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March 2, 1988

[redacted] STAT

Office of Congressional Affairs
Central Intelligence Agency
Washington, D. C. 20505

Dear [redacted] STAT

In the rush to get this draft report up to the Hill, I neglected to send you a copy. It was sent on February 26th to the Chairman and Ranking Members of the SSCI and the HPSCI, with copies to all of the members of the two committees.

The report is a draft report to the ABA Standing Committee on Law and National Security and it represents only the views of the four of us who worked on it, and does not purport to bind the ABA.

We did weigh in on the definition of "special activities," which you expressed some concern about, but we went beyond that as you will see.

Thank you for providing us with a copy of the original Star Print of S. 1721. Let me know what you think of the attached.

Sincerely yours,

Fred

Frederick P. Hitz

FPH:emf
Enclosure

DRAFT REPORT TO THE STANDING COMMITTEE ON
LAW AND NATIONAL SECURITY OF THE
AMERICAN BAR ASSOCIATION ON S. 1721

This report to the Standing Committee on Law and National Security considers S. 1721, the "Intelligence Oversight Act of 1987" (the "Bill"), as reported by the Senate Select Committee on Intelligence on January 27, 1988. A companion bill is currently the subject of hearings in the House of Representatives. Our conclusions are that the Bill, while considerably improved in certain respects from the Star Print version of September 25, 1987, should not be enacted in its present form. There are additional changes which ought to be made in the Bill to which we address ourselves below:

(i) As regards intelligence activities other than "special activities," the Bill would change delicately-crafted provisions of the Intelligence Oversight Act of 1980, without apparent justification but with a potential for adversely affecting both the conduct of such intelligence activities and the oversight relationship between the Executive Branch and the Congress as it relates to them.

(ii) As regards all intelligence activities, but special activities in particular, the Bill risks infringing on the constitutional powers of the President. By purporting to create statutory requirements inconsistent with those powers, it would encourage and institutionalize constitutional confrontation and could inhibit necessary presidential action in situations seriously affecting the national security.

Oversight of Intelligence Activities other than Special Activities

The main impetus for the Bill is to cure perceived deficiencies in the provisions of the Intelligence Oversight Act of 1980 relating to presidential findings as a condition precedent to the initiation of special activities, and to require prior notification of the Congress concerning such findings. It also seeks to remedy other drafting oversights and ambiguities highlighted by the Iran-Contra investigation, such as the elimination of oral and ex post facto findings. Nonetheless, the Bill also substantially revises the provisions of the Intelligence Oversight Act of 1980 relating to the obligations of the President, the Director of Central Intelligence and the heads of departments and agencies to inform the Congress about intelligence collection activities and to furnish information regarding them to the Congress. These changes do not seem warranted by evidence from hearings on the Bill or statements by the Bill's proponents that the relationships on these matters between the Executive Branch and the Congress reflected in the 1980 Act have proved insufficent.

The most significant changes that the Bill would bring about are as follows:

1. Section 501(a) would, for the first time, impose a direct obligation on the President, as distinguished from the Director of Central Intelligence, to ensure that the intelligence committees are kept "fully and currently informed on the intelligence activities of the United States, including any significant anticipated intelligence activities, as required by this title."

The substantive scope of the obligation does not in itself differ from that which Sec. 501(a) of the 1980 Act places on the Director of Central Intelligence and the heads of other U.S. government departments and agencies. In the 1980 Act, however, these reporting obligations are conditioned by the prefatory language:

> "[t]o the extent consistent with all applicable authorities and duties, including those conferred upon the executive and legislative branches of the Government and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods."

This language was central to the willingness of the Carter Administration to accept the enactment of the 1980 Act.

The provisions of the Bill weaken the force of the 1980 Act's prefatory clause in two ways: The first is to remove the clause entirely from the provisions in Section 501(a) imposing reporting obligations on the President. In its place there is only a narrow constitutional savings clause which states that nothing in the Bill "shall be construed as a limitation on the power of the President to initiate [intelligence] activities in a manner consistent with his powers conferred by the Constitution" (emphasis added). This does not appear to be intended to recognize the existence of any presidential power to conduct intelligence activities without informing the Congress about them, but rather suggests acknowledgment only of a narrow possible constitutional authority to defer notification temporarily. Moreover, there is no reference to the protection of classified information, unless the words "as required by this

title" be construed to import into Section 501 the prefatory language of Section 502, which imposes a reporting requirement on the Director of Central Intelligence and the heads of other departments and agencies, a construction which is by no means clear. It would be bizarre to deny to the President the same right to protect information as is granted to his subordinate officers. This ambiguity should be eliminated.

