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SUBJECT Analysis of S. 1721 12 NOV 1987

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REMARKS:

ANALYSIS OF S.1721

THE IMPACT ON THE INTELLIGENCE COMMUNITY

This paper analyzes the issues raised by S. 1721 for the Intelligence Community. The paper covers both issues raised in the DCI opening statement to the SSCI on the bill and those other issues not addressed in the opening statement. The issues covered are presented in the order they appear in the bill.

§501 General Provisions

(a) This subsection places a statutory obligation on the President to keep the Congress fully and currently informed of intelligence activities. The subsection also states that President or his representatives ordinarily shall consult with the intelligence committees prior to initiating an intelligence activity. The Section-by-Section analysis makes clear that the President also should consult with intelligence committees on proposed findings prior to their approval by the President.

Position of Community: We would oppose legislating a requirement to consult. Rather, we suggest Congress would be better served by pursuing the President's offer in his 7 August letter to consult in advance on important decisions affecting our national security. Issue further discussed in DCI opening statement.

[The position of the White House on placing a statutory obligation on the President to report is not known.]

(b) This subsection would impose on the President the duty to ensure reports are made to the intelligence committees of illegal intelligence activities or significant intelligence failures. The obligation currently rest with DCI and agency heads. The section also would eliminate the discretion to report such activities in "a timely fashion." Third, the obligation to report is no longer qualified by reporting with due regard to protecting classified information or information relating to intelligence sources and methods. Finally, the reporting requirement would no longer have to be consistent with "applicable authorities and duties, including those conferred by the constitution upon the executive and legislative branches of the Government."

Position of the Community: We would object to the elimination of the ability to report in a timely fashion. The intelligence agencies should not be required to report intelligence failures or illegal activities instantly . Time is sometimes essential to gather the facts necessary before a report, if any, is made. Second, we are concerned that reporting obligation is not qualified by the need to protect sources and methods. While we do on occasion provide source information with respect illegal intelligence activities or significant intelligence failures, we wish to preserve the right to withhold this information in necessary cases.

[Position of the White House on making the President responsible for ensuring the reporting of illegal intelligence activities or significant intelligence failures or eliminating the recognition in current law of the President's constitutional privilege to delay notification of illegal intelligence activities or significant intelligence failures is not known.]

§502. Reporting Intelligence Activities other than Special Activities

This provision would for the first time explicitly state that DCI and heads of other agencies shall report significant intelligence collection activities to the oversight committees prior to the initiation of the activity. Such a requirement exists in current law, but is not stated as explicitly. In addition, the provision does not allow for the reporting of sensitive intelligence collection activities to the the Chairman and Vice Chairman of SSCI, Chairman and Ranking Minority Member of the HPSCI, the Speaker and Minority Leader of the House of Representatives and the majority and minority leaders of the Senate (the "gang of eight"). Lastly, the provision provides that reporting shall be done with due regard for the protection of classified information relating to sensitive intelligence sources and methods.

Position of Intelligence Community: This provision should be amended to allow the DCI to report sensitive intelligence collection activities to the "gang of eight." In addition, the clause providing that reporting shall be done with due regard for the protection of classified information relating to sensitive intelligence sources and methods may be too narrow. There are other types of classified information--such as military information and information bearing on the foreign relations of the U.S.--that also must receive appropriate protection in the context of briefing on intelligence activities. The language of the existing law, which provides reports should be made with due regard for protecting from unauthorized disclosure classified information and information relating to intelligence sources and methods, should be retained.

§503. Approval and Reporting of Special Activities

(a) This subsection explicitly provides legislative authorization for the President to conduct special activities. In addition, it would impose a new requirement that the President determine that the Finding is "necessary to support the foreign policy objectives of the United States."

Position of the Community: No objection to explicitly giving the President the authority to conduct special activities. [The additional determination that must be made by the President needs further study by the State Department on whether it is acceptable.]

(a)(1) This paragraph would require findings to be in writing, unless time does not permit a written finding, in which case it must be reduced to writing within 48 hours.

Position of the Community: No objection.

(a)(2) This paragraph would prohibit findings retroactively sanctioning special activities which have already occurred.

Position of the Community: No objection.

(a)(3) This paragraph would require that each finding identify the other government agencies funding or participating in any way in the activity. It would also require that employees of other agencies participating in the activity be subject to the policies and regulations of the CIA, or written policies or regulations adopted by such agency, in consultation with the DCI.

Position of the Community: We would object to requiring that each government agency that assists CIA in carrying out a special activity be named in the Finding regardless of how routine that assistance actually is. There may be instances were insignificant assistance is required, but which under the terms of the bill cannot be given if the government agency that will give the assistance is not named in the finding.

(a)(4) This paragraph would require that the finding specify any third parties, including any foreign country, that funds or participates in any way in the special activity.

