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INTELLIGENCE OVERSIGHT ACT OF 1988

HEARINGS AND MARKUP

BEFORE THE

COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

H.R. 3822

JUNE 14, 16, AND 22, 1988

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INTELLIGENCE OVERSIGHT ACT OF 1988

TUESDAY, JUNE 14, 1988

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The committee met, at 9:30 a.m., in room 2172, Rayburn House Office Building, Hon. Dante B. Fascell (chairman) presiding.

Chairman FASCELL. The committee will come to order. I would like to recognize some distinguished guests we have with us this morning: Mr. George Agree of the Association of Former Members of Congress is here with a group of distinguished parliamentarians from Egypt. I would like to have them stand up to be recognized.

We are pleased to have you here to sit in on this committee hearing.

We meet today to begin consideration of H.R. 3822, the Intelligence Oversight Act of 1988, which has been jointly referred to the House Foreign Affairs Committee and House Permanent Select Committee on Intelligence. This measure was introduced by our colleague Mr. Stokes, the distinguished Chairman of the House Permanent Select Committee on Intelligence. The House Permanent Select Committee on Intelligence ordered the bill favorably reported, as amended, by a vote of 11 to 6 on May 11, 1987. The Senate companion measure, S. 1721, sponsored by Senator Boren and Senator Cohen was approved by the full Senate on March 5th by a vote of 72 to 19. The measure was jointly referred to the House Foreign Affairs Committee based on its oversight responsibility of the foreign policy implications of intelligence activities and specifically on section 2 of the bill which repeals section 662 of the Foreign Assistance Act, the revised Hughes-Ryan provision.

H.R. 3822 has been the subject of extensive hearings in the intelligence committees. The bill as ordered reported by the committee enjoys bipartisan support except for one provision, the requirement that the President must notify the Congress no later than 48 hours after the initiation of a covert action. A lot has been said about this provision but I view it as a modest adjustment to the present law, which, currently requires that the Congress be notified of covert operations in a "timely fashion." I believe that requirement for prior notice and consultation is designed not only to recognize the constitutional duties and prerogatives of the Congress. It also gives the President the benefit of independent counsel on important foreign policy decisions, which are needed to build a bipartisan consensus on covert operations which impact on larger foreign policy consensus. In short, H.R. 3822 doesn't infringe on the President's

flexibility; rather it is the essence of true oversight and consultation. It will ensure that covert actions advance rather than erode U.S. National Security interests. H.R. 3822 will ensure that the necessary and appropriate consultation occurs at the time it is most useful—prior to the initiation of a sensitive covert action.

To assist the committee in consideration of this legislation, we are pleased to have before us today the Honorable William Webster, Director of the Central Intelligence Agency; the Honorable Michael H. Armacost, Under Secretary for Political Affairs, Department of State, and the Honorable Clark M. Clifford, former Secretary of Defense.

Mr. Broomfield has a statement he would like to make.

OPENING STATEMENT OF CONGRESSMEN BROOMFIELD

Mr. BROOMFIELD. Thank you very much, Mr. Chairman.

I wish to join in welcoming the Director of Central Intelligence, Judge Webster, as well as Michael Armacost, the Deputy Under Secretary of State.

Let me say at the outset I cannot support the bill we are discussing this morning in its present form.

This does not mean that H.R. 3822 does not have some desirable elements. It would help to clarify and consolidate the laws applicable to the reporting of intelligence activities, particularly covert actions.

The basic problem with the bill is the requirement to report to Congress all presidential findings authorizing covert activities within 48 hours. Regardless of misunderstandings that may arise from time to time, the President simply must have more flexibility to delay notification for a time, especially in sensitive circumstances.

This is because requiring immediate notification in every case could inhibit the President from taking action essential to the national security.

It could also discourage foreign governments and others from cooperating with the United States because of the perception that information given to Congress is not completely secure.

Mr. Chairman, former senior officials of our government are virtually unanimous in their belief that notification to Congress of covert action may have to be delayed in certain cases. Those who have come forward—former National Security Advisor Zbigniew Brzezinski, Henry Kissinger, and Brent Scowcroft and former Directors of Central Intelligence William Colby, Richard Helms, and Stansfield Turner.

I ask that a letter to Chairman Stokes of the Intelligence Committee by several of these prominent Americans be included in the record.

Chairman FASCELL. Without objection, so ordered.[1]

Mr. BROOMFIELD. However, since the Minority heard only late last week that a private witness would be appearing on behalf of the 48-hour bill, the Minority has not been able to accommodate

[1] The letter referred to appears in app. 3.

the schedule of the many witnesses who are opposed to this provision.

I hope, Mr. Chairman, you will have another hearing. I hope at that time we will be able to schedule a witness of our choice.

Mr. Chairman, I want to note our former chairman and colleague, Clem Zablocki, supported a limited exception to the congressional notification requirement during debate on the current oversight act in 1980.

He stated,

> The legislation makes the fundamental recognition that in extraordinary circumstances advance information on covert operations might be withheld from the Select Committees on Intelligence. . . . Such exemptions are absolutely essential to a strong intelligence community and important for U.S. security.

Mr. Zablocki also stated that the exemption—

> Will also help the American intelligence community to maintain the extraordinary secrecy necessary for intelligence activities and promote cooperation from the intelligence communities of friendly countries.

Let me make it clear, however, that I do not believe that the Executive Branch has an unfettered right to withhold information on covert activities from Congress. Under legislation I have sponsored, H.R. 3611, the President could delay notification for a time, but only if there were an emergency constituting a grave and immediate threat to national security.

I would have to say that an excellent example was the Canadian rescue operation during the Carter Administration.

Under my approach, the President would have to make a written determination that the situation justified withholding notification from Congress. In addition, the President would have the option of notifying only four congressional leaders and not eight members of Congress, as at present.

In my view, this bill is a misguided attempt to cure the ills of the Iran-Contra affair. But the Administration has already gone far in that direction. In particular, I think everybody owes a great tribute to Bill Webster for what he personally has done.

The President's new national security decision directive on covert actions states that notification can be delayed only in "rare, extraordinary circumstances." This is consistent with my concept.

The President is also required under the NSDD to review such a decision together with his senior advisors every ten days.

Early on during the investigation of the Iran-Contra affair, the Tower Commission clearly placed the blame on the National Security Council.

They commended the Administration for removing speedily to make the necessary corrections, in particular removing the NSC from covert operations.

Similarly, the Majority Report of the Iran-Contra Committees—and Mr. Hamilton, one of the co-chairmen is here—itself indicated that the basic problem in the Iran-Contra affair were the people, not the laws. It is not clear, therefore, why the investigating committees and the intelligence committees have recommended the inflexible approach we have before us today.

It is clear to me that the 48-hour requirement is an unconstitutional intrusion on the ability of the President to conduct necessary covert action in support of United States foreign policy interests.

There is much in this bill that is useful—I think that this is a point that should be made as well as some things that are very constructive. But H.R. 3822 is flawed by the insistence of its proponents on the inclusion of the absolute 48-hour notification provision.

How can this be seen as anything but a purely political issue? The Administration has extensively reformed its own internal procedures. It has also cooperated closely with the congressional intelligence committees in approving this bill.

It seems that the proponents of this bill, want to cause a veto by the President over the 48-hour issue. If so, they have chosen the wrong issue.

There is no doubt that, constitutionally as well as practically, the 48-hour requirement is seriously defective.

With that said, I am thankful for this opportunity to discuss this bill. I particularly look forward to the testimony of the Administration witnesses. Thank you very much.

Mr. LEACH. Will the gentleman yield for a unanimous consent?

Mr. BROOMFIELD. I would be happy to yield.

Mr. LEACH. I would like to request the Chair to allow me to insert in the record a particularly prescient quote from the gentleman from Michigan on a floor statement holding entirely this position. I would say this is not a view that is novel to the gentleman from Michigan in this particular year.

It is a long-held, firm conviction for which he is to be respected. I would like unanimous consent to place that in the record.

Chairman FASCELL. Without objection, I am sure Mr. Broomfield will not object.

[The information follows:]

Henceforth, in extraordinary circumstances affecting vital national interests—the President will be allowed to defer reporting to Congress on CIA covert action operations abroad. The key word here is defer. The President is not excused forever from letting us know about such activities. * * * We are just allowing him to postpone his reporting in those rare instances where, for example, prior disclosure would jeopardize the lives of the personnel or the methods employed in a particular covert action activity.

Mr. BROOMFIELD. Thank you very much.

Chairman FASCELL. Mr. Webster, let's start with you. You have a statement. You can put it in the record. You may summarize it.

STATEMENT OF HON. WILLIAM H. WEBSTER, DIRECTOR, CENTRAL INTELLIGENCE

Judge WEBSTER. Thank you, Mr. Chairman. I am sure I cannot improve on what Mr. Broomfield said.

In any event, I am pleased to be here to share some of my thoughts on H.R. 3822, the Intelligence Oversight Act of 1988. Since this is the first time I have appeared before this Committee as Director of Central Intelligence, I also want to take this opportunity to provide you with my views on the relationship between this Committee and the CIA.

Chairman FASCELL. I think that would be very useful, Mr. Webster. Let me on behalf of the committee welcome you. We are delighted that you have this opportunity to appear with us. We have felt for a long time that it was absolutely essential to maintain the closest relationship with the Agency.

Life being what it is on the Hill, we do not always get what we want. But nevertheless, because everything you do in your Agency does have such an impact on policy, we are delighted to have you here today even if it is on a peripheral matter.

Judge WEBSTER. Thank you, Mr. Chairman.

The views expressed in this statement on H.R. 3822 reflect the position of the Administration. I draw your attention at the outset to the Administration position, as conveyed to Congress in the President's legislative message, that a bill which fails to preserve the flexibility and authority the President needs to conduct intelligence activities effectively will not be acceptable to the President.

Mr. Chairman, my testimony today will be the third time I have testified on Intelligence Oversight Legislation. I appeared last November before the Senate Intelligence Committee to testify on similar legislation and in February before the House Intelligence Committee on H.R. 3822. In my testimony before those committees, I focused primarily on whether the legislation was truly necessary, and on the practical impact of the Oversight bill on the intelligence community. I intend to address both points in my testimony on the House bill today.

In my remarks before the Senate and House Intelligence Committees I questioned the need for this type of legislation. Although both Intelligence Committees subsequently decided to recommend approval of the legislation, I still believe that this legislation is not a necessary response to the concerns Members of the Congress have expressed about the oversight of covert action.

As you know, the President recognized last year that there was room for improvement in the way the two branches were meeting their responsibilities. As a result, he took concrete, substantial steps to establish improved procedures to ensure that Congress is given the opportunity to play its appropriate oversight role.

These new procedures, in the form of a National Security Decision Directive on Special Activities, NSDD-286, much of which has been declassified, clarify the rules by which covert actions are reviewed, approved, and reported to Congress. In fact, many of the proposals contained in H.R. 3822 are already contained in NSDD-286. This can be illustrated by making a few comparisons between the bill and the presidential directive.

The bill requires that findings be in writing, cannot be made retroactive, and must be consistent with existing law. Similar requirements are contained in the NSDD.

The bill makes clear that a presidential finding must be obtained before any agency or department can conduct a covert action. The presidential directive affirms this principle.

The bill requires that a presidential finding specify the names of each department or agency of the U.S. Government that is funding or participating in a significant way in a covert action, and whether it is contemplated that any third party will be used to fund or

otherwise participate in a significant way in the covert action. Again, the presidential directive contains the same requirement.

It is not surprising or coincidental that provisions of the bill are similar to the presidential directive. The procedures the President has installed were developed following close and prolonged consultation with members and staffs of the intelligence committees.

While a presidential directive is not the same as legislation, I am not persuaded that new legislation at this time is the best way to address the concerns that Members have with the congressional role regarding special activities. In my view, a legislative remedy should be employed only if it is clear that there is a basic deficiency in the oversight process. That is doubly the case when the legislative remedy proposed raises constitutional issues that threaten to divide the two branches in an area where effective work places a premium on cooperation.

The Iran-Contra matter, while serious, has not in my view demonstrated that the system of congressional oversight of the intelligence community established under current statutes is seriously flawed. Many of the problems exposed were the result of officials failing to follow existing procedures and rules, as Mr. Broomfield pointed out in his statement.

As you may be aware, I have taken steps within the CIA to discipline those employees who failed to follow CIA procedures or who testified to Congress in a manner that was not candid or complete. Those actions, taken in light of the requirements defined by current statute, in my view have adequately addressed the problems we found.

Similarly, to the extent that there were any procedural shortcomings demonstrated by the Iran-Contra matter, they have already been addressed by the new presidential directive within the statutory framework presently existing.

I would like to emphasize that any legislation that is enacted should not adversely affect the intelligence community's ability to do its job. In this connection, Mr. Chairman, the bill passed by the Senate in March and the bill marked up by the House Intelligence Committee have addressed constructively some of the important substantive concerns I and other Administration officials raised with the original Senate bill introduced in that body.

Both the House and Senate bills, for example, recognize the need to report on special activities and intelligence collection in a manner consistent with due regard for the protection of sensitive intelligence sources and methods. I am also pleased that neither bill requires that the finding specify the identity of foreign countries assisting the Agency in the conduct of covert action.

These important safeguards will in my view go a long way in assuring friendly intelligence services and potential agents that source-identifying information will not be widely disseminated and possibly compromised.

I am also very pleased with the changes in the original House version of the bill made by the House Intelligence Committee in response to concerns I raised before that committee. My reservations regarded the definition of covert action, the expenditure of non-appropriated funds and the reporting of the transfer of Defense articles or services. In particular, the new definition of covert action

removes much of the ambiguity over what constitutes a covert action and is in my view a distinct improvement over the current definitions.

While the intelligence committees have addressed several concerns previously raised in my testimony before those committees, there is one area of the bill that remains particularly troublesome. This area of difficulty involves the provision of the bill that requires notification of a covert action to Congress, without exception, within 48 hours after the signing of a finding. Last summer, the Department of Justice provided the Congress with its views on the constitutionality of such a provision, so I will not address that issue here. I have two separate concerns about this provision.

First, the fact that there is a sharp difference of interpretation between the view of the Administration and the position embodied in this bill regarding this provision's constitutional validity will promote tension between the Executive and Legislative Branches for years to come. In the intelligence area such tension has the potential to disrupt the cooperation and trust that effective national security policy requires.

Second, I believe that as a practical matter allowance must be made for that rare case where a limited delay in congressional notification is critical to preserve the absolute secrecy of an operation when, for example, lives are at stake. In such a rare case, the success of an operation may depend on the cooperation of a foreign government that has conditioned its support on the President delaying congressional notification until the operation is completed. An inflexible notification requirement could force a President to choose between providing the congressionally required notification within 48 hours and jeopardizing the lives of innocent Americans, or delaying that notification to protect those lives. I can understand why any President would be reluctant to agree to a law that would require such choices.

It is worthwhile to note that concerns about excessive delay in congressional notification of a special activity have already been addressed by NSDD 286. That directive requires the National Security Planning Group to reevaluate at least every ten days a decision to delay congressional notification of a given finding.

This will ensure that when a delay in notification is necessary, the reason for that decision will be continually reassessed by responsible senior officers of several agencies or departments so that the delay will be as short as possible. I repeat, however, that I can think of very few circumstances that would ever necessitate such extraordinary steps.

Mr. Chairman, if the committee should nevertheless decide that legislation is necessary to limit the President's authority to delay notification, I would urge the Members to give serious consideration to language contained in a bill proposed by Ranking Minority Member Broomfield that would allow the President to delay notification if he determines that an emergency constituting a grave and immediate threat to the national security of the United States exists. While such a standard may not cover all situations where lives are at stake, it would allow the President the flexibility to delay notification in circumstances where the government faces a grave and immediate threat to its security.

Although not directly relevant to the legislation before this committee, I thought this would be an appropriate time to address a concern I understand some Members have with respect to access by the Foreign Affairs Committee to intelligence information. In my view, the Foreign Affairs Committee has a legitimate need for information about developments around the world. Some of this information is classified. Our best intelligence analysis about the significance and implications of such developments can play an important part in the committee doing its work properly.

I believe the record will show that the Central Intelligence Agency has, in fact, been responsive to the request of the committee for such information. Some recent statistics help to illustrate this point. During the period from 1986 to the present, there have been 48 staff briefings, 68 Member briefings, and 14 appearances before the committee involving formal testimony.

To the Congress as a whole, CIA now provides more than 1,000 briefings a year. Listening to these briefings takes a great deal of valuable time on your part, so I gather you must find them useful.

The substance of the information conveyed by the Agency to the Congress has ranged from pre-trip briefings on particular countries for Members to formal testimony on the disaster at Chernobyl or terrorism in general. In addition, the committee has access to the National Intelligence Daily, our National Intelligence Estimates and a variety of other intelligence publications. And I would urge members of this committee who are interested in obtaining more intelligence information to take advantage of the access of the committee to this wealth of information.

While I believe we have been responsive to the committee's request for intelligence information, I hope that you will understand my need to protect from disclosure operational intelligence information that might jeopardize our sources and methods for gathering this information.

When this information is compromised, not only is the particular source of intelligence lost to the Government, but others become reluctant to cooperate for fear their identities will also be disclosed. In some cases it may be advisable to disclose sensitive operational information in order for Congress to conduct effective oversight. A decision was made by Congress itself in 1980 to limit this type of information to the intelligence committees. This decision was a wise one, and I would strongly oppose any proposal to expand the number of congressional committees directly involved in intelligence oversight.

In addition to the question of access to intelligence information in general, I understand some Members are concerned that the Foreign Affairs Committee is not being briefed on covert actions that have significant foreign policy implications. Under existing law and the Intelligence Oversight bill being considered by the committee, access to covert action information is confined to the intelligence oversight committees and the defense subcommittees of the appropriations committees. I do not believe it is necessary or wise to expand the number of committees to which we must report covert actions.

To do so would simply return us to the situation existing before the Intelligence Oversight Act of 1980 when we had to provide

covert action information to eight committees of Congress. This situation made it almost impossible to conduct covert action covertly.

I believe that the concern expressed by some regarding the lack of committee access to covert action intelligence may be the result of a misperception as to how covert action relates to our foreign policy. Covert action is implementation by clandestine means of the foreign policy of the United States Government. Our foreign policy is formulated by the President and the Secretary of State.

The Director of Central Intelligence should not make foreign policy or use covert action as a vehicle for creating a secret foreign policy. Because the Secretary of State is obligated to keep the Foreign Affairs Committee informed of our foreign policy, I believe that the committee does have the necessary means to make its views known regarding foreign policy, including those specific policies being implemented by a covert action.

If you believe that the arrangement I have described is not adequate to ensure that the views of the Foreign Affairs Committee are represented in the oversight of covert action, I would suggest Congress consider greater use of cross-over membership between the Foreign Affairs Committee and the House Intelligence Committee. Such cross-over members are in the best possible position to express the views of the Foreign Affairs Committee in deliberations conducted by the House Intelligence Committee. Some of you now serve or have in the past served very effectively in this way.

In closing, I would like to reemphasize to each of you my personal commitment to making the oversight process work. It has always been clear, and recent experience has again demonstrated, that the implementation of the foreign policy of our government, including covert action, can only be successful when the Executive and Legislative Branches of government work together in an atmosphere of mutual respect and trust. This spirit of cooperation can only occur if the Congress receives the appropriate information needed to review and make informed judgments on covert action, while at the same time ensuring that this intelligence is protected from unauthorized disclosure.

The law should reflect not only the need for cooperation, but also the President's responsibility for the conduct and management of our intelligence and the importance to the nation of ensuring that the President has the necessary flexibility and authority to employ our intelligence capability effectively.

As I have noted, the President has taken corrective steps to improve the oversight system through a presidential directive. At CIA, I have approved a number of measures that will prevent a repetition of the shortcomings in the Agency's performance in the Iran-Contra matter.

In short, significant changes have been made. I would respectfully submit that they should be given a chance to work. Indeed, they are working. I am convinced that the current framework, and not new laws, represents the most appropriate and effective means to achieve our shared commitment to have Congress play an active, effective role in the oversight of United States intelligence activities.

This concludes my statement. I am prepared to answer your questions.

[Prepared statement of Director William H. Webster follows:]

PREPARED STATEMENT OF HON. WILLIAM H. WEBSTER, DIRECTOR, CENTRAL INTELLIGENCE

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

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

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

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

THE NEED FOR LEGISLATION

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

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

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

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

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

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

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

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

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

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

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

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

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

PRIOR NOTICE OF SPECIAL ACTIVITIES

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

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

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

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

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

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

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

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

ACCESS BY FOREIGN AFFAIRS COMMITTEE TO INTELLIGENCE INFORMATION

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

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

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

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

ACCESS TO COVERT ACTION INFORMATION

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

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

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

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

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

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

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

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

Chairman FASCELL. Thank you very much, Mr. Director.
Secretary Armacost.

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

Mr. ARMACOST. Mr. Chairman, it is a privilege to appear before the committee on this sensitive subject. I am particularly pleased to be here with my colleague, Bill Webster. He has given authoritative testimony on behalf of the Administration. The Department of State obviously concurs fully in that testimony, as in some of the comments Mr. Broomfield made by way of introducing the subject.

Rather than reading my testimony, I submit it for the record and am ready to answer your questions.

Chairman FASCELL. Without objection, your entire testimony will be included in the record, Mr. Secretary.

We thank you.

[The prepared statement of Mr. Armacost follows:]

PREPARED STATEMENT OF MICHAEL H. ARMACOST

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

Since last December, I have had the opportunity to testify twice on the issue of oversight legislation.

During this period, significant changes have been made to the bill which this committee is now considering. Many of the

specific objections made by the Administration have been addressed, including in particular problems regarding the protection of sources and methods and the naming of foreign countries in findings. We are pleased that changes have been made to accommodate many of our concerns.

Nonetheless, we regret that our most serious objections regarding this bill remain. These objections cause us to oppose the bill, and the President's senior advisers will recommend he veto this bill if it is presented in its current form.

Our most fundamental objections remain the absolute and rigid requirement to notify Congress within 48 hours of the adoption of a written finding, combined with the deletion of the references in present law to the constitutional authorities of the executive and legislative branches. The President's National Security Decision Directive 286 on covert action (declassified last December) requires that findings now be reported to Congress within 48 hours of signature except in quite extraordinary situations. A decision to delay notification must be reviewed by the President's senior advisers at least once every ten days. We believe that the NSDD establishes a sound procedure and provides the kind of flexibility that is necessary in the execution of U.S. foreign policy.

In our view, the absolute 48-hour requirement may not be reasonable in those very rare instances where extremely sensitive operations require the tightest possible security to protect the lives of U.S. and foreign nationals. It is possible that the success of an operation may depend on the cooperation of a foreign government that has conditioned its support on delaying notification of an operation. The 1980 Iran rescue mission and the role of the Canadian Embassy in assisting our people in Iran are specific cases in the past where advance notification could not be given. It is my understanding that these two cases constitute, apart from the Iran finding of January 1986, the only cases since the enactment of the Hughes-Ryan Amendment of 1974 in which the Executive Branch did not inform the Congress in advance of a planned covert action.

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

There is one other Administration objection to this bill which I believe is not fully appreciated by many in Congress.

In our view, there is a need for Congress and the Executive to work together closely on intelligence matters, and to provide mutual trust in handling sensitive intelligence issues. The Iran-Contra affair obviously put great strains on the relationship between our two branches in this field. This episode is now behind us. The President has taken decisive action to ensure that there will not be a repetition of that unfortunate affair.

The procedures established by NSDD 286 are working well and will ensure that covert actions are decided upon in a proper manner, taking into account all relevant factors. With the exception of the rigid 48-hour rule, NSDD 286 incorporates the significant changes to existing law reflected in H.R. 3822. The problem that we both face at this time is not inadequacy in the law but, rather, the need to restore confidence and trust. We do not believe the solution is to pass a bill which could rekindle confrontation over a basic constitutional issue, as would be the case if H.R. 3822 were to be enacted. Instead, we recommend a genuine partnership that will enable Judge Webster and other senior officials charged with reforming intelligence procedures the chance to make their reforms work. We see this as operating to the mutual advantage of the Congress and the Executive Branch. We therefore urge the Committee not to recommend adoption of this legislation.

DIFFERENCE BETWEEN GATHERING INTELLIGENCE AND COVERT OPERTIONS

Chairman FASCELL. Mr. Director, we have a clear understanding, do we not, on the difference between the function of gathering intelligence and covert operations?

Judge WEBSTER. I think we do, Mr. Chairman.

Chairman FASCELL. Do you want to tell us in very brief terms what that difference is, please?

Judge WEBSTER. The intelligence gathering or collection responsibility is to develop by a number of means—human intelligence, signals intelligence, national collection means, satellites in space—information about what is going on in other parts of the world as accurately and completely as we can and to present it, an analysis of that information, in such form that our policy makers can make wise decisions in the interests of our national security.

Covert action on the other hand represents activities beyond the collection of information intended to implement the foreign policy of this country in areas in which normal diplomatic means have not been successful or are not likely to succeed.

The implementation of covert action, which can range anything in the way from political action to lethal support for activities in other parts of the world are approved through a formal process originating initially within the Central Intelligence Agency, passing through the National Security Council, to the President who finds that such action is required and in the interests of national security, and then that finding is communicated to the Congress.

But it is to implement the established foreign policy of the Government by other means.

Chairman FASCELL. Now this legislation does not affect the flexibility or the authority to conduct intelligence activities, does it?

Judge WEBSTER. That is correct, Mr. Chairman.

Chairman FASCELL. So that under the basic law, whatever authority the President has or whatever authority has been delegated to you continues unaffected; is that correct?

Judge WEBSTER. That is correct, Mr. Chairman.

OVERSIGHT ON INTELLIGENCE GATHERING

Chairman FASCELL. And the intelligence reports or estimates or analyses that are made available to the Congress under the present law are made available to the Intelligence Committee as a matter of course; is that correct?

Judge WEBSTER. That is correct. I think it is also consistent with legislation that requires that the intelligence committees be kept timely informed of all significant intelligence activities.

Chairman FASCELL. And, therefore, the Intelligence Committee, having the primary responsibility for oversight of the intelligence community, has that relationship?

Judge WEBSTER. That is correct, Mr. Chairman.

Chairman FASCELL. But that relationship does not exist with any other committee of the Congress, does it, under the present law?

Judge WEBSTER. If I understand your question, Mr. Chairman——

Chairman FASCELL. In other words, when the CIA or other intelligence agencies report to the Congress, they report to the oversight committee, do they not?

Judge WEBSTER. They do, Mr. Chairman, with respect to significant intelligence activities and with respect to oversight. But, as I pointed out in my statement, we are responsive to requests for information by committees and individual Members of Congress.

Chairman FASCELL. And you have been. The Agency has always cooperated.

Judge WEBSTER. We try to be.

Chairman FASCELL. All I am pointing out on the record is where the official legal responsibility lies.

Judge WEBSTER. That is correct, Mr. Chairman.

Chairman FASCELL. As far as oversight on intelligence-gathering is concerned.

Now, just give us a rough estimate, if you will—I don't mean either in quantitative terms, that is, dollars, or in personnel or any other identifiable criteria, but maybe some kind of a percentage figure, or take a number from 1 to 10.

What would you say your intelligence-related responsibility is. What number? What factor would you give it on a scale of 1 to 10?

Judge WEBSTER. Mr. Chairman, do you mean in relation to covert action?

Chairman FASCELL. No, sir. First just intelligence-gathering.

See, you have two principal functions, as I see it. One is intelligence-gathering; the other is the implementation of foreign policy by covert action.

Judge WEBSTER. I think I understand your question.

Chairman FASCELL. How much, on a scale of 1 to 10, do you take in time, effort, personnel, money, et cetera, to do your intelligence-gathering, and how much do you take with regard to your covert operations?

Judge WEBSTER. Covert action requires about 3 percent of our resources.

Chairman FASCELL. So, 97 percent of your resources, by whatever measurement, more or less—and I am not trying to establish a specific—is spent on intelligence-gathering, which is your primary function?

Judge WEBSTER. Gathering and analysis, yes.

Chairman FASCELL. And dissemination within the Government to the proper authorized people?

Judge WEBSTER. That is correct, Mr. Chairman.

Chairman FASCELL. This bill does not touch that in any way?

Judge WEBSTER. No, it does not.

Chairman FASCELL. So we are dealing with 3 percent of your activity; that is covert operation. That means, according to your definition, something other than intelligence-gathering. It has to do with the implementation of a foreign policy decision?

Judge WEBSTER. That is correct, Mr. Chairman.

Chairman FASCELL. Now, in that case, the present law—not this bill—the present law requires you to notify whom?

Judge WEBSTER. In reference to covert action?

Chairman FASCELL. Yes, sir.

Judge WEBSTER. It requires that the Intelligence Committees be notified, Mr. Chairman.

Chairman FASCELL. And the law says in timely fashion, does it not?

Judge WEBSTER. Yes, it does.

Chairman FASCELL. That is a subjective judgment left to the President?

Judge WEBSTER. My reading of the legislative history at the time was that it was purposefully flexible or ambiguous and it is in the President's discretion, but I do not believe it is in his uncontrolled discretion.

Chairman FASCELL. Well, I like that phrase. I don't know how you can control a president. We have tried, goodness knows.

But it does say in a timely fashion. I would assume, although reading the language, that would mean whatever the President decides is timely. Don't you agree?

Judge WEBSTER. I think it comes pretty close to that. But certainly when there is substantial disagreement with that conclusion, at some point that decision is reviewed. But at least initially it is his call.

Chairman FASCELL. But the only place that a difference of opinion could exist with respect to that decision is within the Administration itself, because nobody else knows anything about it; isn't that correct?

Judge WEBSTER. That is true, until it becomes known.

NSDD DIRECTION 286

Chairman FASCELL. Yes. Well, you know, we don't run any newspapers. It is very tough for us to leak anything.

All right. Let's talk about NSDD Directive 286, which is an effort to correct some of the things that have concerned Members of Congress and an effort on the part of the Administration to tighten down with respect to the question of oversight and knowledge and consultation with regard to an operation by the intelligence community as distinguished from a normal intelligence-gathering function.

The directive is a directive issued by the President, is it not?

Judge WEBSTER. Yes, Mr. Chairman.

Chairman FASCELL. As you pointed out in your testimony, it certainly is different from a law.

Judge WEBSTER. That is correct, Mr. Chairman.

Chairman FASCELL. Those directives are normally highly classified, are they not?

Judge WEBSTER. Normally they are. This one is substantially declassified.

Chairman FASCELL. Well, that is so Congress would know you are making changes?

Judge WEBSTER. That is correct.

Chairman FASCELL. And therefore you undertook to give this a minimum of classification, to get the information out?

Judge WEBSTER. That is correct.

Chairman FASCELL. There is nothing wrong with that. I like that.

But generally speaking, with regard to operations that would occur under a national security directive, the directive itself would be highly classified?

Judge WEBSTER. That is correct.

Chairman FASCELL. To whom, to what committee of the Congress, would that directive normally go, if it goes to anybody?

Judge WEBSTER. It would normally go to the Intelligence Oversight Committees.

Chairman FASCELL. That is all; isn't that correct?

Judge WEBSTER. So far as I know, that is correct.

Chairman FASCELL. Now, the point you made about the fact that since Congress knows the policy, you directed that statement to this committee but you can enlarge it, since Congress knows what the policy is, as I understand the presumption in your testimony, why should Congress be concerned about the implementation of the policy?

Is that a fair restatement of what you are saying?

Judge WEBSTER. I am not sure that it is, Mr. Chairman. You are moving away from the NSDD onto a new subject. I want to be sure of that.

Chairman FASCELL. I am just saying if the NSDD is simply a means by which you carry out the implementation of policy, and since the Congress knows about policy, we have all the information we need, why are we so concerned about implementation of policy. That is the way I read it. That is the impression I get from your testimony.

Judge WEBSTER. No, I don't mean to imply that Congress has no concern with the implementation of the policy. I think it has every right to be concerned and to be reassured through the Oversight Committees that the implementation is taking place.

What I sought to say was that the NSDD goes beyond the existing statute and represents a presidential commitment to keep the Congress informed in a way that the Congress will understand.

