONs to the President through the Chief of Staff to the President. Each proposed Finding and MON shall be coordinated, in advance of its submission to the President, by the NSC Legal Advisor with the Counsel to the President. Under normal circumstances, the NSPG will meet to review each Finding or MON prior to presidential approval.

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The President may, however, approve a Finding or MON on the basis of the NSPG members' comments communicated other than in a formal NSPG meeting. The National Security Advisor shall ensure that an appropriate record is made of the President's consultations with NSPG members however conducted, and that the President's decision is committed to writing. The National Security Advisor shall notify all NSPG members in writing of the President's decision with regard to each proposed Finding and MON...

C. Periodic NSC Review of Special Activities

Not less often than once each calendar year, the NSPG shall review each special activity, and recommend to the President those Findings to be reaffirmed, revised, or terminated. Unless, within thirty (30) days following the conclusion of such review, the President approves in writing the continuation of a Finding, or otherwise directs, such Finding and associated MONs, if any, together with the authority to undertake special activities thereunder, shall be deemed cancelled upon appropriate notice to the DCI or head of such other Executive department, agency, or entity authorized to conduct the special activity. The National Security Advisor shall provide a written report of the results of this review to NSPG members. The Director of the Office of Management and Budget shall ensure that the President's budget provides resources consistent with all Findings for the congressional budget request.

D. Executive Secretary of the NSC

The Executive Secretary of the NSC and the NSC staff shall assist the National Security Advisor and Deputy National Security Advisor with appropriate preparations for, and follow-up to, all... meetings relating to special activities. Such assistance shall include preparation of meeting minutes and the development and dissemination of decision and other documents. The Executive Secretary of the NSC shall have custody of record copies of Findings and MONs as approved by the President. The DCI, other members of the NSPG and the head of such other Executive department, agency or entity the President may direct to undertake a special activity, shall be provided with a copy of each Finding and MON as signed by the President, together with the National Security Advisor's memorandum recording the President's decision.

E. Conduct of Special Activities

Absent a specific presidential decision, as provided in section 1.8(e) of Executive Order 12333, that another Executive department, agency or entity is more likely to achieve a particular objective, no department, agency or entity other than the CIA shall be responsible as lead agency for the conduct of a special activity. Private individuals and organizations used in the conduct of special activities shall be subject to observation and supervision, as appropriate in the interests of proper

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operational secu :y and control, in accord. ce with procedures established for such purpose by the CIA, or other Executive department, agency, or entity.

F. Restricted Consideration

1. Security

The National Security Advisor shall establish a separate, specially compartmented control and access system at the Top Secret classification level for all policy matters concerning special activities...

G. Congressional Notification

1. The Requirement to Notify Congress

Consistent with section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), and unless the President otherwise directs in writing pursuant to his constitutional authorities and duties, Congress shall be notified on the President's behalf of all special activities in accordance with this Directive.

2. Contents of Notification

In all cases, notification to Congress as provided herein shall include a copy of the Finding or associated MON, if any, as signed by the President, and the statement described in section II.A.3 hereof.

3. Prior Notification

Consistent with the expectation of prior notification to Congress, in all but extraordinary circumstances as specified herein, the DCI, or head of such other Executive department, agency, or entity authorized to conduct a special activity, shall notify Congress, on the President's behalf, through the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter collectively referred to as the "Intelligence Committees"), prior to initiation of each special activity authorized by a Finding and associated MON, if any. In extraordinary circumstances affecting the vital interests of the United States, the DCI, or head of such other Executive department, agency, or entity authorized to conduct a special activity, shall notify Congress, on the President's behalf, through the Majority and Minority Leaders of the Senate, the Speaker and Minority Leader of the House of Representatives, and the Chairman and Vice Chairman of the Senate Select Committee on Intelligence, and the Chairman and Ranking Minority Member of the Permanent Select Committee on Intelligence of the House of Representatives, prior to initiation of a special activity authorized by a Finding and associated MON, if any.

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...ary Circumstances

If the President determines that it is necessary, in order to meet rare, extraordinary circumstances, to delay notification until after the initiation of a special activity, the DCI, or head of such other Executive department, agency, or entity authorized to conduct a special activity, shall delay notification consistent with section 501(b) at the direction of the President. Unless the President otherwise directs, not later than two working days after the President signs a Finding or associated MON, if any, the Intelligence Committees shall be notified in accordance with established procedures. In all such cases, notification shall include the reasons for not giving prior notice to the Intelligence Committees. In the event the President directs that notification to Congress be delayed beyond two working days after presidential authorization of a special activity as provided herein, the grounds for such delay shall be memorialized in writing and shall be re-evaluated by the NSPG not less frequently than every ten (10) days.

III. SPECIAL ACTIVITIES NOT CONDUCTED BY THE CIA

If, as provided in section 1.8(e) of Executive Order No. 12333, the President directs that an Executive department, agency or entity other than the CIA conduct a special activity, the provisions of this Directive shall apply to such department, agency, or entity. In such cases, the head of such other Executive department, agency or entity shall fully and currently inform the DCI of all aspects of the special activity, and jointly with the DCI shall notify Congress of the special activity, in accordance with the DCI's role as the President's principal advisor on intelligence matters as set forth in NSDD 266.

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CONFIDENTIAL

STATEMENT BY
MICHAEL H. ARMACOST
UNDER SECRETARY FOR POLITICAL AFFAIRS
DEPARTMENT OF STATE

House Foreign Affairs
Committee Hearing on
H. 3822, the Oversight
Intelligence Act of 1988

June 14, 1988

Thank you for the opportunity to appear today to present the views of the Department of State on the Intelligence Oversight Act, as marked up by the House Permanent Select Committee on Intelligence.

During the past year, I have had the opportunity to testify twice on the issue of oversight legislation. Last December, I testified before the Senate Select Committee on Intelligence on S. 1721, the companion bill to the bill before this committee. On June 10, 1987, I testified before the House Permanent Sclect Committee on Intelligence on Chairman Stoke's earlier version of what is now H.R. 3822.

During this period, significant changes have been made to the bill which this committee is now considering. Many of the specific objections made by the Administration, including the Department of State, have been addressed. This includes problems which I and my distinguished colleagues on this pancl

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have identified regarding the protection of sources and methods and the naming of foreign countries in findings. We are pleased that changes have been made to accommodate many of our serious concerns.

Nonetheless, we regret that our most fundamental objections regarding this bill remain. These objections require that we oppose this bill.

Our most fundamental objection to the specific contents of the current bill remains its absolute and rigid requirement to notify Congress within 48 hours of the adoption of a written finding, combined with the deletion of the references in present law to the constitutional authorities of the executive and legislative branches. As you know, the President's NSDD 286 on covert action (declassified last December) requires that findings now be reported to Congress within 48 hours of signature except in extraordinary situations. We believe that the NSDD establishes a sound procedure and provides the kind of flexibility that is necessary in the execution of U.S. foreign policy.

