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INTELLIGENCE OVERSIGHT ACT OF 1988

JUNE 15, 1988.—Ordered to be printed

Mr. STOKES, from the Permanent Select Committee on Intelligence, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 3822 which on December 18, 1987, was referred jointly to the Permanent Select Committee on Intelligence and the Committee on Foreign Affairs]

The Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 3822) to strengthen the system of congressional oversight of the intelligence activities of the United States, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

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 Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is hereby repealed.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

"(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.

tions, low morale, and ultimately the exposure of a covert operation through the investigation and hearing process.

So it seems to me that from the prespective of a professional intelligence officer they would want to know that Congress has been informed, that it is a lesson they are going to draw from the Iran-contra affair and something that a DCI in the future owes them just as much as they owe secrecy and security. (Statement of Dr. Alan E. Goodman, February 24, 1988, Subcommittee on Legislation, Permanent Select Committee on Intelligence, Transcript, p. 182, 183).

Witnesses opposing prior notice often have preferred two examples to bolster their argument, both, ironically, related to Iran. The examples are the preparations for the Iran hostage rescue mission and the exfiltration from Iran of the U.S. diplomats who took secret refuge in the Canadian Embassy in Tehran. Neither of these events was reported to the Congress as covert action, the first, according to Admiral Turner, because of the risk to the lives involved, and the second according to Admiral Turner and Secretary Carlucci, because the Canadians specifically asked that Congress not be given notice.

There are two points to be noted in responding to these examples. First, each occurred prior to the enactment of the Oversight Act of 1980, at a time when covert actions were reportable to eight committees, and when the "Gang of Eight" mechanism did not exist. Second, the proper response to such a request today is to note the requirements of American law with particular reference, if applicable, to the "Gang of Eight," and to describe in as detailed a fashion as necessary the overwhelmingly salutory experience of the intelligence community with the prior notice requirement. Such a response is not, as some would urge, naive; it is, rather, a statement of the reality of American government. History, including recent history, provides ample evidence that policies which contradict these realities or seek to avoid the sure course of our traditional governmental processes were doomed to failure, not because they needed the cloak of secrecy to succeed but because they were wrong. And the result of such failure is more often than not long term damage to the interests of the United States, not just to the future of a particular Administration or political party. Prior consultation with those in Congress who have developed expertise in the conduct of such intelligence activities may not avoid all such failures, but surely will avoid some. The Committee is persuaded that the benefits of such consultation far outweigh the theoretical, and unlikely, risk of intentional or inadvertent disclosure by the senior leaders of Congress.

Constitutional Considerations

In testimony and written submissions before the Committee, officials of the Administration have expressed opposition to H.R. 3822 on the grounds that it would violate the U.S. Constitution, Specifically, the Department of Justice has stated that "enactment of this legislation . . . would unconstitutionally intrude on the President's authority to conduct the foreign relations of the United States."

Letter of John R. Bolton to Chairman Matthew F. McHugh, June 9, 1987 ("Bolton Letter") at 1.

The Committee notes that acts of Congress are presumptively constitutional, *Flemming* v. *Nestor,* 363 U.S. 603, 617 (1960), and that definitive determination of the constitutionality of legislation lies within the power of the courts. *Marbury* v. *Madison,* 1 Cranch 137 (1803). Nevertheless, the Committee recognizes the gravity of the Administration's concern and the importance of the legislation in question. Accordingly, the Committee has given full and due consideration to the constitutionality of H.R. 3822.

SUMMARY

The focus of the Administration's concern is the provision in H.R. 3822 that would require the President to notify the congressional intelligence committees or leadership within no more than 48 hours of approving a covert action. Current law requires that, as a general rule, prior notice must be given, but permits notice "in a timely fashion" when prior notice is not given. 50 U.S.C. §413(b). The Administration fears that the more definite provision would impinge on the President's "plenary" authority in foreign affairs and also would present specific obstacles to the President's conduct of covert action.

The Administration does not dispute that Congress has a role in foreign affairs. Rather, the Administration takes the view that Congress' role is limited to discrete powers, while the President exercises plenary authority. However, there is no justification for this view in the Constitution or the decisions of the Supreme Court. The purported basis for the Administration's view has been repudiated and never was binding.

As interpreted by the Supreme Court and analyzed by scholars, the Constitution accords powers in the field of foreign affairs both to the President and to Congress. According to the most reliable exposition of the constitutional scheme, there is a "zone of twilight" between the Executive and Legislative in foreign affairs. Thus, the President may exercise greatest discretion when granted authority by Congress and, correspondingly, is most constrained when Congress has limited or conditioned the President's authority. The President and Congress possess "concurrent authority" whereby Congress may regulate the President, as long as this regulation is reasonably restrained to accommodate the President's authority.

Congress' specific authority to regulate the President's conduct of covert action is demonstrated by the nature and origin of this activity. Covert action occurs pursuant to the National Security Act of 1947 and has consistently been defined thereunder as subject to Congress' authority. In regulating covert action, Congress has accommodated the President's authority, and H.R. 3822 represents a refinement of this reasonable and restrained regulation.