Chairman FASCELL. I wasn't speaking of only this NSDD, I am just talking about NSDDs generally, when an operation is about to take effect or even a finding pursuant to an NSDD and whether or not that in some way flows to the Congress, it is my understanding that it does not.

I don't know how you get one of those, if it is highly classified. I assume—I don't know; I am not on the Intelligence Committee—I assume the Intelligence Committee, if they had some question about it or got a rumor or got a tip or whatever, they could ask to see one?

Judge WEBSTER. Yes, indeed.

Chairman FASCELL. But no other committee could have the benefit of that request because they have no oversight jurisdiction; is that correct?

Judge WEBSTER. That is correct, Mr. Chairman. But, of course, we have the Appropriations Committee and the Armed Services Committee. We have other committees who have monetary interests for which they require additional information. We try to supply it so they can make sound judgments.

Chairman FASCELL. That is a pragmatic necessity, is it not?

Judge WEBSTER. That is correct.

Chairman FASCELL. From the standpoint of the operation of the department and the government. You better talk to the Appropriations Committee and you better talk to Defense, because they are your friends.

I have a lot more, but I will stop now and let Mr. Broomfield take over for five minutes or so.

BROOMFIELD AMENDMENT (NOTIFYING ONLY FOUR MEMBERS OF CONGRESS INSTEAD OF EIGHT)

Mr. BROOMFIELD. Thank you, Mr. Chairman.

Director Webster, I want to thank you for the words of support in your testimony for my approach to congressional notification, especially for sensitive covert operations.

As you know, under the amendment I am going to be proposing to this bill, H.R. 3822, in markup next week, the President could in extraordinary circumstances notify only four leaders of Congress, rather than eight Members of Congress as currently provided.

The President could also delay notification, but only in an emergency constituting a grave and immediate threat to the national security. The President would also have to determine in writing that the situation requires postponing notification.

Now, the first question I would like to ask you is: The administration has certainly improved the notification process since you became Director. Nevertheless, would the administration support what I would consider a higher standard if it also gives the President some flexibility in difficult circumstances?

Judge WEBSTER. I am sure that your bill addresses the primary concern of the Administration with respect to the flexibility that is needed for those very rare circumstances.

I can't answer the constitutional question. I would have to defer that to the Justice Department.

SITUATIONS THAT MAY REQUIRE INFORMATION BEING WITHHELD

Mr. BROOMFIELD. Mr. Director, what sort of circumstances would, in your view, constitute an emergency in which notification could be delayed under this approach?

Judge WEBSTER. Under the approach in your proposed bill?

Mr. BROOMFIELD. Yes.

Judge WEBSTER. Life-threatening situations, I believe, of major proportions, would clearly fall within the provisions of the bill.

In trying to interpret it, I am unable to state with certainty whether an individual hostage situation would be covered by it. But certainly those situations in which major risk to American life was at stake would fall, I believe, within the provisions of your bill and could be justified on national security grounds.

Mr. BROOMFIELD. Approximately, if you know, how many incidents in the last 12 years would come under this category?

Judge WEBSTER. It is my understanding that we have had only three situations in which information has been withheld during that period of time. All three related to situations in Iran—two situations at the time of the Iran hostage-taking a decade ago, and more recently in the Iran-Contra matter.

Mr. BROOMFIELD. So this whole argument is really centering around—at least if you go back in history the last 12 or 15 years—about three instances?

Judge WEBSTER. That is correct.

Mr. BROOMFIELD. How long, in your judgment, would it be justified to delay in such circumstances?

Judge WEBSTER. Well, it has been my view that one way to approach it is whether the need to inform becomes more compelling than the protection of the lives or other national interests at stake.

I find it very difficult to measure it in terms of one day, two days, three days. I can think of very few situations in which more than a few days can be justified, but I can certainly think of at least one example in which deference would have to be given to the needs and wishes of foreign countries supplying important information of a life-saving nature on the condition that no others be informed, as was the case when the Canadians provided shelter for our citizens in Iran.

Mr. BROOMFIELD. Judge Webster, do you agree it would be preferable, in the extraordinary circumstances mentioned in the act, to limit notification to the four congressional leaders of both Houses, rather than to the eight at present?

Judge WEBSTER. With no disrespect for those who would be not included, any reduction in the number of people who need to be informed in order to provide the surrogate responsibility of Congress, I think is desirable.

ELIMINATING THE 48-HOUR NOTIFICATION REQUIREMENT

Mr. BROOMFIELD. Now, the final question I want to ask you is, you generally agree that this is a pretty darned good bill overall; is that correct?

Judge WEBSTER. Overall, with the exception of this provision.

Mr. BROOMFIELD. If the committee or the Congress—and we will probably have to try it on the Floor—if this 48-hour provision is taken out, in your judgment would the Administration support the bill?

Judge WEBSTER. I know of no reason why the Administration would not support it. Indeed, General Powell's letter indicates that this is the Administration's problem with the bill. All of the other problems have been very constructively addressed in the process of debate.

I would like to point out again how important I think the NSDD provision is, which is not in the bill but which I think really is the way you need to address these discretionary issues, the provision that requires reassessing it by the senior members of the National Security Council, the President, every ten days. That forces the issue out.

I think it was in Iran-Contra where they put it away and didn't look at it for ten months. This requires every ten days a consideration of whether or not it is time to tell the Congress.

Mr. BROOMFIELD. Mr. Armacost, do you agree with the position of the Administration that, if this 48-hour provision is deleted from the bill, in all probability the President would support it?

Mr. ARMACOST. I can't speak for the President, but I think the senior advisors would support recommendation of the bill.

Mr. BROOMFIELD. I thank both of you for your testimony.

Chairman FASCELL. Mr. Hamilton?

Mr. HAMILTON. Thank you very much, Mr. Chairman. We are very pleased to have these distinguished witnesses with us.

Director Webster, I noticed your emphasis several times on limited delay. You have that phrase in your statement when you are speaking about the notification provision.

You have made changes and I think those changes have been significant and helpful. The question is: if a President of the United States wants to delay notice to the Congress under the present law and under the NSDD that you have described and if he wants to delay for a year, he could do so, could he not?

Judge WEBSTER. He could. That is theoretically possible for him to do so. But I have never been able to formulate a circumstance that would justify that kind of delay and I cannot conceive of the process as laid down in the NSDD permitting that to happen, because your senior advisors have got to go along with that, including the Director of Central Intelligence.

Mr. HAMILTON. I appreciate that, Mr. Director. But the fact is the President did delay in one instance, in a very recent instance, for ten months, and he only then made it known to us after a Lebanese newspaper revealed it.

So, if a President wants to delay under the present procedures, he may do so, it seems to me, even with the review provision which you have cited, and that causes me a great deal of concern.

I also wanted to check with you with regard to your handling of the NSDDs. You said a moment ago, I think, that those are made available to the Intelligence Committees. My recollection is that they are not made available to the Intelligence Committees.

NSDD'S AVAILABILITY TO INTELLIGENCE COMMITTEES

Mr. ARMACOST. I think, as I understood it, Mr. Webster was referring to findings——

Mr. HAMILTON. Well, I may have misunderstood. My understanding was that you said NSDDs were made available to the Intelligence Committees. That may be the case now; it was not the case, I believe, when I was on the Intelligence Committee.

Judge WEBSTER. Mr. Hamilton, you are probably correct on that, and I may have misspoken.

Those are internal documents that relate to tasking of the Executive Branch of Government. But it is still my understanding that key NSDDs that relate to foreign policies or intelligence matters are communicated in one form or another to the Intelligence Committees, and I would be happy to respond more accurately on the record.

ADMINISTRATION'S VIEW ON CONSTITUTIONAL POWERS OF THE PRESIDENT

Mr. HAMILTON. Let me raise one other question. It is really the Justice Department's position, but also it is my understanding of the Administration's position is that it doesn't really matter what

you put into this bill so far as notification is concerned, because the President has an inherent constitutional right to withhold information from the Congress. Now, that right may be more precisely defined as under extraordinary circumstances or something of the sort.

But if that is the position of the Administration, that a president, no matter what this bill says, can withhold information and can withhold notice, then this bill becomes almost a nullity, doesn't it, given this view of the Administration?

Judge WEBSTER. I am trying to avoid getting into the constitutional issue because I don't believe I am the proper person to raise that issue.

There are other analogous situations, for instance, the Foreign Intelligence Surveillance Act, in which the Chief Executive did not acknowledge that he was bound to observe the requirements of the Phizer Statute but agreed to do so, and his successor has followed suit.

So I don't know what the position of the Administration would be with respect to a constitutional issue if, in fact, the President signed such a bill.

Mr. HAMILTON. Do you think I am misstating the Administration's position with regard to the President's constitutional powers here?

Judge WEBSTER. I don't think you are misstating it as far as the Administration's position with respect to his powers. I am not sure you have accurately stated the Administration's position if the bill is passed.

Mr. HAMILTON. One other thing. It seems to me we have to look at this bill in the context in which it occurs. The context is that over a period of time we have had deep suspicions in this body about the operations of the Central Intelligence Agency—the residue of Iran-Contra, the lack of trust and all the rest—and I must say I think Mr. Broomfield is correct when he commends you for the work you have done, and I commend the President for the steps he has taken to try to correct these problems.

But what stands out, when you look through the steps you have taken, is that all of them could be abolished with a signature from the President. The NSDD expires when the President's term expires. He could change it tomorrow and not notify the Congress. We wouldn't know anything about it. He could just completely wipe out these changes that you have mentioned.

So while I commend the Administration for the steps that have been taken, and you specifically for the steps you have taken, I am bothered that these changes could just be abolished at will, without the Congress ever knowing it.

In that situation and in that context, it seems to me that a law is appropriate to deal with the problems we have had in the Congress with your agency and with the Administration. Like so many things that require a judgment, where you have to balance different factors, on the one hand you have got the bill which does put some restrictions on a President. He has got to notify within 48 hours in this particular provision that concerns us. You have some harm—I suppose that some risk may be present from the fact that

you make a disclosure to four or eight Members of the Congress. But I must say that that risk appears to me to be extremely small.

If this bill provided that the administration has to notify 535 Members of the Congress, I would agree with you. But what you are saying, in effect, is that we don't trust the leaders of the Congress, we do not trust the Speaker of the House, the Majority and Minority leaders, to keep information.

That is an extraordinary claim. We are not talking about the rank and file Members of Congress here; we are talking about the leadership of the Congress, and a very few of them. That is the risk, on the one hand, and that has to be weighed against the value of consultation and independent advice that the President would receive if he gives prompt notice, prior notice in most cases, notice within 48 hours.

I can recognize where there is a problem in balancing these risks, if you would, but also benefits. I just come down strongly on the side that the benefits, here outweigh what I see as small risks: the risk of leaking to respected leaders of Congress and the risk of the most minimal kind of restriction, it seems to me, on a President's flexibility, and that is that he notify within 48 hours.

JUDGE WEBSTER'S POSITION ON 48-HOUR RULE

Judge WEBSTER. Mr. Chairman, if I may respond to Congressman Hamilton's observations, I certainly do not, by my position on the 48-hour rule, mean to imply any lack of trust in the leadership of Members who are presently covered by the statute. That is not my concern, even though I don't read in the statute any limit on their ability to further communicate anything that we communicate to them. So there is that possibility there.

You do not really address, as I listen to you, the problem which is real, that others supplying us information may condition that information on our not telling anyone else, as occurred in the Canadian situation.

As I travel around the world—and I have visited 15 countries in the last year—the one concern they have as they look at our system is the ability to share information with us and under circumstances where it will not be communicated elsewhere. I don't know what we do in that situation, which has already once occurred, where a country has declined to let us communicate. What do we do then?

Mr. HAMILTON. Mr. Director, I do not think we can let a third country dictate the constitutional processes of the United States Government.

If a third country is going to say to us, we are only going to cooperate with you under the following conditions, and these conditions we think run contrary to our view of how our government ought to operate, I don't think we can accept those kinds of conditions.

If the Canadian Government's position in the case you are saying is we don't want to share information with the Congress—that was the way the Canadian Government stated that position—I agree with that position. I wouldn't want to share the information with the entire Congress either.

But that is not what we are asking for here. We are asking for very, very limited notification by the President to a handful of people. If the Canadian Government or any other government says we are not going to give you this information because we don't trust these four leaders of the Congress, or eight leaders of the Congress, then I think that is a condition that is unacceptable to us.

That is my attitude.

Chairman FASCELL. Mr. Leach.

PRESIDENTIAL SIGNATURE

Mr. LEACH. Well, thank you, Mr. Chairman.

Let me just begin with the preface I think I share as much as any Member of Congress the concern that covert actions have been a little overused in the last several decades, and I also believe we ought to be pinpointing, as much as possible, accountability within Government.

But I am troubled by aspects of the bill. The one is the 48-hour notification, and I think Judge Webster has indicated several very valid concerns; the second, which is a very interesting and novel departure that I would like your comments on, involves presidential signatures.

There are two dimensions of it: one, there is a requirement that the presidential finding be in writing and signed before action is commenced, and, second, there is a requirement that a copy of the finding bearing the president's signature be transmitted to Congress at the time of the notification.

My concern is twofold on this signature issue. In the first instance it sounds like a very realistic way of demanding accountability within the Executive Branch, but on the second hand, because some of these types of operations have a dimension that isn't a happy one, that is, they are aggressive, you place the President of the United States on line as personally being the initiator, not the Government of the United States. It becomes a personalized act.

When you have a personalized act rather than a government act, you might well have a temptation on the other side, if these things ever become public, that you will have a personal response.

Are you placing, for example, the President of the United States of America in a more vulnerable position to assassination?

The second aspect is, you look at this very precise way of defining accountability with the presidential signatures and notification to Congress—that is another place for the signatures to reside—I think there would be a tendency of the Executive Branch to move away from formulation in the formulation of policies, that is, there would be a tendency where it would be obvious in everybody's mind the Iran-Contra affair, where some of the discretion for action was taken away from an institutional bureaucracy, the one you headed, into a new bureaucracy within the National Security Council, and partly with the understanding that people in that environment were told that we don't really want to know everything that is happening, just to get the job done.

So what I am suggesting is do you have a problem with the signature element? Is that a real thing from your perspective, or is

that a non-problem? And do you think that it should be modified in any way?

Judge WEBSTER. We haven't taken a position on the signature problem. I think that that was an outgrowth of the Iran-Contra hearings and recommendations from various groups that looked at it and wanted to make certain that the President was in fact making a particular finding.

It is a step back from some of the procedures that have been in place in the past to insulate the President from the kinds of adverse circumstances to which you refer.

I am not aware that the President personally objects to those provisions.

Mr. LEACH. Let me go on further.

One of the things that has been indicated by several people earlier, and I just think it can't be stressed enough, is this difference between the President's policies and procedures. This is an effort to change procedures, but the policies and the people have already been changed, and I think they are more important in this particular instance.

Everyone I know of has the deepest respect for what you are trying to do at the agency, and I think all of us have to acknowledge that. But I think we should recognize that implicit in this bill is something, a kind of presumption, that I am not convinced by. The presumption is that because several Members of Congress will be notified at some point in time, that these individual Members of Congress will bring a great deal of perspective to bear that will be very helpful.

It is my sense that realistically if one were to put a restraint on covert operations, one would put a requirement, for example, that the Departments of State and Defense would have to sign off at the highest levels on each of these operations because that is where the kabosh occurs.

I have never specifically known of an instance where the wisdom of Congress has put a kabosh on these instances. Congress has a tendency to be totally and utterly cooperative in these circumstances.

The signature issue, it strikes me, is one that is designed as a personal embarrassment to the President, either in an international context or in a presidential campaign setting or partisan setting. So I have concerns about that.

But most of all, I am concerned with the presumption that we are dealing with a problem by simply notifying a few people. I have never known that to occur.

Do you have any experience that would indicate to you that that would likely deter serious decisionmaking within the Executive Branch?

WOULD NOTIFYING A FEW LEADERS EFFECT THE DECISIONMAKING PROCESS

Judge WEBSTER. Your question is whether notification——

Mr. LEACH. Yes.

Judge WEBSTER. In most situations I think we benefit from getting reactions of members of the Oversight Committees to particu-

lar findings. It is, in my view, a kind of insurance policy that what we are doing makes some sense. I am not talking about potential partisan differences, matters of disagreement with policies. But it is often helpful and reassuring to know that the professionals have not taken leave of the realities of day-to-day life, and I think the committees have a potential to make a substantial contribution there.

Whether the one or two people who are given the notice supply that additional wisdom is something I can't say, but at least we would be required to expose them to a reaction and we would have to listen to the reaction, although it might not change the result.

Mr. LEACH. Well, Mr. Armacost, as to some institutional checks and balances that occur on covert decisionmaking within the Executive Branch, do you think it would be realistic to attempt to modify this legislation in any way, to legislatively prescribe that the Department of State be integrally involved in covert decisionmaking?

Mr. ARMACOST. I believe, Mr. Leach, an earlier version of the House bill did include an effort to specify the Executive agencies that had to be involved in the decision, and we took exception to that on constitutional grounds, and that it was inappropriate for Congress to identify those elements within the Executive Branch that had to be involved in a presidential decision.

I would only add that the changes now in the Executive Branch procedures that Director Webster described I think have assured against the kind of problem that occurred in the Iran-Contra episode, where the Secretary of State and Secretary of Defense were not involved subsequent to earlier deliberations, did not see the finding in written form and therefore to some degree lost the opportunity to inject balance and foreign policy contributions as the program was implemented.

We do believe the procedures have had a salutary effect.

Mr. LEACH. I would just ask for one request, if I could. Could you respond in writing to the committee on your consideration of the signature issue and whether or not you believe it should be modified in any way?

Mr. ARMACOST. Surely.

Judge WEBSTER. We will do that.[1]

Chairman FASCELL. Mr. Solarz.

NUMBER OF EXECUTIVE BRANCH PEOPLE INVOLVED IN ISSUING A FINDING

Mr. SOLARZ. Thank you very much, Mr. Chairman.

Judge Webster, are you in a position to let us know, generally speaking, how many people within the Executive Branch are involved in the process of advising the President with respect to whether or not to issue a finding, and how many people in the Executive Branch, generally speaking, are aware that a particular finding has been issued?

Judge WEBSTER. If I can walk you through a typical example, normally the covert actions do not originate within the Central In-

[1] Webster's written views on signature issue requested by Cong. Leach appears in app. 8.

telligence Agency. They are usually requested, although not in specifics, through another branch, but most likely the State Department, when normal overt foreign policy efforts are not adequate to achieve the foreign policy objective.

We then internally develop some ideas and stratagems which are vented through a subgroup of the National Security Council called the Policy Coordination Group, the PCG, which includes senior members of key departments, Defense, State and so on. That is a very small group. Then it comes back for a refining. A finding is prepared within the Central Intelligence Agency and is submitted to the National Security Council Planning Group, consisting of the heads of the major departments.

All of these are people who know, if that is what you are saying.

Mr. SOLARZ. That includes the President, Vice President, Secretary of State, Secretary of Defense, the DCI——

Judge WEBSTER. Joint Chiefs of Staff and Attorney General and——

Mr. SOLARZ. So at a minimum they are all aware that a finding has been issued, if it has been issued?

Judge WEBSTER. That is correct.

Mr. SOLARZ. Mr. Armacost, let me ask you, is it your impression that when a finding is under consideration—and the Secretary of State is, of course, a part of this National Security Planning Group—is it generally his practice when he goes back to the Department to consult with the key people within the State Department who would be in a position to bring relevant judgment to bear on the merit of this proposed finding, in order to determine whether they think this is in the best interests of the country? Or does he handle this exclusively by himself, without any effort whatsoever to solicit advice from relevant people within the Department?

Mr. ARMACOST. No, no. He would normally consult a handful of people.

Mr. SOLARZ. So if the Secretary of State consults a handful of people, the Secretary of Defense does also, and so on and so forth, which means that exclusive of who knows or who doesn't know in the Congress, there is a not insubstantial number of people within the Executive Branch who are aware of these findings.

Judge Webster, based on your experience, do you think that the Executive Branch is from time to time responsible for leaks concerning covert activities?

NUMBER OF LEAKS BY EXECUTIVE BRANCH

Judge WEBSTER. Well——

Mr. SOLARZ. Or do you think the leaks that have taken place emanate only from Congress?

Judge WEBSTER. Well, clearly the Executive Branch has supplied a number of leakers, at least equal to those in Congress.

If you ask it with respect to covert actions, I have no specific knowledge that comes to me at the moment. I would not be surprised to find that there have been those on the Executive Branch who have given away some information about covert actions.

Mr. SOLARZ. I understand that your predecessor, Mr. Casey, indicated in his view that the Executive Branch was responsible for many leaks in the House Intelligence Committee, which had an impeccable record, I am told, in not divulging this information in an unauthorized fashion.

But I would like to ask you a question about what seems to me to be the gravamen of your objection to this bill. You point to the problem that might be created if a foreign government whose cooperation we seek in some kind of covert activity were to say to us that its willingness to cooperate is contingent upon our not notifying the Congress, even though under this legislation congressional notification is limited to a handful of congressional leaders. Therefore, this legislation might potentially render the cooperation of this country impossible to obtain.

The problem I have with that argument, which has been explained very eloquently by Mr. Hamilton, is that we would be permitting a foreign government to determine how we conduct our internal procedures.

But supposing that same government said to us, "Look, the State Department leaks like a sieve. There are dozens of examples of reports in the press that were supposed to be confidential that come from the State Department. We are willing to cooperate with you but only if the Secretary of State is cut out of the loop, because if he is included, he is going to consult with people in his Department and information will be leaked." Maybe the same thing will be said one day about the Secretary of Defense, and maybe there are leaks from the office of the Vice President. I have even heard it said that from time to time there are leaks on the NSC.

Now, under the logic which you have advanced against this bill, which would require consultation with a limited number of Members of Congress, we would, by the same logic, have to cut out of the loop any of the key people in the Executive Branch the foreign government objected to.

I would like to know what you would do under those circumstances. Would you say to Canada or some other country that insisted we not inform the Secretary of State or the Secretary of Defense or the NSC or the Vice President that we will accept their conditions? Would you tell them that is not how we do business and we can't make a decision like this without the input from these people?

FOREIGN GOVERNMENT'S INSISTING NO ONE ELSE BE CONSULTED

Judge WEBSTER. Well, I am sure the latter is what we would have to do.

We are dealing with a very small, narrow set of circumstances, which have only occurred three times in terms of delayed notice and one time with respect to a country's demand for not sharing information.

We are successful where we need to be in communicating information to the Secretary of State directly under circumstances in which he must necessarily limit further dissemination, and we have done that. I suppose that that would be the answer to the objection.

I have trouble dealing with hypotheticals——

Mr. SOLARZ. If this legislation were enacted, couldn't you give the same answer to such an objection with respect to informing the Congress?

Judge WEBSTER. We could, Mr. Solarz. It would still leave open two questions: one, whether the foreign government would accept that—and, of course, what they are doing is offering help and refusing that help if we don't comply with their rules, so it is not a question of having them dictate our procedures; and the other one is a constitutional issue which I prefer not to address myself, but it is still there.

CONSTITUTIONAL ISSUE'S INVOLVED

Mr. SOLARZ. I think the constitutional issue is a very important one and I hate to see us get involved in the same kind of situation we are involved in with the War Powers Act where we have legislation on the books and the Congress expects it to be adhered to but the President takes the position that it is unconstitutional and doesn't carry it out.

Would you or any of your legal advisors present be in a position to let us know whether or not, if this legislation in its current form is enacted, the President would comply with the law by notifying the congressional leadership specified in the bill within 48 hours that special activities were underway or were contemplated?

Judge WEBSTER. I think that entire question has to be referred to the Justice Department, Mr. Solarz. I have no personal knowledge of it.

Mr. SOLARZ. Mr. Chairman, I think this question, which was also raised by Mr. Hamilton, is a very important one, and I would hope that we could arrange to get an answer from the Administration whether it is from Justice or whomever, before we proceed. I think it is essential to know that there would be presidential compliance with the legislation, and if there isn't going to be presidential compliance with the legislation, then perhaps we need to consider some provisions designed to elicit it.

Chairman FASCELL. Well, if the gentleman will allow me to respond, if we don't have something from Justice we will certainly seek it. But nevertheless I would be guided by the constitutional requirement that the President faithfully execute the law.

Mr. SOLARZ. Judge Webster, can you undertake to use your influence to get us a response from the Administration on this?

We want to know whether the President would carry out the law or whether he would refuse to on the grounds that it violates his constitutional prerogative.

Mr. HYDE. Would the gentleman yield?

Since our Supreme Court does not give advisory positions, I doubt whether the White House would be similarly bound.

Judge WEBSTER. I am not sure what kind of influence I have in this area, so I think the Administration will be made aware of your concern about this issue.

The President has indicated that lack of flexibility would not be acceptable to him in terms of addressing a bill presented for his signature. But I can't take it beyond that point.

TIMELY NOTIFICATION AS OPPOSED TO A RIGID 48-HOUR RULE

Mr. ARMACOST. Could I comment?

I hope the issue wouldn't be phrased as one on withholding information from Congress. I think, as Mr. Hamilton was saying, there is an inherent tension between your requirements for accountability in this area and the requirements that the President conduct foreign policy, and we have been trying to find some practical way of managing a very sensitive subject.

Nobody on our side rejects the notion of timely notification. The question is whether a rigid 48-hour rule should apply in every instance, and whether there can be foreseen occasions, in extreme cases where that should not be the rule. I think that is the question.

I think honorable people will disagree on whether that is the line we ought to strike. It is whether or not the 48-hour rule is appropriate.

Mr. SOLARZ. I think the reason we have a 48-hour rule is that timely notification in the Iran-Contra affair was apparently defined to be of an indefinite duration. It went on not for hours or days or weeks but for months, and could have gone on for years. I think that is the problem we have.

EXAMPLES WHEN 48 HOUR NOTICE HAD NOT BEEN GIVEN

One final question, Mr. Chairman.

Other than the effort to rescue the hostages in Iran, which has been referred to under the Carter Administration in your testimony, are you in a position to give us any examples, in closed session if necessary, of any covert activities in which we have engaged over the last eight years, which we would not have been able to have engaged in if this proposed legislation had been the law of the land and notification of the finding had been obligatory to the congressional leadership within 48 hours?

Judge WEBSTER. I think the answer has to be no, those are the only three situations in which notice I think well within the 48-hour period was not given to the Congress.

Mr. SOLARZ. Thank you very much.

Chairman FASCELL. I would say to the gentleman from New York that we have nothing in writing in the Foreign Affairs Committee.

I don't know whether this is still the policy of the administration, but on May 10th Colin Powell, Assistant to the President for National Security Affairs, wrote to the Chairman of the Intelligence Committee, with attachments which included the definition of "covert action" and some amendments to the bill that they suggested.

In that letter in part he says,

> It should be well understood that the President's senior advisors will recommend a veto of legislation containing such an absolute reporting requirement because such a requirement encroaches upon the President's constitutional authority.

I don't know whether they talked to the White House lawyer or whether they talked to the Justice Department, but be that as it may, that is the position they have taken. I don't know how legal it is.

Without objection, we will put the full letter in the record to go with the attachment so that everybody can read it.[1]

CONSTITUTIONAL QUESTION OF THE LEGISLATION

Chairman FASCELL. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Judge Webster, this statement is contained in the Congressional Record in debating this companion legislation in the Senate, and this is by Senator Cohen, who is the chief sponsor, although Senator Boren's name may be first, but as I read this, Senator Cohen is the driving force.

Director Webster has recently testified before the House Intelligence Committee that the notice requirements in S. 1721 do not, in and of themselves, place undue burdens on the intelligence community. Furthermore, Director Webster has not endorsed a Justice Department statutory and constitutional interpretation.

Is that a correct statement?

Judge WEBSTER. I think, if not inaccurate, it is misleading because, first of all, I have avoided a participation in the constitutional issue because I believe that should be addressed by the Justice Department. Indeed, it was addressed in a letter to the House Permanent Select Committee on Intelligence in a letter dated June 9, 1987. I don't know whether it is a part of this committee or not, but I have a copy of that.

On the issue of the 48-hour rule, I have pointed out in testimony the same kind of situations that would be very difficult for us if we were confronted with an outside offer of help which was conditioned upon giving notice of the kind that is contemplated by the bill. We have had very few situations in our experience where we could not provide that 48-hour notice.

It has been my position that, with the constitutional question creating unnecessary tension between the Congress and the Chief Executive, and the Chief Executive publishing a national security decision directive which represents his commitment to make notice within 48 hours except in those very extraordinary circumstances and to review any decision to delay notice to ten days, that legislation in this area is not necessary.

That has been my position.

48-HOUR PERIOD FOR NOTIFICATION

Mr. HYDE. I quote further from the distinguished Senator from Maine,

The only thing we have added is the 48-hour notice. I picked that 48-hour period, as I indicated before, because Mr. Gates, Mr. Webster and Mr. McMann have indicated that is entirely reasonable. That is the practice. That is why we put it in the bill.

I assume, from your testimony today and the testimony I have heard you give before, that you do not agree that 48 hours as an inflexible statutory mandate is something that you support.

Judge WEBSTER. That is correct.

Mr. HYDE. Now, let me read a couple of sentences to both of you witnesses, Mr. Armacost and Judge Webster.

[1] Letter referred to appear in appendix 2.

As the committee knows, covert activities have become numerous and widespread, practically constituting a routine component of our foreign policy.

Do you agree with that, Mr. Armacost?

USE OF COVERT ACTIVITIES

Mr. ARMACOST. No, I don't, nor should they be. They should be an unusual instrument that is employed when there are special circumstances requiring plausible deniability.

Mr. HYDE. I understand that. But there is a flat statement made by a very distinguished witness who says that "covert activities have become numerous and widespread, practically constituting a routine component of our foreign policy."

I say that is way overstated. Would you agree with that?

Mr. ARMACOST. I would.

Judge WEBSTER. Yes, I would agree with that.

Mr. HYDE. On this sentence, "I believe that covert activities have harmed this country more than they have helped us," is it possible to make a judgment like that and, if so, would you agree with that, bearing in mind that our successful covert activities never get publicized or we learn about it years later, if at all?

Judge WEBSTER. There is some truth to the statement that when our covert actions fail, they are likely to cause a good deal of harm because of the reaction by the press and by the Congress and other parts of the world.

This is not to say, however, that it is not necessary for the United States to have such a capability. In many parts of the world we work with countries and with groups within countries to which, from the perspective of those friends, it is important that the role of the United States be identified, for very legitimate reasons.

So it is important that we have that capability in order to supply aid to our friends in implementation of our foreign policy.

CONSTITUTIONALITY OF BILL

Mr. HYDE. I see my friend, Mr. Hamilton, is leaving. I wish he wouldn't.

Lee, I am going to talk about something you said and I would like to have you here.

Mr. Hamilton said that we can't let a third country dictate the constitutional processes of our government. That assumes that this bill is constitutional. I don't assume that at all. I think it is very questionable that it is constitutional.

I would like to give you a statement made by Eugene Rostow, Sterling professor of law emeritus and senior research scholar at Yale Law School, who is known to all of us.

He quoted Congressman Hamilton and said he was commendable and frank in his testimony on February 24th of this year when he said, and I quote,

Now we are told by the Administration that "timely" means whatever the President says it means and that he can withhold notice as long as he wants. If we let this interpretation stand, an interpretation that says that the President can withhold information from Congress at his discretion, then Congress will have weakened seriously its oversight capabilities and consented to a basic shift of power away from Congress to the Executive. Once this power to withhold information from Congress is granted to the President, how can it then be maintained that Congress stands equal in power to the President?

Now, Professor Rostow responds to that,

> But Congress and the President are not constitutionally equal in power with respect to all aspects of the making and conduct of foreign policy. Congress has enumerated legislative powers. The President, the executive power. In some areas Congress is clearly supreme; in others, the President. Only Congress can appropriate money, declare war and enact laws. Only the President can nominate and remove high officials, recognize foreign governments and conduct foreign relations. (What ever happened to the Logan Act?) In all areas, however, cooperation between Congress and the President is necessary if our complicated government is to function. But cooperation is not a simple rule of thumb equally applicable in every case and it is not a matter for legislative timetables. The timing and sequence of that cooperation must be flexible and responsive to circumstance. Its success depends ultimately on the political insight and intuition of the chief participants in the process.