In our view, the absolute 48-hour requirement may not be reasonable in those very rare instances where extremely sensitive operations require the tightest possible security to

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protect the lives of U.S. and foreign nationals. The 1980 Iran rescure mission and the role of the Canadian Embassy in assisting our people in Iran are examples.

In addition, the Justice Department has concluded that the 48-hour requirement would infringe upon the President's constitutional authority. The Justice Department has testified on this matter before the Senate, and has informed the HPSCI of this conclusion in writing. This fundamental constitutional objection to the bill remains.

However, there is another objection to this bill which I believe is not fully appreciated by many in Congress. In our view, there is a need for Congress and the Executive to work together closely on intelligence matters, and to have trust in each other. The Iran-Contra affair obviously put great strains on the relationship between our two branches on intelligence matters. This episode is now behind us. The President has taken decisive action to ensure that there will not be a repetition of that unfortunate affair.

The procedures established by NSDD 286 are working well and will ensure that covert actions are decided upon in a proper manner, taking into account all relevant factors. With the exception of the rigid 48-hour rule, NSDD 286 incorporates the significant changes to existing law reflected in H.R. 3822.

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The problem that we both face at this time is not inadequacy in the law but, rather, the need to restore confidence and trust. We do not believe the solution is to pass an unnecessary bill which rekindles confrontation over a basic constitutional issue.

In many respects, the debate on this bill bears significant similarities to past debate on the War Powers Resolution. This Administration and all of its predecessors during the past fifteen years have expressed serious doubts regarding the wisdom and constitutionality of that Act, and have declined to implement those provisions which they considered unconstitutional. When issues arise regarding the use of U.S. armed forces abroad, we are distracted into discussions of the War Powers Resolution rather than deliberating together over the substance of policy. An increasing number in Congress appear to recognize these problems, as evidenced in recent proposals to repeal or amend the War Powers Resolution.

We are concerned lest we be entangled in similar problems in the case of intelligence matters, as would be the case if H.R. 3822 were to be enacted. Instead, we recommend a genuine partnership that will enable Judge Webster and other senior officials charged with reforming intelligence procedures the

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chance to make their reforms work. We see this as operating to the mutual advantage of the Congress and the Executive Branch. We therefore urge the Committee not to recommend adoption of this legislation.

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BACKGROUND READING ON INTELLIGENCE OVERSIGHT LEGISLATION

FOR THE DIRECTOR OF CENTRAL INTELLIGENCE APPEARANCE

THE FOREIGN AFFAIRS COMMITTEE

HOUSE OF REPRESENTATIVES

14 JUNE 1988

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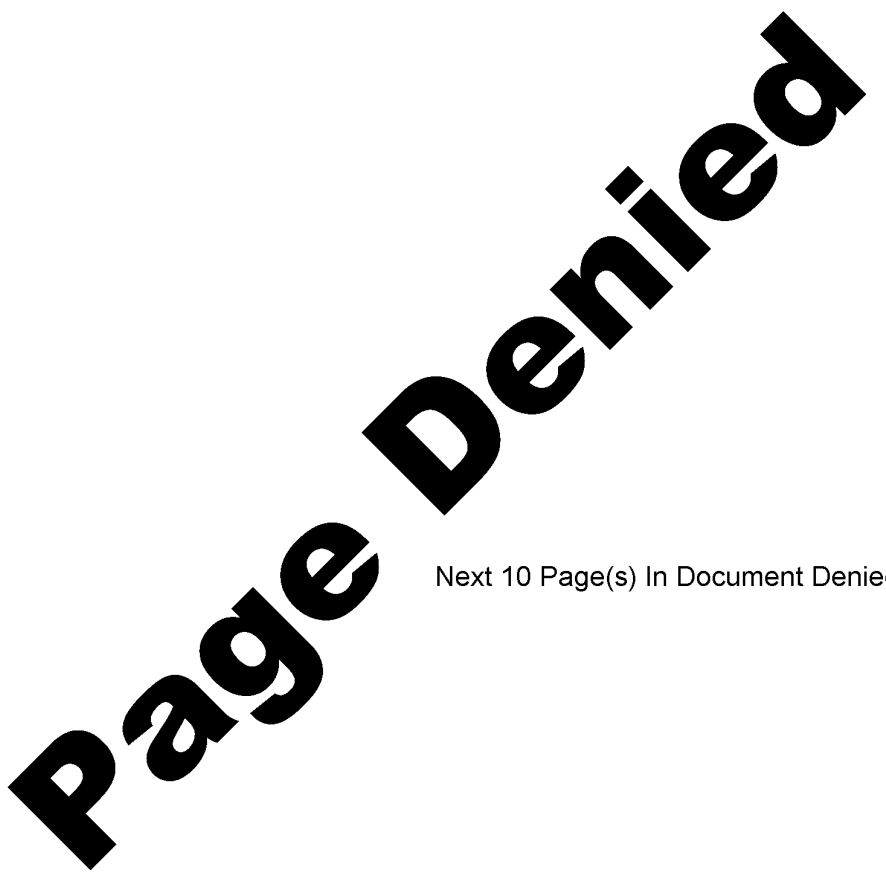

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WASHINGTON

Dear Mr. Chairman:

We appreciate the opportunity to work with the Committee in the effort to address certain technical issues raised by the language of H.R. 3822, the Intelligence Oversight Act of 1988, as introduced in the House of Representatives. We have reviewed the proposed amendments (copy attached) provided to us by Committee staff on May 9. These amendments as drafted address certain technical problems in the original language of H.R. 3822 about which agencies expressed concern. (The CIA does not object to the provision on the use of non-appropriated funds provided an acceptable agreement is reached with committee staff on terms and conditions under which non-appropriated funds would be reported to the committee.)

The proposed amendments do not, of course, resolve the Administration's constitutional objections to the proposed Act's provision regarding the forty-eight-hour reporting requirement for all covert action Findings, a problem that was outside the scope of work our staffs have done on the technical issues presented by the proposed Act. It should be well understood that the President's senior advisors will recommend a veto of legislation containing such an absolute reporting requirement because such a requirement encroaches upon the President's constitutional authority. As the President said in his message to Congress, March 31, 1987, "I will strongly oppose legislation that would attempt to encroach further on what I regard as the President's independent constitutional authority in the intelligence field."

In our work with the Committee staff, the effort to reach agreement about an improved definition of "covert action" for incorporation into the proposed Act has been especially important. This effort has helped to clarify and strengthen our mutual understanding about what is meant by covert action. While experience over time has produced mutual understanding as to what constitutes covert action, ambiguities in existing law have created misunderstandings and tension that both the Executive and Legislative Branches are determined to avoid in the future. As we understand it, the proposed definition is a distinct improvement over the provisions of existing law. Our understanding of the proposed definition is explained in the attached analysis.

