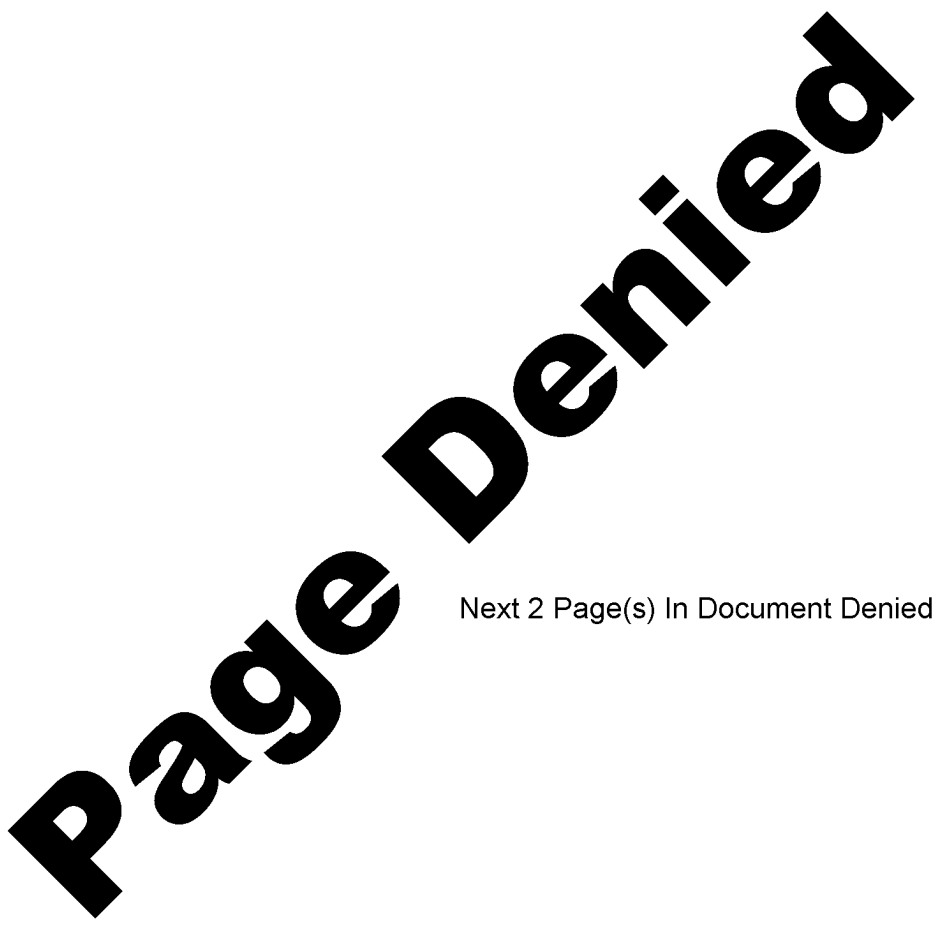

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David S. Addington, Wh
NSA
DIA
Central Intelligence Agency

Washington D.C. 20505

STAT

25 August 1988
OCA 2863-88

Mr. James Murr
Assistant Director, Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Murr:

I write to advise you of the opposition of the Central Intelligence Agency to the "Anti-Stonewalling Act of 1988" (House Report No. 100-861, pp. 54-55), an amendment to be offered by Representative Alexander to the omnibus, anti-drug legislation that will probably be considered by the House of Representatives when it returns to session in September.

The amendment would require any Executive Branch employee obtaining information about "illegal foreign drug activities" to forward such information promptly to his agency head. The agency head, in turn, would be required to furnish it to Presidentially-designated law enforcement agencies and, upon request, to any committee of Congress and/or the General Accounting Office (GAO). Information could be withheld from the Presidentially-designated agencies under certain limited circumstances but only by the agency head on a non-delegable basis and only after notification to the President. The information would have to be disclosed, upon request, to any committee of the Congress and to the GAO. The President could withhold the information but would have to report to the Congress on his reasons therefor. GAO could sue to obtain the information in accordance with the provisions of 31 U.S.C. §716 et seq.

Our reasons for opposing this amendment are as follows:

Congressional Reporting Requirements

Our primary concern is with those portions of the amendment dealing with the Congress. Most important, the key phrase "information about illegal foreign drug activities" could be

interpreted as requiring intelligence agencies to provide routinely to Congressional requesters raw, unevaluated intelligence reports. Currently, it is not our practice to forward such unevaluated reports on any subject to the Congress, even to the intelligence oversight committees. The proposed amendment would constitute a radical change in this area and would raise serious questions regarding the protection of sensitive intelligence sources and methods.

Moreover, by permitting any committee of the Congress to obtain such information on demand, the provision, in effect, gives every committee oversight of intelligence matters in this area. This, too, would be a radical departure from present practice, breaching the understanding between the Executive and Legislative Branches that oversight of intelligence activities be confined to the two intelligence committees.