The second change which the Bill would make to the prefatory language of the 1980 Act is to restrict the scope of the information that may be protected. The 1980 Act referred to "classified information and information relating to intelligence sources and methods." In Section 502, the Bill refers only to "classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." This narrows substantially the category of information the protection of which might provide a basis for withholding disclosure from the Congress (not on the grounds that the Congress is an unauthorized recipient but solely on the basis of added risks of disclosure which follow from increasing the number of people holding the information, the "need-to-know" principle).

The elimination of unclassified information regarding intelligence sources and methods from the prefatory language may be relatively insignificant, since information regarding intelligence sources and methods of sufficient sensitivity to warrant withholding from the Congress is likely to be classified or eligible for classification. The narrowing of the protected category, however, to refer only to "sensitive intelligence

sources and methods or other exceptionally sensitive matters" seems unwarranted. Neither the term "sensitive" nor the term "exceptionally sensitive" has any precise meaning. No doubt the drafters intend by these terms to express the thought that justification for withholding information from the Congress should be a rarity rather than a regular matter. No attempt has been made so far in the legislative history to give examples of the kind of rare circumstances that might be considered "sensitive" or "exceptionally sensitive." Such an exercise, in our view, would be both unwise and unnecessary. The basic principle already existing under the 1980 Act is that disclosure to the Congress should be made for the purposes described by the Act, except where compelling reasons exist to withhold such disclosure, grounded under the 1980 Act either in due regard for the protection of information from unauthorized disclosure or in constitutional considerations. Either basis carries with it an inherent and sufficiently high threshhold of seriousness.

While certain of the modifications that the Bill would introduce to the prefatory language of the 1980 Act might be argued to have little or no effect, the elimination of the acknowledgment of constitutional limitations on what disclosures the law can compel is highly significant. In our view, the legislation should make no changes to the portions of the 1980 Act that deal with intelligence collection activities. The changes embodied in the Bill do not appear to be justified by any record of significant inadequacy of the 1980 Act as it applies to intelligence collection activities of which we are aware. While

it is possible that problems have occurred which have not been reflected in the public record, we consider it unlikely that this could be the case to any significant degree without there having been some public comment by the intelligence committees of dissatisfaction with the agencies' performance under the 1980 Act.

The prefatory provisions of the 1980 Act, which would be significantly narrowed by the Bill, represented a carefully crafted compromise between the positions of the Executive Branch and the Congress, a compromise which recognized several key points. One was that there exists no bright line defining the respective constitutional authorities of the President and the Congress with respect to intelligence activities and thus no absolutist formulation, either affirming or denying a constitutional right of the President to withhold information, could be accepted by either side. A second was that the conduct of intelligence activities -- and particularly intelligence collection -- required that the intelligence agencies be capable of giving credible assurances of protection to foreign sources of information and assistance, both governments and individuals, to whom the notion of legislative branch oversight is both unknown and alien. On rare occasions such assurances must extend to a promise that the identity or activities of the foreign source will not be revealed to the Congress. Thus it was thought important to leave in the 1980 Act a prefatory clause containing a measure of ambiguity and to leave to the evolution of the oversight relationship, out of the public eye, the development of an appropriate level of disclosure relating to collection activities.

These considerations, in our view, are still valid. To remove any statutory acknowledgment that the provisions of the Bill are not to be interpreted to invade the constitutional powers of the President generally (as opposed to a limited disclaimer which reads only on the initiation of activities by the President, does not refer to the constitutional role of the Executive branch in general and is not made applicable to the reporting duties of subordinate officials) is to invite future constitutional confrontations or to encourage inaction on the part of the Executive Branch, and to deprive the intelligence agencies of an important basis on which credible assurances can be offered to their sources.

The intelligence committees of the Congress (and the appropriations committees also, for that matter) are provided a wealth of information on collection programs of the intelligence agencies in the course of the annual intelligence program budget reviews. To our knowledge the committees have never contended that this budgetary information was insufficient to keep them informed about the risks inherent in highly sensitive collection operations. The enterprise of intelligence collection is vital to our nation's security. It would be irresponsible for the Congress to enact a statute for purposes only of political symbolism which could have an adverse effect on the effectiveness of intelligence collection.

The Requirement for Prior Notice of Special Activities

Section 503 of the Bill would impose on the President a requirement of notice to the Congress prior to initiation of a

special activity and no later than 48 hours after the making of a finding, subject only to a limited exception under subsection (c)(2), when time is of the essence, permitting notice no later than 48 hours after the finding but after initiation of the special activity. While the constitutional saving clause in Section 501(a) disclaims limitation of the President's power to "initiate such activities in a manner consistent with his powers conferred by the Constitution," that provision, as noted above, does not appear to extend to the President's power to conduct a special activity once initiated without notice to the Congress. This seems to reflect the view of the provision's drafters that the President's constitutional powers to withhold notice from the Congress exist at most in situations of exigency and cover only the commencement of special activities which are thereafter promptly reported to the Congress.