Regarding the requirement in H.R. 3822 for prior notice of a covert action—the gravamen of the Administration's concern—it should be noted at the outset that this requirement is strictly procedural, not substantive. It does not dictate or limit what covert action the President may conduct or how or when it may be con-

ducted. The requirement simply is that the President provide notice within a time certain.

The Administration's concern that this requirement would interfere with the President's discretion is hypothetical since, as the Administration states, the President since 1980 has provided prior notice of covert action in "virtually every case." Indeed, the provision to which the Administration objects would not require prior notice in every instance, but would permit delayed notice when "time is of the essence," and additionally, the President could restrict the recipients of the notice when appropriate.

The Committee concludes that H.R. 3822 unquestionably complies with the Constitution.

THE CONCERNS OF THE ADMINISTRATION

In testimony before the Senate Select Committee on Intelligence regarding the Senate's companion legislation to H.R. 3822, an official of the Justice Department defined the Administration's objection to H.R. 3822:

> Our primary constitutional concern with S. 1721 arises from the requirement that absolutely every finding be reported to the congressional intelligence committees within a fixed period of time.
>
> * * * * *
>
> While cooperation is the rule, the Department believes that 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,* to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this constitutional prerogative of the President.

Testimony of Charles J. Cooper, December 11, 1987 ("Cooper Testimony") at 2-3 (emphasis in original).

The Administration's concern over the constitutionality of H.R. 3822 appears to arise from its general view of what the Constitution proivdes for the operation of foreign affairs and from its specific expectations of what effect H.R. 3822 would have on the President's conduct of covert action. The Administration's general view of the Constitution was expressed in a letter to the Committee from a Justice Department Official:

> [T]he 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 intelligence operations, to the President except insofar as the Constitution gives specific tasks to the Congress.

Bolton Letter at 4.

While this letter refers to the President's "exclusive and inalienable duties in the area of foreign affairs," Bolton Letter at 3, the

Administration does not appear to contend that Congress lacks any authority over foreign affairs. Rather, it concedes that Congress has authority to oversee the activities of the executive in order to consider and enact appropriate legislation. Bolton Letter at 6. The Administration's position on this score is stated in a 1986 memorandum prepared for the Attorney General:

> While we agree that Congress has some powers to curb a President who persistently pursued a foreign policy that Congress felt was seriously undermining the national interest, especially in cases where Congress' constitutional authority to declare war was implicated, well-settled historical practice and legal precedents have confirmed the President's dominant role in formulating, as well as carrying out, the Nation's foreign policy.

Memorandum of Charles J. Cooper, December 17, 1986 ("Cooper Memorandum") at 5 n. 5.

In addition to its general view of the Constitution, the Administration's concern over H.R. 3822 stems from how it expects the bill to affect the President's conduct of covert action. The Justice Department stated:

> 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.

Bolton Letter at 6.

Again, the Administration does not deny that Congress has a legitimate role in the formulation of foreign policy. Cooper Testimony at 6. Indeed, the Administration has stated that the constitutional bases for Congress' oversight powers are as explicit as those for the President's foreign affairs powers. Cooper Memorandum at 16 n. 20. Thus, the Administration's position appears to be limited to a concern that congresssional oversight not intrude on the President's discretion.

CONSTITUTIONAL PRINCIPLES

The most eloquent exposition of the Constitution's provisions for foreign affairs also serves as the most effective refutation of the Administration's view that H.R. 3822 would violate the Constitution. In his concurring opinion in *Youngtown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), Justice Robert Jackson stated:

> Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings.
>
> The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presiden-

> tial action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy.

343 U.S. at 646–647.

Subjected to Justice Jackson's analysis, the Administration's view of what the Constitution provides for foreign affairs becomes uncertain and untenable. It is at best tautological to say that the President has "plenary authority" in foreign affairs, "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." Bolton Letter at 4. Congress' enumerated powers include: the power to declare war; the power to provide for the common defense and the general welfare; the power to define offenses against the law of nations; the power to make rules for the government; and the power to regulate foreign commerce. U.S. Constitution, Article I, section 8. These indisputably are broad, far-reaching powers whose "limits" evade easy definition.[3] Similarly, it eludes reason to compare these powers quantitatively to the President's enumerated foreign affairs powers: to command the military; to appoint and receive ambassadors; and to make treaties, the latter two powers subject to the Senate's consent. U.S. Constitution, Article II, section 2.

Indeed, Justice Jackson eschewed just such a quantitative comparison:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

343 U.S. at 635. Thus, in place of the rigid categories of exclusive powers that the Administration appears to espouse, Justice Jackson's conception consists of a pragmatic interplay of executive and legislative powers. In his well-known phrase, there is a "zone of twilight" between the President and Congress where they possess "concurrent authority." 343 U.S. at 637. The President has independent powers, but Congress may add to these powers by authorizing the President's actions or detract from these powers by restricting the President's actions. The Constitution does not separate powers in terms of foreign and domestic affairs or accord primacy to one branch of government or another on such a basis. The Constitution separates powers in terms of executive, legislative, and judicial functions and provides that this separation will serve as a system of checks and balances in all affairs of government.