Would either of you or both of you agree with that statement?

Mr. ARMACOST. I certainly would.

Judge WEBSTER. I have no trouble with it.

Mr. HYDE. Now, I want to——

Mr. HAMILTON. I wonder why they are so anxious to comment on that constitutional question when they wouldn't comment on the constitutionality of the bill? [Laughter.]

Mr. HYDE. Perhaps I asked a leading question. [Laughter.]

I want to pose a hypothetical that is very important and I want to insist that it is hypothetical, and if I name countries, these are absolutely fictional, not true, hypothetical, but to give some substance to my hypothetical I must do that.

Now, it is learned through a highly placed source that the Iranian ambassador to the U.N.—I insist this is fictional—has a cache of a biological agent that, if released, will destroy New York City and six million people. The Tunisian delegation has access to the Iranian ambassador—fictional, again, I insist—and his quarters, and has indicated a willingness to take whatever steps are necessary to neutralize the biological agent but requires ongoing intelligence and logistic support from the FBI and the CIA.

The Tunisian ambassador insists no one be notified beyond the President and the Director of the FBI as to what is underway, and a leak of this would panic a whole nation.

What do you tell the Tunisian ambassador? Do you tell him, sorry, Mr. Ambassador, we have to tell at least Speaker Wright and Senator Byrd about this within 48 hours, we have got to do it, that is the law, we don't want to be impeached and don't want to be a scofflaw, so just what do you do?

How do you deal with it? You can't under this law. And if this is the law, the cooperation of other countries, indispensable to sometimes very life-threatening situations, will be forfeit. That is why it is bad and it is dangerous.

I just throw that hypothetical at you. You don't have to deal with it. I am sorry I mentioned the names of countries; it could have been the PLO or Syria or anything. But it can happen, because biological warfare is a reality.

But I must say, we are playing with the very existence of our country by forcing, into a mechanical mold of 48 hours, the President to do something that he may not be able to do because we have to work with third-party countries. We have to work with them; they may be the only people available.

This is very foolish legislation for our own interest. There is so much more, the constitutional issues are profound and important and so misunderstood.

The Chairman said if you don't own a newspaper, you can't leak. I have just read Woodward's last book and tried to figure out how many hundreds of leaks are in there. Of course, "none of them came from Congress." We have serious problems in this country, and overreacting to Iran-Contra to force President Dukakis, President Jackson or President Bush into 48-hour notification, no matter what the covert activity is, is self-defeating, I think.

Thank you, though, for listening, and I know you are pleased you don't have to answer that hypothetical. I will ask Mr. Clifford the answer to that when his turn comes.

Thank you.

Chairman FASCELL. Mr. Director, you made reference to a letter from the Justice Department to the Permanent House Select Committee dated June 9, 1987, which addressed the constitutional issue. We are not the recipients of that letter and don't have the benefit of their wisdom. If you have got a copy of that letter, it would be nice for us to have it for the record, although I at least strongly disagree with it.

Judge WEBSTER. I will be happy to leave one with you or supply one to you.

Chairman FASCELL. Thank you. Otherwise, we would have to spend a lot of time getting a copy of a letter that wasn't addressed to us, and we appreciate your cooperation.

[The information follows:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 9, 1987

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

Dear Mr. Chairman:

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

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

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

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

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

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

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

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

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

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

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

> No funds appropriated under the authority of

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

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

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

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

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

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

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

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

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

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

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[1] Cont. to subordinate executive branch officials.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

John R. Bolton
Assistant Attorney General
Office of Legislative Affairs

Chairman FASCELL. Mr. Berman?

Mr. BERMAN. Thank you, Mr. Chairman.

Judge Webster, I have a number of different areas I would like to cover in my five minutes and so, understanding that, I hope you will bear with me and I will try to be brief.

First I would like to pursue this question of the constitutional issue raised by the Administration.

Is there any question but that it is appropriate in the Administration's view, constitutional, for Congress to require that before a covert operation is undertaken there be a presidential finding?

Judge WEBSTER. Not in my mind.

Mr. BERMAN. How about that the finding be reduced to writing either contemporaneously or within 48 hours where time is of the essence?

Judge WEBSTER. Well, I slipped, getting on the slippery slope of giving constitutional opinions, and I would like to avoid that. I don't have any practical problem with it. If you could put it on the basis of practical issues, we can do it.

Mr. BERMAN. Here is our problem. The Administration, I gather, is asserting three reasons for urging us to defeat this legislation.

One is the third-country matter, which I think has been effectively responded to by Mr. Hamilton and Mr. Solarz. The second is this question of the expanded potential for unauthorized leaks.

But my assumption—and correct me if I am wrong—is that there is absolutely no evidence that there has been any unauthorized disclosure of a covert operation, prior to completion of that covert operation, as a result of the notification required and undertaken by the Administration to the Intelligence Committees during this Administration.

Could we establish that for the record? I have been told there is no dispute about that, but I think it would be good to get that on the record.

UNAUTHORIZED LEAKS

Judge WEBSTER. I would rather respond to that for the record. That is a pretty sweeping statement and I don't know that I am in a position to give it to you off the top of my head. I can't identify in my mind.

Mr. BERMAN. Let me ask the question as precisely as I can.

There is no instance in which—it is my understanding, and I would be interested in knowing if this is the Administration's understanding as well—that there is no instance in which advance notification of covert operations has resulted in advance disclosure by virtue of the briefings to the Intelligence Committees or to the group of eight.

Judge WEBSTER. I believe, although I can't say that I know—I believe that that statement is correct. There have only been three situations in which notice was not given.

Mr. BERMAN. Well, in the cases where notice has not been given, there has not been unauthorized disclosure by virtue of the notification to Congress.

I am talking about the instances—Mr. Hyde says it hasn't been that many, but I am talking about where there has been notifica-

tion to Congress, and my understanding is that there is no evidence of unauthorized disclosure as a result of those notifications.

Judge WEBSTER. Well——

Mr. BERMAN. There was once a threat which was never carried out, but there has been no such disclosure?

Judge WEBSTER. I think that is generally true. I am trying to think in terms of over time. It becomes an awareness of some of these covert actions, people talk about aspects of them, but whether they come from——

Mr. BERMAN. I am speaking prior to the time the covert operation was completed.

Judge WEBSTER. I think your statement is probably true.

WHAT SHOULD BE THE TIME RESTRICTIONS PUT ON THE ADMINISTRATION TO NOTIFY CONGRESS?

Mr. BERMAN. As I understand it, the issue is not whether Congress should be notified, but what kind of restrictions to put on the Administration in terms of time.

There is an acceptance that Congress should be notified of all covert operations; is that a fair statement?

Judge WEBSTER. I think that is fair.

GENERAL NOTIFICATIONS REQUIREMENTS TO CONGRESS

Mr. BERMAN. Well, we have started going down that slippery slope that I hope to pursue with you, but I think, given where my time is, rather than pursue that I would like to move to another subject.

In legislation which Mr. Hyde and I sponsored which has passed the House, dealing with arms transfers to countries on the terrorist list, overhauling some of the general notification requirements in which we have worked closely with the Central Intelligence Agency and other parts of the Administration—and I think we have removed fundamentally any Administration opposition to legislation. We removed a provision which required the Intelligence Committees to be fully informed of arms transfers made as a part of covert operations.

It is my understanding, based on the discussions, that part of a presidential finding, part of what is notified to Congress will include any arms transfer component of a covert operation, any munitions item, that is the practice in the Intelligence Committee notifications and briefings.

Is that a correct statement of the practice?

Judge WEBSTER. I believe, if I understand your question, that it is correct.

The practice is to distinguish between lethal and nonlethal aid. The extent to which the finding actually specifies quantity or quality and so forth, I think we don't do that. But that is followed up in scope notes and other briefings to the Congress, to the Oversight Committees.

Mr. BERMAN. I want to make sure I understand, that when you notify, when you provide the prior notification required by the law, except under the unusual circumstances, that you provide notifica-

tion of a munitions list transfer as part of that covert operation as well, that that is the practice?

Judge WEBSTER. We call it lethal aid.

Mr. BERMAN. Lethal?

Judge WEBSTER. Yes. Yes, we do.

Mr. BERMAN. All right.

Mr. Leach raised the question of the advisability of submitting the formal presidential finding to the Intelligence Committees. Putting aside the question of the timeliness, as I understand it the national security directive provides for that transfer of the finding, of a copy of the finding, to the Intelligence Committees.

What would be the problem with including that in any statutory provision?

Judge WEBSTER. I am not objecting to any language of that kind and I don't believe the Administration is as such. That is—I think the earlier thinking, pretty much as Mr. Leach outlined, is an effort to keep it from personalizing and to try to insulate the President from personal responsibility for specific acts of conduct made pursuant to the finding.

But beyond that I don't know of any legal inhibition or prohibition and we have not raised objection to it.

Mr. BERMAN. You are requiring it by virtue of your own national security directive?

Judge WEBSTER. That is correct.

Mr. BERMAN. Thank you, Mr. Chairman.

NATIONAL SECURITY DECISION DIRECTIVE

Chairman FASCELL. Mr. Bereuter.

Mr. BEREUTER. Thank you very much for your testimony. I have been spending part of my time in waiting reading related extracts from NSDD 286. It would seem to me that this National Security Decision Directive answers many of the objectives that the administration seeks to obtain—maybe all of them.

One of the problems I see with the procedure of establishing NSDDs is that subsequently one can be issued which makes exceptions to them. For example, NSDD 286 could be modified as to the kind of notifications that Congress would receive. And, as someone else pointed out, we may not in fact know when a new directive is issued.

Now, if we are to avoid taking these actions by statute, can you gentlemen or anyone else in the Executive Branch give us some way of dealing with the possibility that these good procedures that are helpful to keeping selected Members of Congress informed will not be set aside with or without our knowledge?

Judge WEBSTER. Well, I think your point is very well taken and it highlights the real emphasis between trying to find legislative solutions to all problems which in effect then create problems of their own kind, such as Mr. Hyde talked about, and the expectations and commitments of the executives assigned to carry out those national directives.

I would not impute to the President the possibility that he might try to pull the blind down on this directive by some indirect and substitute national decision, National Security Decision Directive.

There would be no way for me to view it other than some act of deception.

And in my present capacity, and the commitments I made at the time of confirmation, I don't believe that I could accommodate to that, but I would never expect this President to do that nor would I be willing to accept that kind of conduct from any other President under whom I might serve. I would have a personal obligation to do something about it.

Mr. BEREUTER. Of course, I am trying to look at this under an institutional basis, regardless of who the President is at the moment.

I understood that some kind of oral assurance was given to the Senate Intelligence Committee on this very subject. I don't know that that is the case.

Judge WEBSTER. It started with a letter from the President to the Congress and was followed up then by a formal National Security Decision Directive.

I believe the President's commitment is there. And I do not believe he could or would attempt to change that commitment without a formal notification to Congress that he is operating under a different set of rules.

Mr. BEREUTER. It is true, isn't it, that the President can sign a directive or remove one from existence without any established group of people necessarily being involved? Could, with one person for example, decide to issue a directive which would have force? That is theoretically possible, isn't it?

Mr. ARMACOST. I believe it is.

Judge WEBSTER. Right.

Mr. BEREUTER. I would ask the Director, in your statement you said that you thought the definition of what constitutes covert actions in terms of a special activity as defined here "removes much of the ambiguity over what constitutes such covert action," and later you said a distinct improvement. Are those words of art or can you think of additional ways that this definition could be improved?

Judge WEBSTER. I think that is an improvement because it recognizes in a statutory way what we have had to depend on by way of legislative history for an understanding of a meaning for those terms, and makes it clear that it does include that legislative history.

Mr. BEREUTER. Do you think they are deficient in any way? Do you think the definition is deficient in any way?

Judge WEBSTER. I have no suggestions to make to improve it. I think we understand it, it is what we have been living under and it codifies on what to now has been based on legislative history.

Mr. BEREUTER. Mr. Secretary, do you have anything you wish to say about either question I have formulated?

Mr. ARMACOST. I think I would merely say, Mr. Bereuter, that the practices, which in my experiences endure from one administration to another, are practices which work and which enjoy, the support of those who have been actively engaged both on the Hill and the Executive Branch in managing those activities—in this case, sensitive intelligence activities.

I think, to go back to Mr. Hyde's question—and I am not a constitutional scholar and I think Bill Webster is prudent in leaving these matters to Justice—I would recall Edwin Corwin describe the Constitution as it applied to some areas as a standing invitation to struggle. I think it would be unfortunate if we got our attention diverted to the jurisdictional issues here rather than concentrating on ways to manage sensitive intelligence activities. It is my experience that over the last year and a half, people have learned the proper lessons from the Iran-contra episode. We have gotten better procedures in the Executive Branch. It is my impression that in the intelligence committees, a tremendous amount of information is shared and a good deal of confidence has been established in those procedures.

It seems to me it would be an unfortunate thing if we wound up inviting the kind of jurisdictional struggle that we have had in the War Powers areas in this area also rather than focusing on procedural arrangements that are working quite well, and that permit you to have oversight without encroaching upon that preserve of Presidential prerogative which Mr. Hyde was speaking of, and in his quotation from Jacques Rosseau.

I don't know that this can be fixed with absolute precision legislatively. I think what we agree upon and what we deem to be the normal rule, that is 48 hours, is reasonable, and this should underlie our common effort.

We would simply add that we can envision circumstances in which the exception would obtain and we don't want to make that a focus for a struggle between the branches; we want to concentrate on making it work, and I think it is working well.

NATIONAL SECURITY DECISION DIRECTIVES

Mr. BEREUTER. Thank you. Let me ask one more quick question. Pragmatically, what happens in a change of administration. Are the NSDDs automatically taken and re-embraced by the new President until such time that any changes are identified? Is that pragmatically what happens?

Mr. ARMACOST. Frankly, I would have to return to the record and provide a written answer.

I think by and large there is a re-look by a new administration at least when there is a change of party. As I recall in this administration, the first NSDD that was at least considered involved the procedures under which the national security system would work. Of course, those procedures are central to the management of intelligence operations. I expect that is the case.

I wish to have an opportunity to refer back to my colleagues and provide something for the written record.

[The information follows:]

Presidential directives (such as NSDD's) normally remain in force until they are formally revoked. This is also the case with new administrations. The directives are normally reviewed by the incoming President and remain in force until a decision is made on whether they should be terminated or modified.

Mr. BEREUTER. Thank you.

Judge WEBSTER. I can tell you from my own experience in a transition of administrations that we consider all directives to be in place until notified to the contrary.

Mr. BEREUTER. Thank you, Mr. Chairman.

Chairman FASCELL. Mr. Levine.

Mr. LEVINE. Mr. Chairman, I have a number of questions. However, in deference to the witnesses and the scheduling—and to our next witness who has been waiting for a long time—I will suspend and not ask questions of these witnesses at this time.

Chairman FASCELL. Well, we certainly can submit them for the record, Mr. Levine. I thank you.[1]

Any members who wish to do that, we appreciate it.

Chairman FASCELL. Mr. Weiss.

PREVIOUS TESTIMONY ON SUPPORT FOR 48 PREVIOUS-HOUR RULE

Mr. WEISS. Thank you, Mr. Chairman.

For the same reasons, I am going to limit myself to two very, very brief questions.

Mr. Director, these are addressed in light of the question Mr. Hyde asked about Senator Cohen's testimony that he arrived at the 48-hour notification time frame on the basis of discussions and testimony from Mr. Gates, Mr. McMahon, and yourself.

I ask you first in testimony before the Senate Intelligence Committee, John McMahon, former Deputy Director for Operations of the CIA, was asked if he supported the 48-hour requirement. He said,

> I do. I come from the position that the Intelligence Oversight Committee has to be an integral part of our intelligence program. I also believe very strongly it should have bipartisan support or it is eventually doomed for failure.

Are you familiar with that response?

Judge WEBSTER. I am familiar generally with Mr. McMahon's testimony and what he has told me with respect to that testimony.

Mr. WEISS. Do you deny that that was his response? Do you agree that was his response?

Judge WEBSTER. I don't have it before me, but it sounds like his response.

Mr. WEISS. It is my understanding that in your testimony before the Senate Intelligence Committee during confirmation hearings on your nomination as DCI, you stated that you couldn't conceive of a situation in which notice of a covert action should not be given to the intelligence committees within a few days of its initiation and if the President ordered you to do otherwise, you would resign.

Do you recall giving that answer?

Judge WEBSTER. That sounds like the substance of what I said.

Mr. WEISS. Thank you.

Thank you, Mr. Chairman.

Chairman FASCELL. Mr. DeWine.

Mr. DEWINE. Mr. Webster, what did Mr. McMahon tell you about that testimony?

Judge WEBSTER. He told me that he had come to the conclusion that whenever there was a problem of this kind that inevitably the

[1] See app. 8.

Agency became the fallguy for it and that from a parochial point of view, he thought that it wasn't necessary for the Agency to expose itself to this kind of thing because in almost every case, it was able to provide notice within 48 hours.

That was his view of it. He didn't address the constitutional question and I don't recall his having considered the outside circumstances, the rare circumstance.

He was tired of having the Agency——

Mr. DEWINE. Take the hit on it?

Judge WEBSTER. Right.

Mr. DEWINE. His perspective was called we say a more narrow perspective in that he was looking at it from the point of view of the Agency and did not look at the overall global view or some of the other possibilities?

Judge WEBSTER. I think that is correct.

Mr. DEWINE. There has been a lot of talk this morning about the fear that the Canadians had in regard to the embassy situation about leaks from Congress.

We certainly have talked a lot about that. I wonder, though, if in your experience other nations have expressed a reluctance to either engage in covert operations or maybe even share intelligence with the U.S. if Congress was notified? Is that a hypothetical problem we are talking about?

In your opinion, is it a practical problem?

Judge WEBSTER. No. It is a very real problem. It is one that I have had to confront from time to time with both expressions of concern and indications that certain kinds of information might not be available to us because of the perception that too many people are involved in preparing the pudding.

We ourselves have expressed reservations in other countries I would rather not name where those outside the intelligence community are—in that country are dipping into raw files and, therefore, exposing information we supply to ventilation outside the intelligence community.

It is an ongoing concern. Sometimes it is over-stated. We are dealing with perceptions often more than we are dealing with reality. But they do express it, and they exist in a somewhat different environment than we do.

When we try to give reassurances on this, I am not at all sure how much we are getting back. We get some tacit understanding but I am not sure we are getting the information.

Mr. DEWINE. Let me read, if I could, to you a quote from Admiral Stansfield Turner, former CIA Director. This was in testimony before the House Intelligence Committee.

In that testimony he argued that risk is the most important determination of when to notify the Congress of covert operations.

> The timeliness of notification is not measured by a clock. Timeliness should be measured by risk. When that risk to human life is diminished sufficiently is when it is timely to notify the Congress.

Do you agree with that assessment? Do you have a comment about that?

Judge WEBSTER. I think that is probably another way of saying what I said earlier. It is time to tell when the need to tell out-

weighs the reasons for not telling. It is a balancing process in which risk definitely plays a role.

There is no reason not to tell the Congress unless either there is a very substantial risk of life-threatening-type situation which you must keep to a minimum by confining those who know it or some restriction has been imposed by those offering the information on further dissemination.

CONGRESSMAN HYDE'S BILL PROVIDING FOR A JOINT INTELLIGENCE COMMITTEE

Mr. DEWINE. We talked a lot today about the potential of leaks. I wonder if you have had a chance to look at Congressman Hyde's bill which would provide for a joint intelligence committee, a smaller intelligence committee, smaller staff combining the two committees, the House Committee and the Senate Committee, and if you have any comments about that.

Judge WEBSTER. Some very strong arguments can be made and have been made in favor of a joint committee. I think there also are some benefits from preserving both the House and the Senate Intelligence Committees. I haven't come to a personal conclusion about it other than anything that would reduce the numbers of people who have access to the information, collectively reduce the numbers of people, we would consider a step forward.

The combined staffs, all the numbers of people where the information is duplicated, I see some benefit in getting by with fewer numbers.

Mr. DEWINE. Fewer people?

Judge WEBSTER. Fewer people.

Mr. DEWINE. Thank you very much.

Thank you, Mr. Chairman.

Chairman FASCELL. Mr. Owens.

Mr. OWENS. I have no questions, Mr. Chairman. Thank you.

Chairman FASCELL. Mr. Atkins.

Mr. ATKINS. I will submit my questions in writing, Mr. Chairman.[1]

Chairman FASCELL. Gentlemen, thank you very much. We appreciate your being here and testifying and responding to the questions in writing that may be submitted.

Also, submit the additional material we discussed.

Thank you very much. I hope you make your appointment. We tried to get you out at 11:45.

Judge WEBSTER. Thank you, Mr. Chairman.

Chairman FASCELL. Our next witness is the Honorable Clark Clifford who has been patiently waiting. I express my appreciation to you, Mr. Clifford, not only for your willingness to appear and testify, but also for being so patient to give your testimony this morning.

If you would take your position at the witness table, we would appreciate it. We will prepare to start.

Again, let me express my appreciation. You have served your country faithfully and well over a long period of time in many ca-

[1] The response to Mr. Atkins' question was received in classified form and is retained in the committee's files.

pacities. We appreciate your testimony today and your willingness to answer such questions as may be put to you.

STATEMENT OF HON. CLARK M. CLIFFORD, FORMER SECRETARY OF DEFENSE

Mr. CLIFFORD. Thank you, Mr. Chairman.

I have a short statement to read. I think it has some importance because my approach is so different from that of Director Webster.

I am pleased to appear before you today to offer my views on the subject of covert activity, and in particular, the legislation under your consideration for improving the process whereby these activities are approved by the President and made known to the Congress.

This is a subject of great significance to our nation's foreign policy and our system of government. It is also, as we have recently seen, a subject of serious potential abuse. Therefore, the Committee's efforts are both timely and vital.

As the Committee knows, covert activities have become numerous and widespread, practically constituting a routine component of our foreign policy. And with these activities have come repeated instances of embarrassing failure—where the goals of the operations themselves were not fulfilled and unforeseen setbacks occurred instead.

I believe that, on balance, covert activities have harmed this country more than they have helped us. Certainly, efforts to control these activities, to keep them within their intended scope and purpose, have failed.

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

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

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

One of the principal shortcomings of the Iran-Contra affair was the failure of the President to notify the intelligence committees of the government's activities. The oversight process could have served a significant, salutary purpose: giving the President the benefit of the wisdom of those who were not beholden to him, but be-

holden like him directly to the people, and prepared to speak frankly to him based on their wide, varied experience. Had the President taken advantage of notifying Congress, he and the country might well have avoided tremendous embarrassment and loss of credibility.

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

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

In the Iran-Contra affair, the President displayed an attitude that is antithetical to the oversight process. You will recall that the President signed a finding that explicitly instructed the Director of the CIA not to notify the Congress of the activity.

For ten months the Director and others involved abided by this instruction. In fact, the President finally notified the Congress only after the activity had become public knowledge. Much later, after the Congress had begun its inquiry, the President in his letter to the committee supported the concept of notification but insisted on two exceptions. These exceptions would relieve the President of the notification requirement in "cases of extreme emergency" and "exceptional circumstances". I suggest to this committee that to permit these two exceptions would make the notification requirement meaningless.

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

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

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

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

I wish to lend my full support to H.R. 3822, the legislation that the committee is considering today. Late last year, I testified before the Senate Intelligence Committee and supported S. 1721, the companion bill to H.R. 3822, and earlier this year, I testified before the

House Intelligence Committee concerning H.R. 3822. I understand that all of the committees have worked together on these bills, and I commend this cooperation, as well as its result. The legislation that has been crafted meets the need for change that exists in the important area of notification to the Congress.

H.R. 3822 would require the President to sign a written finding, setting forth the particulars of a covert activity, normally when approving it but in no event more than 48 hours afterwards.

The legislation would require the President to provide the intelligence committees with the signed finding normally before the activity begins but in no event more than 48 hours after it is approved. The President could limit notification to the so-called Group of Eight, but he would have to explain why he was doing so. Findings that purported to validate past activities or authorize illegal measures would violate the law.

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

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

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

First, is H.R. 3822, particularly the specific-notice requirement, consistent with the Constitution?

I have studied this question extensively. I am convinced of the constitutionality of requiring the President to provide notice of covert activities within 48 hours of approving them. There is no basis in the Constitution for the Administration's claim of plenary Presidential power in foreign affairs; rather, Congress and the President share concurrent authority in this area according to the constitutional system of checks and balances. It is entirely consistent with Congress' legislative and other enumerated powers to establish reasonable procedural regulation of covert activities.

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

Notice is an obvious and essential component of oversight, and it is the least of what Congress may require in fulfilling its oversight function. After all it was by act of Congress—the National Security Act of 1947—that the CIA was established and exists today; and it

was by this same act of Congress that covert activities were authorized and continue to occur. H.R. 3822 represents a refinement of Congress' previous reasonable procedural regulation of covert activity.

Second, is this the appropriate time to enact this legislation?

Absolutely. Indeed, I believe that the legislation is long overdue. We have gone through the agony of covert activity gone awry all too often. Change is essential.

I can recall some 13 years ago testifying before the Select Committee to Study Governmental Operations—the Church Committee—regarding the gross abuses in covert activities that were the concern of that committee. In my testimony in 1975, I said:

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

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

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

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

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

We have great economic power.

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

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

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

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

Thank you.

[Secretary Clifford's prepared statement follows:]

PREPARED STATEMENT OF HON. CLARK M. CLIFFORD

Chairman Fascell and members of the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Thank you.

COVERT OPERATIONS IN AN OPEN SOCIETY

Chairman FASCELL. Mr. Clifford, thank you very much. I appreciate your testimony.

I think you raised in addition to the specifics with regard to the legislation and the legal matters—and I certainly respect your legal ability in the examination of both the constitutional questions and the legislative questions—but you also raised a fundamental issue with regard to the use of covert operations by an open society, a constitutional republic, in our efforts to deal with an alien or a different ideology.

I find it refreshing that while you are willing to accept the idea that perhaps there comes a necessity to conduct a covert operation, that in the process, we ought not to change our society or system of government. I find it equally as frustrating as many of my colleagues in dealing with the opposition that exists in this world and the frustration and the competition that exists, but I find that after long experience less than desirable to abolish the Congress, change the Constitution, close the society in order to win a fight somewhere.

I think we are more intelligent than that. I think we have a greater responsibility. I think Mr. Armacost had a more enlightened view, although he supports the Administration's position, when he said that we ought not to engage in the constitutional struggle here—I don't think one exists, frankly—but nevertheless, we ought to find a practical, sensible way for a democratic society to deal with this problem.

I believe, like you, that this legislation gives us that opportunity.

I want to thank you, also, for the suggestion you made. I think we have to give very serious consideration to this matter of how we conduct our covert operations, what responsibility and place, if any, Congress is to have, and also how we get a handle on it other than the two meat axe approaches that normally we are confronted with, which is impeachment of the President, or cutting off all his money.

So I am ready to consider the question that if a finding is not presented, if notice is not presented pursuant to the law, then we ought to resort to the funding process. That is the only handle Congress really has.

PREVIOUS ADMINISTRATIONS THAT COULD HAVE GAINED BY THIS LAW

I want to thank you for that suggestion.

Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

It is a real pleasure to meet Mr. Clifford again. Incidentally, just commenting briefly on what the Chairman said, you don't have to change the Constitution.

I certainly agree with that, especially if the Constitution is interpreted willy-nilly as silly putty which there is a very extant theory that that is proper constitutional interpretation. God forbid anyone have original intent on their mind.

The constitutional system of checks and balances, Mr. Clifford, you mentioned, but I did not see in your statement or hear in your

testimony any comment on the constitutional system of separation of powers, which I think is somewhat at issue here.

Do you feel the Carter Administration was justified in withholding notification to Congress of at least three covert actions relating to the Iranian hostage situation, the covert reconnaissance and preparation for the mission, the actual mission that unfortunately was a failure trying to get our people out, and then the assistance to Canada, or Canadian assistance to us in getting six of our diplomats out of the country?

Do you feel the Carter Administration was justified in withholding notification to Congress?

Mr. CLIFFORD. First, a general statement, Mr. Hyde. Different people have different approaches to the whole subject of covert activities. Many in the intelligence community believe that it should be a routine weapon that our country uses. I do not.

I think it is inimical to many of our basic principles. I think it should be carefully structured. It should be restricted very, very carefully.

That is why I take the position that I do today. Thus, when President Carter was considering the advisability of that venture into Iran to rescue hostages, I would much have preferred that this law be in effect at the time requiring him to come, let's say, to the Group of Eight, and report what it was he intended to do.

If he had done that, it is entirely possible that wiser heads would have persuaded him not to do it. It was a total disaster. It never should have taken place.

It was planned poorly and carried out worse. Anything that could have been done to prevent that tragedy would have been a benefit to our country.

Mr. HYDE. Surely you are not referring to the successful part of that operation where the Canadian embassy cooperated in our extricating six of our diplomats through forged passports and Congress wasn't told for three-and-a-half months? You exclude that, I take it?

Mr. CLIFFORD. No, I don't. I haven't gotten to that part yet.

In the first part I was talking about the venture into the desert. I thought it was entirely wrong. I think it had no possibility of any success.

Now if he had some agreement, if the Canadians said we will help you get six hostages out, I think he should have gone to the Group of Eight and reported that to them. That is what I want to have take place.

Mr. HYDE. Breaking his word to the Canadians who insisted they tell no one?

Mr. CLIFFORD. No. No. He wouldn't break any word. If the Canadians put that restriction precedent on their offer, he would say I will come back to you after I have thought this over. I do not want the President to be the only individual that makes these decisions.

We had enough of that under George the Third. I want him to be able to come back and consult with the people around him.

Mr. HYDE. That is——

Mr. CLIFFORD. Excuse me. I will finish. He must not make that sole decision. He must come back and talk to State perhaps, to De-

fense, and I want him also to talk on the Hill. Then he would have gone back to them and said I cannot accept your condition.

We will have to find another way to get our people out and I think we probably would have found another way to get them out.

Mr. HYDE. We would have done it another way then. All right. You are talking about what is desirable.

I certainly agree. The more advice the President can get from reasonable people, experienced people, the better his judgment will be. But I think what we are talking about here when we are enacting legislation is we are mandating certain conduct. From what you have said, I take it that you reaffirm your statement in your—the sentence in your statement that there is no basis in the Constitution for the Administration's claim of plenary presidential power in foreign affairs.

Rather, Congress and the President share concurrent authority in this area according to the constitutional systems of checks and balances.

Bearing that in mind, I take it you disagree with Thomas Jefferson who said in 1790,

> The transaction of business with foreign nations is executive altogether. It belongs then to the head of that department except as to such portions of it as are especially submitted to the Senate. Exceptions are to be construed strictly.

Or I take it you disagree with Alexander Hamilton who explained in his First Pacificus letter,

> It deserves to be remarked that as to participation of the Senate in the making of treaties and the power of the legislature to declare war are exceptions out of the general executive power vested in the President. They are to be construed strictly and ought to be extended no further than is essential to their execution.
>
> I won't burden you with John Jay's "Federalist" 64, and the whole history of our constitutional law that says the President has the executive power and that Congress has certain specifically defined and assigned responsibilities which are to be construed strictly. To say they are both coequals, they are partners in the formulation of policy, is without constitutional warrant.

May I have your comment on that?

Mr. CLIFFORD. Yes. The problem is approached intelligently in the Federalist Papers. I call your particular attention to Federalist Papers 69 and 75. Where discussed in great detail along with the joint responsibility that the Congress and the President have.

The best modern discussion of the subject which is a very complex one occurs in the decision of Youngstown Sheet and Tool against Sawyer. Justice Jackson, in a concurring opinion, takes quite a bit of time and talks about those areas in which the President has specific responsibility and those areas in which the Congress has specific responsibility.

Then he uses an attractive phrase. He says in many areas there is the twilight zone, and in those areas which occur over and over again, there should be joint responsibility on the part of the President and the Congress.