The question of the respective constitutional powers of the President and the Congress with respect to special activities is too complex to address here. At a minimum, however, it seems clear that serious constitutional issues would be raised not only by legislation that attempted to deny the President the right to initiate such activities without notice to the Congress but by legislation denying the President the right to continue to conduct special activities without such notice. For so long as the President's constitutional prerogatives and duties justified the withholding of notice upon initiation of a special activity, those constitutional powers would seem equally applicable to the on-going conduct of the special activity.

Because the constitutional issues mentioned above have not been definitively resolved by the Supreme Court and continue to engage constitutional scholars in debate, it seems unlikely that the proponents of the Bill can be proceeding on the basis of a certainty that the reporting requirements imposed by the Bill represent a correct statement of the respective constitutional roles of the President and the Congress in this area. Instead, it appears to be the view -- one expresssed in discussions by members of the staff of the Senate Select Committee on Intelligence -- that, while the constitutional issue is indeterminate, the Bill at least would have the virtue of forcing the President to "climb a steep hill" whenever contemplating the initiation or conduct of special activities without prior notice. Thus, by tipping the balance in favor of a statutory requirement of prior notice, the Bill appears intended to put the President's constitutional powers to conduct such activities without prior notice at their lowest ebb and to set the stage for a constitutional crisis should any President ever again proceed in such a manner.

We consider this not a virtue of the Bill but its greatest shortcoming: it would create conditions of permanent constitutional conflict and might precipitate future constitutional crises which inevitably can only be harmful to our system of government. After the body blow to Executive-Congressional relations represented by the Iran-Contra investigation, the task at the present time, in our view, is to rebuild the structure of those relations across the entire spectrum of foreign policy issues, of which special activities are a part. Within that

spectrum, special activities by their very nature must occupy a somewhat different position than those foreign policy initiatives which are capable of being debated either in advance of their initiation or in the course of being conducted. Working out the proper relationship between the President and the Congress in this delicate area demands the concerted efforts of both branches to reestablish a climate of trust and comity between them. It requires flexibility on both sides and the nurturing of an institutional structure in which there is room for the development of pragmatic solutions.

In the particulars cited above, this Bill runs counter to these objectives. Adoption of these provisions would be bad policy, regardless of the constitutional merits of the position it represents. By inviting a constitutional crisis whenever the President steps outside the rigid procedural confines mandated by the Bill, there is a considerable likelihood that the Bill will produce dangerous results.

The argument has been made that the Bill cannot deprive the President of his constitutional powers and therefore does no real harm if in fact it would infringe on them as applied in a specific future situation. This is unrealistic. The constitutional point is one easily forgotten by the press and the public, particularly if the special activity is a failure or unpopular (neither of which necessarily proves that there was not a compelling national interest to undertake it in the first place). If the President acts in the face of a statutory prohibition of unclear constitutionality, he must pay a heavy

political price or worse. To any President not supremely confident of his political invulnerability, this could be a potent force in favor of inaction.

A second danger is that the consequence of any such presidential action, once brought to the attention of the Congress, will be a debilitating confrontation of the kind that surrounded the Iran-Contra affair and that this will occur regardless of the merits of the underlying factual situation. Confrontations of this kind are harmful to the national interest. They benefit neither the Congress nor the President, regardless of who appears to be the "winner." It is a serious mistake to build into the statutory structure of Presidential-Congressional relations a permanent invitation for such crises to occur.

The Definition of "Special Activity"

The proposed statutory definition of "special activity" in Section 503(e) carries forward the old language of the Hughes-Ryan Amendment as regards the Central Intelligence Agency, but adds a new definition, inspired by Executive Order 12333, applicable to all other agencies and departments of the government.

If special activities are to be subject to findings and notifications when carried on by any agency of the government, it is unclear why a distinction should be made between the CIA and other agencies of government. The implication which arises from the two subsections of Section 503(e) is that there may exist a category of activities conducted by the CIA which does not meet the definition found in subsection 503(e)(2) but which is not

"intended solely for obtaining necessary intelligence." If such a category of activities exists -- which seems open to question -- there is no apparent reason why they should be burdened by a requirement for a presidential finding as a condition precedent when conducted by the CIA, any more than they should be if conducted by any other agency. If legislation in the area of special activities is to be adopted it should cure this defect of the Hughes-Ryan Amendment, which was left essentially intact by the 1980 Act. The authors of the Hughes-Ryan Amendment, in lieu of hazarding a definition of special activities, took the blunderbuss approach of requiring a presidential finding for everything done abroad by the CIA which did not meet the purity of purpose test embraced in "intended solely for obtaining necessary intelligence." It is now almost 15 years since passage of that law. The formulation found in Section 503(e)(2) of the Bill has been in use for a substantial part of that period and is generally understood as describing the kind of activity about which the Congress is concerned. It is a known and workable definition of "special activity" which should be applied to the CIA as well as other U.S. departments and agencies, letting the imperfections of the Hughes-Ryan definition rest in peace. The time is long past to free the President from the unnecessary burden of making findings about low-level activities carried out by the CIA abroad merely because they arise in circumstances that cast doubt on whether intelligence collection is the sole and unalloyed purpose.