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[3] The Administration asserts that these powers are somehow limited to "the exercise of legal authority over American citizens." Cooper Memorandum at 3–4. However, the Administration proffers no basis for such a limitation, and there is none; the assertion is fanciful and flawed.

Justice Jackson's conception of the Constitution represents a remarkably uncanny and unerring refutation of the specific contentions of the Administration regarding the constitutionality of H.R. 3822. According to the Administration, "[t]he 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.'" Bolton Letter at 4. This was the very contention made by the Executive in defense of its seizure of the steel mills which the Court in *Youngstown Sheet & Tube Co.* v. *Sawyer* found to be unconstitutional. In rejecting this contention, Justice Jackson compared the asserted powers of the Executive to the "prerogative exercised by George III" and stated, "I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated." 343 U.S. at 641.

In a similar fashion, Justice Jackson disposed of the Executive's reliance on the powers of the President as commander-in-chief, to justify the seizure—also asserted by the Administration in defense of the President's discretion over covert action:

> I cannot foresee all that it might entail if the Court should indorse this argument. Nothing in our Constitution is plainer than that a declaration of war is entrusted only to Congress. . . . [N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

343 U.S. at 642.

In addition to the President's executive and military powers, the Administration bases its constitutional view on historical examples and judicial decisions. Here, too, Justice Jackson's reasoning serves as a disarming riposte:

> A century and half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.

343 U.S. At 634-635.[4]

The most widely-touted basis for the Administration's view of the Constitution is the Supreme Court's decision in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). There, the Court referred to the President as "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, but which, of course, like every other governmental power, must be exercised

[4] Specifically, the Administration relies on *The Federalist* No. 75 for Alexander Hamilton's broad view of presidential power. Bolton Letter at 4. However, elsewhere, the Administration has recognized that James Madison took a different view in response to Hamilton's "overstatements." Cooper Memorandum at 5 n. 5. As Justice Jackson said, "[a] Hamilton may be matched against a Madison." 343 U.S. at 635 n. 1.

in subordination to the applicable provisions of the Constitution." 299 U.S. at 319–320. The Administration, omitting reference to the final, limiting clause of this statement, asserts that *"Curtiss-Wright* thus confirms the President's inherent Article II authority to engage in a wide range of extra-territorial foreign policy initiatives. . . ." Bolton Letter at 5.

Reliance on *Curtiss-Wright* as a basis for broad presidential power requires isolating a single passage of the Court's opinion and stripping it of its context in the case, in history, and in law. First, the reference to the President as the "sole organ" of the Nation was most likely intended to refer simply to the President's role as the spokesperson of the federal government *vis-a-vis* other nations. *See* E. Corwin, The President: Office and Powers 1787–1957 178 (1957). Second, the reference to the President acting in foreign affairs without authority from Congress is *obiter dictum,* i.e., unnecessary to the decision and therefore not binding, as the Administration has recognized. Cooper Memorandum at 10 n. 11. The case dealt with presidential action that was authorized by Congress, and as Justice Jackson stated, "[i]t was intimated that the President might act in internal affairs without congressional authority, but not that he might act contrary to an Act of Congress." 343 U.S. at 636. Finally, the Supreme Court more recently has specifically questioned the *Curtiss-Wright* language on which the Administration relies. *Dames & Moore* v. *Regan,* 453 U.S. 654, 661–662 (1981), citing *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 634 (1952) (Jackson, J., concurring).[5]

In *Dames & Moore,* the Court favored Justice Jackson's conception of the President's and Congress' foreign affairs powers in interplay. 453 U.S. at 668–669. Congress may authorize the President to act, but even if it does not, the President is constrained by Congress' "concurrent authority" stemming from its constitutional powers. When Congress explicitly restricts the President's actions, however, the President's discretion is "at its lowest ebb." *Id.,* citing 343 U.S. at 637–638. That Congress has such authority in foreign affairs was also acknowledged by the Supreme Court in *Perez* v. *Brownell,* 356 U.S. 44, 57 (1958) ("Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation."), and most recently in *Japan Whaling Assn.* v. *American Cetacean Society,* 92 L.Ed. 2d 166, 179 (1986) (recognizing "the premier role which both Congress and the Executive play" in foreign relations).

On this basis, the Committee concludes that Congress' concurrent authority in foreign affairs is well established in constitutional law, and therefore there is no justification for the Administration's view that the President has "plenary" authority on which

[5] The Administration claims that *Curtiss-Wright* was re-affirmed in *United States* v. *Nixon,* 418 U.S. 683 (1974). Bolton Letter at 5. However, that case dealt with executive privilege, certainly not invoked by the Administration with regard to covert-action notification. Moreover, the Court never referred to *Curtiss-Wright* and recognized presidential responsibility in the specific context of diplomatic and military secrets, not covert action. 418 U.S. at 710. Judicial deference in "political questions" which involve Congress and the President is wholly distinct from any congressional deference to the President. 418 U.S. at 693.

H.R. 3822 would intrude. This general conclusion is confirmed in the specific area of covert action.