Now, much attention has been given to a case that first came up——

Mr. HYDE. Curtiss Wright?

Mr. CLIFFORD. Curtiss-Wright, There is some obiter dictum there in which the Judge—not in deciding the case—branched out philosophically. I have read that with interest. I think what he is talk-

ing about is that the President is the sole spokesman for the country.

Mr. HYDE. Sort of a Larry Speakes on foreign policy. He is the spokesman once the policy is formulated by the Senators, is that it?

Mr. CLIFFORD. No, once the policy is formulated by the President and the Congress working together. But the President is the spokesman. He is the day-by-day operator in that area, but in the policy field, Justice Jackson says, there should be the closest kind of cooperation between them. So that when it is suggested in the Justice Department's memorandum that the President is the sole determinator of covert action, that the more sensitive it is, the less burden is on him to notify the Congress, it is so sensitive, he doesn't have to notify them at all—that is what Mr. Cooper from the Justice Department says in his opinion—I disagree entirely. We do not have any government if the President is able to make a decision in which he says this is so sensitive I am not going to inform the Congress.

He might say I am not going to inform anybody, and that is when our government breaks down.

Mr. HYDE. That has happened throughout our history. You know that. Time and time again things have occurred that President Roosevelt in World War II, President Washington on the Jay Treaty, history is replete with examples of the President not, telling Congress, for whatever reason.

I am not saying it is desirable. I am not saying is is helpful. But we are talking about the Constitution and what—how Congress can legislate a check or a balance that is not in the Constitution and is not in the writings of the Founding Fathers.

Mr. CLIFFORD. And at the same time, Mr. Hyde, there is nothing in the Constitution that says that the President shall have plenary power in the field of foreign policy. The word isn't mentioned.

Mr. HYDE. It says executive power. The executive is the executive. He is commander-in-chief.

Congress' powers are specifically enumerated and are to be strictly construed if Madison and Jefferson knew anything about the Constitution.

Mr. CLIFFORD. At the same time, if you please, the Constitution does specifically give the Congress certain powers in foreign policy: the power to declare war——

Mr. HYDE. They can declare it, but the President has to make it. They made a distinction between "declare" war and "make" war. We could argue on and on.

I don't want to trespass on your time. I would like to write you a letter at some length and discuss these things more and perhaps you would have time to read it.

Mr. CLIFFORD. I would value that.

If I might make one concluding comment—thank you so much for your discussion. We have had certain tragedies in our country these past years. They have occurred in the covert field. In the 1950s, we made an effort to change the government in Indonesia, a total disaster.

A CIA pilot was shot down. The whole story broke. We were doing something we should not have been doing.

You all will remember in the sixties the Bay of Pigs debacle. Total and complete disaster. We really got a very black eye out of that.

We came along into the seventies. There we get into that Operation Mongoose which some of you may remember. It was a plan within the intelligence community to assassinate Castro.

Mr. HYDE. Mr. Clifford, you forgot Italy right after the war, one that worked very well, one that you were involved in.

Mr. CLIFFORD. That is right.

Mr. HYDE. Don't miss the successes.

Mr. CLIFFORD. I was really talking about our disasters. I will go back and cover some successes, too.

We got to Operation Mongoose. The story broke that we had had people in Cuba trying to assassinate Castro. We were made to look ridiculous. One of the plans we were going to use, considered seriously by the CIA, was to give him a box of Cuban cigars. When he lit one, it would explode and he would be extinguished.

We then came on and got into Nicaragua and there the CIA went down and mined the waters off of Nicaragua. Some of our ally's ships ran into the mines. Nicaragua took us to the World Court, and we went through the embarrassing experience of having to withdraw from the whole matter because we were so wrong.

But then after all of the efforts made by the Church Committee and others to put a stop to it, we came to the greatest debacle of them all. That was the Iran-Contra affair. That is when the President was making speeches in this country to the American Bar Association, and, he was going to Japan, saying that we must never deal with the terrorist nations.

The record shows within weeks after each of those speeches, he was sending arms to Iran. So our credibility all through the world sustained possibly permanent damage.

I say, Mr. Hyde, we have gotten to the point now that we have had so much experience, let us for the first time step up to the problem and do what has to be done. That is, require the President to notify the Congress.

Mind you, if by any chance this law suggested that the Congress could interfere with the President's decision, then the constitutional question would come into issue. It does not. The President can sit down with the Group of Eight and each one of the eight can say, Mr. President, you are getting ready to make a very serious mistake. He can say to them all, after he listens to them, thank you all very much, gentlemen, I appreciate your comments, I am going right ahead.

He has that complete power. They have no involvement in it at all because it is the Executive Branch. At the same time, what would any of us give if the President had sat down with the Group of Eight before he launched us on the Iran-Contra experience?

It is entirely possible that you would have been able to persuade him not to do it. So let's improve our efforts in the covert field.

Let's keep them to a minimum. And whenever the President decides then let the Congress know and you might be able to dissuade him if it is an unfortunate decision.

Chairman FASCELL. Mr. Hamilton.

NOTIFICATION REQUIREMENT DOES NOT RESTRICT THE PRESIDENT'S FLEXIBILITY

Mr. HAMILTON. Mr. Clifford, first let me just extend my appreciation to you for your willingness to testify. As your comments in the last few minutes have suggested, your vast experience and perspective are exceedingly helpful to this committee. We are grateful to you for your appearance.

If I may shift away from the constitutional question, two of the arguments you heard this morning presented by the Director and by the Under Secretary were, number one, that this notification requirement restricts the President's flexibility, and the Director says, for example, an inflexible notification requirement could force a President to choose between providing the congressionally required notification within 48 hours and jeopardizing the lives of innocent Americans delaying that notification to protect those lives.

One of the arguments made here apart from the constitutional question is you are restricting the President's flexibility.

The second argument that was made is that foreign governments won't assist us if the Congress must always be informed. I wonder if you could just elaborate quickly on those two things and why you think those two particular arguments are not meritorious?

Mr. CLIFFORD. Yes. I believe there is no merit to the first argument. I do not understand it really. The President has conferred with his Secretary of State, Secretary of Defense, the National Security Council, and they decide that they wish to launch a covert activity.

We will call it Project A. They have talked it all out. They believe it would help. There is a political situation in some foreign country and they make that decision.

The President reaches that decision on Monday, we will say. All I want him to do is to prepare a brief finding, explain it—what it is they are going to do—sign it, and send it up to the Hill.

He could do that on Monday. The bill gives him until Tuesday or Wednesday morning to do it. I don't understand that that interferes with his flexibility. I don't know that it puts people's lives in jeopardy.

The fact is that if he got a cable saying you must act within 15 minutes—that is quite unusual—but if he did, he could go ahead and act within 15 minutes, but then notify the Congress within 48 hours.

So when they say that the flexibility of the President is adversely affected, I do not even understand really what it is they are saying.

On the second question, I was prepared perhaps to make the argument that one of you gentlemen had already made, and that is that if a foreign power like Canada says we will assist you in gaining the extrication of your six hostages but, Mr. President, you must not notify the Congress, then under this law, the President should say I cannot make that agreement, I am bound by the law. And the law says I must notify them in 48 hours.

So I will not break the law, because the Congress has passed it. I vetoed it. They passed it over my veto, so it is the law of the land.

It is right for the President to say that to them because we must not be subject to those condition precedents that foreign governments place upon the operation of our government. They say we don't want you to notify the Group of Eight. We don't want to notify either the Secretary of State or anyone in the State Department. That was discussed earlier. We would never submit to that.

Let's make it extreme and say, Mr. President, we will agree to do this with you only if you do this entirely alone without consulting anyone. That is totally abhorrent to our system.

That isn't the way we run our government. He has the right to consult with the people in the Executive Branch and under this law, in turn, he must notify the Congress. We build in safeguards that way.

Suppose the Canadian plan was unfortunate. Maybe it didn't have merit to it. Yet the President said, all right, I agree to this and I won't consult with anybody and I won't consult with the Congress and it turned out badly.

I want to tell you our country would be in trouble and the President would be in even worse trouble. So let's avoid results of that kind.

Mr. HAMILTON. Thank you.

Thank you, Mr. Chairman.

Chairman FASCELL. Mr. DeWine.

EXAMPLES OF COVERT OPERATIONS THAT WERE SUCCESSFUL

Mr. DEWINE. Thank you, Mr. Chairman.

Mr. Clifford, I wonder if you could give me a little better understanding of the covert operation that you were involved in as far as making the policy within Italy and the communists. Could you give us a little background about that?

Mr. CLIFFORD. I missed some of those words.

Mr. DEWINE. You testified in regard to Mr. Hyde—he asked you—he said, Mr. Clifford, weren't you involved in some covert operations that were successful in regards to the communists in Italy? I wonder if you, for the younger members of the committee, I wonder if you could give us a little background on that and briefly tell us what that consisted of?

Mr. CLIFFORD. Well, I will with reference to that particular instance.

In the Spring of 1948, the Soviets were engaged in a period of the most aggressive kind of expansionism. As you know, they had taken all of the nations on their western periphery. They were extending their influence into Western Europe.

They established the Comintern which was a communist cell in every country. We were watching it carefully because we wanted to oppose, of course, the communization of Western Europe. They were making more headway in Italy than in any other country. The reports came in to us from Italy that the expenditure of some wisely placed funds in Italy could be very useful in stopping the communist advance in that country.

So over a period of some months, funds were expended in Italy at that time which ultimately led to the Italian decision turning down the communist threat. That was one of our successful efforts.

TESTIMONY GIVEN IN FRONT OF THE CHURCH COMMITTEE

Mr. DEWINE. Thank you very much. Let's go back to your testimony in front of the Church Committee, April 26, 1976. I will read you a paragraph from that testimony and see if you still agree with the essence of these comments. This is your testimony on that date.

Second, the creation of an effective House, the creation of an effective joint House committee to oversee intelligence operations—I consider this the most important function of the new law, proper congressional oversight law. Oversight has been sadly lacking. I would hope that a small oversight committee of possibly five members of a committee chamber might be created. It should be considered an assignment of outstanding performance, and members should give necessary time to it. By keeping the committee small, security can be maintained and the possibility of disclosures can be minimized.

I wonder if you still agree with that statement on that day.

Mr. CLIFFORD. The condition that existed at that time was that we did not have any intelligence committee. So the reports came into our large standing committees that existed. So the Church Committee was searching for a more effective machinery to accomplish its purpose. I supported it. I thought it was a good idea. I liked the idea of each chamber having an intelligence committee and I liked the idea of keeping them small. And I might say I continue to support that position.

Mr. DEWINE. In fact, on that date you were talking, I believe, about a joint committee and small in numbers?

Mr. CLIFFORD. Well, possibly as time goes on, you go through varying opinions. I don't know how strongly I supported the idea.

Mr. DEWINE. But the size is important, is it not?

Mr. CLIFFORD. Size, I think, has some influence on it.

Mr. DEWINE. Expertise in the area?

Mr. CLIFFORD. Now I am inclined to believe that it is better to have separate committees. I think it acts as an additional safeguard, but I believe in confining the size.

Mr. DEWINE. Thank you very much.

Chairman FASCELL. Mr. Solarz.

HOW DO WE GET THE PRESIDENT TO ADHERE TO THE LAW

Mr. SOLARZ. Thank you very much, Mr. Chairman.

Mr. Clifford, whenever I hear you testify before our committee, I feel more keenly than ever of my own inadequacies. I must tell you that I think you are really a national treasure, sir, and it is wonderful that you continue to be willing to share your wisdom with our committee and with other Members of Congress on these very important national issues. You bring to them a clarity of mind and a degree of experience which we rarely receive on the Hill. I know you have the esteem of all the Members of our committee on both sides of the aisle.

There are some questions that I would like to ask you about this legislation. I am concerned about how we actually go about securing compliance from the President with the timely notification pro-

visions of the legislation, given the apparent view of the White House that these requirements with respect to timely notification constitute an unconstitutional infringement on the powers of the President.

What would happen, in your judgment, if the legislation were to be enacted even over the veto of the President and then the President simply refused to notify the Congress in a timely fashion on the grounds that he wasn't constitutionally required to do so? Would there be any way to bring him into compliance? If not, what would we have accomplished by adopting this legislation?

Mr. CLIFFORD. This is a fundamental problem in the operation of a democracy. If the same situation existed in the Soviet Union, the matter would be settled very quickly. Somebody would either cease to exist or end up in the salt mines of Siberia. But we don't work that way.

The Congress passes a law in the expectation that the Executive Branch will comply with it. Our system works that way. It will have to continue to work that way even with all its weaknesses, or we change from a democratic system to some other system.

Now, the very concern that you have is the one that prompted me to make the recommendation that I did. I have made it before the Senate Intelligence Committee and the House committee. I say let's put in the law some sanctions, because, as it is now, there aren't any sanctions. We have five laws now in existence that have to do with how the President will handle covert matters.

Do you remember the 1980 law, Hughes-Ryan Bill, the original act, the National Security Act of 1947 and so forth? To illustrate the point that none of those has any teeth in them, I said I could imagine a meeting one time in the White House basement presided over by Colonel North, and Colonel North is talking about getting $30 million from selling arms to Iran and somebody says, "Well, Colonel, but how about the laws that are on the books?" And the Colonel says, "Well, what are the laws?" And somebody reels off five names of the laws. And he says, "What is the penalty for violating the law?" And the lawyer in the group says, "There aren't any penalties." So the Colonel says, "Please don't bother me; let's get on with the meeting."

Now, that is where we are now. That is where we will be even after we pass this present act.

I was suggesting that you put language in the bill so that in those instances in which the President refuses to sign a finding, or refuses to send it to the Hill in 48 hours, that refusal automatically terminates the President's right to expend any funds. You have that right. You are the ones who appropriate the funds.

Then I would go further and say, if he then has no right to expend the funds, he comes under a lot of laws because he is spending funds without congressional authority. I go further and say, for those individuals working at the time, whether it is a Colonel North or an Admiral Poindexter, whoever it might be, if they go ahead and expend the funds in the knowledge that they are in violation of the law, that is a criminal offense and they are subject to trial by jury, and punishment. I think both of those suggestions are valid.

Mr. SOLARZ. I think there is much merit to those suggestions and I hope our committee will consider including amendments along those lines in the legislation when we mark it up. But I wonder, sir, whether you could elaborate on the suggestion by letting us know precisely what kind of penalties, presumably criminal penalties, you would think appropriate here for willful violations of the requirement to issue a finding and to notify the Congress.

Mr. CLIFFORD. I would use the usual language. One penalty is a $10,000 fine and five years in the penitentiary. I would put that kind of a sanction into the law.

Mr. SOLARZ. Presumably that would apply to the President himself?

Mr. CLIFFORD. Well, there you have a very real constitutional problem as to whether it applies to the President. I don't know that we have to disturb ourselves about that because I think the President, any President would be exceedingly loathe to take the chance on that and test out the constitutionality of a criminal act on his part. But it certainly would apply to everyone else in the White House.

Mr. SOLARZ. Mr. Clifford, how would you distinguish the situation created by this legislation, in which an obligation is imposed on the President which he believes is unconstitutionally imposed, to the situation created by the War Powers Act where another obligation to report to the Congress is imposed on the President in circumstances where our forces are introduced into situations where hostilities may be imminent. As you know, every President we have had over the last 15 years has believed that that requirement is unconstitutional, as a consequence of which they have never carried out their obligations under the law. And apparently it is almost impossible to obtain a judicial determination of the constitutionality of the issue because the Court believes this is a political thicket into which it doesn't want to insert themselves.

Would this legislation be any different from the war powers legislation? In other words, if in fact we had a President who believed that the requirement to issue a finding and to report it within 48 hours of the Congress was unconstitutional and stood on his constitutional interpretation, the law notwithstanding, would there be any practical way to hold the President accountable for this violation of the law, or to induce him to comply in the first place?

Mr. CLIFFORD. This law will very likely fall into that same no man's land in which the War Powers Act has fallen. Our system possibly is inadequate in that regard. There will probably not be a resolution one that I can foresee, of the War Powers Act controversy. There probably would not be one here as far as the President is concerned.

This, however, is sharper and clearer than that act. And I think the President would be taking a substantially greater risk in refusing to comply with this law because it is so specific.

If, on the other hand, you were to add those two other clauses, making it illegal to expend funds and having those who work for the President be subject to criminal sanction, then the President would be in a very bad situation where the people around him could go to prison for violating the law but he claims it doesn't apply to him.

Mr. SOLARZ. I gather your feeling is that with the addition of those two provisions and penalties for noncompliance, that the prospects for adherence to the law would tilt very significantly in the direction of compliance, precisely because of the penalties that are in the law.

Mr. CLIFFORD. I think they are improved considerably.

PUTTING LANGUAGE IN THE BILL THAT WOULD LIMIT THE PRESIDENT FROM INFLUENCING PUBLIC OPINION BY COVERT OPERATIONS

Mr. SOLARZ. One final question, if I might, Mr. Chairman. I don't know if you have a copy of the bill in front of you, but on page 9, lines 5 to 7, we find the following provision: "No special activity"—and we are referring here to a covert operation—"may be conducted if it is intended to influence United States political processes, public opinion, polls or media."

I would like to ask you for your judgment about the appropriateness and wisdom of including such a prohibition, given the extent to which, as I understand it, throughout the course of American history, Presidents have often taken actions in order to, at least to one degree or another, influence public opinion in our country. Part of the responsibility of the President of the United States is to maintain public support for policies in which they believe.

I recall, for example, that one of the factors that led FDR to give the go-ahead for the invasion of North Africa was his feeling that the American people needed to be shown we were capable of engaging the enemy somewhere in order to sustain their morale.

During the Civil War, there were innumerable examples taken by President Lincoln to influence public opinion in the north in order to sustain support for his effort to preserve the Union.

So it strikes me that if you take a look at the long course of American history, one of the lessons that emerges is that it is legitimate for a President to take actions abroad to some extent in order to influence public opinion at home.

And if that is the case, I wonder whether you think it would, in fact, be appropriate to flatly prohibit any special activity, any covert operation if it is intended to influence our political processes, public opinion, polls or media, particularly if the President is obligated by law to inform the Congress about the activities.

Mr. CLIFFORD. I would delete that language from the bill. I think it clutters up the bill.

Also, I can't imagine how in the world you would ever prove a charge of that kind as to what was in the President's mind at the time. Leave it out. It doesn't help us and just gives people something else to argue about.

Mr. SOLARZ. Thank you very much.

Chairman FASCELL. Mr. Berman.

THE WAR POWERS ACT VERSUS THIS LAW

Mr. BERMAN. Thank you, Mr. Chairman. And thank you, Mr. Clifford, for sharing your thoughts with us on these issues.

I think initially you made a comment in response to a point that Mr. Hyde made, I think it should be clarified. He referred to three

covert operations—including the gathering of information before the hostage rescue attempt under the Carter administration. It is my understanding of the definition of covert activity in this bill that that kind of intelligence gathering would not be a covert operation. It would be in the realm of intelligence gathering and would not require, under this legislation, notification to Congress before it proceeded. And I just didn't want to leave that part of it unresponded to in the record, and I think Mr. Hyde may not disagree with that, based on my conversation with him.

I would like to deal with the issues raised by Mr. Solarz a little bit more, the War Powers Act versus this law. The President under the War Powers Act is required to submit reports to Congress, very similar to the notification requirement under this legislation in terms of a direction to provide Congress with information, in a different fashion, in different situations.

Why, I am trying to understand, why would criminal penalties or an automatic cut-off of funds is any more likely to ensure Presidential compliance with this law or would make his willingness to respond to the mandates of this law any more likely? Is it pretty clear that when Congress appropriated funds, if it attaches an unconstitutional provision to that appropriation of funds, the President is under, I think, no obligation to manage his implementation of that appropriation, the expenditure of funds according to an unconstitutional prohibition, and I am wondering, under what process would we ever activate the kind of test of the constitutionality even with criminal penalties, even with an automatic cut-off of funds provision?

Mr. CLIFFORD. I can see how that would come about. In the first place, this question they raise about the constitutionality of this bill that is now before this committee, I don't believe has any merit to it.

Mr. BERMAN. I don't either.

Mr. CLIFFORD. As you begin to get into it, you begin to find that there are all kinds of precedents. All that this asks for is notification.

Keep in mind, it was the Congress that passed the National Security Act of 1947 that created the CIA. And they put language in there that would permit covert activities. Some of us back in those years worked on the drafting of the act. And specifically it is in there so that Congress has continued control over it. And as for those who say you have no right to insert yourself into the question of covert activity, I think they are unable to make a case in that regard. You passed the law and put the provisions in there; notification has been ruled over and over again to be proper by our courts.

Now, in this particular instance, what we are saying is, "A" must give notification within 48 hours. Now, if he doesn't do it, then he must not under this law expend any funds for that particular covert activity. And if he is doing it, he is in violation of law.

Presidents have to be awfully careful about that. You know, for instance, this is one reason that President Reagan has stayed completely away—he admits engaging in the Iran part of that matter but has stayed completely away from the Contra part, the funds flowing to the Contras. If you begin to get into the business of send-

ing funds to somebody else without authority to Congress, without appropriation of Congress, you run into a network of laws. You are really in trouble.

So, I don't believe the President would want to take that risk of expending Federal funds when the Congress has said to him, you have no right to expend those funds.

Now, if those around him had knowledge of what has taken place and knowledge of the violation of this law, you get a very quick test of it because you get a grand jury. You present it to the grand jury, they are indicted and you have a trial.

Mr. BERMAN. Who presents it to the grand jury?

Mr. CLIFFORD. The Federal Government.

Mr. BERMAN. Possible, certainly, but if it is the same department that is advising the President that it is unconstitutional——

Mr. CLIFFORD. We are going through that right now.

Mr. BERMAN. Right.

Mr. CLIFFORD. We are going through that in the case against Oliver North and Poindexter. And you see, the Justice Department is supposed to prosecute it.

Mr. BERMAN. But they agreed to a special counsel.

I think that as a matter of politics, our leverage is greater in convincing the President to abide by the law if the potential of the fund cut-off or the criminal sanctions exist, but I am still curious as to why there is less question about the constitutionality of this provision, the 48-hour notice provision and the prior notification requirement than there is about the reporting requirement under the War Powers Act?

Mr. CLIFFORD. I believe that the other gets into a much broader question. It is a clear foreign policy problem.

The President is handling the day-by-day affairs. He thinks that the situation in the Gulf is such that it demands the presence of U.S. Naval vessels. It is inherently within the ordinary powers of the President so it is tougher to make the case.

I say that it is easier to make the case in this covert field because he should only be using it in the most restricted means anyway, and a violation of that, I think, is easy to prove.

Mr. BERMAN. Thank you.

Chairman FASCELL. Mr. Levine.

Mr. LEVINE. Thank you, Mr. Chairman.

Mr. Clifford, let me also join my colleagues in expressing my appreciation to you for your thoughtfulness and help before this committee.

I would like to stay on the same subject for one moment I then have one other area that I would like to explore with you briefly.

Do I understand correctly, in trying to ascertain your response to Mr. Berman's question, that the easier case, if you will, in terms of constitutionality is this bill and the issues it raises versus the War Powers, that basically you are saying we are here legislating an area of intelligence oversight, and that these very intelligence functions were spelled out pursuant to statute? That therefore exercising this oversight, and putting a deadline within the administration of this oversight procedure, becomes explicitly a part of the delegation that Congress has already provided to the Executive Branch? That this, therefore, doesn't move into the grayer areas of

war and peace and the questions of war-making that are a part of the War Powers issue? Or am I missing something?

That is how I interpret your response to Mr. Berman, in terms of the narrower area that we are dealing with here. I want you to tell me whether this is your testimony.

Mr. CLIFFORD. It is. And let me say parenthetically, that I think Presidents should comply with the War Powers Act. Ever since it has been on the books, Presidents have raised questions about it.

I think in those instances in which it is very clear and the degree of hostility that has developed in an area becomes clear, I think a President could well comply with the War Powers Act. But there are all kinds of precedents now of those who haven't, and the area becomes grayer and grayer with each passing year.

This one is sharper and clearer; the language is there. People can understand why the Congress feels it should participate in these matters, and I think that the President will be much less likely to violate this present law than the past law.

As for this idea of giving timely notice, well, he can construe that as giving any notice that he chooses. After this President waited 10 months, he got an opinion from the Justice Department that said 10 months is timely notice. Now, let's put a stop to that.

The British have a wonderful term: "That is plain rubbish." And let's not go on with it anymore. Let's have it clear and concise and the President will know what the rules of the game are.

TIME REQUIREMENT IMPOSING A TIME REQUIREMENT ON THE PRESIDENT FOR NOTIFYING CONGRESS

Mr. LEVINE. That is the other area I wanted to explore with you briefly. Obviously this President has interpreted "timely" to mean anything that he wants it to mean, and, in fact, has interpreted it to mean no notice at all. But I wonder whether there may be any circumstances—and I would ask you to let me know if you think there are any—where some middle ground might be appropriate between 48 hours and timely notice.

Mr. Hyde, in his questions—and I unfortunately wasn't in the room during his questioning of you, although I was here during his questioning of the prior witnesses—continued to provide hypotheticals in which he argued that 48 hours is simply too restrictive. And my question to you is, are there any instances in your opinion in which 48 hours is simply too restrictive, or is that rigid requirement appropriate in all circumstances, in your opinion?

Mr. CLIFFORD. We have to make a policy decision. Are we going to leave it up to the discretion of the President as we have in the past, or will we have a set of finite, specific rules? I come down strongly in favor of the latter.

Keep in mind, the President wrote a letter to the Senate some time ago in which he said, "I am going to go along with the 48-hour rule," but he said—and I want to get the language exactly—he said, "My obligation to notify the Congress is subject to two exceptions: I will not have to notify you in the event of extreme emergency; second, I will not have to notify the Congress under exceptional circumstances."

You don't have anything left. You don't go into a covert activity unless it is an emergency. You don't go into it unless it is exceptional circumstances. That is the whole theory. But he is saying, "If I encounter what we have encountered all through the years as an opportunity for a covert action, I am not going to give you the notice because I am going to claim, which I have a right to do under this rule, that I find that there exist exceptional circumstances."

Mr. LEVINE. Let me follow up. I understand that this language that is presented by the President and that is being suggested as an amendment opens the door so widely that we end up back at essentially timely notice. But my question is not with regard to that particular language. Rather, it is whether in your opinion there are any circumstances which would justify more than two days as a requirement?

Mr. CLIFFORD. I do not know of any. This doesn't have to be complicated.

An emergency comes up. The President says, "I must meet that emergency." The President gets on the phone. Maybe the first thing he would want to do would be to call the Speaker of the House and the Majority Leader in the Senate and say, "I have got a very tough situation here. You both happen to be in town; come over right away." Or maybe he calls the Chairman of the Senate Intelligence Committee and of the House and says, "Can you just come over right away? I want to get at you."

And so he takes it up with them and he explains it to them, and they say, "All right. Go ahead and comply. Give us notice within 48 hours, keep us posted and we will work with you." They might say, "We are with you 100 percent. If this is what you think should be done, we will support you all the way."

Now, that is the way this can work and the way it is supposed to work. But what I don't want to have happen—as we have learned since this bill was passed 41 years ago, and we started on it in 1945—is that you leave it up in some way to the discretion of the President. Let's have the President clearly in front of him the necessity of getting in tough, let's say, with a Group of Eight or sugget it with a Group of Four. If all Four are not in town, then whichever ones of the Four are in town can get right over there. They would be there in a half hour. So that I do not see any trouble with it.

Mr. LEVINE. Thank you, Mr. Clifford.

I will be happy to yield to the gentleman from New York.

Mr. SOLARZ. Thank you.

The argument was advanced by the Director that a situation could develop in which Congress was not in session and where it simply wasn't practically possible to consult with the eight Members specified in the bill within 48 hours. This becomes potentially even more of a problem if we were to amend the legislation to include your suggestions that penalties be added to the bill for noncompliance on the part of the Executive Branch with respect to notification within 48 hours.

What would you think of a further amendment to the legislation which would require the President to make a good-faith effort to notify the eight Members designated in the bill within 48 hours so

that if a situation developed where it was simply not possible for the President to reach all of them because Congress wasn't in session, that under those circumstances the President would be relieved of a potential criminal liability for having failed to notify one or more of the Group of Eight in spite of the best efforts on his part to contact them?

Mr. CLIFFORD. I would consider it a complication. I think reason must prevail here.

I know what I would do if I were the President and I felt I had to move and all eight Members of the Group of Eight were out of town; I would sign a finding and I would have it, by hand, delivered to the office of each one of the Eight and I would have the operator on the telephone at the White House find, start in and find one of the eight, maybe find more than that, and say, "A finding has been delivered to the office of all eight Members of the Group of Eight. I want to notify you that you might want to get back here and look at it."

I would rather depend on a rule of reason and men working together than begin to put language into it that in any way softens the requirement of the President to give this notice.

Mr. SOLARZ. Thank you, sir.

Chairman FASCELL. Mr. Clifford, I want to thank you very much. You have continued to be of great service to this committee and to Congress and to the country. You have devoted a lot of time and attention to this matter, and we are grateful to you.

Mr. CLIFFORD. Thank you, Mr. Chairman.

Chairman FASCELL. This committee stands adjourned subject to its return.

[Whereupon, at 1:07 p.m., the committee adjourned, subject to the call of the Chair.]

INTELLIGENCE OVERSIGHT ACT OF 1988

THURSDAY, JUNE 16, 1988

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The committee met, in open markup session at 1:30 p.m., in room 2172, Rayburn House Office Building, Hon. Dante B. Fascell (chairman) presiding.

Chairman FASCELL. The Committee will come to order.

We meet today to continue the Committee's consideration of H.R. 3822, the Intelligence Oversight Act of 1987. On Tuesday, the Committee received testimony from the Director of the Central Intelligence Agency and the Under Secretary of State, Michael Armacost, followed by the distinguished statesman and former Secretary of Defense, Clark Clifford. Each witness on Tuesday and again today brings a distinct and useful perspective, based on many years of experience, and will undoubtably contribute to a better understanding of the important issues with which the Committee must deal. Before introducing our distinguished witnesses I would like to make a brief comment on the prior notice provision of H.R. 3822 which has generated so much controversy. This provision is in my view a modest adjustment to the present law. It sets forth clear parameters for concerning Congressional notification to a restrictive group in Congress. It does so without restricting the ability of the President to respond rapidly in emergency circumstances. Finally, I believe that the prior notice provision gives the President the benefit of Congressional counsel on important decisions which impact on our foreign policy and national security so as to build a consensus on covert operations. It seems clear to me that H.R. 3822 is a modest response to recent events.

Mr. Broomfield.

OPENING STATEMENT OF CONGRESSMAN BROOMFIELD

Mr. BROOMFIELD. Thank you, Mr. Chairman. As you know, at our last hearing I explained the reasons why I cannot support this bill in its present form.

There are many constructive elements in the bill which have been extensively discussed between the Administration and Congress.

Unfortunately, the bill contains the ill-advised requirement that covert operations must in all cases be notified to Congress within 48 hours. I believe this provision to be unconstitutional. I also believe that as a practical matter it would impede the President in his execution of foreign policy and could prevent our allies and

friends abroad from cooperating fully with us in difficult circumstances.

I am especially glad today to have Secretary Carlucci here to give his views on the bill, particularly the 48 hour provision. Secretary Carlucci was instrumental in reforming the operations of the National Security Council staff. It was he who implemented the recommendations of the Tower Commission, by taking the NSC out of covert operations.

Secretary Carlucci also played an important role in improving the Administration's procedures to approve covert action plans and notify Congress of them. As National Security Advisor to President Reagan, he coordinated the Administration's response to congressional concerns and assisted in the preparation of the President's new National Security decision directive, the NSDD, on this subject.

I believe the Secretary's testimony will demonstrate that the Administration has already taken corrective action to address the concerns about notification to Congress that were raised as a result of the Iran/Contra affair.