Position of the Community: We object to identifying the foreign countries that will assist in a special activity since this will make it much more difficult to protect the confidentiality of their assistance. Issue further discussed in the DCI opening statement. In addition, we do not believe it is necessary to identify whether a foreign country or third party is assisting in the conduct of a special activity where such assistance is minimal or routine. The bill is vague in its requirement that a party be identified if it participates "in any way" with the activity. It is not clear whether this would cover situations where U.S. and other countries run parallel operations that benefit one another, but that do not technically involve joint funding or participation.

(a)(5) This paragraph would require that findings cannot authorize any action inconsistent with or contrary to any statute of the U.S. The section-by-section analysis makes clear that this provision is not intended to require that special activities authorized in Presidential findings comply with statutory limitations which by their terms only apply to another U.S. Government program or activity. Laws that govern, for example, the transfer of weapons or other equipment to foreign countries do not apply to transfer of weapons by CIA pursuant to a finding even if CIA obtains the arms from DoD under the Economy Act.

Position of the Community: This provision is acceptable. It is Administration policy that all special activities will be conducted in accordance with applicable law. It is important the legislative history to this provision incorporate the caveat contained in the section-by-section analysis of the bill that the provision is not intended to require special activities comply with statutory limitations which by their terms apply only to other government agencies.

§503 (b) This subsection would impose an additional requirement on the President to keep the intelligence committees fully and currently informed of all special activities. In addition, heads of other agencies that participate in any way in the special activity would have an obligation to report the activity to the oversight committees. The obligation to report on special activities is no longer qualified by reporting with due regard to protecting classified information or information relating to intelligence sources and methods. Under the subsection, the intelligence committees would be entitled to any information or material concerning a special activity within the custody of any department or agency.

Position of the Community: We would object to dropping the general proviso that the reporting obligation shall be carried out with due regard for the protection of classified information or intelligence sources and methods. Dropping this general proviso could appear to others as an attempt to require the disclosure of highly sensitive information. We are concerned that the bill could discourage others from cooperating with CIA out of fear, however misplaced, that their identities will inevitably be compromised. Issue further discussed in the DCI opening statement. We are also concerned that placing an obligation on the heads of agencies that participate "in any way" in the special activity could make it difficult for the executive branch to maintain control over the timing and substance of what is reported to Congress. It would also derogate the lead role the DCI currently has with respect to reporting special activities to the intelligence committees.

[The position of the White House on making the President responsible for reporting special activities to Congress is not known.]

c. This subsection would require the President to report a special activity to Congress, without exception, within 48 hours after the signing of a finding. It will also require a certified copy of the finding be provided to intelligence oversight committees.

Position of the Community: We strongly oppose this provision since it does not make allowance for that rare case where a limited delay in Congressional notification is critical to preserve the absolute security of an operation where, for example, lives are at stake. Issue further discussed in the DCI opening statement. We do not object to providing the signed finding to the oversight committees, but believe that the requirement that the finding be a "certified" copy is inappropriate.

d. This provision would require the President to notify the intelligence committees of significant changes in any previously approved special activity.

Position of the Community: No objection to this provision so long as a designee can report.

e. This provision would establish for the first time, a statutory definition of the term "special activity." Currently, the Executive Order contains the only definition of this term. The Hughes-Ryan Amendment is

broader than the Executive Order definition in that it requires a Presidential Finding for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence. The definition in the bill is similar to that contained in the Executive Order, but would exclude certain categories of activities that currently might be construed as requiring a Presidential finding under Hughes-Ryan.

Position of the Community: We welcome the attempt to narrow the scope of the Hughes-Ryan by defining special activities to exclude a whole range of activities which do not fall into the traditional category of covert action. However, the categories of activities excluded from the definition of special activities must be carefully reviewed by DoD, State and Justice to ensure that the scope of the exclusion is proper.

§504 (d). This provision would replace the current Hughes-Ryan requirement (22 U.S.C. 2422) for obtaining a Presidential finding. It differs from current law in several ways. First, the provision states funds cannot be expended by any agency or department of government for special activities without obtaining a Presidential finding. Hughes-Ryan only limits expenditure of funds by CIA, although Executive Order 12333 requires a Presidential finding for special activities conducted by any agency or department. The provision also differs from Hughes-Ryan in that it would require a finding prior to the expenditure of non-appropriated funds available from any source where the agency has the ability to direct the expenditure of the funds. This requirement would apply regardless of whether the agency concerned actually came into possession of the funds at issue.

Position of the Community: We have no objection to requiring a Presidential finding as a precondition for any agency or department to engage in a special activity. We have concerns with the provision if it is interpreted to require a Presidential finding to cover a request to a foreign country to expend funds where CIA does not have possession of the funds and does not control the activities financed by the foreign country. In these circumstances, the Agency would not be in a position to ensure that the activities of the foreign government remained within the scope of the finding. Issue further discussed in the DCI opening statement.