COVERT ACTION AND THE CONSTITUTION

The nature and origin of the government's conduct of covert action demonstrate that this activity lies well within Justice Jackson's zone of twilight where the President and Congress possess concurrent authority. The President is subject to the regulation of Congress, and Congress is constrained in its regulation by the President's authority. In fact, Congress has regulated the President's use of covert action, and this regulation has been reasonable and restrained. H.R. 3822 represents a refinement of this regulation accommodating the President's discretion while fulfilling Congress' constitutional role.

The legal authority for the conduct of covert action is an act of Congress. The National Security Act of 1947 created the Central Intelligence Agency and authorized it, among other activities, "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." Section 102(d)(5); 50 U.S.C. § 403(d)(5). The Honorable Clark M. Clifford, serving as Special Counsel to President Truman, participated in the drafting of this Act and has testified regarding the intent of this provision of the Act:

> The "other functions" that the CIA was to perform were not specified, but we did expect that they would include covert activities. These activities were intended to be separate and distinct from the normal activities of the CIA, and they were intended to be restricted in scope and purpose.

Testimony of Clark M. Clifford Before the Senate Select Committee on Intelligence, December 16, 1987 at 4.

After passage of the 1947 National Security Act, President Truman approved the first authorization for the conduct of covert action. National Security Council Directive 10/2 of June 18, 1948 relied on the authority of Section 102(d)(5) of the Act in establishing a covert action function in the government. Moreover, when President Eisenhower reorganized this function in 1955, he also relied on the authority of the Act, *see* National Security Directive 5412/2 of December 28, 1955, as did subsequent Presidents. *See* Executive Order 12333 of December 4, 1981, 46 Fed. Reg. 59941; Executive Order 12036 of January 24, 1978, 43 Fed. Reg. 3674; Executive Order 11905 of February 18, 1976, 41 Fed. Reg. 7703.

Thus, it was by act of Congress that the means and authority for the conduct of covert action came to be.[6] It is correspondingly well

[6] One member of the Committee has suggested that President Jefferson's assault against the Barbary States serves as an example of covert action preceding the 1947 National Security Act and occurring without congressional authority. This assault appears to have been more an overt act of war than a covert action; even so, it is instructive to review how President Jefferson informed Congress of the assault:

> Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the [American] vessel, being disabled from committing further hostilities, was liberated with its crew. . . . I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to

Continued

within Congress' authority to regulate how this activity should occur, as long as this regulation itself is reasonable and restrained to accommodate the President's authority. Otherwise, the law would be left in the untenable state where Congress could authorize or even prohibit an activity but not regulate it. The Constitution certainly does not compel this; rather, it permits and indeed encourages Congress to legislate as it has. After all, it is Congress that the Constitution vests with "all legislative powers," Article I, section 1, as well as the power to make appropriations. Article I, section 9.

The nature of covert action is also such that its conduct falls within concurrent presidential and congressional authority. As first authorized by President Truman, covert action was defined to be "so planned and executed that any U.S. Government responsibility . . . is not evident to unauthorized persons and if uncovered the U.S. Government can plausibly disclaim any responsibility . . . ." National Security Council Directive 10/2 of June 18, 1948, *reprinted in* Leary (ed.), *The Central Intelligence Agency* at 131–133. And as important to the definition of covert action as this concept of plausible deniability was the statement of what this activity was not: "Such operations shall not include armed conflict by recognized military forces, espionage, counter-espionage, and cover and deception for military operations." *Id.*

This definition of covert action—as distinct from intelligence activity—has remained consistent since President Truman's initial directive. *See* Executive Order 12333 of December 4, 1981, 46 Fed. Reg. 59941, 59953; Executive Order 12036 of January 24, 1978, 43 Fed. Reg. 3674, 3692; Executive Order 11905 of February 18, 1976, 41 Fed. Reg. 7703, 7705. In addition, the Intelligence Oversight Act of 1980 recognized this distinction between intelligence activity and covert action and established different requirements for the President to notify Congress of them. *Compare* Section 501(a) *and* Section 501(b), 50 U.S.C. §§ 413(a) and 413(b). Moreover, H.R. 3822 continues this distinction.

The significance of the distinction between intelligence activity and covert action resides in the Constitution's provisions governing them. Intelligence activity resembles a means of engaging in diplomatic relations and thus relates to the President's specific power to appoint ambassadors. U.S. Constitution, Article II, section 2. Covert action, on the other hand, represents an amalgam of commerce and warfare that falls within Justice Jackson's zone of twilight. *See* Henkin, "Foreign Affairs and the Constitution," 66 *Foreign Affairs* 284, 304 (Winter 1987/88). As the highly-regarded author of this article stated:

> From a constitutional perspective, it is difficult to make a persuasive argument that Congress cannot regulate these covert activities, whether under its power to regulate commerce with foreign nations, to deal with the issues of war and peace, or to define offenses against the law of na-

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the legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.

I Richardson, Messages and Papers of the Presidents, 314, quoted in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 642–643 (Jackson, J., concurring).

> tions—or under the unarticulated "foreign affairs power" which the Supreme Court found implied for Congress in the notion of the national sovereignty of the United States.