The President's directive specifically addresses the "rare extraordinary circumstances" in which notice must be deferred beyond 48 hours. In such cases, the President is committed to review such a decision with his senior advisers every ten days. I am looking forward to Secretary Carlucci's testimony on these points and I am also looking forward to asking the Secretary whether inclusion of my proposed prepared amendment—which contains a very high legislative standard for deferring notice—would cause the President's senior advisers to recommend that he approve the Act.

Chairman FASCELL. Mr. Secretary.

STATEMENT OF HON. FRANK C. CARLUCCI, SECRETARY OF DEFENSE

Mr. CARLUCCI. Thank you, Mr. Chairman, Members of the Committee. I am very pleased to be with you today. I do have a prepared text. With your permission, I will submit that for the record and make some brief comments.

Chairman FASCELL. Without objection, the full statement will be included in the record and you may proceed.

Mr. CARLUCCI. It seems to me, Mr. Chairman and Members of the committee, that the Iran/Contra report was very wise in noting that democratic government is not possible without trust between the executive and legislative branches, and between government and the people. There is no question that the Iran/Contra affair represented a setback in that critical element of trust.

The real issue is how we restore the trust. I would submit to you today that legislation which lays claim to the prerogative that presidents, and I emphasize the plural, presidents, firmly believe is theirs, is hardly the way to restore trust between the executive and legislative branches.

Of course, we all want to have a tight system that governs specific activities. We all want oversight. I think congressional oversight has proved itself to be valuable throughout the years.

But who among us can say that some future president will never be faced with the kind of situation where he may have to delay notification of a special activity to the Congress beyond 48 hours? And we have a specific case, which I am sure the committee has heard about. I will mention it simply because I lived through it. I was there when we said, good luck to our people who went in and got the hostages out of the Canadian Embassy, and the Canadian Government, as you are well aware, said that they would not allow us to exfiltrate potential hostages if we were to notify, if we intended to notify the Congress.

Now you and I can say that is wrong, you and I can say the Congress is worthy of trust. That is not the issue. The issue is what other governments believe, and covert action in almost every case requires the cooperation of some foreign government; and if the Canadian Government, which is a government closest to us and best understands our system, makes such a demand on us, what are governments less likely to understand our system likely to do in the future?

In fact, had this legislation been law at the time, President Carter would have been faced with an impossible dilemma. It is legitimate, of course, for the Congress to ask how you prevent future Iran/Contra affairs. I would simply note, as Mr. Broomfield has done, that the President took prompt action when the Iran/Contra affair was brought to his attention. He changed the NSC adviser; I in turn turned over a substantial amount of the NSC staff. The NSC was banned from participating in covert action activities. We created an office of general counsel in the NSC, which to this day is functioning extremely well.

We undertook a comprehensive review of existing covert action programs. The President also sat through a review program-by-program, and we worked together with the Senate, because the House elected not to work with us on this. We worked together with the Senate in drafting an NSDD that tightened up the procedures on covert action activities, including such things as no retroactive findings, written findings and, most importantly for the issue at hand, a requirement where in it the President did not notify the Congress in 48 hours, the NSPG was to review the situation and review the finding every ten days.

These seem to be appropriate corrective actions. The Iran/Contra report said that the laws and procedures which exist are adequate to the task, providing of course they are observed. Both the Iran/Contra report and the Tower Commission indicated that the failing was a failing in people.

Corrective action, as I indicated, was taken. No amount of legislation can correct errors of judgment on the part of people, but it can stop a President from taking action which he believes necessary in the national interest.

I think you need to ask yourselves, will a presidential veto increase or decrease the degree of trust between the Congress and the Executive Branch? I would submit that what you will do is create a contentious constitutional argument that will last throughout the years, very similar to the argument we are currently experiencing with regard to the War Powers Act.

I would ask: Is this worth the gain? In fact, to me the gain is not at all clear.

Before I close, Mr. Chairman, let me mention one specific. I notice that Director Webster said that we should not deviate from existing practice as to what constitutes a special activity. I think that is particularly important, and it is absolutely vital as far as the military is concerned.

Tactical military activities must be distinct from covert action activities. We do not want to have a finding every time we deceive the U.S.S.R. on the movement of weapons or forces. When I testified before HPSCI, Subcommittee Chairman McHugh assured me that there was no intention to include under this bill military activities, but I emphasize the point so there will be no misinterpretation.

Mr. Chairman, as Mr. Broomfield has pointed out, I lived through the lessons of Iran/Contra, I saw the pain it caused the President, I saw the mistrust between the Executive and Legislative Branches, and I and my colleagues worked very closely with the Congress to correct the situation and heal the wounds.

We are now nearing a period of presidential transition and in my judgment we need to pass on a healthy legacy instead of one that could plague us for years to come. I urge you not to create a constitutional confrontation through this legislation.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Frank C. Carlucci follows:]

PREPARED STATEMENT OF HON. FRANK C. CARLUCCI, SECRETARY OF DEFENSE

Mr. Chairman, I thank you and the Committee for the opportunity to exchange views on the proposed Intelligence Oversight Act of 1988. The subject matter of H.R. 3822, the degree of Presidential interest, and my prior position as National Security Advisor during the period when important NSC reforms were made which bear directly on these hearings, bring me here on behalf of the Administration.

Today, I would like to offer the Committee my thoughts on the proposed legislation, bearing in mind the circumstances which prompted the Congress to consider new legislation, and to ask whether this bill would improve the situation. I strongly believe that this legislative proposal is the unhappy result of a breakdown in consultation between the Executive and Legislative branches. It serves no purpose to cast blame. An attitude of mistrust on both sides complicated the kind of confidence in one another which our Presidents and our legislators need in order to carry out their respective Constitutional duties effectively and successfully.

The Congressional Iran-Contra report was right when it said, "Democratic government is not possible without trust between the branches of government and between the government and the people." (p. 20) Those relationships suffered a setback in the Iran-Contra affair, as actions were concealed from Congress and, in one key

instance, from the President himself. An unhealthy lack of shared purpose between the Congress and the Executive -- to be blunt, an adversarial relationship -- kept key actors on each side from sharing confidences and building a lasting consensus which would apply to all of the tools of statecraft which support national foreign policy objectives.

I can think of no step by the Congress which would do more harm to the process of rebuilding an atmosphere of trust and candor between the branches than unilaterally laying claim to prerogatives which the President firmly believes are vested in the Executive by the Constitution. The distinguished Members of this Committee are particularly well-versed in the nature of exigencies abroad affecting U.S. interests and the inherent limits on our ability to act effectively beyond our borders. The founders of this country similarly recognized that compelling circumstances could require the Executive to act on behalf of the American people. Who among us can say with absolute certainty that no future President will ever be faced with a situation requiring that notification of a covert action to the Congress be delayed beyond 48 hours?

One recent example, which the House and Senate intelligence committees have both discussed in their hearings on the proposed Intelligence Oversight Act of 1987, is the assistance which Canada rendered to the United States in 1980 in helping to smuggle six American hostages out of Iran. As one Member of Congress who served on the House Permanent Select Committee on Intelligence

at the time has testified, Canada had one request in offering its cooperation: that the President not tell the Congress. Was this unreasonable? You and I might say "yes," believing that the Congress could be trusted to protect this information. But from Canada's perspective, clearly it feared having its own Embassy in Teheran laid siege, as our own had been, if its assistance became known. President Carter authorized a covert action to get those six Americans safely out of Iran. He did not tell the Congress until after the fact. Some members disagreed but others argued that President Carter had done the right thing.

This example helps us to separate politics from process, and to understand how the founding fathers did the same thing when they designed our Constitutional separation of powers. Virtually all Americans would regard the rescue of six citizens in that situation as a goal justifying covert action, and they would view the Government of Canada as a worthy partner in that endeavor. Canada's demands for extreme secrecy would also appear reasonable, when we recall the climate of danger in Teheran at the time.

Yet the cold fact remains that if H.R. 3822 had been the law of the land in 1980, President Carter would have had to say "thanks but no thanks" to Canada. What would have happened to those six Americans, who were separated from the fifty-two Americans held in the American Embassy in Teheran, no one can say.

So there is more to the 48-hour notification issue than abstract theory. President Reagan's policy, as laid down in NSDD 286, is

to do precisely what H.R. 3822 would compel him to do -- to notify the intelligence committees of covert action findings no later than 48 hours after they are signed. If this policy cannot be followed for exigent reasons, the NSPG is required to review the situation every ten days. We believe the NSDD works well with the current statutory framework governing intelligence activities. President Reagan also strongly believes that no President can accept a statute that purports to impose limitations on a power which the Constitution vests in the Executive and which has rested with the Executive since the founding of our nation.

I respectfully urge the members to reflect on the wisdom of the President's position and, beyond this, to consider the effect of provoking a Presidential veto on legislation governing the entire realm of intelligence activities. Will this really improve the situation, or will it simply add to the atmosphere of mistrust in a well-meaning effort to be certain that never again will an admitted mistake be repeated? If trust, candor and accountability are the remedy to the problems which brought about the Iran-Contra affair -- as I believe they are -- the Congress risks undermining all of those goals, and reintroducing instead an unhealthy adversarial basis to the oversight process for years to come, if it incorporates a fundamental Constitutional disagreement into the law.

I have dwelt on this one central issue because I hope to persuade the members that the position taken by President Reagan and his immediate predecessors is reasonable and correct.

Appropriate action was taken as soon as the President became aware of the true nature of what had transpired in the Iran-Contra affair. A new National Security Advisor was brought in. Judge Webster was nominated as Director of Central Intelligence. President Reagan prohibited the National Security Council staff from participating in covert action, and he upgraded the position and authority of the NSC Legal Advisor.

The President directed that findings be set in writing prior to initiation of the covert action. He ordered a full review of ongoing covert actions, and revised or terminated any which were not seen to be necessary or effective. Under a "sunset" clause, Presidential authority for a covert action now expires after one year unless he revalidates it. These and other measures have been praised by the sponsors of the companion Senate legislation. This is not surprising since we consulted with the Senators as we developed our guidelines.

This is the framework currently in place for the management of covert action within the Executive Branch. Does it have the permanence of a statute? No -- admittedly not. The next President will be entitled to set up his own system of managing covert action, consistent with existing law, as will the President after him. However, if government is to function effectively as well as responsively, there must be a line where the statutory framework ends and the President's internal management responsibility begins. No two Presidents are alike in their management styles. No two Administrations have used identical procedures

and mechanisms for recommending options to the President or implementing Presidential decisions. We must allow our Presidents to manage, and each President must be allowed to manage his Administration in the manner which suits him best.

Let us remember that the failures of the Iran affair were human and managerial. No statute can prevent these mistakes. The Congress' Iran-Contra investigation led to the conclusion that "the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance." (p. 423) With specific reference to the existing "laws and procedures to control secret intelligence activities, including covert actions," the congressional report concluded that, "Experience has shown that these laws and procedures, if respected, are adequate to the task. In the Iran-Contra Affair, however, they often were disregarded." (p. 375)

I do not believe statutory change is necessary. New statutes offer no protection from those who would disregard them. Nor would the public good necessarily be served by a framework so restrictive that the talents and initiative of law-abiding public servants were stifled. How much better it would be to have a procedural and statutory framework that heals the wounds, provides for reasonable safeguards, encourages an atmosphere of trust and candid consultation between the branches, and brings the best out of our intelligence professionals and public servants.

Mr. Chairman, permit me to offer the Committee my vision of such a framework. It begins with the observation, developed over several years working with intelligence matters, that statutes and Executive orders, no matter how well-crafted, can never anticipate every future situation -- nor should they attempt to do so. Inevitably, the intelligence community faces unforeseen circumstances, challenges and requirements, and must come to terms with them as best it can within the existing framework.

Over time, mutually accepted understandings and practices develop in the community and between the branches which become part and parcel of the regulatory framework. Indeed, this is what has happened since the enactment of Hughes-Ryan Amendment. I note that the Senate Select Committee on Intelligence has recognized this fact. Its committee report on S. 1721 states that the definition of the term "special activity," as used in the bill, "is intended, as written, to reflect and incorporate existing law and mutually-agreed upon practice." (p. 38)

Judge Webster recently testified before the House Intelligence Subcommittee on Legislation that a deviation from the existing practice regarding what constitutes a special activity could result in Executive branch agencies having to obtain findings for categories of activities that do not require findings today. I support Judge Webster's position that the Congress should not change the existing practice within the Executive branch on which activities are governed by a Presidential finding.

As Secretary of Defense, I have a particular concern in this regard that tactical military activities continue to be understood as distinct from covert intelligence actions. This is not a question of what the Congress should be told, but rather a question of which activities should require a Presidential finding. For example, should a finding be required every time we attempt to deceive the Soviet Union on the movement of nuclear weapons or the capabilities of our own military forces? Clearly not, according to the current definition.

I hope that the members will recognize the importance of preserving the body of mutually-agreed upon practice between the branches, even as we look for new ways to prevent the mistakes of the recent past from recurring. I emphasize this because I believe it is important that the House affirm that it is building on the existing foundation of understandings, as the Senate has done. Surely we wish to avoid the paralysis which would plague Executive departments and agencies if they were suddenly unsure whether to seek Findings and report to the intelligence committees on categories of activity which previously have not been viewed by either branch as requiring such treatment.

The present system of congressional committees, in some measure, parallels the Executive branch division of labor, and I am confident that neither this Committee nor any other intends for H.R. 3822 to change that. In this regard, I was gratified by the verbal assurance I received from Chairman McHugh, when I testified before the House Intelligence Subcommittee on Legislation in

March, that activities traditionally regarded as military activities are not intended to be subject to the covert action procedures delineated in H.R. 3822.

In sum, Mr. Chairman, I come before this Committee as an advocate for learning the lessons of the Iran-Contra matter and restoring integrity, accountability -- and yes, vitality -- to our intelligence activities, which are a small but critically important instrument of our national power. However, I urge the Committee to step back from the immediate context, as did the founding fathers, and consider the value and necessity of an Executive which can act for the nation in extremis. Ask yourself whether the most honorable and talented of our young will join our intelligence services if the bureaucracy is mired in an atmosphere of uncertainty and recrimination. Think about how governments and individuals in other countries will regard the risks of cooperating with the United States if the Executive and the Congress are perpetually at loggerheads on these sensitive matters.

We will not put the mistrust which caused the Iran-Contra affair behind us until we trust each other again. We have laws and regulations in place today which are quite satisfactory. The enormous repercussions of the Iran-Contra matter have made a lasting impression on officials throughout the intelligence community that will serve to prevent a recurrence. I urge the Committee to consider the very real adverse consequences of attempting to impose a new and inflexible statutory framework on

our Presidents and our intelligence community. Let us instead test each other's good faith and professionalism, and give responsible officials in both branches a chance to earn each other's respect by giving real meaning to the concept of consultation.

Not only does such an approach have the advantage of bringing the best out of our public servants: it is the way the founding fathers intended the system to work.

Thank you, Mr. Chairman.

BILL EXCLUDES NORMAL MILITARY ACTICITY

Chairman FASCELL. Thank you, Mr. Secretary. The bill as reported out of the Intelligence Committee and submitted to us, now pending before us, makes clear and addresses the issue that you just raised with regard to military activity. I don't think, it is certainly not my intent, and I think the bill is clear we don't intend to have a finding, report or anything else, with respect to military activities under the normal powers of the President who is Commander-in-Chief of the armed forces of the United States.

DEFINING COVERT OPERATIONS

Mr. CARLUCCI. I appreciate that, Mr. Chairman.

Chairman FASCELL. Let me also add, I want to express my commendation to you as one citizen to another for your continued public service and your willingness to take on tough jobs, coming out of private industry to take on a difficult task at a time when the country needed you, and you did a good job with that, and now you have moved on to another difficult position which seems to have about as many prickly problems as the one you left, and I am sure however, that you will address that in the usual manner in which you do, which is forthrightly and without fear or favor.

And that would be very important for the Department of Defense it seems to me at this time.

The issue though on notice, which I think is a modest change in the law which has created so much consternation both with CIA, the Administration, and you, seems to me to be rather modest, but nevertheless I recognize and respect the difference of opinion that exists but I submit, Mr. Secretary, that it has raised a different issue which has been here all the time and which, for one reason or another, we have never confronted directly, maybe because we just haven't had to or we didn't want to.

And that is the whole question of either special activity or covert operation. I want to be sure on the record we are speaking the same language, so when you are talking special activity, you are referring also to covert operation and it is within the purview of the definition now agreed upon in this legislation. Am I correct?

Mr. CARLUCCI. That is correct.

PUTTING COVERT ACTION IN PERSPECTIVE

Chairman FASCELL. Now, the issue that I see that has been raised, Mr. Secretary, and we have had testimony from the director of the agency that the special activities part of the covert action only takes up 3 percent of their total time or resources or whatever the measuring stick would be.

But, we certainly don't want to in any way interfere with 97 percent of the activity, which has to do with the very important job of intelligence gathering, collection, dissemination, analysis, and all of the things that the intelligence community must do.

So the question comes up then: Under what circumstances, under what conditions, if any, should a special activity be entered into or a covert operation, and how is that decision made in the United States Government?

It was authorized by Congress in the intelligence law, now I am hearing from people, Congress can't take that away. Well, I am of the opinion that Congress can. But that is an argument that can be made at another time because there is not legislation pending to revoke the authority by Congress for the President to carry out a covert activity or a special activity through the CIA, which is basically an intelligence gathering institution.

So the issue that is raised still comes back to those very rare 3 percent of the cases where this country wants to do something to implement its foreign policy and do so in a secret manner, without attribution, and to do it safely with protection of the personnel and the objective, and how in a democratic society do we manage to do that without running into the problem that we ran into?

It seems to me that notice to four people or eight people in the Congress can be equally trusted with knowledge of 200 people in the Administration who have to make the decision with regard to the matter.

But, I don't ask you to comment on that, in other words, that it is readily conceivable if we are going to have trust, we have to have trust on both sides.

Mr. CARLUCCI. I quite agree with that, Mr. Chairman. I would like to comment, though, because I think you have helped to put covert action in perspective. I think it has been greatly overblown as a foreign policy tool. It is a minor part of the agency's activities, and there should be certain criteria for covert action. The most important of which is that it cannot be a substitute for policy. You have to have the policy first and you have to have clearly defined goals, and then you look at all the instruments to implement that policy, and covert action in my judgment should be the last instrument that you look at, and then that should be tied to specific goals and there should be a sunset provision as we wrote into the NSDD.

How do you handle the problem of public accountability? I think we struck an ingenious solution through the congressional oversight process, which really isn't all that old. It has worked well.

In my days in the CIA I enjoyed working with the oversight committees; they brought a lot of wisdom to bear.

The only issue we are talking about here are exceptional circumstances, rare circumstances; "rare and exceptional" is the phrase that is used in the NSDD, where the President, some future President for some reason or other cannot notify the Congress within any specific time frame. The Canadian Embassy incident is a perfect example of how that could happen.

In fact, there have been only three instances where the Congress was not notified prior to the initiation of the activity, one being the rescue operation, the other being the Canadian Embassy operation, and the third being Iran/Contra.

So it would be only in very rare circumstances that we are talking about. But we should not deprive the President of that authority. Then also there is the constitutional argument that I made—that is to say, let's not set up a constitutional confrontation.

CRITERIA FOR INITIATING A COVERT OPERATION

Chairman FASCELL. Well, we didn't do that, Mr. Secretary, the constitutional confrontation was set up by the founding fathers in setting up a tripartite form of government with a judiciary, Congress, and Chief Executive, and we have been living with it now for over 200 years, and I dare say we can keep on doing it, but we have got to discuss these matters intelligently and with good humor and try to arrive at the best judgment we can with respect to our activities.

Now, would you agree that a covert operation, if we are going to undertake it and commit the integrity and the sovereignty of this government and our people, that we ought to start out, as you say, with a clear policy objective, that is number one, we are agreed on that; number two, you want to be successful, don't you?

Mr. CARLUCCI. Yes, sir.

Chairman FASCELL. Number three, if you are going to bypass the Congress in the manner in which you suggest, you had better be able to act fast.

Mr. CARLUCCI. Well, I don't know——

Chairman FASCELL. The operation better be over quickly because it is not going to be secret very long.

Mr. CARLUCCI. That is probably true. You made an assumption, you made an assumption in your earlier statement that 200 people in the Executive Branch——

Chairman FASCELL. Well, 150.

Mr. CARLUCCI. That really depends on the nature of the action.

Chairman FASCELL. I will settle for 25 as against eight, whatever number. The number is meaningless.

Mr. CARLUCCI. With something like the Canadian operation, the number is indeed very small and people take their responsibilities pretty seriously. We have a leaky government, I am prepared to grant that.

Chairman FASCELL. I take it seriously, too. I wouldn't want my life jeopardized because of an article that appeared in the newspaper or somebody didn't have sense enough to keep their mouth shut, I would not want that either, but all I am saying is if you are going to undertake a covert action, don't you agree it better be acted upon pretty quickly because it will soon become public knowledge.

Mr. CARLUCCI. Some of them become public knowledge. I have had experience with highly successful covert action operations that have not leaked. And the term "covert action" has taken on somewhat of a pejorative meaning. I have seen covert action programs that in a number of instances have helped the functioning of democratic processes.

Chairman FASCELL. I am sure that is true, Mr. Secretary. Let me lay out another criterion.

Are we agreed that the CIA should not carry out a military operation?

Mr. CARLUCCI. By and large. They do have—there are cases where they get involved in what are called paramilitary types of

operations, but by and large that should be a function of the Pentagon, yes.

Chairman FASCELL. Well, I have got some more criteria which I think we could reach common ground on, but basically they would be the criteria upon which reasonable people would engage in a special activity or covert operation, and I would like to explore that at length, perhaps at another time, but I have taken enough time now, and I will yield to my colleague, Mr. Broomfield of Michigan.

THE AMOUNT OF FLEXIBILITY THE PRESIDENT SHOULD HAVE IN NOTIFYING CONGRESS

Mr. BROOMFIELD. Thank you, Mr. Chairman.

Mr. Secretary, getting right to the crux of this whole bill, the key question is are we going to give any flexibility at all to the President or are we going to have a rigid enforcement of legislative prerogatives on every covert activity? I find it quite interesting that in the last 12 years under two administrations, as I understand, there have only been three instances in which knowledge of covert operations has been kept from the Congress.

Mr. CARLUCCI. That is right.

Mr. BROOMFIELD. That seems to me to be a very, very exceptional situation. Let me ask you at the outset, wouldn't you say this is veto bait, if this language is left the way it was reported out of the Intelligence Committee?

Mr. CARLUCCI. I have talked to the President about this legislation on several occassions and I have no doubt that he would veto it if it came to him in its current form.

Mr. BROOMFIELD. Mr. Carlucci, in the President's National Security Decision Directive, which you helped draft, the President committed himself to notifying Congress in virtually all cases. In addition, the President and his senior advisers would review a decision not to notify Congress every ten days. Is that not true?

Mr. CARLUCCI. That is correct, sir.

Mr. BROOMFIELD. As I mentioned earlier, I will introduce an amendment next week to incorporate a very high standard into the bill which would nevertheless permit the President to defer notification in certain rare instances.

Speaking as a representative of the Administration, do you believe the Administration could accept a very high standard provided it allowed some flexibility?

Mr. CARLUCCI. I think the Administration could accept a high standard providing it allowed some flexibility. It really depends on the wording of the standard. I would want a standard that could allow another Canadian Embassy rescue operation, for example.

Mr. BROOMFIELD. In what kind of cases do you believe the President must retain the power not to notify Congress within 48 hours—a case like the Canadian caper?

Mr. CARLUCCI. That is probably about as good an example we have right now.

Mr. BROOMFIELD. Isn't it possible a President could go through four or five years without exercising this kind of flexibility?

Mr. CARLUCCI. I would anticipate that would be the case.

Mr. BROOMFIELD. I want to assure you I intend to work with your legal advisers in trying to come up with legislative wording for an amendment that would meet with the approval of the President. If that is changed, would the President not in all probability sign the bill?

Mr. CARLUCCI. Let me point out we do have wording in the NSDD and that is "rare, extraordinary circumstances." I submit that itself is a high threshold.

Mr. BROOMFIELD. If the amendment followed the word of the NSDD?

Mr. CARLUCCI. I am sure that would be acceptable.

Mr. BROOMFIELD. We will be working with you on this.

Thank you, Mr. Chairman.

Chairman FASCELL. Mr. Solarz.

IRAN-CONTRA AFFAIR EXAMPLE

Mr. SOLARZ. Thank you very much, Mr. Chairman.

Mr. Secretary, it is good to have you with us. It may well be true, as my very good friend from Michigan pointed out, there were only three instances in the last eight years in which the President declined to notify the relevant committees of a covert operation in a timely fashion.

But it is also true that one and perhaps two of the three covert operations ended up disastrously for the United States. I have in mind the Iran-contra affair and possibly the rescue mission for the hostages.

It is entirely possible that if this law had been in place and the President had in fact been obligated to report to the eight leaders of the Congress, that one or more of them might have persuaded the President that this was an unwise action to initiate, thereby sparing the country the consequences of these failed missions.

Mr. Secretary, we have heard from Director Webster, now we have heard from you and we have heard from others. As I understand it, your objections to the provision in the legislation which would require notification within 48 hours, if it wasn't possible to provide notification prior to the commencement of the covert operation, are based essentially on three arguments: first, that it could conceivably lead to leaks which would compromise the operation, possibly even result in the loss of life; second, the Canadian conundrum which you pointed to, a situation in which the willingness of another country to cooperate might be lost because they would not want to participate in the operation if they knew Members of Congress had to be informed; and, third, your constitutional objections on the grounds this is an unconstitutional infringement upon the powers of the President.

Let me leave the constitutional question aside for a moment and focus on the first two.

First, with respect to leaks, you served with great distinction for several years as Deputy at the CIA, then at the NSC, now as Secretary of DOD. Are you aware of any instances in which there were leaks, from either the Intelligence Committees or the leaders of the House, of covert operations about which they had been briefed?

THE PROBLEM OF LEAKS, WHEN TOO MANY ARE CONSULTED

Mr. CARLUCCI. Mr. Solarz, I would prefer not to get drawn into that kind of a discussion.

The candid answer to your question is that I know of instances where there has been a substantial chance that the leak came from congressional committees, but I think that is irrelevant.

You will notice I don't even mention, in my prepared testimony or in my opening remarks, the question of leaks. I don't think that is the major issue. I trust the Congress. I quite agree that the Executive Branch is just as leaky as the Legislative Branch, or the Congress is just as trustworthy as the Executive Branch, whichever way you want to put it.

Mr. SOLARZ. I am pleased to hear that. The fact is, leaks are a problem. They are a problem on the Hill, they are also a problem in the Executive Branch, and we both have to find better ways to deal with it.

So your objections are really two: the constitutional objection and the Canadian conundrum objection.

OTHER GOVERNMENTS OBJECTING, IF OTHER PEOPLE ARE REQUIRED TO BE INFORMED

Mr. CARLUCCI. Yes, the Canadian conundrum and the constitutional objection, although I am not prepared to make the constitutional argument—Mary Lawton can do that—but from my perspective, the idea of a constitutional confrontation and the damage that can do between the Executive and Legislative Branches.

Mr. SOLARZ. Let me focus on the Canadian conundrum—that is more eloquent than "Canadian caper." There is no pride of authorship here; either will do.

We are talking about the situation in which we successfully attempted to retrieve some of our people from Iran with the cooperation of Canada, and I gather the Canadians would only cooperate if the Congress weren't informed.

I have two points on this that I would like to put forward and ask you to respond to.

The first is that I have a feeling that, particularly with the Canadians, if this law had been on the books and the President could have said to the Canadian Prime Minister, "Mr. Prime Minister, if we were proposing to share information about this operation with 435 Members of the House and 100 Members of the Senate, I would certainly understand your concerns, and I wouldn't propose the operations myself if we had to do that. But we are talking here about sharing the information with eight leaders of the Congress, our most senior respected Members. They have been informed about the most intimate secrets of our nation; I have them at the White House weekly for top-level briefings. I have as much confidence in them as people in my own Administration and I don't think you have too much to worry about." It strikes me that in the face of such representations there is a very good chance the Canadians would have said, "So long as it is limited to those eight, we can accept it."

The second point I would like to make, Mr. Secretary, is this. Presumably the Canadian concern was based on the fear that if

Members of Congress, even limited to the top eight, were informed, that somehow or other word might leak out. But if that is the case it is equally plausible that they might have been concerned, or if a similar situation develops in the future another country might be concerned, that if the Secretary of State or the Secretary of Defense or other top-level members of the Administration who serve on the NSPG——

Mr. CARLUCCI. National SPG.

Mr. SOLARZ [continuing]. Are informed, there might be leaks as well. After all, in most situations if the Secretary of State, for example, is informed, he usually goes back to his Department, I would imagine, as we were told by Mike Armacost, and may call in the people who deal with this area or this problem to get their advice.

I assume you probably, with one or two trusted subordinates, do the same so you can get the wisdom of your Department on this issue.

If the Canadian Prime Minister or any other national leader were to say to the President in the future, "Mr. President, I am willing to cooperate with you on this special activity or covert operation, but only if you don't say anything to your Secretary of Defense and/or Secretary of State, because, sir, no matter how much you respect them, I must tell you I have no confidence that they or their Departments can keep a secret," I would imagine the President would say to him under those circumstances, "Mr. Prime Minister, if that is the case, then I am afraid we are not going to be able to cooperate, because I am not prepared to limit my ability to consult my primary advisors on these questions to people whom you find acceptable, and I believe I have an obligation to myself and the American people to get the advice of those members of my Cabinet who have the primary responsibility for dealing with this."

Now, if that is in fact the approach the President would take with respect to a demand that you not inform a member of the Cabinet, why can't the same position be taken with respect to the leadership of the Congress?

I would appreciate it if you could respond to those points.

Mr. CARLUCCI. You are throwing out hypotheticals, of course. I can't second-guess them. It may be possible that the Canadians could have been talked into it, had this legislation been in effect. We will never know that.

The fact was that they couldn't be talked into it at the time, because it was our normal practice to inform the Congress.

Secondly, I am not so sure if I were President—which will never happen, of course—and I were forced to make a choice between five lives and cutting my Secretary of Defense or Secretary of State out of the loop, that I wouldn't cut the Secretary of Defense or the Secretary of State out of the loop.

Thirdly, let me point out that foreign governments usually have their own reasons, too. It is not solely a question of trust of the Congress; they may be worried about the precedent they set in their own country—that is to say, if it is a democratic system, will their own legislature demand similar access.

Finally, let me point out that Canada is one of our closest allies. It has got a similar system of government. It understands us very

well. It is right on our border. Most countries do not enjoy all of those happy circumstances. We have to deal with any number of non-democratic countries who don't understand the functioning of a democratic system, who don't understand the role of the Congress; and I don't know how many hours, when I was in the CIA, I spent arguing with my foreign colleagues that, yes, you can trust the Congress, we do have to share information with them, and having them turn a deaf ear to that.

That may not be desirable. It may be a totally inaccurate perception, but it is, nonetheless, reality.

IMPOSING CRIMINAL PENALTIES ON UNAUTHORIZED DISCLOSURES

Mr. SOLARZ. Mr. Chairman, if I may ask one final question.

Mr. Secretary, an effort may well be made to amend the legislation before us to provide for criminal penalties for any Member of Congress who receives information concerning special activity or covert operations pursuant to this legislation, if it is enacted, who then engaged in an unauthorized disclosure of that information.

Now, I know you are opposed to the legislation per se, because you think it is unconstitutional, but could you tell us whether you think the addition of such an amendment to the legislation, providing for criminal penalties for Members of Congress who engage in unauthorized disclosures of information of covert activities, would be a useful addition to the bill or not?

Mr. CARLUCCI. Well, this is, of course, a presidential issue and I don't think I can speak for him on that point. But my own reaction would be no, that would not satisfy the concerns I have.

Mr. SOLARZ. You would still be against the bill.

What I am saying, if there is going to be a bill, would you like to see such a provision providing criminal penalties to Members of Congress or not? If so, why? If not, why?

Mr. CARLUCCI. I cannot speak for the Administration on this point. We would be glad to take it under advisement.

My personal reaction is that we ought to have stiffer penalties throughout the Government, not just the Legislative and Executive Branches, for people who leak classified information of any sort.