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In summary, the language used in the definition as well as the process by which it was developed, should go a long way toward preventing misunderstandings in the future. We hope that it and the other technical amendments our staffs have discussed can be incorporated in a bill that does not contain objectionable features that would require a Presidential veto.

Sincerely,

Colin L. Powell

Attachment: Definition

The Honorable Louis Stokes
Chairman
Permanent Select Committee
on Intelligence
House Office Building
Washington, D. C. 20515

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DEFINITION OF COVERT ACTION

Focusing on the draft definition of covert action furnished on May 9, 1988, this analysis sets forth the Administration's understanding of the Committee's intent as well as our views about particular language. We do this in the context of our understanding that the Committee's goals are: (1) to reach agreement between the two branches as to what constitutes covert action; (2) to ensure that covert action receives presidential approval and is reported to Congress whenever it is undertaken by any Executive Branch entity; (3) to ensure that procedures for reporting covert action will encompass significant operations without trivializing and overloading the Finding process by requiring presidential action for diplomatic, counter-intelligence, security, military, law enforcement or other activities that fall within the standing authorities and missions of Executive Branch departments, agencies, and entities, and that have not, in the past, been understood by both branches to be covert action. In light of this understanding, we take it that the reference to influencing "political, economic, or military conditions abroad" is intended to encompass significant covert operations of the type currently covered by the definition of "special activities" in Executive Order No. 12333 in the context of intelligence agency missions and capabilities.

Similarly, we read the language regarding a U.S. role that is "not intended to be apparent or acknowledged publicly" as distinguishing between operations, which, while conducted secretly for security reasons at the initial stage, ultimately will be acknowledged and those which the United States has no intention of ever acknowledging. Thus, we would not view military special operations (preliminary reconnaissance for a Grenada rescue mission, for example), as a covert action, even though conducted secretly, because the ultimate intent is to carry out a public operation. In our discussions with staff it was agreed that "clandestine" and "covert" are not synonymous and that secret preparations for activities that are ultimately acknowledged or for which the U.S. Government has no intention of denying responsibility, do not constitute "covert actions."

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The various exceptions contained in the proposed definition, in our view, are crucial and reinforce this distinction between "clandestine" and "covert." Further, the exceptions outlined are critical to a definition of covert action that correctly matches the real scope of the term. The risk inherent in giving new form to well understood concepts is that we might inadvertently leave open to argument the question of whether the scope of the definition actually has been changed.

The first exception, for example, clearly excludes clandestine intelligence gathering from the definition of covert action. It also excludes traditional counterintelligence activities and traditional operational security activities. We agree with these exclusions.

The reference to "operational security" will help ensure understanding that security activities which might otherwise fall within a broad description of covert action are excluded from the definition of covert action in this Bill. "Operational security," a term of art in the military, involves, but is not limited to, measures including camouflage, concealment, cover, and deception. Making clear that such security measures, together with other elements of security programs to protect U.S. programs, are excluded from the intelligence activities covered by the Bill will avoid ambiguity.

The second exclusion incorporates the concept of Executive Order No. 12333 that diplomatic initiatives are outside the scope of covert action even if conducted secretly. For example, traditional activities of the Treasury Department are not considered included. Likewise, it makes clear that "traditional" military activities, which have not in the past been considered covert action, will not be included in the new definition merely because the preamble refers to influencing "military conditions abroad." Again, we do not believe that use of the term "traditional" should be construed to mean that there must be an exact precedent for every aspect of these activities. It is also helpful that the exclusion makes it clear that routine support for these diplomatic and military activities is not covert action. In this regard, we note with approval the assurance, stated in the SSCI Report on S. 1721, that the revised definition in the Senate Bill is crafted so as to reflect existing law and not to disturb the body of legal interpretation under current legal requirements, as well as the oral statement of Subcommittee Chairman McHugh to Secretary Carlucci on March 10, 1988, that H.R. 3822 does not encompass traditional military activities.

The third exclusion makes it clear that even though the covert action definition is expanded to cover activities by all

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elements of the U.S. Government, this expansion is not intended to encompass "traditional" law enforcement activities conducted under cover. Similarly, it specifies that routine support to such activities, even if provided by intelligence agencies, does not require a Finding.

Finally, the fourth exclusion makes it clear that clandestine, non-covert support services do not require a Finding if the underlying operation itself does not require a Finding. Thus, it shifts the focus to the nature of the undertaking being supported rather than the nature of the agency providing support. This clarification should prove particularly helpful in eliminating ambiguities in situations where several agencies are involved in an operation, not in itself covert, but involving clandestine, non-covert support services.

No definition can anticipate every circumstance that may arise. Experience gives rise to common understandings, practices, and procedures. Since the establishment of the Central Intelligence Agency and congressional intelligence committees, the Executive and Legislative Branches have achieved an understanding of covert action--recognizing that "covert action" is synonymous with "special activities"--to be operations designed to influence foreign governments, events, organizations or persons in support of U.S. foreign policy objectives abroad, whose sponsorship or conduct by the U.S. Government is officially deniable, notwithstanding the disclosure of the activities during or after their execution. This understanding traditionally has meant that covert action consists of covert propaganda, covert paramilitary, covert economic and covert political actions or influence operations abroad. Since 1974, these operations have required a Presidential Finding for their authorization. It has also been understood that support by an Executive Department or Agency, including DoD, to the conduct of a covert action by the CIA or another Executive Department or Agency, pursuant to a presidential Finding does not constitute, in itself, a separate covert action. This is the traditional understanding of covert action on which the Executive Branch consistently has operated since the establishment of the requirement to report such activities to Congress; and we interpret your proposed definition of covert action to be consistent with this understanding.

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HPSCI
May 9, 1988

AMENDMENTS TO H.R. 3822

1. Page 1, line 5, delete "1987" and insert in lieu thereof "1988". Page 3, line 23, delete the comma after "methods" and insert in lieu thereof "or other exceptionally sensitive matters,". Page 6, line 11, delete the comma after "methods" and insert in lieu thereof "or other exceptionally sensitive matters,".

2. On page 3, line 20, delete "(a)". Page 3, line 26, insert "(1)" before "keep". Page 4, line 6, strike the period and insert in lieu thereof "; and". Page 4, line 7, strike everything through "shall" on line 10, and insert in lieu thereof "(2)".

3. On page 4, line 17, strike "The" and all that follows through "when" on line 19 and insert in lieu thereof "The President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government unless".

4. On page 4, line 20, strike "the" and insert in lieu thereof "identifiable".

5. Page 5, lines 21-22, delete "in consultation with the Director of Central Intelligence,".

6. On page 8, line 14, strike everything through the period on page 9, line 1 and insert in lieu thereof

"(e) The term 'covert action' means an activity or activities conducted by an element of the United States Government to influence political, economic, or military conditions abroad so that the role of the United States Government is not intended to be apparent or acknowledged publicly, but does not include—

"(1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;

"(2) traditional diplomatic or military activities or routine support to such activities;

"(3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or

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activities to provide routine support to the overt activities (other than activities described in paragraphs (1), (2), or (3)) of other United States Government agencies abroad."