Id. at 304–305 (citation omitted).

Again, the Administration does not contend that H.R. 3822 is wholly unconstitutional. In addition to asserting limitations on Congress' authority over foreign affairs—discussed previously—the Administration questions the constitutionality of requiring the President to notify Congress of all covert actions within a fixed period of time:

> 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.

Bolton Letter at 6. Thus, the constitutional question posed by the Administration is whether Congress may require the President to notify the congressional intelligence committees or leadership prior to initiating a covert action.

It bears emphasizing that the prior notice requirement is strictly procedural, not substantive. It does not dictate or limit what covert action the President may conduct. Similarly, it does not dictate or limit how or when such action may be conducted. The requirement simply is that the President provide notice every time within a certain time when covert action is approved. This has every appearance of a reasonable and restrained regulation, as well as a necessary and proper means of effecting Congress' constitutional powers, pursuant to Article I, section 8.

Moreover, the notice requirement has been fashioned specifically to accommodate the expressed concerns of the Administration regarding the exigencies of covert action. These exigencies, according to the testimony of officials and the experience of the Committee, include the need to respond immediately in an emergency, and the need to respond in utmost secrecy in some situations.

According to the provisions of H.R. 3822, the President is not required to give prior notice of covert action in every instance, but only in normal circumstances. Where "time is of the essence," the bill authorizes the President to delay notice for 48 hours after approving a covert action. Thus, the President is unrestrained in responding to an emergency.

Similarly, the President may take measures to ensure secrecy where appropriate. The bill authorizes notice to be provided, not to the intelligence committees as a whole, but to the so-called Gang of Eight—the leaders of the Congress and the committees—where extraordinary circumstances pertain. Significantly, the bill defines the circumstances for limiting or delaying notice, but leaves it within the President's discretion to invoke this limited or delayed notice.

In this way, H.R. 3822 resembles other legislation in the field of foreign affairs where Congress has established specific time requirements for presidential notice. Thus, the War Powers Resolu-

tion requires notice to Congress within 48 hours of the introduction of U.S. forces into hostilities or situations where imminent involvement in hostilities is clearly indicated. 50 U.S.C. § 1543(a). While the Administration has also challenged the constitutionality of this Resolution, its challenge does not focus on the 48-hour requirement, nor has this challenge received judicial approbation. Similarly, the Arms Export Control Act sets specific time limits for the President to notify Congress or proposed arms sales to foreign nations and the President does not challenge these limits. *See* 22 U.S.C. § 2776. Thus, there is nothing unusual or inherently offensive with Congress requiring presidential notice by a time certain.

As stated, the Administration's constitutional concern stems from the "potential" interference that the prior notice requirement purportedly would pose. This potential in fact appears to be hypothetical. As the Administration recognizes, the President has provided prior notice of approval of covert acton in "virtually every case" since enactment of the 1980 Intelligence Oversight Act. Bolton Letter at 6. No President has complained of any specific burden imposed from providing such notice. Only the President's January 1986 approval of arms sales to Iran lacked the requisite notice to Congress. In the Committee's estimation, this exception to compliance with the requirement proves the rule that the President's notification to Congress ensures good government. And good government is the purpose and the product of our Constitution.

On this basis, the Committee determines that H.R. 3822 is constitutional.

Conclusion

The bill reported by the Committee is a modest, balanced, and measured attempt to clarify the requirements of the Intelligence Oversight Act of 1980, the ambiguities of which apparently encouraged the Administration to engage in a major covert action without the required finding and without notice to the Intelligence Committees—questionable activities which were compounded by the issuance of a Department of Justice legal opinion claiming both statutory and constitutional authority for them.

In almost all respects, the provisions of H.R. 3822 reflect internal executive branch requirements regarding covert actions established by the President in NSDD 286. The prior notice provision, while opposed by the Administration, actually reflects the historic practice of covert action reporting and affords all due deference to the President's responsibilities to maintain the security of sensitive operations and to respond swiftly in exigent circumstances. These legitimate presidential interests are accommodated by maintaining the "Gang of Eight" reporting mechanism found in current law and by authorizing the President to initiate a covert action without a written finding and without prior notice to either the intelligence committees or the "Gang of Eight" in extraordinary circumstances when time is of the essence.

Enactment of H.R. 3822 will complement steps taken in recent months by the Director of Central Intelligence, the Assistant to the President for National Security Affairs, the Secretary of Defense, and the President to insure thorough Executive Branch oversight

of intelligence activities and to establish trust and cooperation between the intelligence committees and the intelligence community.

Enactment of H.R. 3822 will also insure that the Congress is able to effectively provide advice on and oversight of necessarily secret activities which may have a profound impact on significant United States foreign policy interests. Such a rule was clearly envisioned by the drafters of the Constitution. The accuity of their vision has been borne out by recent events. In the long run, prior consultation and adequate oversight will contribute more to the national security of the United States than congressional acquiescence in Executive Branch assertions of a nebulous constitutional right to unilaterally and secretly formulate and conduct the foreign policy of the United States.