I think our espionage act is antiquated. I would like to see it modernized and brought up to date, and I think we ought to have much tighter penalties for leaking that security information.

Chairman FASCELL. Thank you, Mr. Chairman.

Mr. Hyde.

CONSTITUTIONALITY OF 48-HOUR RULE

Mr. HYDE. I would like to ask Mary Lawton if she might step up, if that is all right with you, Mr. Chairman. I want to get a constitutional opinion from a lawyer.

Would you identify yourself?

Ms. LAWTON. Mary Lawton, Counsel for Intelligence Policy, U.S. Department of Justice.

Mr. HYDE. Would you give us your opinion as to the 48-hour mandatory notice?

Ms. LAWTON. I will try to summarize. What is already on the record before Congress is largely the Intelligence Committee. But

the Department's position, the Administration's position, is that the 48-hour rule, by tying the President's hands too rigidly in an area that is committed to him by the Constitution—the handling of the foreign affairs of the nation, the collection of intelligence to protect the national security and to react, the reason for the unitary Executive being precisely that, the ability to react quickly—steps over the line of separation of powers.

Now, we recognize separation of powers is not neat and categorical, and clearly there are areas where the Congress has a role in foreign affairs, there are areas where the President has a role in making regulations of a legislative nature, and it can get over the line. It is not a neat line, but there is a line. When you tie the President's hands so rigidly that you say, "Never under any circumstances may you react, Mr. President, to a threat to this nation without telling us first," then you have gone over the line of separation of powers.

Mr. HYDE. Thank you.

I will yield back my time and save what little I have left for Senator Cohen, if that happens.

Thank you.

Chairman FASCELL. Mr. Berman.

ESTABLISH LEGAL FRAMEWORK TO ENSURE NOTIFICATION BY PRESIDENT

Mr. BERMAN. Thank you, Mr. Chairman.

Unfortunately I got called out by an appointment I had scheduled and I missed the thrust of your answers to Mr. Solarz' questions, but I am interested in this Canadian issue.

When I first heard about it from—I think Mr. Hyde, in fact—and the logic of secrecy and the need for it, it seemed to be an appealing case, an appealing, very specific situation that argued against the kind of constraint this legislation is viewed by the Administration as imposing on it.

As I think about it more and more, I really wonder just how that washes. Of course, the Canadian rescue operation occurred before the 1980 amendments which provided the group of eight, restricted notice provision, an exception to the Intelligence Committee notification requirements. I think it is important to note that. So the specific Canadian issue dealt with a much larger group of people than would be allowed now under the law.

Secondly, you get to this question of "for a worthwhile objective." I mean, it gets right back into the arms sales to Iran kind of thing—look, we have this important goal to free our hostages, but the way to do it is to provide some arms to this country which is on our terrorist list, the law doesn't allow it but we have a worthwhile objective. I think in retrospect everybody thinks, both on policy reasons and on legal grounds, that was not a justified conclusion.

If we create a constitutional set-up, it is an impossibility for me to believe without serious effort by the Administration to persuade the Canadians in the situation that is constantly cited, that this group of eight—the Speaker, the Majority Leader, the Chairman and the Ranking Minority Members of the two Intelligence Committees, the Senate Majority Leader—that group of people is somehow less trustworthy or more likely to leak than the number of

people who by definition will have to be involved from the Executive Branch in this particular type of operation.

You are talking about the true leadership, people who, by virtue of their judgment and history, have been elevated to these kinds of responsible positions. You certainly have something to say back to the Canadians to convince them that it is an unreasonable and improper and unfortunately illegal expectation that they are asking to have visit on you, and to abandon any effort to ensure the kind of timely notice the Stokes bill provides, based on this position, based on this potential argument, opens up the potential for all kinds of evasions of congressional notification, consistently seeking third countries setting up requirements that Congress not be notified if they are going to be involved in some aspect of a particular covert operation as a way of avoiding congressional notification.

It seems the risk, the harm, the specific situation that occurred just two or three years ago in terms of the arms sales to Iran, all point out that the risks are much greater from not trying to provide a legal framework to ensure notification and not simply to rest on the President's interpretation as provided by the Justice Department that timely notice means when the President decides to give notice.

You talked about the President's prompt action. The President in his own finding in connection with Iran-contra said Congress was not to be notified. There wasn't prompt action to deal with Congress. When it came out and the publicity shined on it, then there were a variety of important corrective actions, but at the time there was a clear intent to avoid that kind of notification.

I just don't think the Canadian example is nearly as compelling as I did at first blush, and I don't know if this—this is really not a question; it is just my reaction to the consistent use of this.

I would like to raise one other issue. You have sort of implied, in response to Mr. Solarz' question, that there are questions of congressional leaks that may very well be out there, even though you are not using that as an issue in this discussion.

Judge Webster two days ago said unequivocally that there has never been any evidence of any congressional leaking of disclosures prior to the undertaking of covert operations, and the number of times the Congress and the Select Committees have been notified of those covert operations far exceeds the three times that they haven't been.

Mr. HYDE. Will the gentleman yield?

Mr. BERMAN. I would be happy to.

THE PROBLEM OF LEAKS

Mr. HYDE. I don't agree with the statement at all. Is the gentleman saying that Judge Webster has said no leaks have occurred from the Intelligence Committees on any matters that have been disclosed to us?

Mr. BERMAN. No. What Judge Webster said was that the prior notification to the Intelligence Committees of the intent to undertake covert operations has never resulted in unauthorized disclosures of those covert operations.

Mr. HYDE. I serve on the committee and I could name the gentleman several activities—and I know two that are under investigation right now, I hope, by the CIA and the FBI—of leaks from the Intelligence Committees.

I just don't agree with that and I didn't want the witness to think he said that.

Mr. BERMAN. Judge Webster did say it. We can go back to the transcript.

Mr. HYDE. I don't know why he would say that. That is not the fact.

Mr. BERMAN. It is hard for me——

Chairman FASCELL. If I could interrupt, let's allow the transcript to settle that. It will show what the judge said. There is no point in discussing that.[1]

Mr. CARLUCCI. May I comment?

Mr. Berman, I would not, of course, argue with what you said about the Congress and the high esteem in which one would hold the gang of four and the integrity of the institution and the seriousness with which you take your responsibilities. That is really not the issue.

You reflect on it from your perspective, with all due respect. I have spent at least half my life living in other countries of the world, including some fairly far out places like Zaire and Zanzibar, and I know how they look at us. They don't look at us through the same eyes as we look at ourselves. They don't view the Congress-Executive Branch relationships in the same light.

When you talk about legalities in the United States, "You are asking us to do something that is illegal", that is a concept that doesn't register in many countries of the world.

There is a view generally that the U.S. Government is very leaky and, quite candidly—and I don't want to get into the merits of the issue—there is a perception out there that information given to the Congress leaks. The issue isn't whether it is true or not; the question is, what is the perception, what do other countries believe?

You mentioned the danger of evasion. We have had an oversight process now for 10 or 12 years. You have got one case that you allege there has been what you call an evasion, and I don't want to get into the merits of the issue. I made it a point to say I am not dealing with the past, I am dealing with the future.

By and large, the oversight process has worked. What we need is that element of trust between the Executive and Legislative Branches. We need to work together. We don't need more confrontation.

If you weigh the two instances—the Canadian rescue operation, where lives were at stake, and the Iran-Contra operation, which was a foreign policy blunder—and you look at the future and you say, "Which is more likely to happen and which is more likely to entail painful decisions, heavy responsibilities on the President? Will he ever have to move in the future to save some lives?" I don't think you and I are capable of making that kind of an assessment. I don't think we can predict into the future for the sake of tying

[1] See pg. 56 of transcript of June 14, 1988 hearing.

down presidents to make sure that you will never get a repetition of the Iran-Contra affair.

Secondly, you are going to visit the correction for this error on future presidents, not the current President. When we elect our presidents, we have to put an element of trust in them; that is the only way our system will work, and that is precisely what the Iran-Contra report said.

Chairman FASCELL. The gentleman's time has expired.

Mr. Solomon?

[No response.]

Chairman FASCELL. Mr. DeWine.

Mr. DEWINE. I have no questions, Mr. Chairman.

Chairman FASCELL. Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman.

We welcome Secretary Carlucci before us.

Secretary Carlucci, during the course of our testimony, we have heard a great deal of issues with regard to the constitutionality of several provisions of this measure, and discussion of the bill has centered on the absolute 48-hour congressional notification requirement.

I understand that we have before us——

Mr. Chairman, I understand that this question has been fully responded to. Then I will waive my question.

Chairman FASCELL. Mr. Weiss.

CONGRESS' CONSTITUTIONAL AUTHORITY

Mr. WEISS. Thank you, Mr. Chairman.

Mr. Secretary, do you agree that the CIA exists because of legislative authorization?

Mr. CARLUCCI. Well, if you consider—I would defer to counsel on this, but the 1947 National Security Act——

Mr. WEISS. Do you agree that covert activity exists because it is authorized by the Legislature?

Mr. CARLUCCI. I defer to Mary Lawton.

I think it is inherent in the constitutional authority.

Ms. LAWTON. There is no legislation that I know of authorizing covert action. There are appropriations setting dollar limits on expenditures. There is no authorization act that I am aware of.

Mr. WEISS. Congress could, by failing to appropriate funds for it, eliminate covert activities; is that correct?

Mr. CARLUCCI. That is correct.

Mr. WEISS. Therefore, would you agree that Congress has the right, through the appropriation process, to limit the nature and extent of covert activities?

Mr. CARLUCCI. It has the ability, yes.

Mr. WEISS. All right. So would you then not agree that Congress has the power to determine that, regardless of what the time period is, there ought to be notification to Congress before or after a covert activity is undertaken by the President?

Mr. CARLUCCI. Except in rare and extraordinary circumstances, I would agree.

Mr. WEISS. Wait a minute. You agree that Congress has the power to make the determination as to notification; is that correct?

Mr. CARLUCCI. I don't think the Congress has the constitutional authority to put a definite time limit on notification, no.

Mr. WEISS. Well, if we have the right to eliminate it altogether, it seems to me we have the right to eliminate it.

Let me go a step further. Would you think that a four-week notification would be unconstitutional, four weeks after the onset of covert activity?

Mr. CARLUCCI. I don't think the time frame is the question.

Mr. WEISS. Do you think four years would be constitutional?

Mr. CARLUCCI. I defer to counsel, but I don't think the time frame is the issue. The issue is the President's constitutional prerogatives.

Mr. WEISS. Ma'am?

Ms. LAWTON. It is the denial of the flexibility of the President to respond, as a unitary executive, to foreign conditions. That is the problem, not the time frame, not the numbers notified, but the denial of flexibility.

Mr. WEISS. So whatever time limitation the Congress were to place on it, whether it were 48 hours, 48 days, 48 months, it would be a violation of the Constitution, in your judgment?

Ms. LAWTON. If it is that rigidly written, yes, if it permits of no exception.

Mr. WEISS. "That rigidly"—48 months would be a violation of the Constitution, in your judgment?

Ms. LAWTON. Yes, it probably would.

Mr. WEISS. Probably. Okay.

I know, Mr. Secretary, you have said you don't want to talk about the past but the future, but you came in and took your position because of that immediate past.

If we were to believe the testimony given by Colonel North and some of the other Administration witnesses in the Iran-Contra hearings, your predecessor, as Director of the Central Intelligence Agency, sat before us and brazenly lied to us as to what in fact he was charged with doing and what he had done in relation to the Iran-Contra affair.

We have a finding that the President made a directive to the Director of Central Intelligence, that is, not to disclose a certain finding to Congress. We have an Assistant to the Secretary of State who tells us that he lied, told the committee under oath that he lied to Congress, he didn't tell the truth because he felt that that was the way he would have to testify.

Now, do you believe that in fact Congress ought then to just sit still and accept the possibility of that kind of situation being repeated again and do nothing to try to correct the situations?

Mr. CARLUCCI. Mr. Weiss, I don't think it is appropriate for me to comment on specific situations. But obviously if the Congress feels it has been lied to, it has appropriate remedies. I don't think that has anything to do with an absolute 48-hour notification requirement. In fact, the Iran-Contra report makes precisely that point, that the existing laws and regulations are adequate if observed, and the Tower Commission and the Iran-Contra report both said these were failings of people. Fine, deal with the people, but don't deal with the issue by restricting the authority of future presidents.

Mr. WEISS. Mr. Secretary, I remind you, and I close on this, Mr. Chairman, we are supposed to be a nation of laws, not of people. We have a Constitution and laws so that in effect we don't have to rely just on the judgment, good or bad, of individuals. We provide very clear-cut statutory or constitutional guidelines for people in government to abide by.

When, in fact, we have a demonstration that the laws have been insufficient to give that kind of guidance, or that the existing guidelines were brazenly violated, it seems to me that there is an obligation on the part of the Congress to correct or to try to correct the situation.

We can't guarantee that there will not be another President who will not violate even those guidelines, but at least this Congress, if it is concerned about the safeguarding of democracy and the future of democracy, ought to discharge its only responsibility.

Secretary CARLUCCI. I would only repeat the Congress' own report say the existing laws were adequate if fully observed.

Mr. WEISS. Thank you, Mr. Chairman.

Chairman FASCELL. The record should show the report did recommend changes in legislation as the first recommendation.

Where are we now? Mr. Leach.

Mr. Secretary, did I understand that you have to leave right now?

Secretary CARLUCCI. I can go through one or two more questions if you would like.

Chairman FASCELL. Mr. Leach?

We will let Mr. Leach be the last, then.

PRESIDENTIAL SIGNATURE

Mr. LEACH. Thank you, Mr. Secretary. I wanted to raise one or two questions that are signature oriented. One requires a Presidential signature to be held within the Executive Branch of certain covert operations and special operations; second, that it be transferred to the Congress.

It strikes me that there are two problems with at least the second aspect. One is that the signed document implies more than simply informing eight people in Congress; it implies a document that will go into files up on Capitol Hill. That means that there is access by more people than simply eight Members of Congress.

One of the lessons of the Iran-Contra hearings for which there has been no comment about, and I think is a rather intriguing dimension, is there appears to be a leakage of papers from those files that were developed and they were used for a political purpose.

One of the candidates for President, for example, was embarrassed by some of the documents that were leaked. So, I don't think Congress has as great a record as might be implied by some of the earlier questions in terms of leaking papers, although perhaps the Members themselves might have a pretty good record.

I am wondering if you have any concerns at all about signed documents by the President coming up here and being placed in files.

Secretary CARLUCCI. To be quite candid with you, Mr. Leach, my preference would be not to have it signed. On the other hand, the NSDD we worked on with the Congress did say in paragraph (f)(2)

that "notification to the Congress would include a copy of the finding or associated memorandum of notification as signed by the President."

This seemed to be something that was desired on the part of those that we consulted with in the Congress. I don't think it is anything that is of particular importance to the Executive Branch.

Mr. LEACH. If one were to offer an amendment to strike the one provision, you would have no objection to that amendment?

Secretary CARLUCCI. I cannot speak for the administration. I would personally argue in favor of no objection to that.

Mr. LEACH. I would only raise one other objection to that whole idea of signing. That is, it personalizes policy in some very aggressive areas and sometimes I think it is better to have policy perceived to be impersonal, the Government of the United States for which a President is accountable. But whether or not there is a signed document, that Ronald Reagan certainly was held accountable for the Iran-contra issue.

There are some types of situations that one can envision that I think it is just better not to have the President's signature floating around in more places than would otherwise be the case.

So I would personally believe it might be helpful to change that, although I do think the larger issues, the notification ones——

Secretary CARLUCCI. I think you make a good argument on the signing issue.

Mr. LEACH. Thank you.

I have no further questions.

Chairman FASCELL. Mr. Bereuter, you have a question before the Secretary leaves?

EXECUTIVE ORDERS

Mr. BEREUTER. Thank you. Yes, Mr. Chairman.

Mr. Secretary, thank you for your testimony. One of the difficulties that has been pointed out with the NSDD approach is that directives can be altered or exceptions could be made to Directive 286, for example, in a fashion that even the Congress and others would not know about any subsequent directive.

I have been asking members of the Executive Branch relevant agencies how could we overcome the difficulty, the lack of trust that has occurred. I find the procedures, for example, in NSDD 286 that have been drafted, to be acceptable arrangements. They provide adequate flexibility for the President to act under unusual circumstances.

I think, as I understand it, you are largely responsible for the drafting of it, or a major involvement. The answer I got back from the people in the Executive Branch is, well, there are some possibilities of doing this by Executive Order. With executive orders, you have higher visibility. The chance for subsequent action on another directive could not be taken.

Still, if you simply took the language of Directive 286 and put it in Executive Order, you preserve the prerogatives of the President to respond to unusual circumstances.

Would you have any reaction to the possibility of trying to relieve the problem that Congress has as a matter of trust at this point by taking something like the Directive 286 and putting it in an Executive Order? Do you think it would have advantages?

Secretary CARLUCCI. I think the NSDD form is more appropriate for this kind of issue, but if this is helpful in terms of getting acceptable legislation, I personally would be prepared to recommend to the President that he put it in Executive Order.

Mr. BEREUTER. In that case, we can avoid the statutory approach.

Secretary CARLUCCI. If we can avoid the statutory approach, I would be prepared to recommend that it go in an Executive Order, yes, sir.

Mr. BEREUTER. Thank you, Mr. Secretary.

Thank you, Mr. Chairman.

Chairman FASCELL. Thank you very much, Mr. Secretary. We appreciate your time, attention and your testimony.

Mr. Miller, he has got to go. I'm sorry you weren't here when that announcement was made, but again, thank you very much.

Our next witness is our distinguished colleague from the esoteric arena euphemistically called "the other body," the distinguished Senator from the State of Maine who served on the Iran-Contra committee and who is the primary sponsor and supporter of S. 1721, which is the companion bill to the bill which is pending before us that came out of the Permanent Select Committee on Intelligence, and was passed in the Senate by a bipartisan vote of 7 to 19, for which I congratulate you, Senator, and to say that we have a difference of opinion in this committee about the validity of this particular piece of legislation.

I don't suppose it would be any surprise to you to have some questions that would go to the point. We are delighted you are here. I want to thank you very much for giving us your testimony.

If you like, we can put your testimony in the record in full. You can present extemporaneously.

STATEMENT OF HON. WILLIAM S. COHEN, A U.S. SENATOR FROM THE STATE OF MAINE

Senator COHEN. Thank you very much, Mr. Chairman.

I see I have lost my audience with the exception of some stalwarts over here who I have had the pleasure of serving with on the Iran-Contra Committee. The cameras have also exited, so that means my remarks before you will be really brief.

Chairman FASCELL. I won't take that as a personal comment. The electronic media, radio is still here. Pencil pushers are still around. I wouldn't be forlorn or give up all hope.

Senator COHEN. Mr. Chairman, I think I can summarize my remarks. My remarks have been distributed to the Members and perhaps I can just address myself to a couple of quick points.

I believe the bill that was passed in the Senate satisfied all of the administration's questions with the exception of one. That is the 48-hour notice requirement.

Ultimately, it comes down to two questions, I suspect, one of power and one of policy. Does Congress have the constitutional power to impose such a restriction or requirement upon the President of the United States. I think we can all cite different scholars to support our particular positions—I know that Congressman Hyde and others have cited Eugene Rostow—that Congress does not have that kind of power.

I have cited Mr. Louis Henkin, who is a University Professor of law at Columbia University, who has indicated that Congress indeed does have the power in the field of this type of legislation where we are now, that there is a shared responsibility. It is not the exclusive domain of the President of the United States, but a shared responsibility with Congress.

So the first question is one of power. We can debate that ad infinitum. I believe there is a constitutional power. I think Congressman Weiss just a moment ago touched upon it. We have the constitutional power to prohibit covert actions, period. We can simply not fund them through the appropriations process, and there would be no covert actions.

The question has been raised: Is there any authority, legislative authority, for covert activities? I might point out that is one of the basic differences in our bills. In the S. 1721 we expressly authorize covert actions as one part of a number of things that the President can call upon to carry out foreign policy. I believe that S. 1721 is probably the first place where that authority is actually expressed in legislative language. That provision is not contained in the House bill. But the question of power is one that we will be divided on depending upon your viewpoint.

Number two, the question of policy is also one of great division. I think that the notion that was just advanced a moment ago from the Justice Department that notification to Congress inhibits the President's flexibility, is preposterous. We are not seeking to prohibit the President from taking action. There is no allegation or suggestion that Congress has the power to prevent the President from initiating a covert action or indeed prohibiting it from continuing once having been initiated. All the legislation calls for is notification.

It calls for notification not to the full committees of both the House and the Senate Intelligence Committee, but to the so-called "gang of eight" or "big eight."

We went further in the Senate bill and confined it to the so-called gang of four. That was not my preference, but that was done in order to accommodate some of the opposing viewpoints.

But I think the notion that has been advanced that notification inhibits Presidential flexibility is not one that ought to be accepted by the Congress.

Another point that was made by Secretary Carlucci, was that the laws were adequate as revealed by the Iran-contra report. I don't believe that was precisely how the Iran-contra report read, at least the majority report. There may be a difference of the majority and the minority report.

I think the laws were adequate if they had been interpreted according to the legislative history. When the Intelligence Oversight Act was adopted back in 1980, it was contemplated, I believe the reading of the history shows, that notice would be given within a very short time. Timely notice encompassed a time frame of a matter of days.

I believe, Congressman Hyde, that you raised the issue about whether or not the Director of Central Intelligence supported the 48-hour notice. When Judge Webster was up for confirmation before the Senate Intelligence Committee, I asked him whether or

not he would come to Congress within a matter of a couple of days and he indicated he could foresee no circumstance in which he would not be before the Intelligence Committee notifying us of a covert action—even one involving life-threatening circumstances. While he did not indicate he supported the 48-hour notice on the legislation——

Mr. HYDE. May I just discuss that with you for a minute with leave of the Chairman?

Chairman FASCELL. Sure.

Mr. HYDE. I think I agree that when he was before the committee for confirmation, that was his position, and Mr. Gates', as well. Then later on, his position is different. His position now is he does not think the 48-hour mandate is sufficient, is adequate, is enough.

To what do you attribute his change? Do you think he is being dishonest or the administration has pressured him?

Senator COHEN. I think given the administration policy, it would be very difficult for the Director to come before the Congress and support a notification requirement that was so adamantly opposed by the administration.

I think however, it is important to emphasize what the director said at the time: he could foresee no circumstance which would prevent him from giving notice to Congress. He would want to come.

Mr. Gates was more emphatic. He said he would be up here within a matter of a few days, and if not he might be forced, as I recall, even to terminate his service. But he felt pretty strongly that notice ought to be given within that 48-hour period.

Mr. HYDE. Of course, in seeking confirmation one's approach to these questions is much more conciliatory than one clinically analyzing these things.

Senator COHEN. I would not disagree with that.

Mr. HYDE. The director may have had more time since then to think about hypotheticals. I intend to give you one later, and I think had the director thought of that hypothetical, he might have said things differently.

I thank you, and I thank you, Mr. Chairman.

DIFFERENCES BETWEEN THE SENATE AND HOUSE BILLS

Senator COHEN. I may have a chance to give my good friend some hypotheticals as well. But I think the point has been made, Mr. Chairman.

I believe that Congress has a constitutional responsibility that we share with the President in the field of foreign policy. The President is not the sole, exclusive architect of foreign policy. He may be the executor of foreign policy, the implementor, but he is not the sole architect, and we do share responsibilities in that field.

I think that this power derives from—it is through the appropriations clause. Congress also has the responsibility for the raising and supporting of armies and navies. It is through the enforcement powers given by the Constitution. So I don't think we have to belabor the point.

I would just like to make reference to a couple of major differences between our two bills. Number one, the language in our bill

expressly authorizes the President to conduct covert actions and your bill has been changed. The President may not authorize covert actions "unless." So there is a difference that may be one of nuance, but I suspect there is fairly strong feeling on that matter that the House does not feel it wants to resort expressly to covert activities.

Those of us in the Senate came to the conclusion that covert actions are required from time to time. We do not wish to engage in a wholesale utilization of covert activity, but recognize as a reality that the President may be called upon to carry out covertly a legitimate foreign policy objective he could not otherwise carry out on an overt basis. That is one difference.

Number two, your bill does not have the so-called gang-of-four option. We limited it in those extraordinary cases to four Members, the leadership of both the House and Senate.

Number three, your bill has a new definition of covert actions and ours is referred to as special activities. Frankly, I do find a great deal of difference. I find no objection to the House's reference and definition of covert activities with one cautionary note. There is a reference in your definition of covert activities that would relate to law enforcement actions that would not otherwise be classified as a covert action requiring a finding.

I think you ought to exercise some caution in that field, either in the statutory language or in report language, to make sure that we don't have a situation in which a special activity or covert action, if it were carried out by the Central Intelligence Agency—and thus require a finding and notification—could be delegated in some fashion to another agency to carry out that same activity or similar activity without the requirement of a finding or notice, because the action could than be classified as a law enforcement activity.

I think that is something you should look at carefully, and I would be happy to discuss it in a different forum with you.

The fourth point: Your bill has a provision which does not appear in S. 1721. It requires reports to the Intelligence Committees of expenditures of nonappropriated funds available to intelligence agencies, and frankly, I think that is a good proposal.

With that, Mr. Chairman, I would yield for your questions.

[The prepared statement of Senator Cohen follows:]

PREPARED STATEMENT OF HON. WILLIAM S. COHEN

THANK YOU, MR. CHAIRMAN. IT IS A PLEASURE TO APPEAR BEFORE THE COMMITTEE TO COMMENT UPON H.R. 3822, WHICH IS PENDING BEFORE YOU. WHILE I HAVE NOT STUDIED THE BILL IN DETAIL, IT APPEARS SIMILAR IN MOST RESPECTS TO S. 1721, WHICH I INTRODUCED AND WHICH WAS SUBSEQUENTLY PASSED BY A 71-19 VOTE, ATTESTING TO THE BROAD BIPARTISAN SUPPORT IT RECEIVED IN THE SENATE.

WE WERE ABLE TO RESOLVE ALL OF THE ADMINISTRATION'S PROBLEMS WITH THE SENATE BILL SAVE ONE, THE REQUIREMENT TO PROVIDE NOTICE OF COVERT ACTIONS NO LATER THAN 48-HOURS OF A FINDING BEING APPROVED BY THE PRESIDENT. I THOUGHT THEREFORE THAT I WOULD CONFINE MY REMARKS HERE TO THIS ISSUE.

THE ADMINISTRATION HAS ARGUED THAT THERE MUST BE GREATER FLEXIBILITY FOR THE PRESIDENT -- THAT THERE WILL BE OCCASIONS WHEN THE PRESIDENT WILL NOT WANT TO COMPLY WITH THIS REQUIREMENT AND TO REQUIRE HIM BY STATUTE TO DO SO WILL, ON SUCH OCCASIONS, HAMPER HIM FROM CARRYING OUT HIS CONSTITUTIONAL RESPONSIBILITIES AS COMMANDER-IN-CHIEF, AND AS THE PRINCIPAL ARBITER AND EXECUTOR OF U.S. FOREIGN POLICY.

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LET'S EXAMINE THIS ARGUMENT FOR A MOMENT. NEITHER THE SENATE NOR HOUSE BILL PREVENTS THE PRESIDENT FROM INITIATING A COVERT ACTION WITHOUT ADVISING THE CONGRESS, SO LONG AS NOTICE AFTER-THE-FACT IS PROVIDED WITHIN 48 HOURS. MOREOVER, IT MAKES CLEAR THAT CONGRESSIONAL APPROVAL IS NOT REQUIRED EITHER TO INITIATE OR CONTINUE A COVERT ACTION. SO, LET'S BE CLEAR. THE BILL DOES NOT PROHIBIT THE PRESIDENT FROM "ACTING." THE QUESTION, THEN, IS HOW PROVIDING NOTICE TO CONGRESS WITHIN 48 HOURS OF AUTHORIZING A COVERT ACTION WOULD INTERFERE WITH THE EXECUTION OF ACTIONS WHICH HAVE ALREADY BEEN INITIATED BY THE PRESIDENT.

THE CONCERN SEEMS TO BE THAT NOTICE TO THE CONGRESS, EVEN THE SO-CALLED "GANG OF EIGHT," OR GANG OF FOUR IN THE SENATE BILL, INEVITABLY INCREASES THE RISK THAT THE ACTIVITY WILL BE DISCLOSED, AND THAT WHERE LIVES ARE AT STAKE, OR THE SUCCESS OF THE ENTERPRISE IS CRITICAL TO THE NATION'S SECURITY, THE PRESIDENT CANNOT AFFORD TO TAKE THE RISK OF NOTIFYING EVEN A LIMITED NUMBER OF CONGRESSIONAL REPRESENTATIVES. TO REQUIRE IT BY STATUTE THUS WOULD INEVITABLY INTERFERE WITH THE EXECUTION OF THE PRESIDENT'S CONSTITUTIONAL RESPONSIBILITIES.

ON A PURELY PRACTICAL LEVEL, I REJECT THE NOTION THAT INCLUDING EIGHT MEMBERS OF THE CONGRESSIONAL LEADERSHIP WITHIN THE CIRCLE OF THOSE WHO HAVE TO KNOW THAT SUCH ACTIVITIES HAVE BEEN INITIATED EITHER HAS OR WILL SIGNIFICANTLY INCREASE THE RISK THAT SUCH ACTIVITIES WILL BE DISCLOSED.

BUT, MORE IMPORTANTLY, I REJECT THE NOTION THAT THE CONSTITUTIONAL RESPONSIBILITIES OF THE CONGRESS CAN BE SO EASILY OVERRIDDEN. COVERT ACTIONS FREQUENTLY RAISE SERIOUS FOREIGN POLICY AND DEFENSE CONCERNS WHICH ARE EVERY BIT AS IMPORTANT TO CONGRESS IN TERMS OF ITS CONSTITUTIONAL RESPONSIBILITIES TO ENACT LAWS OR APPROPRIATE FUNDS AS THEY MAY BE TO THE SATISFACTION OF EXECUTIVE BRANCH RESPONSIBILITIES. THESE ARE NOT AREAS WHERE THE PRESIDENT EXERCISES EXCLUSIVE CONSTITUTIONAL POWER. THE EXECUTIVE MAY BE THE IMPLEMENTER, BUT IT IS THE LEGISLATIVE WHICH MUST AUTHORIZE APPROPRIATIONS FOR SUCH ACTIVITIES UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES. THE CONSTITUTION EXPRESSLY PROVIDES THAT "NO MONEY SHALL BE DRAWN FROM THE TREASURY, BUT IN CONSEQUENCE OF APPROPRIATIONS MADE BY LAW." FURTHER, IT IS MADE CLEAR BY STATUTE THAT FUNDS WHICH HAVE BEEN APPROPRIATED BY LAW MAY BE EXPENDED ONLY FOR THE PURPOSES AUTHORIZED BY CONGRESS. COVERT ACTIONS REQUIRE FUNDING, AND IT IS THE CONGRESS WHICH MUST PROVIDE IT. IT IS THAT SIMPLE.