7. Strike "special activity" and "special activities" wherever they occur and insert in lieu thereof respectively "covert action" and "covert actions". Page 4, line 20 and page 7, line 21, strike "activity" and insert in lieu thereof "action". Page 5, lines 8 and 13, strike "activities" and insert in lieu thereof "actions". Page 6, line 11, strike "funding" and insert in lieu thereof "finding". Page 9, line 2, strike "country" and insert in lieu thereof "government".

8. Page 9, line 11, strike the comma and all that follows through the comma on line 13. Page 9, line 14, strike "new subsection (d)". Page 9, line 21, strike the quotation marks and insert after line 21 the following:

"(e) Except as provided in Section 204(b) (appearing under the heading 'General Provisions--Department of Justice') of the Department of Justice Appropriations Act, 1988 (contained in P.L. 100-202) and in Section 423 of Title 10, United States Code, funds available to an intelligence agency which are not appropriated funds may be obligated or expended for an intelligence or intelligence-related activity only if they are used for activities reported to the appropriate congressional committees pursuant to procedures jointly agreed upon by such committees, the Director of Central Intelligence or the Secretary of Defense, which identify types of activities for which nonappropriated funds may be expended and under what circumstances an activity must be reported as a significant anticipated intelligence activity before such funds can be expended."

9. On page 10, line 1, insert "the anticipated transfer in any fiscal year of" before "any".

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Amendment to the Amendment in the Nature of a Substitute
Offered by Mr. McHugh to H.R. 3822
Offered by _____

Page 10, after line 2, insert the following:

Sec. 6. Title V of the National Security Act of 1947 (50 USC 413, et. seq.) is amended by adding at the end thereof the following new section:

"UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION

"Sec. 506. Any person who, having received classified information pursuant to the provisions of this title, knowingly and willfully discloses the substance of that information without the authorization of the President, unless pursuant to the applicable rules of the House of Congress of which that person is a Member, officer or employee, shall be fined not less than $1,000 nor more than $20,000 or imprisoned for not less than ninety days nor more than five years, or both.".

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(Confirmation hearings held on 8 April 1987)

in hindsight we could have done a better job than they did. But that——

Chairman BOREN. Had you known that it was going to indeed turn into a criminal inquiry, which it did 4 days later, in essence, when you were asked to bring the Bureau into it, thinking specifically about the need to protect records and the need to protect potential evidence, had you known on the 21st that this was to become a criminal inquiry, would you at that time have advised the Attorney General that either the FBI or those within the Justice Department who have dealt with a criminal inquiry should have been brought into it specifically to protect evidence?

Judge WEBSTER. Absolutely, Mr. Chairman. If I might go one step further, I am confident the Attorney General wouldn't have had to have that; he would have asked for it had he known it would be a criminal.

Chairman BOREN. Well, I gather then it does not surprise you that the Attorney General in his testimony before the committee on December 17th, which we have released today, testified that you agreed, and I quote from this, you agreed that it would not be appropriate for the FBI to be brought in at that time.

Judge WEBSTER. That is correct.

Chairman BOREN. This morning you have entered into the record some comments in regard to a memorandum, an internal FBI memorandum dated October 30th, which bears your initials, which indicates that an official at the Justice Department had speculated that Colonel North might someday come under a criminal investigation, and that certain information which was contained in this memorandum might best be withheld from him at that time. I wondered if, when you had those discussions with Attorney General Meese on November 21st, it must have been known that Colonel North was one of those involved with the Iranian matter, if you had in mind or gave any thought to this information passing across your desk, that there were at least some people in the Justice Department who had suspicion that Colonel North might become the target of criminal investigation?

Judge WEBSTER. No, I have to tell you in all candor it was not on my mind. In fact, I don't even recall seeing it until it was called to my attention recently in connection with preparing the answers to these questions. It came up with the kinds of informational notes that come up literally by the dozens, call for no action on my part, had been reviewed by all of my career subordinates in the criminal line. I really did not have that in mind.

Chairman BOREN. So there was nothing in your mind at that time that caused you to have any feeling that this might turn into a criminal investigation.

Judge WEBSTER. No, Mr. Chairman. It was entirely focused on Iran and the Iranian situation, the Iranian initiative. I frankly have entertained some ill ease about the role of the National Security Council in those areas, but I had no question about whether anything illegal was taking place.

Chairman BOREN. Let me go now directly to the point of oversight responsibility, and of course as you know, prior notification is to be given to this committee, or at least in extraordinary circumstances to the leadership of this committee in regard to covert ac-

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tions, significant intelligence gathering activities, or any illegal intelligence gathering activities that are brought to the attention of government officials. These are also to be reported.

Can you think of any circumstances in which the President should withhold prior notice altogether, even of the Chairman and Vice Chairman of this committee and the four leaders of the two Houses?

Judge WEBSTER. Mr. Chairman, it is difficult for me to conjure up situations in which I, based on my own experience with this committee, would want to see information withheld. This is not to say that the President might take a different view of an extraordinarily sensitive, potentially life-threatening initiative that could be damaged and lives put at risk if there were some kind of premature exposure. I have difficulty thinking of any such situations. But the President has a more overriding responsibility.

Chairman BOREN. If for some reason some dire emergency developed where notice were withheld from this committee, the President, of course, then is required to provide notice after the fact in a timely fashion. How would you interpret that phase, "in a timely fashion"?

Judge WEBSTER. Well, of course, I went to the dictionary, having a name of that kind—Webster's Dictionary—[general laughter.]

I didn't get very much help there nor really in the legislative history. It speaks about an appropriate time or in reference to something. In law, if there is a specific number of days you have to do something, then you would decide whether you did it in a timely way, that is, within the time prescribed. If there is no time, and it appears that this issue was wrestled out during the legislation, then we have to fall back on words like appropriate.

And in trying to articulate to you my view of this, which I knew that you would ask, it seems to me that notice is timely at the moment when the compelling circumstances which the President felt called for deferral ceased to be as compelling as the legitimate interests of the Congress and its Select Committee in knowing it. In other words, a deferral is not something you just put off indefinitely. A deferral goes against the tide and it should be continually revisited. It should be a subject of constant agenda review to determine whether it is appropriate at that point to let the committee know.

Chairman BOREN. If you had been Director of Central Intelligence during the period of time in which we have just passed with the Iranian arms situation and notification had been withheld for many months as it was, would you have advised the President that you felt it was inappropriate to withhold notification of this committee for that period of time?

Judge WEBSTER. I would.

Chairman BOREN. If you were the Director of the Central Intelligence Agency and a President took action to withhold notice for prolonged periods of time over your repeated objections and your strong feeling that it was wrong in terms of the spirit of the law and wrong in terms of public policy to continue to withhold notification, what course of action would you take?