Section-by-Section Analysis

SECTION 2. REPEAL OF HUGHES-RYAN AMENDMENT

Section 2 of the bill repeals the Hughes-Ryan Amendment of 1974 so as to consolidate intelligence oversight provisions at a single place in the law and expand the requirement for presidential approval of covert action to all entities of the U.S. Government (to parellel Executive Order 12333).

Current statutory provisions for intelligence oversight include the general requirements to inform the House and Senate Intelligence Committees in Title V of the National Security Act of 1947, as amended in 1980 (the Intelligence Oversight Act), and the requirement of presidential approval for CIA covert action in section 662 of the Foreign Assistance Act of 1961, as amended in 1974 (22 U.S.C. 2422—the Hughes-Ryan Amendment). The differences in language and scope between these provisions, which appear at different places in the statutes, have been a source of unnecessary confusion and disagreement between the branches. Therefore, section 2 of the bill would repeal the Hughes-Ryan Amendment in order to substitute a new presidential approval requirement as an integral part of a more coherent and comprehensive statutory oversight framework for covert action and other intelligence activities to be set forth at one place in the law. The superseding presidential approval requirement is contained in the proposed new sections 503 and 504(d) of the National Security Act of 1947, discussed below.

This change is intended to bring the statutes more closely into line with the current executive order which requires presidential approval for covert action by any component of the U.S. Government, not just by the CIA. Section 3.1 of Executive Order 12333 (December 4, 1981) states that "the requirements of section 662 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2422) and section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), shall apply to all special activities as defined in this Order." Replacing Hughes-Ryan, which applies only to the CIA, with a comprehensive presidential approval requirement for covert action by any U.S. Government entity gives statutory force to a policy that has previously been a matter of executive discretion.

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"(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 intelligence committees in order to carry out its authorized responsibilities.

"(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.

"(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

"(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

a previously-approved findings. This would occur when the President authorizes a significant activity under a previously-approved finding without changing the scope of the finding concerned.

(e) Definition of "covert action"

Subsection 503(e) contains a new definition of "covert action." It is intended to supercede the current references to CIA "operations" abroad under the Hughes-Ryan Amendment and "special activities" as defined by Executive Order 12333. The new definition would generally reflect current practice as it has developed under the Hughes-Ryan Amendment and the Executive Order definition for activities conducted by the Central Intelligence Agency.

The need for a new definition of covert action arises from the fact that there are now two definitions, one in law and one in executive order, the former explained and post-dated by the latter; and neither of which encompasses all of the understood or asserted exceptions applied by the executive branch. Hughes-Ryan was intended to be only a temporary measure which would be further refined by congressional review of covert action operations. In fact, since the 1974 enactment of the Hughes-Ryan Amendment, the Central Intelligence Agency in particular and the executive branch in general have interpreted that legislation to narrow its apparent broad sweep by applying subsequently—promulgated executive order definitions of special activities and have developed various exceptions, based on interpretations of congressional intent, that have been applied as precedent in practice. The result has been a sometimes confusing list of exceptions and case-by-case determinations that have left both the executive and legislative branches uncertain as to the outside parameters of covert action.

However, it seems clear to the Committee that certain activities such as covert paramilitary operations, propaganda, political action, election support and related activities have been generally understood to be covert action. Other activities that may literally fall within the definitions but for which it would be impractical to seek presidential approval and report to Congress on a case-by-case basis, have been assumed not to be covert action. To some extent, Congress has known of and acquiesced in this practice and has worked with the executive branch to develop mutually agreeable understandings of the reach of the reporting requirements.

In attempting to reconcile the current definitions, the Committee decided that the inherent difficulty in describing large areas of covert operations with particularly weighed in favor of a broad general definition—i.e., the approach employed by the Hughes-Ryan drafters—but with the addition of explicit enumerated exceptions to that general definition, the approach employed in a limited way by the drafters of Executive Order 12333.

In accordance with this overall approach, the Committee intends that the core definition of covert action be interpreted broadly. That is why, for instance, the Committee has eliminated the requirement, found in the definition of "special activities" under Executive Order 12333, that the activities be "in support of national foreign policy objectives abroad." The Committee's experience since 1977 has been that the foreign policy interests of the United States are so broad that any covert operation abroad is likely to be in sup-

port of some foreign policy objective. The Committee also wished to remove the possibility of ambiguity presented by previous administration arguments that sought to distinguish the foreign policy of the United States from the defense policy of the United States. Furthermore, this phrase is not so much a definitional element, as a limitation of covert action, and one which is reflected in the presidential determination required by section 503(a). Thus, the definition encompasses activities to influence conditions—be they political, economic or military—overseas and focuses on the objective features of the activity, rather than on a formal relationship to foreign policy purposes, as the controlling test in determining which activities constitute covert action.

Further, the reference in the body of the definition to activities "conducted by an element of the United States Government" means that the activity or activities to be conducted must be examined in terms of each element of the United States Government that will be involved in a particular area to determine if the activity of that element is a covert action. It may be that an activity which is not a covert activity may be supported by an element of the government, for example an intelligence element, whose participation does constitute a covert action. Thus, an operation conducted by the uniformed military forces may not be a covert action but the unattributable efforts of the CIA in support of that activity may be a covert action.