The appropriateness of removing subsection 503(e)(1) from the Bill is confirmed by the Report of the Senate Select Committee on Intelligence on the Bill, Report 100-276, which indicates that the definition found in subsection 503(e)(2) represents an Executive Branch interpretation, acquiesced in by the intelligence committees, of what kinds of activities are within the ambit of Hughes-Ryan. Thus, for the last several years the language embodied in subsection 503(e)(1) has been interpreted by CIA and the intelligence committees as meaning what is described in subsection 503(e)(2) and the Senate Report states that such interpretation would continue to be applicable, leaving it entirely unclear what CIA operations would fall under subsection 503(e)(1) and what justification there is for including them.

Conclusion

It is to be expected that the trauma caused by the Iran-Contra episode to Executive-Legislative relations would prompt the Congress to seek to redress its grievances in legislation, just as the Church Committee sought to do more than a decade ago in 1976 in reaction to previous intelligence community excesses. However, just as the Church Committee investigations after lengthy hearings and extensive Executive-Legislative deliberations produced the constitutionally ambiguous and delicately balanced Intelligence Oversight Act of 1980, so it is our hope that this Bill will benefit from the observations and suggestions we have made above to achieve a similar balance and freedom from constitutional confrontation. While it is understandable that the intelligence committees wish to make as explicit as possible

the rights and duties of both partners to this constitutional duet, in our view it is unwise to push the process too far. For in the end, in the matter of secret intelligence information and activities, it is trust, comity and respect between the Executive and Legislative branches of government which ensures a successful national intelligence effort not a bare listing of legal rights and obligations. If the Executive feels constitutionally hamstrung by congressional requirements, its recourse is to evasion, inaction or to the courts -- but not to the production of first-rate intelligence in the national interest. By the same token, if the Congress believes that the Executive is free to ignore meaningful legislative oversight, its reaction is to investigate or oppose, using the power of the purse, which is likewise not in the national interest. Our country is better served if neither side of this constitutional argument is seen to hold sway over the other, and the inevitable power struggles which ensue are sorted out through negotiations between the parties in an atmosphere of mutual respect and concern for the national interest. We believe that adoption of the above comments would help move the Bill in this direction.

Respectfully submitted,

Frederick P. Hitz,
John H. Shenefield
Daniel B. Silver
Robert F. Turner

ADDITIONAL VIEWS OF JOHN H. SHENEFIELD

The events at the center of the Iran-Contra fiasco invite once again in this decade, as did revelations of other such activities not too many years ago, the effort to define with mathematical precision the constitutional responsibiities of the Executive and Legislative Branches in the field of intelligence activities, including special activities. We believe such an effort is unwise now, as it was then. Instead, all of those involved in the policy and practice of intelligence oversight ought to dedicate themselves to rebuilding the trust and confidence that must characterize inter-branch relationships in this most sensitive of areas.

Two ideals must be high on the agenda of that reconstruction of trust. First, officials of the Executive Branch cannot continue to challenge the congressional purpose to participate in the governance of intelligence activities that are at once so essential and so controversial. In every options paper proposing an intelligence activity of significance, there ought to be careful consideration of the potential for damage to the constitutional fabric, whether or not the operation is disclosed to Congress in advance and on the assumption it may turn out to be both a failure and politically unpopular. The price of prolonging the Executive Branch record of arrogance and miscalculation is likely to be a frittering away of the very constitutional power now so vigorously defended. In that direction lies national weakness, not international strength.

Second, the Legislative Branch must organize itself to share the grave responsibility it seeks to exercise. There must be no occasion that justifies allegations of sloppiness or indiscretion. Those in the Congress entrusted with confidence ought to succeed to that position on the basis not of seniority but of fitness, which must itself be confirmed by conventional personnel security procedures.

In short, we are as a nation beyond the point where either branch may rest upon its prerogative alone. The challenge is to build the most efficient and most responsible intelligence community in the world. Both the Executive Branch and the Legislative Branch have an essential part in that effort. But that part must be played at both ends of Pennsylvania Avenue with modesty and a determination not just to foster pet schemes or amass political capital, but to make the system work.

2/88