Judge WEBSTER. Mr. Chairman, I believe that the Director of Central Intelligence clearly has an obligation directly with the

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Senate through this committee, and that is an obligation of trust which would be breached by my continued acquiescence in something that I believed to be arbitrary, and for all the reasons that you have just stated, inappropriate. And I think that I would have to advise the President of my position on that, and if he would not authorize me to speak to you, I would have to leave. It is that simple.

Chairman BOREN. Let me ask one last question related to this matter. As you know, the law talks about intelligence gathering activities, and intelligence operations, and it says that this committee is to be notified of intelligence gathering activities and operations conducted by any agency. We have always assumed in the past that it would be the traditional agencies like the Central Intelligence Agency. We have learned in this instance that other bodies, including the National Security Council, have undertaken operations at some point in time that are intelligence activities.

If you learned of what appeared to be legal activities by, let us say, the National Security Council, agencies that are not considered traditionally intelligence operative agencies, or if you learned of illegal activities, either one, about which this committee had not been notified, would you view it as your responsibility—even though you are Director of Central Intelligence, you wouldn't be director of the National Security Council or any other agency that might be involved—would you view it as your responsibility as the overseer of intelligence in general, to report such legal or illegal intelligence activities to this Committee?

Judge WEBSTER. I would consider it my first obligation to insist that the member of the intelligence community or the National Security Council make the notification itself, and if it refused to do so, I would consider it my obligation to inform you.

Chairman BOREN. Thank you very much. Senator Cohen.

Senator COHEN. Thank you, Mr. Chairman.

Mr. Webster, you had some notice of the activities that were taking place with respect to the sale of arms to Iran, as I recall, in August of 1986.

Judge WEBSTER. That's correct.

Senator COHEN. The circumstances were such that a deputy of yours had a conversation with Colonel North, is that correct?

Judge WEBSTER. That is correct, Senator Cohen. It was not a private conversation. It was at the operations subgroup committee meeting at the Executive Office Building.

Senator COHEN. But you were concerned enough about it to contact Mr. Meese directly?

Judge WEBSTER. I was concerned enough about it to contact the Attorney General directly.

Senator COHEN. Were you concerned, for example, that it might be in violation of the Export Control Act?

Judge WEBSTER. I wasn't focusing so much on specific statutes so much as I wanted to be sure that the initiative was supported by a Presidential Finding as Lieutenant Colonel North had represented to Mr. Revell, and that the Attorney General had himself reviewed it and approved it. We've had experiences in the past when the Department of Justice has somehow gotten outside the loop on decisions in which the Attorney General really should have been in-

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strong as it was in the beginning, but when the corresponding need to keep the Congress informed—to have the support of the Congress through the Intelligence Committees was more compelling than the remaining reasons for keeping it secret.

Senator COHEN. Do you recall seeing Mr. Gates testify before this committee several weeks ago? Did you have a chance to either watch or read about his interpretation of timeliness?

Judge WEBSTER. I've only seen portions of Mr. Gates' testimony, and I have read portions of it.

Senator COHEN. With respect to timeliness, I think he indicated that forty-eight hours was about as timely as one could get within the meaning of that interpretation. That beyond that time, he would start to be very concerned, and would feel compelled to notify Congress.

Judge WEBSTER. I haven't any problem with that. I think he said several days would be his view of the outside.

Senator COHEN. So you would confine timely notice, then, to within several days, as opposed to several months or in some cases several years?

Judge WEBSTER. Well, I would try to relate it to the particular situation. And as I said in my testimony, I have trouble imagining any situation that is so sensitive and life threatening that the Congress cannot be advised of it.

But one thing, not only do I believe the act makes it clear that you're entitled to be informed, but also, I think, that any project that cannot survive Congressional notification is suspect from the beginning.

Senator COHEN. You also indicated that one other test that you would apply would be that you would have to know whether Congress could keep that secret. That is not a condition in that statute.

Judge WEBSTER. I realize that. And I appreciate your bringing that to my attention. But there are no conditions in the statute. It says that the President should give his reasons why and that he should notify in a timely way. And I was trying to leave room for things that I have said I cannot even imagine that would—where something was so tight that they couldn't come. I can't—I really—I'm a lot in the situation I was when I stood before the committee—Judiciary Committee to be Director of the FBI. I'm trying to leave myself room for the unknown. But I'm telling you that I don't know any situations where you shouldn't be promptly advised.

Senator COHEN. I share your concern about not wanting to disclose information that might possibly be leaked and jeopardize lives, and Senator Boren and the rest of us who sit on this committee are certainly dedicated to that.

But that qualification is not part of the law, and it's one of the things that ended in this entire Iran affair where you have Ollie North, for example, saying let's not tell Secretary Shultz. If you tell the Secretary of State, that's the end of the program. And let's not tell all of the other people, and soon you have a private foreign policy being carried out without anyone's notice or knowledge beyond a select group within the White House. And that's a very dangerous situation to——

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ed our investigation because the informant, through his attorney, declines to be interviewed under terms acceptable to the government. So I can't be final about that. It was only after the money issue surfaced that the informant began to tell an entirely different story to others than he had been telling to us.

Chairman BOREN. So the first problem surfaced the April 1984 to the knowledge of authorities in the Bureau . . . with the break in of the car and the investigation that followed.

Judge WEBSTER. That's correct.

Chairman BOREN. And then how long was it before you were personally notified that there might be something going wrong with people who were involved in activities, operations, with a domestic political group that was practicing political dissent?

Judge WEBSTER. I didn't anticipate that question. I'll have to supply it for the record. I distinguish between the activities of Mr. Flanagan and his informant and the overall investigation for which there was a very solid predicate.

Chairman BOREN. Did you make the decision personally to close out this operation with CSPES?

Judge WEBSTER. No, I did not. That was made in the normal way in which our domestic security investigations take place when, on advice of the Department, there is no longer a basis for continuing. That's part of the process.

Chairman BOREN. How can you be assured, as Director, that you know of . . . in other words the American people have looked to you as Director of the Federal Bureau of Investigation to make certain that the authority of the FBI is not abused in terms of legitimate and rightful domestic political dissent. And if you are confirmed as Director of the Central Intelligence Agency, the American people will look principally to you to make sure that the assets of that Agency are not used in any inappropriate, illegal, or unconstitutional manner. What system did you have in place to make sure that you would learn of any kind of complaint or problem that might arise in terms of surveillance of domestic political dissent?

Judge WEBSTER. All allegations of impropriety are immediately picked up by our Office of Professional Responsibility. They pass through me to the Administrative Services Division for review following the completion of their investigation and then I monitor low level administrative action and personally participate in high level administrative action. If I can say to you as a generalization, without trying to spell out all of the procedures that we have in place, in my nine years of office, there has not been one single successfully maintained claim of a violation of a constitutional right by agents of the Federal Bureau of Investigation.