EQUALLY AS COMPELLING, HOWEVER, COVERT ACTIONS INEVITABLY INVOLVE ACTIONS ON THE PART OF THE UNTIED STATES WHICH BEAR DIRECTLY UPON RESPONSIBILITIES GIVEN TO CONGRESS BY THE CONSTITUTION. FOR EXAMPLE:

-- CONGRESS ALONE IS GIVEN THE FUNDAMENTAL RESPONSIBILITY TO DETERMINE WHETHER THE UNITED STATES WILL BE AT PEACE OR AT WAR WITH PARTICULAR COUNTRIES. COVERT ACTIONS

SOMETIMES INVOLVE THE UNITED STATES IN SECRETLY CONDUCTING OR SUPPORTING ARMED HOSTILITIES AGAINST FOREIGN GOVERNMENTS, WHICH THEMSELVES COULD DRAW THE U.S. INTO OPEN HOSTILITIES. SUCH ACTIONS MIGHT ALSO INVITE RETALIATORY MEASURES BY HOSTILE FOREIGN GOVERNMENTS, EITHER AGAINST THE U.S. OR ITS ALLIES, AGAIN A POSSIBILITY OF WHICH CONGRESS OUGHT TO BE AWARE;

-- CONGRESS IS ALSO CHARGED BY THE CONSTITUTION "TO RAISE AND SUPPORT ARMIES" AND "TO PROVIDE AND MAINTAIN A NAVY." AGAIN, COVERT ACTIONS CAN ADVERSELY AFFECT U.S. MILITARY STRENGTH AND READINESS. CONGRESS NEEDS TO BE AWARE OF SUCH POSSIBLE CONSEQUENCES; AND

-- FINALLY, CONGRESS IS SOLELY INVESTED BY THE CONSTITUTION WITH "ALL LEGISLATIVE POWERS", INCLUDING THE POWER TO "MAKE ALL LAWS WHICH SHALL BE NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE FOREGOING POWERS, AND ALL OTHER POWERS VESTED BY THIS CONSTITUTION IN THE GOVERNMENT OF THE UNITED STATES, OR IN ANY DEPARTMENT OR OFFICER THEREOF..." COVERT ACTIONS CAN UNDERMINE LAWS WHICH HAVE BEEN PASSED BY CONGRESS. WE SAW THIS HAPPEN IN THE IRAN-CONTRA AFFAIR. MOREOVER, THEY CAN SUGGEST THE NEED FOR LEGISLATIVE RESTRICTIONS

AT LEAST FOR ASPECTS OF PROPOSED OR ONGOING OPERATIONS. CONGRESS, IN FACT, HAS OCCASIONALLY IMPOSED SUCH RESTRICTIONS. BUT WITHOUT KNOWLEDGE OF SUCH OPERATIONS, IT NEVER HAS THE OPPORTUNITY TO EVALUATE THEM IN TERMS OF THE EXERCISE OF ITS LEGISLATIVE POWERS.

CONSTITUTIONAL ARGUMENTS ASIDE, THE REALITY IS THAT COVERT ACTIONS CAN HAVE SERIOUS REPERCUSSIONS FOR THE UNITED STATES. AS CLARK CLIFFORD TOLD THE COMMITTEE:

"IN THE LAST YEAR OR SO, WE HAVE WITNESSED THE RECURRENCE OF AN ALL TOO FREQUENT PROBLEM: COVERT ACTIVITIES THAT GET OUT OF CONTROL AND EMBARRASS THE NATION AND UNDERMINE OUR CREDIBILITY AND CAPABILITY TO EXERCISE WORLD LEADERSHIP... MOREOVER, THE PROBLEM IS GETTING WORSE, THE COSTS ARE GETTING HIGHER AND THE DAMAGE IS GETTING GREATER. FOR THIS REASON, I SAY THAT, UNLESS WE CAN CONTROL COVERT ACTIVITIES ONCE AND FOR ALL, WE MAY WISH TO ABANDON THEM."

CONTROLLING COVERT ACTIONS, HOWEVER, MUST START WITH AWARENESS. WITHOUT KNOWLEDGE ON THE PART OF THE CONGRESS, THERE CAN BE NO CHECK AND BALANCE. INFORMATION CONCERNING SUCH ACTIVITIES ARE ORDINARILY CONFINED TO A RELATIVELY SMALL NUMBER OF OFFICIALS WITHIN THE EXECUTIVE BRANCH. THERE IS NO DEBATE IN CONGRESS WITHER ON FUNDING OR POLICY; THERE IS DISCUSSION IN THE PRESS; NO COURT OF WORLD OPINION. PUBLIC AWARENESS IS USUALLY NON EXISTENT. THE SOLE CHECK ON COVERT

ACTIONS OUTSIDE THE EXECUTIVE BRANCH ARE THE INTELLIGENCE COMMITTEES, WHO NECESSARILY BECOME THE SURROGATES FOR THEIR CONGRESSIONAL COLLEAGUES, AND FOR THE AMERICAN PEOPLE. BUT THEY CANNOT PERFORM THIS FUNCTION WITHOUT KNOWLEDGE AND AWARENESS, AND FOR THIS THEY ARE DEPENDENT ULTIMATELY UPON THE PRESIDENT.

SINCE THE INTELLIGENCE COMMITTEES WERE ESTABLISHED IN 1976, EVERY ADMINISTRATION, INCLUDING THE PRESENT ONE, HAS, AS A MATTER OF PRACTICE, RECOGNIZED THE COMMITTEES' SPECIAL ROLE, AND HAS COOPERATED TO ENSURE THAT THEY ARE ABLE TO FULFILL IT. IN FACT, DESPITE THE ASSERTIONS OF THE JUSTICE DEPARTMENT THAT THERE WILL BE TIMES WHEN THE PRESIDENT CANNOT NOTIFY CONGRESS OF A COVERT ACTION WITHOUT JEOPARDIZING IT, THERE HAS NOT BEEN A SINGLE INSTANCE IN THIS ADMINISTRATION WHERE THE INTELLIGENCE COMMITTEES HAVE NOT BEEN APPRISED OF A COVERT ACTION, EXCEPT FOR THE IRAN ARMS SALES, AND WE ARE ALL PAINFULLY AWARE OF THE RESULTS.

THERE HAVE BEEN LIVES AT RISK IN MANY OF THESE COVERT OPERATIONS. THERE HAVE BEEN SUBSTANTIAL FOREIGN POLICY INTERESTS AT RISK. BUT THIS HAS NOT PREVENTED THE ADMINISTRATION FROM ADVISING THE COMMITTEES. INDEED, AT THEIR RESPECTIVE CONFIRMATION HEARINGS, BOTH THE CURRENT DIRECTOR AND DEPUTY DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY TOLD THE COMMITTEE THAT THEY COULD NOT IMAGINE WHAT CIRCUMSTANCES WOULD PREVENT THEM FROM NOTIFYING THE COMMITTEES OF A COVERT ACTION. BOB GATES STATED: "I WILL RECOMMEND TO THE PRESIDENT AGAINST WITHHOLDING PRIOR

NOTIFICATION UNDER ANY CIRCUMSTANCES, EXCEPT THE MOST EXTREME INVOLVING LIFE AND DEATH, AND THEN ONLY FOR A FEW DAYS, SEVERAL DAYS." JUDGE WEBSTER LATER COMMENTED: "I HAVE TROUBLE IMAGINING ANY SITUATION THAT IS SO SENSITIVE AND LIFE-THREATENING THAT THE CONGRESS CANNOT BE ADVISED OF IT."

DESPITE THE LEGISLATIVE HISTORY OF THE OVERSIGHT STATUTE AND DESPITE ACTUAL PRACTICE UNDER THAT STATUTE, THE ADMINISTRATION TAKES THE POSITION THAT THE PRESIDENT HAS "UNFETTERED DISCRETION" IN TERMS OF PROVIDING NOTICE OF COVERT ACTIONS TO CONGRESS. IN OTHER WORDS, THE REQUIREMENT IN SECTION 501(B) OF THE INTELLIGENCE OVERSIGHT ACT THAT THE PRESIDENT NOTIFY THE INTELLIGENCE COMMITTEES "IN A TIMELY FASHION" OF COVERT ACTIONS HE HAS ALREADY APPROVED MEANS WHATEVER THE PRESIDENT WANTS IT TO MEAN. INDEED, IN NSDD 286, WHICH PRESIDENT REAGAN ISSUED LAST FALL, IT PROVIDES THAT ANY DECISION NOT TO NOTIFY CONGRESS OF A COVERT ACTION WILL BE REVIEWED IN THE EXECUTIVE BRANCH EVERY 10 DAYS UNTIL CONGRESS IS NOTIFIED, BUT THERE IS NO OUTSIDE LIMIT ESTABLISHED. PRESUMABLY, WE ARE LOOKING AT AN INDEFINITE PERIOD WHICH WOULD DEPEND UPON THE CIRCUMSTANCES AT ISSUE.

I DO NOT THINK CONGRESS CAN SETTLE FOR THESE ASSERTIONS OF ABSOLUTE DISCRETION BY THE EXECUTIVE BRANCH. IF WE ACCEPT THE NOTION THAT "TIMELY NOTICE" MEANS WHATEVER THE PRESIDENT THINKS IT MEANS, WE MAY AS WELL ANNOUNCE THAT THERE IS NO CONGRESSIONAL OVERSIGHT OF COVERT ACTIONS. HOW CAN WE CLAIM TO PERFORM THIS FUNCTION IF WE ACCEDE TO THE PROPOSITION THAT THERE ARE THINGS WE CANNOT BE TOLD OF?

WE HAVE LOOKED AT A VARIETY OF FORMULATIONS OF POSSIBLE NOTICE PROVISIONS. WHAT WE HAVE CONCLUDED IS THAT EITHER YOU ESTABLISH A TIME CERTAIN -- 48 HOURS OR WHATEVER -- OR IT ENDS UP BEING A MATTER OF EXECUTIVE DISCRETION. THERE REALLY IS NO MIDDLE GROUND.

I APPRECIATE THAT THE PRESIDENT HAS IMPORTANT CONSTITUTIONAL RESPONSIBILITIES. I WANT HIM LEFT FREE AND ABLE TO PERFORM THEM. BUT OUR SYSTEM IS NOT A MONARCHY, RATHER IT IS A SYSTEM OF CHECKS AND BALANCES. THERE IS TOO MUCH AT STAKE FOR OUR COUNTRY WHERE COVERT ACTIONS ARE CONCERNED FOR CONGRESS TO BE KEPT OUT OF THE PROCESS.

THANK YOU. I'LL BE GLAD TO ANSWER ANY QUESTIONS YOU MAY HAVE.

Chairman FASCELL. Senator, I want to thank you very much for pointing out the differences in the bills. I think very good points were made. We will have to consider those very carefully.

I just wonder if I have gotten a full understanding, and I don't think I have. I detect something going on here with respect to the use of words between the Intelligence Community and legislators, and I want to be absolutely sure that I understand that we are talking the same language or I want to understand that we are talking different language.

A covert activity, to me, simply means that it is secret. Am I wrong?

DEFINING COVERT OPERATION AND SPECIAL ACTIVITIES

Senator COHEN. It is secret in the sense that it is not intended to be made public. That is correct.

Chairman FASCELL. Now, a special activity infers to me that it may or may not be covert.

Senator COHEN. I think in traditional intelligence parlance, special activity has its own implications and is not designed to be made public.

Chairman FASCELL. All right. So both the special activity and a covert operation are both supposed to be secret in the general parlance of the Intelligence Community.

Senator COHEN. That is correct.

Chairman FASCELL. There is no presumption as far as you know that would indicate otherwise.

We can carry that presumption one step further, I take it, and that is that any activity by the Intelligence Community is covert.

Senator COHEN. No, that is not correct.

Chairman FASCELL. Intelligence operations can be open, public?

Senator COHEN. I think there can be intelligence activities which are open and not necessarily covert.

Chairman FASCELL. They probably ought to be anyway because everybody knows about them. People write books identifying all the agents, certainly in the countries in which they operate, they are well known. That is for sure. In any event, that is another thing.

Now, does special activities, from your knowledge and experience, intend to refer to activities carried out by other agencies or divisions or departments of government other than the Intelligence Community; to wit, other than the CIA or somebody close thereto?

Senator COHEN. Well, you have a number of intelligence agencies that are considered to be within the Intelligence Community.

Chairman FASCELL. Well, let's consider them all together, all right? How about agencies that are not performing an intelligence activity, although they may be doing that also, like DIA, for example, and the four units that exist within the services that are also doing intelligence plus all the others we have. But how about non-intelligence collection dissemination, analysis activities? Does the word "special activities" in this bill or your bill cover those non-intelligence actions, activities, operations, whatever you want to call them, that are not carried out by the Intelligence Community

as defined in the generally accepted definition that we understand here?

Senator COHEN. The way in which our bill was crafted was to take those activities that would ordinarily be carried out by the intelligence community, one agency or another. If carried out by a non-intelligence agency, it would nonetheless be covered. Let's suppose, for example, the Department of Agriculture was mentioned during the course of our hearings, and was assigned and tasked to carry out what otherwise would be regarded as an intelligence activity, a special activity. That would be embraced under S. 1721.

Chairman FASCELL. See, that is not what I am after. I understand that. But I am glad to know that that activity would be covered as an intelligence related activity. Therefore, it would be classed as a special activity and therefore would be covered under the legislation, is that right?

Senator COHEN. That is correct.

Chairman FASCELL. Okay. Now, what I am referring to is non-intelligence activity, a covert operation carried out by another department of government that is not within the intelligence community.

Senator COHEN. If it is a covert activity that would fall within the definition of trying to influence the economic, military or diplomatic activities of a foreign country, and in which the U.S. role was not intended to be publicly acknowledged, then it would fall within the definition of a special activity and would be covered under the bill.

Chairman FASCELL. Even though it was covert or even though it was open?

Senator COHEN. That is correct. If it is covert activity. If you have an overt activity—we don't have a problem. Everyone at that particular point knows. If you are having a covert activity carried out by an agency that does not normally engage in intelligence activities, it still is covered. So it is the activity that defines whether or not it is covered under the legislation, not the agency itself.

Chairman FASCELL. Have you got a copy of the bill in front of you there? Can somebody get him a bill.

Would you take a quick look at the definition and educate me as to how the definition covers the U.S. Army?

Senator COHEN. My insert here says "covert action is any activity or activities conducted by an element of the United States Government to influence political, economic, or military conditions abroad," so the role of the United States Government is not intended to be apparent or acknowledged publicly, but does not include—and then you go through a list of exclusions.

Activities, the primary purpose of which is to acquire intelligence, traditional counterintelligence activity, traditional activities to improve or maintain the operational security of the United States Government programs or administrative activities. You go through a series of exclusions. So you start off with a broad definition that means an activity conducted by an element of the United States Government.

I would assume under that definition, the Army, the Navy, or anyone else that conducts that kind of activity would fall within the parameters of the bill.

Chairman FASCELL. Okay.

What troubles me—and then I will yield, I have used too much time here, but obviously I think it is an important issue.

The inference there is that it assumes the delegation at any time to carry out a covert activity is proper.

Senator COHEN. I don't think so.

Chairman FASCELL. It assumes—excuse me. The presumption is that other elements of government can carry out the activity. Otherwise there would be no reason to cover them.

Senator COHEN. I think what it is designed to do is precisely achieve what we did in the Senate bill, and that is to make sure that you don't have an activity normally classified as a special activity being assigned to a non-intelligence agency, and thereby escape the oversight provisions. You have gone about it differently, but I think the intent is quite the same.

What you have done is say a covert action embraces any activity by any arm of the government that is designed to achieve the following goals except—and then you except in four cases. Activities primarily to gather intelligence, that would not be covered.

Traditional diplomatic or military activities, that is different than a cover operation, traditional law enforcement activities. Here, again, I would urge some caution. I think you ought to look at this very closely either in report language or statutory language, to make sure that you don't have an expansion of law enforcement activities, broadened by various agencies to thereby justify taking actions which otherwise—if they had been taken by an intelligence agency—would be covered.

And then number four, routine support to the overt activities, that is excluded. So I think we have done the same thing. I have no problem with the House language.

Chairman FASCELL. Thank you very much.

Mr. Hyde.

PEOPLE WHO ARE FOR AND AGAINST THE BILL

Mr. HYDE. Thank you, Mr. Chairman.

Well, Senator Cohen, it is a pleasure to see you here in the lower chamber visiting the campesinos of Congress. I must say, you are looking very well for your ascendency to Mount Olympus to which we all aspire with some longing, and unrequited love.

Now, I know you have got John McMahon on your side, although John McMahon told Judge Webster the reason he said that is the CIA is going to get it in the neck anyway. That is what Judge Webster said, and I am sure John McMahon said that.

I know you have got Morton Halperin on your side. I know that.

On my side, if I may aggrandize them, there is Judge Webster, there is Secretary Frank Carlucci, former Deputy Director of the CIA, former National Security Advisor, now Secretary of Defense. There is Richard Helms, there is William Colby, there is Stansfield Turner, there is Zbigniew Brzezinski, Lloyd Cutler, Henry Kissinger, Brent Scowcroft, and many more.

Are all those bipartisan Democrats, Republicans, are they dead wrong and you and Mort Halperin right?

Senator COHEN. I think you omitted Robert Gates, someone who has certainly served as long in the CIA as you and I have in Congress.

Mr. HYDE. You refused to confirm him.

Senator COHEN. I think that is unfortunate. There is a man who has been on the front lines and he favored very strongly notifying Congress within two or three days at the most.

PUTTING TIME LIMIT ON NOTIFICATION

Mr. HYDE. Well, three days is hardly 48 hours.

Senator COHEN. If it is a question of time—I think the question was asked over here by Mr. Weiss—if it is three days or four days, if you want to make it a week, I don't have a problem with the specific time frame. But the position of the Administration is that any time frame is unconstitutional and I think that is wrong.

Mr. HYDE. Well, Stansfield Turner said that the notice should not depend on the tick of the clock, but the nature of the operation. Now, I find that to make sense. Now, you linked Stansfield Turner with Admiral Poindexter. I guess Admirals somehow have less credibility than normal citizens, but I think that makes a lot more sense than a rigid, mechanical 48 hours. That is just our differences of opinion.

Now, you referred to the President's role in foreign policy as he may be the sole spokesman?

EXECUTIVE/LEGISLATIVE AUTHORITY IN CONDUCT OF FOREIGN POLICY

Senator COHEN. Architect.

Mr. HYDE. Then you said the sole implementer—page 57 of March 3rd of this year. Parenthetically, he is hardly the sole spokesperson when you have the Speaker of the House conferring with Daniel Ortega; you have Congressmen of the Dear Commandante letters. The President is hardly the sole spokesperson. Everybody, as Secretary Shultz says, wants to get in the act.

But continuing, you seem to describe your partnership with the President somewhat imprecisely. You referred to it as less than a full and collegial power in the formulation of foreign policy, and then it seems to me something more than a simple—I quote, using your words "simple limited advisory counsel," that most Presidents would like to maintain. So there is a never never land in between being full and equal partners and more than a simple advisory counsel. You have created a new status for the Senate and it is somewhere in between, which I think is fascinating, if not precise.

Now, you attribute your authority, your constitutional and pragmatic authority, to do this because of the power of the purse among four other reasons. The power of the purse, being the most persuasive to me. The others I think are not, and we will discuss them, and I don't want to take all afternoon on this, although it is interesting. But surely the power of the purse doesn't give you the right to impose something that is unconstitutional.

For example, if you were to pass a law denying the Supreme Court salary unless they passed, decided a certain case in a certain

way, clearly that would be unconstitutional and improper. So the fact that you have the power of the purse doesn't authorize you to do unconstitutional things. You would surely agree to that, would you not?

Senator COHEN. Indeed I would. In fact, if you had read all of my——

Mr. HYDE. I did. I am ready to discuss them seriatum.

Senator COHEN. If you will look at Professor Henkin's, I think, brilliant article, he points out there is a difference. When there is clearly an exclusive exercise of power, power reserved for the President, then it would be unconstitutional for Congress to try and inhibit that action by the power of the purse.

However, where there is a so-called twilight zone of concurrent responsibility, Congress has every power to exercise.

Mr. HYDE. Now we get to the heart of the matter, which is the grant of the executive power by Article II to the President, the executive power. But then Congress gets such powers as are "herein granted" and it is axiomatic, Hornbook, constitutional law that those specific grants are to be strictly construed.

Now, Clark Clifford moved into another area called "modern interpretation." I suppose this is in the wake of the Bork affair that we now no longer have original intent interpretations and we are on new thresholds, new penumbra surround these ideas.

Senator COHEN. Do you want to include Clark Clifford, along with Mort Halperin?

Mr. HYDE. By all means. Clark Clifford taking time out from reconciling presidential candidates who are ostensibly dissimilar but called identical, yes. He is a master. But in any event, then you talk about the power to declare war. Surely that is an anacronym. Surely you know no more wars will be declared. I mean, Korea was certainly not a state of peace. Vietnam, one of the great traumas of this century, and Congress didn't declare any war.

Senator COHEN. Are you talking about power or policy, Congressman? Are you talking about the inherent power or policy?

Mr. HYDE. I am talking about the facts of life. I am talking about the fact that this country can be in a state of shooting, killing, belligerency without Congress declaring war. Surely you are familiar with the debates in the Constitutional Convention about "making" war and "declaring" war. So, I mean that doesn't persuade me. Not that you need to persuade me, but I am just suggesting that it is unpersuasive.

Then you have Congress' power to raise an army and maintain a navy. But surely the President has the right to send the Army where he wants to send it, so insofar as you have provided it to him, right?

Senator COHEN. Assuming that Congress continued to appropriate the money necessary to carry out the action, yes.

Mr. HYDE. Sure. But if you didn't, maybe he could get some volunteers—Green Mountain Boys.

Chairman FASCELL. He would just use the budget, if the gentleman will allow me to intercede. We have so much unobligated, unspent money in the pipeline, if you got the money off tomorrow, you would be a long time seeing the end of your policy.

Mr. HYDE. I couldn't agree with you more, Mr. Chairman.

You said this notion that "somehow the President isn't the mythical, exclusive possessor of power in the field of foreign policy." I don't know anybody that asserts that. That is a straw man. Nobody says he is the exclusive possessor. If you read the Constitution you know that there are shared powers. There are complementary powers, but to say all powers are collegial, there is no warrant for that historically or in the Constitution.

Senator COHEN. I think you are contradicting not only me but yourself. You pointed out, when you opened up, that I had indicated we were not collegial partners in this, we are a more limited power in that regard. That is why if we were collegial, we could prevent the President from either initiating or preventing covert actions.

Mr. HYDE. You don't disagree with Edwin Corwin or so many other constitutional authorities that Congress and the President are not constitutionally equal in power with respect to all aspects of making and conducting policy. Congress has enumerated legislative powers, the President, the executive power. In some areas Congress is clearly supreme, in others the President.

Only Congress can appropriate money, declare war, and enact laws. Only the President can nominate and remove high officials, recognize foreign governments, and conduct foreign relations, else why the Logan Act?

So you will agree then we are in a new, murky area, are we not, on this new status of Congress?

Senator COHEN. I think it is called the twilight zone of responsibility, concurrent authority.

QUESTION OF MANDATORY NOTICE TO CONGRESS

Mr. HYDE. Now—I thank the Chair for indulging me just briefly for a few more minutes.

You also said this, Senator. The reference to the Canadian intervention or help in extracting hostages out of Iran is cited as the premier example of why we should not have mandatory notice. The fact is that this law of notification was not in place at the time that took place. The law was modified and changed in 1980, which was after the extrication of those hostages occurred. So we cannot cite the Canadian example as evidence that notice was not given or timely notice was not given and not explained about.

The fact is, there was no notification requirement, as there was in 1980. This occurred prior to that time. Did you mean that?

Senator COHEN. The 1980 Act confined the notice requirement to the intelligence committees. Prior to that time, under Hughes-Ryan I believe, there were about eight committees that would have had to have been notified, and I think that was the concern. Under that framework many people involved as opposed to regime of the 1980 Act in which only "gang of eight" would have been involved.

Mr. HYDE. So you do agree that timely notice was required and none was given because the Canadians said we are not going to cooperate if you tell anybody; right?

Senator COHEN. There, I would disagree with you. That is a matter that I think requires some exploration.

I would suggest you call Admiral Turner before we discuss it.

Mr. HYDE. We have and he is the one that cites that.

Senator COHEN. I would say I am under a different impression in terms of the degree of opposition. But in any event, if we are going to accede to the notion that a third country is going to determine whether or not they cooperate and whether or not notice is given, I think you might as well just give up the whole notion that you have congressional oversight on covert actions.

THE PROBLEM OF LEAKS

Mr. HYDE. Well, I couldn't disagree more. I think in a very dangerous world, with terrorists, there are going to occur times—and Lloyd Cutler said it, he said nobody is smart enough to imagine the circumstances that can occur where the flexibility, maneuverability, wiggle room, elbow room, may be absolutely indispensable to save lives.

I agree with him there. Just let me make one more point. There is so much more, but I don't want to impose and trespass on my colleagues here. But I think it is a measure of the gravity of the problem that none of the bill's proponents, Senator, express any real concern about leaks.

On the contrary. They are minimized and you have said, I think somewhat ingenuously, that nobody in the Intelligence Committee has ever leaked about a covert activity.

Leaks are endemic. Leaks are all over the place.

Let's talk about the Iran/Contra Committee, which was composed of congressional leaders (myself excepted).

We have three of them up here on the top row, I will say, and one right here, a premier Member right here. May I say that so tight was security that when Admiral Poindexter was deposed, the chairman wouldn't let any of us attend. No Members were permitted.

I wonder why? I wonder why? I know why. That was rhetorical. The members might leak.

Let me just read you a very sanitized list of leaks from that Committee.

Senator Inouye vows to kick leakers off Iran/Contra panel for telling a reporter former CIA Director Bill Casey masterminded contra resupply efforts.—New York Times, March 13, 1987; congressional Member exposes DEA operation on front page of New York Times, May 31, 1987.

Details of Secretary of State Shultz's private interview disclosed to the Wall Street Journal days before Shultz appeared in public session—Wall Street Journal, July 20, 1987.

Two Senators and one Congressman, all Members of the Iran/Contra Select Committee, revealed to The New York Times, on condition they not be identified, that secret—then-secret evidence regarding all of Bill Casey's alleged efforts to mastermind contra resupply efforts.—New York Times.

Congressional administration sources disclose details to Washington Post regarding secret finding concerning assistance to contras.—Washington Post, January 14, 1987.

Sources familiar with congressional investigation tell New York Times about McFarlane's then-secret testimony regarding alleged country No. 2 financial support to the contras.—New York Times, January 13.

Congressional sources tell Walter Pincus of Washington Post details of then-secret computer message Oliver North sent John Poindexter.—Washington Post, January 14.

Congressional sources reveal to Walter Pincus of Washington Post that Senate and House Select Committees are planning to investigate possible misuse or diver-

sion of funds in all alleged CIA-run Swiss bank accounts for the Afghanistan freedom fighters.—Washington Post, January 13.

Congressional sources reveal to L.A. Times Reporter Ronald Astrow details of secret testimony of Assistant Attorney General William F. Weld.—Philadelphia Inquirer, July 23, 1987.

Congressional investigators reveal incorrectly to Fox Butterfield of The New York Times details of the then-secret testimony of Glenn Robinette. This disclosure occurred days before Robinette's public appearance.—New York Times, June 18, 1987.

Congressional sources purport to reveal to Miami Herald Correspondent Charles Green the classified identity of a nation from which the U.S. contemplated soliciting contra assistance.—Miami Herald, August 21, 1987.

This is the last one.

Congressman discloses alleged real name of a CIA undercover officer during Select Committee hearing on July 21, 1987.—Select Committee hearing transcript, page 54, July 21, 1987.

Et cetera, et cetera, et cetera.

Now——

Senator COHEN. You left one out and that was the disclosure of the minority report in The New York Times before it was supposed to be released.

Mr. HYDE. All right. That, too; that, too.

I know you weren't sympathetic to the minority side, so you may well be critical of that.

Now, I don't think our allies or friends or people from whom we seek cooperation make that fine distinction that you made that covert operations weren't leaked, although I could name you several covert operations that have leaked.

The problem with naming them is you confirm them and that makes it very difficult. But I have a bookful of classified leaks, some of which are still under investigation and, surely, Senator, knowing the former chairman of your committee and the former vice chairman of your committee, the difficulties they had with security, keeping secrets and knowing that our committee lost a very valuable Member of that issue fairly recently, isn't it pushing things a little to say that there aren't serious leaks around here?

Senator COHEN. I believe the statement I made that I am not aware of a leak about a covert activity since I have been on the committee is accurate as far as my service in the Senate. I can't speak for the House.

You may have more information on it than I certainly. But I am not aware of any covert action ever being leaked by any Member of the Intelligence Committees.

Mr. HYDE. I am aware of no prosecutions. I am not aware the FBI has ever asked me a damn question. I have never been asked to take a polygraph nor has any Member of our Committee, but I would sure like to see it happen and I would like to see your committee get polygraphed and get investigated because this place leaks like a sieve and nobody cares and that is why nobody wants to talk to us, because it gets in the paper and lives are at risk.

Unless we recognize the problem and stop pushing it aside or redefining it out of existence, nobody is going to cooperate with us.

We can pass all the laws we want and let's get it down to 48 minutes. Nobody is going to trust us and I will tell you, we are going to get into a situation with biological warfare sometime and we are going to need somebody to penetrate the office of somebody at the

U.N. to get that secure and they are not going to cooperate with us because they can't trust us. Then we will have it on our hands.

But this law won't protect us.

I have said enough and I really appreciate the indulgence of the Committee. I will be quiet for a month. I owe you that much.

Senator COHEN. Mr. Chairman, if I could respond briefly.

Chairman FASCELL. You have got equal time, Senator.

Senator COHEN. If that were the case that there was so much leaking going on——

Chairman FASCELL. You can say for the record all of the other leaks made on the other side because I am sure they would fill volumes, too.

Mr. HYDE. If you are speaking of the administration, I concede that.

Chairman FASCELL. No, no. I think there were some left out of this list I recall.

Mr. HYDE. I have a bigger list, but for security reasons, these are the most innocuous and benign.

Thank you.

EXECUTIVE BRANCH COMPLIANCE WITH NOTIFICATION PROCEDURES

Senator COHEN. If I might just point out, if that were the case we would have to raise the issue of why the Administration for the past eight years notified Congress of all of these covert activities?

If they were so fearful that each one would be disclosed, I am sure they would have raised the issue and not abided by what I believe the law to have been.

The fact is that they have, with the possible exception of the mining of the harbors of Nicaragua, informed our Committees of each and every activity, and these apocalyptic results have not occurred.

I respectfully suggest there has been a good working relationship. They have complied with the law and what changed was Iran/Contra.

Now, in their dissenting views to the House Intelligence Committee report Congressmen Hyde, Cheney, Livingston and others on page 4, I believe there is an inaccuracy.

At the top of that page, it reads, "A number of persons involved in reviewing, approving and notifying Congress of covert actions failed to follow established procedures."

I think that is wrong. They followed the procedures directed by the President of the United States. Those engaged in the sale of weapons to Iran followed the procedure by the President specifically directing no notification.

So it wasn't as if they were off on their own not notifying. That was a specific directive by the President of the United States.

The second point I would make again on page 9, "Foreign countries will refuse to cooperate." I would assume if we accept that position that third countries will not cooperate, then for all practical purposes, any President can say in the future that I am sorry, we are going to carry out this covert action, but X country said they wouldn't cooperate; therefore, we had no alternative but not to notify Members of Congress until after the action had been completed.

If you accept that proposition, then you have surrendered any effective oversight action. And if that is the case, so be it. But I think we ought not to be heard to complain at some future time. If a future President—I know that Mr. Hyde would agree—if, for example, President Dukakis should come to office and decide that he would like to covertly assist the ANC or some of the Front Line states with military equipment and consider that activity to be so highly sensitive that notice should not be given to Members of Congress, I would assume Congressman Hyde would be one of the first ones that would want to complain about the fact notice was not given about a secret transfer of weapons to the ANC.

Mr. HYDE. Just for a second let me just make one comment. I think the President has got to notify Congress of any covert activities, especially high risk. I think there is no question about that. I think there is no question that that law, "timely fashion," was violated egregiously by this administration in the Iran Contra, and I agree that had the President consulted with anybody on the Hill, Bob Michel, somebody that he had confidence in, Senator Bob Dole, yourself, anybody, it never would have happened.

I agree with all those things. But I don't agree that we can capsulize a time limit and force him in every circumstance, to disclose within 48 hours. I can imagine a Codel kidnapped in the Middle East and I can imagine people willing to help saying you tell Congress and we won't cooperate. We despise Israel. We don't want anything to do with Congress. You want our help, you do it our way.

What do you do if you are President? You don't stand on your high horse and say you are not telling us how to run our country—you say what do you want to help get these people freed, which is what really happened in the hostage situation here.

Senator COHEN. That is also in Iran Contra, what do you want to get these guys out and that is part of the problem.

Mr. HYDE. It is part of the problem.

Chairman FASCELL. If you had a Codel, I am afraid he would just leave us there. You could always declare war, though, when in doubt.