Under present law (Title V of the National Security Act), the Director of Central Intelligence and the heads of the various agencies in the Intelligence Community are required to keep the committees "fully and currently informed" of intelligence matters. Pursuant to this provision, the Agency and the Community routinely provide the committees with a large body of narcotics intelligence information otherwise falling within the scope of the amendment. The amendment is thus, to some extent, duplicative of existing law.

The provision creates broad new rights of access for the General Accounting Office (GAO) to Executive Branch information, most especially intelligence information. As subsection (c) of the provision indicates, that right is, in fact, superior to the right of a Congressional committee to obtain the information. Moreover, GAO would be given the right to sue the agency involved to obtain the information in accordance with the provisions of 31 U.S.C. §716. This raises the prospect of a lawsuit between two branches of government over some of what could be the most sensitive information in the possession of the United States. Involvement of GAO in the process is particularly objectionable to the Agency since we have historically taken the position vis-a-vis GAO that Congressional oversight of intelligence activities should be limited to the intelligence committees.

The amendment does make provision for withholding information from the Congress but it is not satisfactory. Although not clear on the face of the provision, it appears that if an agency wishes to withold information, it must go through the cumbersome process of obtaining Presidential

approval. In the event the President chooses to withold information requested, he must notify the chairman and ranking minority member of the committee involved (the intelligence committees if it involves intelligence matters). We also see this scheme as sowing the seeds of future problems similar to those currently facing the Executive Branch with respect to Congressional notification of intelligence activities. These range from technical questions of the content and form of the notification to broader questions of what the Congress can do upon receipt of notification and the President's countervailing constitutional authorities in the area. In short, rather than helping to dampen any future conflicts, it will serve to institutionalize and sharpen them.

Intra-Executive Branch Reporting Requirements

We are also concerned with the intra-Executive Branch reporting requirements which the amendment would create. Insofar as the amendment creates such requirements for intelligence information, it unnecessarily duplicates long-standing, carefully-crafted administrative mechanisms for reporting such information within the Executive Branch. These include the requirement in Executive Order 12333 for Intelligence Community agencies to report to the Attorney General information which comes to their attention concerning federal crimes. They also include other such mechanisms which allow for the sharing of narcotics intelligence information with law enforcement agencies while, at the same time, protecting intelligence sources and methods from disclosure.

In fact, the Agency and the Community already share intelligence information of this sort on a routine basis and will undoubtedly share more in the upcoming years. In this regard, I note that the conferees on the Fiscal Year 1989 Intelligence Authorization bill in their conference report have requested the Director of Central Intelligence, the Secretary of Defense and the various law enforcement agencies to develop by 1 March 1989 a plan to expand cooperation even further. (House Report No. 100-879, p. 22.)

The statutory scheme with which the amendment would replace these administrative mechanisms is, by nature, inflexible. Mandatory involvement of the President and various agency heads adds to its inflexibility. More important, however, the scheme is an attempt to resolve by fiat that which has been an historical conflict between two constitutional areas of Presidential authority: his powers and duties to enforce the

laws of the United States, and his powers and duties to conduct the foreign relations and national defense of the United States. By mandating the reporting of such information to law enforcement agencies, the provision subordinates the President's national security powers and duties to his law enforcement powers and duties. We believe the conflict in this area is best handled on a case-by-case basis under existing mechanisms with ultimate resort to the President, if necessary. A statutory reporting scheme favoring law enforcement over national security would be an ill-advised constraint on Presidential flexibility.

We are also concerned with the term chosen to describe the information that "trips" the reporting requirement: "illegal foreign drug activities." This term is vague and subject to any number of interpretations. These will undoubtedly lead to underreporting or overreporting, which, in turn, will lead to further conflict within the Executive Branch and with the Congress.

I also note that there are some units of the Intelligence Community that are specifically tasked to collect narcotics intelligence information. This provision could undoubtedly be interpreted by some as requiring the entire product of these units to be used for law enforcement purposes. Again, we believe the uses of intelligence information vis-a-vis law enforcement activities should be established on a case-by-case basis, rather than by an inflexible rule.

Representative Alexander's introductory remarks (Congressional Record, 11 August 1988, pp. H 6848-54) indicate he introduced the amendment in reaction to positions taken by the Executive Branch in response to Congressional and GAO efforts to obtain information on various topics, including the drug trafficking in Central America and the relationship of the United States Government to Panamanian General Manuel Noriega.

The Agency has cooperated and continues to cooperate with the intelligence committees in response to their inquiries in these areas. Because of this, and our historical position vis-a-vis GAO, we indicated to GAO that we were not able to cooperate in their investigation.

We hope that Representative Alexander's concerns can be addressed other than through legislation. In any event, however, we trust that the Administration will take every appropriate action to oppose this provision. The Director of

Central Intelligence is prepared personally to contact appropriate Congressional leaders as a part of coordinated Administration action to oppose this amendment.

Thank you for the opportunity to comment on this important piece of legislation.

Sincerely,

John L. Helgerson
Director of Congressional Affairs

SUBJECT: Anti-Stonewalling Act of 1988

D/OCA/JLH [redacted] 24 Aug 88 STAT

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