Chairman BOREN. Senator Cohen and then Senator Specter will follow Senator Cohen.

Senator COHEN. Judge Webster, I was not quite clear on the notice that you would feel compelled to give to this committee in the event of a covert operation. I would like to read Bob Gates' testimony before the committee when he came before us for confirmation. He said, "I have committed to the committee that I will recommend to the President against withholding prior notification under any circumstances except the most extreme involving life

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and death and then only for a [illegible], several days, my exact [illegible] commitment as well?

Judge WEBSTER. I'd like to make it my commitment. I'm not quite in the same position as Mr. Gates. He has a far more intimate knowledge of what goes on over there, and I hope he's right. I certainly would want to. I would expect to.

Senator COHEN. I think if you don't, you're going to have Congress legislating 48 hours.

Judge WEBSTER. I know that absolutely. And I don't want you to have to do that.

Senator COHEN. Do you want to think some more about whether you are going to be in a position at some point to make the same kind of commitment that Mr. Gates made?

Judge WEBSTER. I can make it to you now. I just . . . I want from the very beginning of these confirmation proceedings until the end of the length of time I serve if I'm confirmed, to have you feel that I have maintained every pledge that I have made to you.

Senator COHEN. What is your pledge now on the notice to the committee on covert actions?

Judge WEBSTER. My pledge is to notify you in the timeliest way possible and that I cannot conceive of . . . and I said that yesterday . . . that I can't think of any that would not involve the promptest notification. That's whether we talk about several days, or forty-eight hours, or talk about as soon as possible. I would like to see you notified in less than forty-eight hours if it's possible to do so in a rational, reasonable way.

Senator COHEN. And what if you had doubts about the ability of this committee to keep a secret?

Judge WEBSTER. Well I have no doubts at the present time. If I had reason to doubt, I think I would have to discuss that with the Chairman and the Vice Chairman.

Senator COHEN. So you would still notify the Vice Chairman and Chairman of the committee?

Judge WEBSTER. I would notify you that I had something to tell you, but I had a problem in telling you and see if you'd work with me on it.

Senator COHEN. I'll come back to that later. I was not exactly clear on what your statement was with respect to the Abscam investigation or operation in which one Senator was suddenly pulled in with your net.

Judge WEBSTER. We didn't say he was pulled in, he walked in.

Senator COHEN. Well, he was invited in.

Judge WEBSTER. He was invited in by a crook, not by the FBI.

Senator COHEN. Well that crook happened to be an informant for the FBI.

Judge WEBSTER. He was not an informant Senator. I'm glad you asked that question. He was a corrupt influence peddler who was himself tried and convicted, fined $15,000 and sentenced to 3 years in the penitentiary.

Senator COHEN. How did he put out this so-called net without FBI supervision?

Judge WEBSTER. We don't supervise people who are under investigation. He was one of those under investigation, and we were following his activities. We tried in two ways, which worked very suc-

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Chairman BOREN. And therefore—if absent that Finding at the time, it would not have been a legal action?

In other words, retroactivity would not give legality to the action?

Judge WEBSTER. That would be my view of it.

Chairman BOREN. And therefore you would report that illegality to this Committee?

Judge WEBSTER. I would report it.

Chairman BOREN. Let me ask also in terms of oral Findings because there is great concern of people saying that they are acting with the authority of the President without his knowledge. Would you pledge to us to act only upon either a written Finding, clearly signed by the President of the United States, or upon an oral direction from the President himself in case of extreme emergency so that you would know that that order came from the President and from no other person presuming to act under his authority?

Judge WEBSTER. I would.

Chairman BOREN. Let me go back again to the question, and I want you to think very carefully about this because it's very important to the committee.

The law does provide for timely notice of covert action for which prior notice is withheld by the President. The President withholds prior notice; the law says then timely notice shall be given after the fact.

Now I want to repeat again and I want you to really think about this because I can assure you it's extremely important to the members of this committee.

The Vice Chairman has already read the words of Mr. Gates, who has requested to give his position on this matter several times in the course of the hearings and he indicated that he would recommend—we're not saying what would be done, you've already indicated that if the President did not follow your recommendations after a reasonable period of time, that you would consider leaving your post.

This has to do with what you would—not the President's action, but what you would recommend. Would you recommend to the President against withholding notification under any circumstances except the most extreme circumstances involving life and death and then only for a few days? Would that be your recommendation? Would you tell this committee that that would be your recommendation based upon your understanding of the importance of the oversight process?

Would you pledge to this committee to make that your recommendation to the President?

Judge WEBSTER. Yes, it would.

Chairman BOREN. Well, I appreciate that very much and I think it's extremely important that that be understood because we're going to build a consensus for foreign policy, make decisions together, decisions that can stick and won't be reversed every other week. I think it's essential that it is that kind of commitment and that kind of understanding that both branches of government need to go forward together.

Let me ask, and again, I don't want to come back to painful subjects and I don't want to close on this note.

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100TH CONGRESS
2D SESSION

S. 1721

AN ACT

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Intelligence Oversight Act of 1988".

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

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

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"GENERAL PROVISIONS

"SEC. 501. (a) The President shall ensure that the Select Committee on Intelligence of the Senate and the Permanent Select Committee of the House of Representatives (hereinafter in this title referred to as the 'intelligence committees') are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activities, as required by this title: *Provided, however,* 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: *And provided further, however,* That nothing contained herein shall be construed as a limitation on the power of the President to initiate such activities in a manner consistent with his powers conferred by the Constitution.

"(b) The President shall ensure that any illegal intelligence activity is reported to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.

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

"(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, proce-

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dures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this title. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

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

"REPORTING INTELLIGENCE ACTIVITIES OTHER THAN SPECIAL ACTIVITIES

"SEC. 502. To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall:

"(a) keep the intelligence committees fully and currently informed of all intelligence activities, other than special activities, as defined in subsection 503(e), below, which are the responsibility of, are engaged in

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by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and significant failures; and

"(b) furnish the intelligence committees any information or material concerning intelligence activities other than special activities which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

"PRESIDENTIAL APPROVAL AND REPORTING SPECIAL ACTIVITIES

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

"(1) Each finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in

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no event more than forty-eight hours after the decision is made;

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

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

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

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dertake the special activity concerned on behalf of the United States;

"(5) A finding may not authorize any action intended to influence United States political processes, public opinion, policies or media; and

"(6) A finding may not authorize any action which violates the Constitution of the United States or any statutes of the United States.

"(b) To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods, or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a special activity shall:

"(1) keep the intelligence committees fully and currently informed of all special activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures; and

"(2) furnish to the intelligence committees any information or material concerning special activities which is in the possession, custody or control of any department, agency, or entity of the United States

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Government and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

"(c)(1) Except as provided in subsections (2) through (4), below, the President shall ensure that any finding approved, or determination made, pursuant to subsection (a), above, shall be reported to the intelligence committees prior to the initiation of the activities authorized, and in no event later than forty-eight hours after such finding is signed or the determination is otherwise made by the President.