This raises another key element of the core definition, the meaning of covertness. Covert action must be an activity where the "role of the United States Government is not intended to be apparent or acknowledged publicly." It is important to distinguish in this context between operations that are merely clandestine and those that are covert. Clandestine activities are those that are conducted secretly but which, at some time after their completion, may be acknowledged by the United States. A good example is a clandestine military deployment which, although kept secret before it occurs, can be acknowledged after it has taken place, in part because, at that point, it cannot be kept secret.

A covert operation may or may not be clandestine, i.e., the activity itself may or may not be visible or public. Its essential nature, however, is that the role of the United States in the activity is not intended to be acknowledged. The U.S., in other words, seeks a form of plausible denial to the outside world. This deniability would not, of course, apply to those within the United States Government who have a need to know about such activities, including the intelligence oversight committees.

Thus, in drafting the basic definition of a covert action as it will apply to all entities of the government, the Committee intends to retain the same level of general comprehensiveness as is now applied to determine whether activities constitute covert action operations, subject, however, to certain exceptions that are explained further below. The Committee further intends that the definition apply uniformly and equally to all elements of the U.S. Government.

Paragraph (e)(1) is the first exception to the general definition of covert action. It lists first "activities the primary purpose of which is to acquire intelligence." This represents a change from the lan-

guage of the Hughes-Ryan Amendment, which excluded activity only if its sole purpose was the collection of necessary intelligence. The primary purpose test nonetheless reflects actual practice sine 1974. It appears that neither the Central Intelligence Agency nor the Congress have actually applied the sole-purpose test since the enactment of the Hughes-Ryan Amendment. What has applied is a rule of reason that treats as intelligence collection activities such as intelligence liaison relationships that produce intelligence indirectly or have other incidental results. The Committee, by requiring a primary purpose test, however, does not seek to create an avenue for designing operations to avoid the covert action requirements or to change the high threshold traditionally distinguishing covert action from intelligence collection operations. Of course, it is expected that this latter category of activities, while not subject to the covert action reporting requirements, will be brought to the attention of the Committee in the course of keeping it fully and currently informed.

Paragraph (e)(1) also excludes from the definition of covert action operations "traditional counterintelligence activities." The Committee uses the word "traditional" seveal times throughout the new definition. It is intended to be understood in the sense of being usual, accepted, customary practice—practice that is acknowledged and understood to fall within accepted parameters. This does not mean that every possible variation of counterintelligence operation or technique must have an exact precedent to be included within the exception. However, it does require that "traditional" counterintelligence hew to the purpose of, in the words of the executive order, gathering information or conducting activities "to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons or international terrorist activities." Such activities generally include double agent operations and operations to frustrate intelligence collection activities by hostile foreign powers. Again, it is expected that these activities will be brought to the Committee's attention in its ongoing oversight of intelligence activities.

Traditional counterintelligence, however, does not include the use of a counterintelligence operation or counterintelligence assets for purposes other than those that are described as counterintelligence above. For instance, efforts to deceive a hostile foreign power for purposes other than collecting information or frustrating its intelligence operations, or efforts to influence events or individuals beyond the ordinary scope of counterintelligence concerns are not considered to be traditional counterintelligence activities.

Paragraph (e)(1) also lists "traditional activities to improve or maintain the operational security of United States Government programs" as an exception from the definition of covert action. This phrase encompasses most programs and activities of the Department of Defense or other departments or agencies of the United States Government that are intended to improve or maintain the security of their personnel, activities and facilities.

Operational security includes a variety of techniques, such as concealment of military activities and physical and communications security activities, whose purpose is to deny hostile powers access to, or information concerning, U.S. activities. Many, but not

all, of the military's camouflage, concealment, cover and deception operations are included in this category. Thus, the use of U.S. military resources, such as items of military equipment, communications systems, etc., for operational security purposes falls within the ambit of the exception.

However, when efforts at deception—both in terms of the methods employed and of the intended effect on military, political or economic conditions overseas—are such that they depart from the essential purpose of tactical protection of United States military activities and covertly attempt to change foreign perceptions in a strategic or significant fashion, they should be considered covert action.

Operational security activities, when conducted by the military, are a subset of military activities, described further below. They have been exempted by this definition because of concern that some legitimate military operational security activities arguably could be considered covert action operations. While the Committee does not intend to convert security activities into covert action, neither does the Committee intend that military activities that should be considered covert action operations may be considered to be excluded from the definition of covert action simply by calling them traditional military operational security activities. However, the Committee does not intend that such matters as concealing manuevers of military units by using cover and deception, the use of different frequencies in peacetime, etc., should be considered covert action.

The final element excluded under paragraph (e)(1) is "administrative activities." This term is intended to include activities to pay and support the presence of U.S. intelligence or other elements overseas and in the United States. Such activities should not be considered to be covert action as long as they are restricted to providing support for U.S. employees who are capable of performing a range of tasks, including covert action operations. The use of this exception applies only to employees of the United States Government and related housing, pay, benefits and allowances that pertain to them.