"(2) On rare occasions when time is of the essence, the President may direct that special activities be initiated prior to reporting such activities to the intelligence committees: *Provided, however,* That in such circumstances, notice shall be provided the intelligence committees as soon as possible thereafter but in no event later than forty-eight hours after the finding authorizing such activities is signed or such determination is made, pursuant to subsection (a), above.

"(3) When the President determines it is essential to meet extraordinary circumstances affecting vital interests of the United States, the President may limit the reporting of findings or determinations pursuant to subsections (1) or (2) of this section, 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

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minority leaders of the Senate. In such case, the President shall provide a statement of the reasons for limiting access to such findings or determinations in accordance with this subsection.

"(4) Notwithstanding the provisions of subsection (3) above, when the President determines it is essential to meet extraordinary circumstances affecting the most vital security interests of the United States and the risk of disclosure constitutes a grave risk to such vital interests, the President may limit the reporting of findings or determinations pursuant to subsections (1) or (2) of this section to the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. In such cases, the President shall provide a statement of the reasons explaining why notice to the intelligence committees is not being provided in accordance with subsection (c)(1), above. The President shall personally reconsider each month thereafter the reasons for continuing to limit such notice, and provide a statement to the Members of Congress identified herein above on a monthly basis, confirming his decision, until such time as notice is, in fact, provided the intelligence committees. Any information provided by the President pursuant to this subsection shall be subject to the provisions of S. Res. 400, Ninety-fourth Congress, and to rule XLVII of the Rules of the House of Representatives, and may be subsequently disclosed

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by the recipients only in accordance with the applicable provisions of such resolution or rule.

"(5) In all cases reported pursuant to subsections (c)(1), (c)(2), and (c)(3), above, a copy of the finding, signed by the President, shall be provided to the chairman of each intelligence committee. In all cases reported pursuant to subsection (c)(4), a copy of the finding, signed by the President, shall be shown to the Members of Congress identified in such subsection at the time such finding is reported.

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

"(e) As used in this section, the term 'special activity' means:

"(1) any operation of the Central Intelligence Agency conducted in foreign countries, other than activities intended solely for obtaining necessary intelligence; and

"(2) to the extent not inconsistent with subsection (1), above, any activity conducted by any department, agency, or entity of the United States Government in

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support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, but which does not include diplomatic activities or the collection and production of intelligence or related support activities".

SEC. 3. Section 502 of title V of the National Security Act of 1947 (50 U.S.C. 414) is redesignated as section 504 of such Act, and is amended by deleting the number "501" in subsection (a)(2) of such section and substituting in lieu thereof "503"; and is further amended by adding the following new subsection (d):

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

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

Passed the Senate March 15 (legislative day, March 14), 1988.

Attest:

Secretary.

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

87-1252

June 9, 1987

JUN 24 10 40 AM '87
DEPT. OF JUSTICE

Representative Matthew F. McHugh
Chairman, Subcommittee on Legislation of the
House Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1013, a bill relating to the system of congressional oversight of intelligence activities. The Department of Justice opposes enactment of this legislation because we believe it would unconstitutionally intrude on the President's authority to conduct the foreign relations of the United States.

H.R. 1013 would make substantial revisions of both the congressional reporting requirements of the National Security Act and the Hughes-Ryan Amendment. Besides appearing to broaden the congressional notification requirements, section 3 of H.R. 1013 would delete from section 501(a) of the National Security Act the present express acknowledgment that the Act imposes reporting requirements on the President only insofar as the requirements are consistent with his authorities and duties under the United States Constitution.[1] It would also delete the Act's provision acknowledging the

[1] Section 501(a) presently provides (emphasis added):

> To the extent consistent with all applicable authorities and duties, <u>including those conferred by the Constitution upon the executive and legislative branches of the Government</u>, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --
>
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on

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President's independent constitutional authority, namely section 501(b), which provides for presidential discretion in deferring notice to Congress concerning exceptionally sensitive intelligence activities.[2] In place of the current Act's provision acknowledging the President's authority to provide "timely notice" in such sensitive situations, section 3 of H.R. 1013 would purport to require that such notice be given within 48 hours after the initiation of such operations.

Section 2 of H.R. 1013 goes even further with respect to operations involving the Central Intelligence Agency. It would purport to require that copies of Hughes-Ryan "findings" be provided to certain executive branch officials and that this be done before the initiation of any operation requiring such findings.[3]

[1] Cont. Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

Needless to say, deleting the underscored language would be only symbolic and could not alter the constitutional rights or duties of either branch.

[2] Section 501(b) currently provides (emphasis added):

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

[3] The Hughes-Ryan amendment, 22 U.S.C. 2422, provides in its present form:

> No funds appropriated under the authority of

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While the 48-hour provision of the new section 501(e) of the National Security Act would apply to congressional notification of the "Hughes-Ryan" operations, this unprecedented requirement of notification of subordinate executive branch officials appears to impose an absolute rule of prior notice.

In keeping with the long-standing view of Presidents of every Administration that has considered this issue, the Department believes that these provisions of H.R. 1013 are unconstitutional. As you know, these same issues were the subject of thorough debate and extensive negotiation in 1980, when Congress was considering proposals for intelligence oversight legislation. It was the position of the Administration then, as it is of this Administration now, that there may be exceptional occasions on which the President's exclusive and inalienable constitutional duties in the area of foreign affairs would preclude him from giving prior notice of very sensitive intelligence-related operations.

This Administration, like prior Administrations, is anxious to work with Congress in devising arrangements to satisfy the legitimate interests in legislative oversight. But the executive branch in 1980 recognized that there is a point beyond which the Constitution simply would not permit congressional encumbering of the President's ability to initiate, direct, and control the sensitive national security activities at issue here. Testifying before the Senate Select Committee in 1980, then CIA Director Stansfield Turner emphatically pointed out that the prior notification then being considered "would amount to excessive intrusion by the Congress into the President's exercise of his powers under the Constitution." See National Intelligence Act of 1980: Hearings before the Senate Select Committee on Intelligence, 96th Cong., 2d Sess. 17 (1980).

The Constitution confers on the President the authority and duty to conduct the foreign relations of the United States. Covert intelligence-related operations in foreign countries are among the

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[3] Cont. this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 413 of title 50 [i.e., section 501 of the National Security Act].

[4] Section 2 of H.R. 1013 also requires that the national security finding be in writing. We do not, however, interpret this to mean that signed copies of the finding must be provided to Congress or

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most sensitive and vital aspects of this duty, and they lie at the very core of the President's Article II responsibilities. In this letter the Department will not seek to detail all the authorities and precedents relevant to our conclusion that an absolute prior notice requirement of the kind proposed in H.R. 1013 would be unconstitutional. In summary, however, the Department believes that the Constitution, as confirmed by historical practice and clear statements of the United States Supreme Court, leaves the conduct of foreign relations, which must include foreign intelligence operations, to the President except insofar as the Constitution gives specific tasks to the Congress.

The principal source for the President's wide and inherent discretion to act for the nation in foreign affairs is section 1 of article II of the Constitution wherein it is stated: "The executive Power shall be vested in a President of the United States of America." The clause has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. The President's executive power includes all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.

Before the Constitution was ratified, Alexander Hamilton explained in The Federalist why the President's executive power would include the conduct of foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate." See The Federalist No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961). By recognizing this fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" the Framers made clear that the Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens. As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of the "executive Power."

The authority of the President to conduct foreign relations was first asserted by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain neutral in the war between France and Great Britain. The Supreme Court and Congress,

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[4] Cont. to subordinate executive branch officials.

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too, have recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the Constitution itself, stating that "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress." 299 U.S. at 319-320 (emphasis added). Moreover, as the Curtiss-Wright Court noted, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history, stating that "the President is the constitutional representative of the United States with regard to foreign nations." The Committee also noted "that [the President's constitutional] responsibility is the surest pledge for the faithful discharge of his duty" and the Committee believed that "interference of the Senate in the direction of foreign negotiations [is] calculated to diminish that responsibility and thereby to impair the best security for the national safety." 299 U.S. at 319 (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). Curtiss-Wright thus confirms the President's inherent Article II authority to engage in a wide range of extraterritorial foreign policy initiatives, including intelligence activities -- an authority that derives from the Constitution, not from the passage of specific authorizing legislation.

Despite this wide-ranging authority, Presidents have been careful to consult regularly with Congress to seek support and counsel in matters of foreign affairs. Moreover, we recognize that the President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court's Curtiss-Wright decision itself notes the President's exclusive power to negotiate on behalf of the United States. The Supreme Court has also, and more recently, emphasized that this core presidential function is by no means limited to matters directly involving treaties. In United States v. Nixon, 418 U.S. 683 (1974), the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the

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utmost deference to Presidential responsibilities." 418 U.S. at 710 (emphasis added).

We are unaware of any provision of the Constitution that affirmatively authorizes Congress to have the role provided in H.R. 1013. Congress' implied authority to oversee the activities of executive branch agencies is grounded on Congress' need for information to consider and enact needful and appropriate legislation. Congress in the performance of this legislative function, however, does not require detailed knowledge of virtually all intelligence activities particularly prior to initiation. Oversight of ongoing operations has the potential to interfere with the ability of the President to discharge the duties imposed on him by the Constitution. Accordingly, the President must retain his constitutional discretion to decide whether prior notice, in certain exceptional circumstances, is not appropriate.

Since the current legislation was adopted in 1980, of course, the President has provided prior notice of covert operations in virtually every case. Moreover, in acting to implement the recommendations of the Tower Board, the President recently reaffirmed his committment to the current statutory scheme of notification. See the text of National Security Decision Directive No. 266, which accompanied the President's message to Congress of March 31, 1987.

The Department of Justice also objects to Section 2 of H.R. 1013, which would purport to require that the President furnish copies of his national security findings to the Vice President, the Secretary of State, the Secretary of Defense, and the Director of Central Intelligence before the initiation of any operation requiring a Hughes-Ryan finding. Like the congressional prior notice requirements, though for somewhat different reasons, this provision is inconsistent with the President's constitutional authority. By requiring certain of the President's subordinates to be notified of covert actions before they occur, this proposal would infringe on the President's prerogatives as head of a unitary executive branch to exercise full discretion in consulting and communicating with his subordinates.

The Constitution places the whole executive power in the hands of the President. In contrast to political systems that employ some form of cabinet government, our Constitution is based on the principle of the unitary executive. It is worth emphasizing that the Framers deliberately chose this principle and deliberately rejected the cabinet (or privy council) alternative, with which they were quite familiar from British practice and from the constitutions of most of the original states. Indeed Article II, section 2, of the Constitution provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" (emphasis added). Plainly, it is the President who decides when he requires the advice of others in the Executive Branch and which persons he will consult. Neither his authority to seek advice from such officials as he may choose nor the manner in which he makes such consultations may be circumscribed by Congress.

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The Framers' two main reasons for choosing to create a unitary executive were complementary and mutually reinforcing. First, they thought that for the executive branch, in sharp contrast to the legislative branch, rapid and decisive decision-making is sufficiently important that it outweighs the inevitably concomitant danger that rash or ill-considered actions will be undertaken. See The Federalist No. 70, at 423-24 (A. Hamilton) (C. Rossiter ed. 1961). Second, the Framers believed that unity in the executive would promote what today we call "accountability." As Alexander Hamilton pointed out, the more that the executive power is watered down and distributed among various persons, the easier it is for everyone concerned to avoid the blame for bad actions taken or for desirable actions left undone. See The Federalist No. 70, at 427 (A. Hamilton) (C. Rossiter ed. 1961).[5] Certainly, it would be unwise, as well as unconstitutional, to move our governmental institutions in a direction that could lead to less presidential accountability.

Of course, we acknowledge that consultation with the members of the National Secugity Council would almost always be a prudent presidential policy.[6] We object only to undertaking to make such consultation a legal obligation. As a constitutional matter, there is no difference between the subordinate officials listed in this bill and thousands of other executive branch officers. If one statute could require the President to notify any of them of his national security findings prior to initiating a covert operation, another statute could just as easily require him to notify other subordinates, or all of them. Thus, given the Constitution's creation of a unitary executive, the cabinet notification requirements in section 2 of this bill, like the congressional notification requirements discussed earlier, are inconsistent with Article II of the Constitution.[7]

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[5] The Framers also believed that placing the whole of the executive power in one man was usefully "conducive" to secrecy -- a consideration directly relevant to H.R. 1013. See The Federalist No. 70, at 424 (A. Hamilton) (C. Rossiter ed. 1961).

[6] Indeed, in keeping with past practice, the President has directed that "proposed covert actions . . . be coordinated with NSC participants, including the Attorney General, and their respective recommendations communicated to the President . . . ." NSDD 266 (March 31, 1987).

[7] The requirement in section 2 of H.R. 1013, that the national security finding mandated by the Hughes-Ryan Amendment be in writing also raises questions insofar as it has some potential to interfere with the President's discretion in choosing how to run his own office. On the other hand, because this provision does serve the legitimate purpose of facilitating after-the-fact congressional oversight, it is the least objectionable feature of H.R. 1013.

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In closing, the Department notes that when proposals similar to those in H.R. 1013 were introduced in 1979 and 1980, it was recognized that no President has either the right or the power to alter the Constitution's allocation of powers among the institutions of our government. This view was correct then and is correct now.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report to Congress.

Sincerely,

John R. Bolton
Assistant Attorney General
Office of Legislative Affairs

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