Paragraph (e)(2) exempts "traditional diplomatic activities" from the definition of covert action. It includes the use of diplomatic channels or personnel to pass messages and conduct negotiations between the United States and other governments or foreign entities. Traditional diplomatic activities, in this context, include activities long understood and accepted to be diplomatic in nature. They do not include activities that cannot reasonably be considered to be diplomatic in character, despite characterizations by some administration officials, such as the covert sales of arms to Iran. Such an operation went well beyond the traditional and accepted definition of diplomacy because of the means employed.

Paragraph (e)(2) also refers to "routine support" to traditional diplomatic activities. Routine, in this sense, means ordinary support. What is contemplated by this phrase is relatively minor, often administrative activities that are an adjunct to a diplomatic activity. An example would be the use of intelligence communications facilities or personnel to pass diplomatic messages, or providing a safe house for a meeting between U.S. officials and foreign officials.

What is not included would be activities of intelligence elements that in themselves represent separate efforts to covertly influence events overseas as well as provide support to diplomatic activities. In other words, routine support cannot become a "backdoor" instrument of covert action.

Paragraph (e)(2) also exempts "traditional military activities" and "routine support" to such activities. Traditional military activities encompass almost every use of the uniformed military forces. This does not, however, preclude the possibility that military units, whether or not they are intelligence units, could be used in operations that constitute covert action and would require a finding. This emphasizes the importance of examining a particular military activity in light of its specific purpose, the manner in which it is to be accomplished, and the role—including the question of attribution to the U.S. Government or to the entity involved—of the particular element that will perform it.

This qualification is best understood in connection with the Committee's intent, mentioned above, of defining covert action so as to ensure that activities for which CIA would have to obtain a covert action finding under current law and practice will require a finding under subsection 503(e) whether performed by CIA, a military unit or some other element of the U.S. Government.

An area of activity that must be examined carefully in this context is rescue missions or counterterrorist activity. Each element that must participate in some way in such activities must be looked at to determine whether its role falls within the definition of covert action or one of the exceptions. For example, an overt military operation such as the 1980 Iran rescue mission is not a covert action. That operation was conducted by uniformed military units and was always intended to be acknowledged by the United States. However, CIA logistical support (not intelligence collection) to the rescue operation in Tehran was not intended to be acknowledged and was covert action. The Committee intends that rescue missions and counterterrorism activities—by whatever element conducted—continue to be scrutinized carefully to ascertain whether or not they constitute covert action in light of appropriate CIA precedent.

The Committee also notes, however, that routine support to military activities may include a limited range of secret, non-active assistance to military operations such as the provision of false documentation or foreign currency. What is not included in routine support would be activities of intelligence elements that in themselves represent separate efforts to covertly influence events overseas as well as provide support to military activities. In other words, routine support cannot become a "backdoor" instrument of covert action.

Paragraph (e)(3) exempts "traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities." Traditional law enforcement activities include activities such as those of the FBI to apprehend, or otherwise cooperate with foreign law enforcement authorities in the apprehension of, those who have violated U.S. laws or the laws of other nations. It includes Drug Enforcement Agency and State Department assistance to other countries in the destruction or

interdiction of narcotics supplies or products. In each case, it is necessary to distinguish activities which are to be acknowledged by the United States from those which are not and which otherwise meet the test of a covert action. In other words, the fact that an operation is conducted by a law enforcement agency does not alone determine whether the operation is a traditional law enforcement activity.

Routine support to such activities that would not rise to the level of a covert action would include the loan of equipment or certain kinds of training (or example, training in the use of loaned equipment) to a law enforcement agency by an intelligence agency. As the case of routine support to traditional diplomatic activities, what is not incuded in the concept of routine support to traditional law enforcement activities would be activities of intelligence elements that in themselves represent separate efforts to covertly influence events overseas as well as provide support to law enforcement activities. Routine support cannot become a backdoor instrument of covert action.

Paragraph (e)(4) provides a limited exception for activities not covered by paragraph (e) (1), (2) or (3). The exception permits "routine support" to the "overt activities" of "other United States Government agencies abroad." The only example of which the Committee is aware that meet this definition involved the loan of equipment by an intelligence agency to another U.S. Government element to assist it in the conduct of its authorized activities. Routine support has the same general meaning and limitations as that term is used above.

The last sentence of the definition states that 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 of behalf of the United States shall be deemed to be a covert action. This requirement is intended to prevent the conduct of a covert action at the specific request of the United States that bypasses the requirements for Administration review, presidential approval, and consultation with the intelligence committees. Thus, it encompasses within the definition of covert action the indirect conduct of covert action through another country and ensures that the same review, accountability, and oversight will apply as in the case of a covert action conducted entirely by the United States or with another government.

(f) Influencing United States political processes

Section 503(f) would maintain current Executive Order restrictions (section 3.4(h) of Executive Order 12333) that preclude a finding from authorizing any action intended to influence domestic political processes, public opinion, policies, or media. While it is recognized that activities intended to have their impact abroad may be reported in the U.S. media, it is intended that no covert action may have as a purpose influencing political activity, policy, or media within the United States by instituting or influencing events which are undertaken either inside or outside the United States.