Senator COHEN. Part of the difficulty—if I might, Mr. Chairman—in saying timely notice was egregiously violated is how do you know it has been violated either in an egregious or nonegregious fashion. The Justice Department has interpreted Section 501(b) of the Act to say that timely notification means whatever the President says it means. So if the President declares 10 months is timely, then we are bound by that interpretation, and that is the difficulty we have had.

Prior to the Iran Contra affair, there was a working understanding that there be prior notification, but in the absence of prior notification notice within a matter of a couple of days. Now, the Justice Department has said that, no, the President has unfettered discretion to determine when and if he is going to notify the members of the Committee and that is part of the dilemma we are trying to resolve.

Mr. HYDE. Senator, I reject that opinion and so does everybody on this committee. The President doesn't have unilateral authority to make that judgment and bind us. Everybody agrees ten months is not timely fashion. But don't put him in a straight jacket where human lives are at stake. That is my point.

Mr. WEISS. Yield?

Chairman FASCELL. He doesn't have the time. Let me get back in order here because I know the Senator has to get back over there. They are voting on nominations. I am just teasing, just teasing.

Mr. Berman?

CONGRESSIONAL RESPONSE TO EXECUTIVE NONCOMPLIANCE

Mr. BERMAN. Thank you, Mr. Chairman. Thank you, Senator Cohen. We think you are okay even though you are in the Senate. I just might initially point out that Secretary Carlucci emphasized 45 minutes ago that no part of his opposition to this bill has anything to do with a belief or a concern that notifications to the group of eight, the group of four, the Intelligence committees, enhances the likelihood of leaks which could undermine covert operations.

He made that position very, very clear. He raised the Canadian issue. He raised the Constitutional confrontation. He specifically waived any reliance on this notion of leaks as an argument to be against this bill. I think since the administration is leading the opposition to this legislation, that was a useful indication of their premises.

I would like to ask you several questions. Mr. Clifford came here a couple of days ago. Let me put it a different way. Let's walk through this legislation. Let's assume that legislation passes the House along the lines of a bill that has passed the Senate. It is reconciled in a conference committee, sent to the President, he signs it, lets it go into law without his signature. He vetoes it, but the veto is overridden in both Houses and it becomes law. The question of how this becomes different than the War Powers Act in the sense of congressional ability to put meaning into this, to deal with the problem of a President who believes it is unconstitutional and we have had the coal miner case and others on the question of who has the power to decide constitutionality, but if there is no method of enforcing it, we have a real problem here.

Clark Clifford suggests one of two things, either an automatic cut-off of funds under our constitutional power of the purse and the power to appropriate funds, where the timely notification provisions, as provided in this legislation are ignored, or criminal sanctions for those who violate the provisions of this law or engage in covert operations in violation of this particular law.

I think a big part of his reasoning as to why these kinds of provisions would be helpful in that in some almost intangible fashion they would cause a President to think much more carefully about failing to notify Congress, not so much that the criminal prosecution could test the constitutionality or the expenditure of a lawsuit over the expenditure of funds would be meaningful, but that it would create an atmosphere which would give the law the kind of teeth that it might not otherwise have.

What do you think about those suggestions?

Senator COHEN. Well, I would prefer the self-enforcing mechanism of the cut-off of funding over that of imposing criminal sanc-

tions against employees acting under the instructions of the employer; namely, the President of the United States. I would prefer the former to the latter. But I frankly would prefer we not do either in order to get a bill that would be acceptable to the Senate.

I think that to the extent that that kind of provision were included, it would make it more difficult to sustain or override a veto which is expected on this legislation.

Mr. BERMAN. So if for no other reason, than, just simply going through more than an academic exercise this year we should restrain ourselves?

Senator COHEN. I think to the extent we pass this, obviously a future President who feels very strongly that he or she maintains the inherent constitutional authority not to notify Congress under any circumstance until long after a covert action is complete, that particular President is willing to risk a constitutional confrontation and turn it to the courts and the kind of paralysis that we saw during the past year, I think we have to accept that as part of our system.

I think we can raise the stakes in terms of the visibility of the law, that our interpretation of timely notification means timely within a certain time frame and if a President chooses to violate that and challenge us, then we have to either await a court decision, which I doubt very much that a court would consider the issue, preferring rather to declare it to be a political question. You will end up with a political confrontation in which the kind of paralysis that afflicted the Reagan Administration would occur again.

But there is no way, in my judgment, in which you can possibly insulate future Presidents against the temptation to go beyond what we believe to be the constitutional limitations and say that I have the power and therefore I am going to exercise it. I don't think imposing criminal penalties would do it and I don't think that, frankly, the cut-off of the funds would prevent him. I think that would be the more preferable solution to the criminal, but I think the bill as written is sufficient.

GROUP OF EIGHT VS. GROUP OF FOUR

Mr. BERMAN. Is there any rational reason why in recognizing in unique situations the need for a smaller group, now the gang of eight, that the Chairman and the Ranking Minority Member of the two Intelligence committees, the committees that deal with Intelligence activities that have specific information that have a context to analyze what is being suggested, that they should not be part of that group, in other words, that the gang of eight, group of eight, provides the logical tight-knit group rather than the Senate group of four?

Senator COHEN. I don't question that. In fact, I argued that on the Floor myself and frankly, I felt that in order to strike an accommodation with those Members who still were reluctant to impose this mandatory notification in order to satisfy their concerns about the possibility of leaks as articulated by Congressman Hyde, that we would narrow the circle of those who were informed.

My own view is I would prefer to keep it eight, but if we keep it four I would prefer it to be the House and Senate leadership of the Intelligence committees, those who do have some context in which to place the notification given by the administration.

Frankly, it was necessary to get the bipartisan support on such a broad basis that I agreed to accept the four instead of the eight.

NOTIFICATION TO INTELLIGENCE COMMITTEES

Mr. BERMAN. Turning to another issue, is it your understanding that the Senate bill requires that when the group of eight or the group of four is notified of a covert operation that at some point the obligation still remains on the Executive Branch to notify the Intelligence Committees?

Mr. COHEN. I think there is a difference here that in those rare, special circumstances where the utmost confidence is required I think the Administration has latitude in terms of when it notifies the entire committee, and when it consults with the Chairman and Vice-Chairman of the Intelligence Committees.

They still have an obligation to notify the entire committee. I can think of examples.

Mr. BERMAN. They still have the obligation.

Mr. COHEN. They have an obligation to do so, but the time frame in which they have that obligation would vary.

Mr. BERMAN. Oh, no, I understand that, but the notion that they have absolved themselves of their notification obligations simply by notifying the group of eight is contrary to what you think is good policy and is the law?

Mr. COHEN. But it would depend upon the time frame under which the rest of the Members would be alerted.

SEPARATING COVERT ACTIONS FROM DOMESTIC POLITICAL CONSIDERATIONS

Mr. BERMAN. That is a variable.

What was the purpose of the provision in the Senate bill, I think there is one in the House bill as well, a finding may not authorize any action intended to influence United States political processes, public opinion, policies or media, and I guess—I understand the certain logic, these covert operations are not to provide, they are not for domestic political purposes. But this is vague language.

What good are we getting from this language?

Mr. COHEN. You said it precisely. We don't want the CIA or other intelligence operations to carry out covert operations to influence our domestic political situation. We don't want any agency to engage by way of example in disinformation.

You may recall a proposal that was disclosed in the Washington Post, came out of the NSC, to plant a false story that would thereby be repeated by American journalists and have some impact upon our policy. That is something that we wanted explicitly to reject.

Mr. BERMAN. But there are some covert operations that have concluded successfully, can have a side effect of positive political benefits for the Administration and vice versa.

Mr. COHEN. You mean in other countries?

Mr. BERMAN. Yes, covert operations. Oh, is your point where the covert operation is taking place or its purpose?

Mr. COHEN. I have to listen to your question again. I am not sure which section you are referring to.

Mr. BERMAN. I am referring to Section 503(a)5 of your bill, and——

Chairman FASCELL. It goes to a question of intent, whether what country it takes place in, domestic or foreign, and if it is going to the question of intent, you know you don't have to scratch at it, but you can certainly include it because all of them are going to have some impact when they become public.

Mr. BERMAN. A finding may not authorize any action intended—it just seems to me it is worded in a funny way, it gets into matters of intent and motivation in a fashion that is going to have very little legal benefit and maybe messed up the whole picture.

Mr. COHEN. No, what I think it is saying we don't want to have a finding in which the President authorizes action that may be carried out in a foreign country that is designed specifically to have an influence on our own domestic political process, public opinion policies or media and to carry that out on a covert basis, in other words, to subject our own political process with money that is appropriated by U.S. dollars to carry out a covert action.

Chairman FASCELL. Will the gentleman yield?

Mr. BERMAN. I certainly will.

Chairman FASCELL. How are you ever going to find that out, Senator? You don't think the President is going to put that in a finding, do you?

Mr. COHEN. One would hope. Nonetheless, I think it is important to specify.

Chairman FASCELL. No, I understand. I understand.

Mr. BERMAN. All you are saying, you want to purify the formal finding. The notion of what the motivations are for a President entering into a finding are going to be so, both easy and difficult, easy to fathom and difficult to prove that I wonder what we are getting from this.

Anyway, I don't want to dwell—if I might, Mr. Chairman, I would ask one last specific question on the bill.

Mr. COHEN. Counsel just advises me we took this restriction out of the Executive Order, so we are simply repeating what has been the Executive Order for the last eight or 10 years.

Chairman FASCELL. Is this a National Security directive?

Mr. COHEN. Executive Order 12333.

Mr. BERMAN. The one that originally authorized the covert operations?

Mr. COHEN. Well, there has been an Executive——

Mr. BERMAN. The presidential findings.

Mr. COHEN. There is an Executive Order that has been in existence how many years now? Since 1980.

It defines special activities as activities conducted in support of national foreign policy objectives abroad which are planned and executed so the role of the United States Government is not apparent or acknowledged publicly and functions in support of such activi-

ties, but which are not intended to influence U.S. political processes, public opinion policies, or media.

48-HOUR CLOCK STARTS WHEN FINDING IS SIGNED

Mr. BERMAN. I see. Finally, do you think there is a 48-hour obligation under your bill or there should be in law from the time a finding is made—let's say there is a two-week lapse of time between the finding and the commencement of a covert operation.

Is the obligation to report a 48-hour obligation after the finding, or is it a 48-hour obligation after a finding when the covert operation proceeds immediately?

Mr. COHEN. We start with the proposition there can be no activity carried out without a signed finding and, therefore, once the finding is signed, that starts the clock in which the 48 hours——

Mr. BERMAN. Mr. Chairman, our understanding is our House bill in the form we have it now does not read that well and we might want to look at that question.

Thank you, Mr. Chairman.

Chairman FASCELL. Mr. Hamilton.

Mr. HAMILTON. Thank you, Mr. Chairman.

In view of the time constraints, I will not ask any questions. I do want to thank Senator Cohen for his extraordinary leadership on this bill in the Senate and his willingness to testify.

Senator Cohen, we are delighted to have you here. We admire and appreciate what you have done on this bill. I hope we can do as well in the House.

Mr. COHEN. I hope you can as well.

Mr. HAMILTON. Thank you.

Chairman FASCELL. Mr. DeWine.

PRACTICAL APPLICATION OF THIS LAW

Mr. DEWINE. Thank you, Mr. Chairman.

Senator, I have a brief comment and I would like you to comment on that. It is clear from reading your testimony and listening to you today as well as looking at your statement in the Senate one of your main points is that this bill does not prohibit the President from doing anything.

In fact, you state in here, let's be clear the bill does not prohibit the President from acting. I would like to maybe clarify that a little bit and start off by saying I think that is wrong.

I think that on paper it does not prohibit the President from acting, but as a practical matter in the real world, that it will prohibit the President from acting. We can argue that it is good or we can argue that it is bad, but it seems to me to sharpen the debate we shouldn't delude ourselves and think that this, as a practical matter, will not stop the President from acting in certain cases.

One of the things that has troubled some of us are the statements that have been made by Senators and Congressmen to the effect that, and I can think of one specific example where a Senator said he felt he had a—while being informed of a proposed covert operation, if he disagreed with that operation, if he felt it was wrong, that he had a moral obligation to leak it and basically stop the operation.

You can argue whether that is good or bad, but that seems to me if I am President of the United States that that is going to have in

this legislation, which leaves no escape clause at all, which in effect have a chilling, if we can use the term, a chilling effect on future president's actions. And I know that one of the things that you have argued or seem to be arguing is that maybe that is a good idea, if the President would go and consult Congress, he would be better off and I think we can all think of examples, the Iran/Contra case is a prime example, as Mr. Hyde said if the President were to talk to Bob Michel or talk to you or talk to just about anybody up here it probably wouldn't have occurred.

But I just want to sharpen the debate a little bit and argue about maybe what we should be arguing is that a good idea or is it not a good idea, is it constitutional or is it not constitutional? It just seems to me to say that this provision does not, will not in the future stop actions by the President just isn't right, isn't correct.

Mr. COHEN. Let me address the issue in the real world or that of practicality. If what you say is correct, they will have the practical impact of prohibiting the President from acting, Ronald Reagan has been out of the practical world for the past eight years because he has, in fact, been notifying Congress of each and every covert action and he has had no difficulty in acting and executing and carrying it out without jeopardizing those operations.

Number two——

Mr. DEWINE. Excuse me, just a second, let me just say I am talking about in a rare case, I am not talking about the usual every day case, I am talking about a case that may occur once in five years.

Mr. COHEN. There have been a number of very rare cases, I think, that Congressman Hamilton, and perhaps Mr. Fascell agree, but there have been cases, for example, that are highly secretive, highly dangerous, involving a number of lives, many more lives than were involved in this particular case, in which the President has notified the intelligence leadership, the Chairman and Vice-Chairman and frankly I have expressed opposition to several of those particular operations, which nonetheless went forward.

And so, what I am trying to emphasize is that we give him the benefit of our advice, and he is free either to accept or reject it. I can think of one or two cases in which the entire committee was notified and the entire committee concluded that it was a bad idea and they went back, rethought it and said, you are right. But, there have been those cases in which they have come to the leadership of the Senate Intelligence Committee and I have expressed opposition, they have taken into account, said, thank you very much, Senator Cohen, we disagree, we are going forward and they did.

I think as a practical matter, the President has had no difficulty in carrying out covert actions. The difficulty he had in the Iran/Contra affair was not that he feared loss of lives as was put to us, but rather that it violated his own fundamental public policy.

Let's suppose a future President were to determine that it was in our interest to transfer covertly SDI technology to the "moderates" that exist in the Soviet Union. And, the President felt that that would lead to such violent opposition if he notified even two or four Members of Congress he couldn't afford to take the risk until long after the technology had been transferred.

I think I would have difficulty coming before this committee and finding many Members who would support the President's invocation of inherent absolute authority not to notify the leadership of the Senate or the House because lives were involved and it was a dangerous mission.

I would say, wait a minute, this is a fundamental foreign policy objective. You had an obligation to notify us, if not before, then surely within a very short time frame so we could have expressed our concerns about a foreign policy objective that we feel very strongly about.

RATIONALE BEHIND 48-HOUR NOTIFICATION REQUIREMENT

So, I think that in the world of practicality, the President has had no difficulty in functioning, and this bill, this requirement of the notification would not have been necessary but for the interpretation coming out of the Justice Department which says that timely notification is whatever the President says. I think that is what has led to the 48 hours.

If you were to say 36, 48, a week, you know, that is not a problem. This was designed because this was the testimony of Bob Gates, that of Judge Webster and others who felt that was a reasonable time in which if it is not practical to give advanced notice, we can get the notice in that time frame.

Mr. DEWINE. It is an interesting constitutional debate and I guess I was just trying to frame it, and I do appreciate your comments, I wanted to frame it a little bit more narrowly because I think as a practical matter in rare cases it is going to change what the Presidents do, it is going to stop Presidents from taking certain actions, they will be inhibited and we are not talking about the usual case, and I guess my problem is we don't know how rare it is going to be, or when it is going to occur, or whether it is going to be when you and I are still here, or whether we are long gone at that point.

That is what worries me. Thank you, very much.

Chairman FASCELL. Mr. Weiss.

Mr. WEISS. Thank you, Mr. Chairman.

I simply want to echo the sentiments by Mr. Hamilton about the role you have played, Senator, in trying to take constructive action to cure some of the ills of the entire Iran/Contra affair that were disclosed, and I would like to commend you on the role you played in the hearings themselves. Again, I welcome your clarification as to how you arrived at the 48 hours because there was some question as to whether in fact there was not any testimony by the people you mentioned. I think we clarified some of that at the hearing yesterday, but I think it is good to have it on the record again.

Thank you, very much. Thank you, Mr. Chairman.

Chairman FASCELL. Senator, thanks very much. We appreciate your taking the time and your continued interest in this very important matter and we are delighted to have you come here and join us today in consideration of this bill, especially in pointing out the differences in the two bills and the other points you have made which we will very seriously consider.

I want to thank you again. The committee stands adjourned, subject to call of the Chair.

[Whereupon, at 4:15, the committee was adjourned.]

INTELLIGENCE OVERSIGHT ACT OF 1988

WEDNESDAY, JUNE 22, 1988

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The committee met at 9:30 a.m., in room 2172, Rayburn House Office Building, Hon. Dante B. Fascell (chairman) presiding.

Chairman FASCELL. The committee will come to order please.

We meet today to conclude the Committee's consideration of H.R. 3822, a bill to revise and consolidate intelligence oversight by the Congress and to require that a limited group of eight congressional leaders be given prior notification, or if time is of the essence, no later than 48 hours after the covert action has been authorized, of all covert actions.

We have received executive branch testimony over the last several days from the CIA, State Department and from the Secretary of Defense, Frank Carlucci. We have also, received very compelling testimony from the distinguished statesman Clark Clifford and from our colleague in the other body, Senator Cohen who is the principal sponsor of the Intelligence Oversight Act in the Senate. Listening to that testimony which both opposed and supported H.R. 3822, and having reflected on the many hours of testimony before the Select Committees to investigate the Iran-Contra affair, I would like to make the following observations: I agree with one the principal recommendations of the Iran-Contra report that, "While good judgment, honestly or fidelity to the law can not be legislated, some changes to the oversight of covert actions would make our processes function better in the future."

The Committees therefore jointly recommended that section 501 of the National Security Act be amended to require that the Congress be notified in advance, but in certain cases no later than 48 hours after, the covert action has been authorized.

That is what we are doing today. We are considering a modest but very appropriate adjustment to the current law. We must not disregard the lessons learned from the disastrous Iran-Contra affair. We must not overreact either.

H.R. 3822 is a balanced approach to addressing these concerns. It does preserve presidential flexibility while recognizing the constitutional duties and prerogatives of the Congress. H.R. 3822 is the essence of good government and of true oversight and congressional-executive consultation.

After listening and studying all the arguments pro and con on this bill, I must conclude that H.R. 3822 should be adopted. It on balance will serve our collective interests well. It will ensure that

the necessary and appropriate consultation between the Congress and the executive branch occurs at the time it is most useful—prior to the initiation of a sensitive covert action. The bill, by limiting certain sensitive notification to the group of eight congressional leaders will provide appropriate limited access to these most sensitive secrets. It will ensure however that a balance between the need for secrecy and congressional consultation on a covert action which may have a profound impact on U.S. foreign policy and national security interests will be achieved.

Finally, I would like to put in the record, without objection, a letter/memorandum, from the Department of Justice, signed by Thomas M. Boyd, Acting Assistant Attorney General, giving the department's views on this bill. They are strongly opposed to the enactment of the legislation because they believe it unconstitutionally intrudes on the President's authority to conduct the foreign relations of the United States.

Also, I would like to introduce in the record a letter from Mr. Don Edwards, chairman of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, who takes the opposing view. Without objection, we will put both of these letters in the record.[1]

Mr. HYDE. Mr. Chairman.

Chairman FASCELL. Mr. Hyde.

Mr. HYDE. I understand this bill came to us on joint, rather than sequential——

Chairman FASCELL. It did, I am sorry.

Mr. HYDE [continuing]. Referral, and, therefore, when we get to Mr. Solomon's amendment, that it is on joint referral makes a difference as to its propriety. But we can get to that in due course.

Chairman FASCELL. You are right, I was incorrect, it came to us on joint referral, not sequential.

Mr. HYDE. Also, Mr. Chairman, since we are putting things in the record, I have two items I would like to ask unanimous consent to put in the record. One of them is a speech that I made before a section of the American Bar Association having to do with leaks in congressional oversight, and the other is a chapter from the Minority Report in the Iran-Contra investigation, chapter 13, on the need to patch leaks, and I would like those to be a part of the record.[2]

Chairman FASCELL. Without objection, they will be included in the record.

Mr. HYDE. Thank you.

AMENDMENT IN THE NATURE OF A SUBSTITUTE AS MARKUP DOCUMENT

Chairman FASCELL. Anybody else have any comment? Without objection, we will consider the amendment in the nature of a substitute to H.R. 3822, as reported by the Permanent Select Committee on Intelligence. The Chief of Staff will report the bill.

Mr. BRADY. H.R. 3822, a bill of congressional oversight of the intelligence activities of the United States, be it enacted by the

[1] The letters referred to appear in app. 1.
[2] The information referred to appears in app. 9.

Senate and House of Representatives of the United States of America and Congress assembled, short title——

Chairman FASCELL. Without objection, further reading of the bill will be dispensed with, printed in the record in full and open for amendment.[3]

Are there amendments? Mr. Broomfield has an amendment.

Mr. BROOMFIELD. Mr. Chairman, I have a short statement.

Chairman FASCELL. Mr. Broomfield——

Mr. SOLARZ. Would you yield for a technical point?

Mr. BROOMFIELD. Yes.

Mr. SOLARZ. Does your amendment refer to the bill or the amendment in the nature of a substitute?

Chairman FASCELL. The amendment is not before us yet. There are no amendments before us yet.

Mr. BROOMFIELD. Not yet. It will be shortly.

Chairman FASCELL. He hasn't offered it yet.

Mr. SOLARZ. When he does, will it relate——

Mr. BROOMFIELD. Mr. Chairman, I want to make sure that the substitute you have laid before the committee, a copy of which we received just yesterday afternoon, is the same as the bill reported by the Intelligence Committee. Unfortunately, there are numerous discrepancies——

Chairman FASCELL. Excuse me, this came from the committee. This is not a new substitute.

Mr. BROOMFIELD. The Minority didn't get the text of this substitute until yesterday.

Chairman FASCELL. Everybody got it. But go ahead.

Mr. BROOMFIELD. Anyway, there are numerous discrepancies between the committee substitute and the bill reported by the Intelligence Committee. I have been informed the changes appear to be purely technical in nature. Nevertheless, I wish to point out the Minority staff has not had time to go through the bill in detail to assure that the meaning of various provisions has not been altered.

Mr. Chairman, is it your understanding, this is what I want to know, that the substitute text that you have introduced differs from the Intelligence Committee version only in technical ways?

Chairman FASCELL. Yes. The gentleman is correct.

Mr. BROOMFIELD. Thank you.

Chairman FASCELL. And for the purposes of the markup, we are going to use the amendment in the nature of a substitute.

AMENDMENT OFFERED BY MR. BROOMFIELD

Mr. BROOMFIELD. Mr. Chairman, I have an amendment.

Chairman FASCELL. The chief of staff will read the amendment.

Mr. BRADY. Amendment offered by Mr. Broomfield, page 7 to the substitute, page 7, lines 2 and 3, strike the words "the chairman and ranking minority members of the intelligence committee," and delete the comma following the word "Representatives" on line 4.

Page 7, lines 6–7——

[3] The markup document, amendment in the nature of substitute to H.R. 3822, appears in app. 6.

Chairman FASCELL. Without objection, further reading of the amendment will be dispensed with, it will be printed in the record in full, and the gentleman from Michigan is recognized in support of his amendment.

[The amendment follows:]

AMENDMENT TO THE SUBSTITUTE FOR H.R. 3822 OFFERED BY MR. BROOMFIELD

Page 7, lines 2–3, strike the words "the chairmen and ranking minority members of the intelligence committee," and delete the comma following the word "Representatives" on line 4.

Page 7, lines 6–7, strike the words "in a case under either paragraph (1) or (2), a copy of the finding, signed by the President," and insert in lieu thereof: "In a case under paragraph (1), a copy of the finding, as signed by the President,".

Page 8, insert the following after line 2:

"(C) The President may waive the requirements of subparagraph (B) if he determines that it is necessary to meet rare, extraordinary circumstances constituting a serious threat to United States national security interests. In the event the President exercises the waiver contained in this subparagraph, he shall state the grounds therefor in writing. Notification to Congress pursuant to this subsection shall include, for any action for which a waiver was exercised under this subparagraph, a copy of the President's statement of grounds for exercising the waiver."

Mr. BROOMFIELD. Mr. Chairman, as I stated on our hearings on this bill recently, I cannot support H.R. 3822 in its current form mainly because the bill contains an absolute requirement the President notify Congress of all covert activities within the 48 hours.

It is my strong feeling that this provision would place an unconstitutional limit on the President's ability to execute foreign policy. I believe it also would impede U.S. intelligence operations and prevent full cooperation by foreign governments.

Senior administration officials, such as Defense Secretary Carlucci, Director of Central Intelligence, Bill Webster, and Under Secretary of State Armacost, have all assured me that if my amendment is adopted they would recommend the President sign the bill.

I was also informed last night the White House agrees the President should sign the substitute, for H.R. 3822 if my amendment is adopted. It is my concern for the security and effectiveness of covert operations that lead me to offer this amendment.

LIMITING NOTIFICATION TO FOUR CONGRESSIONAL LEADERS

My amendment, I will explain again for the benefit of committee members and others, would do just three things. First the amendment would replace the limited notifiction procedures that the President can employ in extraordinary circumstances. Under the bill, as in current law, the President can choose to inform only the four leaders of Congress and the chairmen and ranking minority members of the Intelligence Committees. I believe that the requirement for Presidential consultation with Congress on such matters could be met in a more secure and satisfactory manner if the President only had to notify the four leaders: The Speaker and Minority leader of the House of Representatives, and the Majority and Minority leaders of the Senate.

DEFERRAL OF 48-HOUR NOTIFICATION REQUIREMENT

Second, the amendment would allow the President to defer notification beyond 48 hours in rare, extraordinary circumstances con-

stituting a serious threat to United States national security interests. This is a high standard that would permit the President some flexibility in withholding notification for a short period of time while a sensitive operation was underway. The administration has already adopted—and I want to point this out, and people ought to know it—the rare extraordinary circumstances standard in its national security decision directive on covert action.

Administration officials have also indicated that the administration would be willing to go to an even higher standard as long as it permits the President some flexibility in special cases. Now, again, I want to point out that the Canadian hostage rescue caper, back in President Carter's time, was such a case. Other cases involving serious risk of loss of life would also qualify. There could be other types of cases that would require the President to exercise these powers.

REMOVAL OF WRITTEN NOTIFICATION REQUIREMENT

And, third and finally, the amendment would remove the requirement that copies of Presidential findings be sent to Congress even if only limited notification is provided under the act. It doesn't make sense to require written notification in such a situation, especially since numerous staff could easily gain access to such materials. The amendment would also substitute the language of the NSDD dealing with transmittal of a written finding. Congress would always be provided a copy of the finding as signed by the President.

ADMINISTRATION SUPPORTS BROOMFIELD AMENDMENT

In conclusion, Mr. Chairman, let me say that I believe the administration has gone far in working with Congress to perfect this bill. This could be a good and useful bill if it were not for the 48-hour requirement. The administration has also worked to specify the extremely small number of cases in which notification to Congress might be deferred, and again I want to point out during our hearings it was said that there were probably no more than three such cases in the last 10 to 15 years, where such an operation would come under this qualification. This amendment would clarify the situation in which the President can exercise that power, and I strongly urge the committee to go along.

We have a good bill here. A lot of work has gone into this bill. With this amendment we can get the administration's support, we can get bipartisan support and we can move this bill along and assure that it will be signed by the President.

NEED TO CONSULT CONGRESS ON INTELLIGENCE OPERATIONS

Chairman FASCELL. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

I want to plead with my colleagues to listen, if they would, because I think what I have to say is important, and this legislation that we are about to pass is perhaps the most important piece of legislation having to do with our national security that we will encounter in many years.

Let me preface my support for the Broomfield amendment by asserting that I think this administration made a grave error in judgment in not notifying Congress of the Iran-Contra initiatives. I think it was absolutely wrong. I think the penalty they have and are sustaining for failure to notify Congress has been tremendous. I think the political fallout has yet to be measured. I don't think that the failure to notify Congress has at all passed with impunity, and I hope and pray a lesson has been learned by future Chief Executives and future administration personnel that you cannot engage in a risky operation, a covert operation, without consulting with and taking into your inner circle Congress.

Because if Congress opposes and rejects what you are doing, it cannot work, it can only serve to embarrass our country and even jeopardize lives. So I want to start out with that premise. We are talking about in this legislation changing the requirement that the President notify Congress, and when I say Congress I am speaking of the Intelligence Committees, the gang of eight or even a lesser number, depending on the exigencies of the situation.

CALL FOR FLEXIBILITY ON 48-HOUR NOTIFICATION REQUIREMENT

The law says now "in a timely fashion." What we are trying to do is force that timely fashion into the narrow constraints of 48 hours. Forty-eight hours. I am pleading with you not to do that, at the same time insisting the timely fashion standard was not met and that ten months is certainly not timely fashion, and I am willing to agree to a 48-hour notice on the normal covert activities. But I am asking for some wiggle room, some flexibility for the extraordinary situation that can involve the very national security of this country.

And let me explain. The current issue of a publication put out by the Arms Control and Disarmament Agency, Arms Control Update, talks about the United States and biological war. That is the real unthinkable subject in this Congress and in this country. We defend ourselves against intercontinental ballistic missiles and cruise missiles and conventional warfare, but nobody wants to talk about biological and toxin weapons, and believe me they are out there, and they are a bigger threat than any nuclear bomb because you can get them into this country in a diplomatic pouch, and nobody will know about it.

Let me quote from this publication, this most recent one, as regards Soviet compliance. The United States stated at the Review Conference that Soviet compliance with this legal obligation was subject to grave doubt. The legal obligation, my colleagues, is the 1972 Biological and Toxin Weapons Convention. Our current report on Soviet noncompliance with arms control obligations takes note of continued activity at suspect biological and toxin weapons facilities in the Soviet Union and reports that a Soviet biological warfare program may now include investigation of new classes of BW agents.

It is clear that the Soviet Union has maintained an offensive biological warfare program and capability in violation of its legal obligation under the 1972 convention.

Now, we know that chemical warfare is being waged in the Iraq-Iran war by Iraqis. We know that other countries have developed the facilities for manufacturing some very serious and poisonous chemical weapons, and I am telling you in the real world you have to contemplate that.

HYPOTHETICAL NATIONAL SECURITY EXIGENCY

Now, I pose a hypothetical to you, and I hope it always stays a hypothetical. An observer to the United Nations who does not have the status as a legal entity or country but is given observer status finds that his group is in desperate straits so he gets biological warfare culture, gets it in the country and has possession of this. What is going to happen if certain demands are not met? New York is going to feel this biological weapon and 6 million to 8 million people can be wiped out. It can happen. Believe me, it can happen.

Now, through intelligence, we find out about this, we know who has it, and we have an idea where it is. It is a desperate situation.

Another Middle Eastern country has access to this person and has access to the inner sanctum of his chambers, and they offer to go get this stuff and to take this man out if necessary to prevent this disaster. But they tell us, don't you tell anybody because our people's lives are at stake, our country is at stake, lives are at stake, and we don't trust your Congress, we don't trust your CIA, we don't trust your White House, we have seen enough of Bob Woodward, we have seen enough every day in the papers quoting "a congressional source," an "informed source," a "White House source" acknowledge this or acknowledge that.

Now this happens. It happens regularly. It isn't only that somebody leaks or doesn't leak, it is the perception that other countries have that we can't keep a secret. And if this cooperating country's lives are going to be at stake, don't you tell anybody.

Now, they can go in and maybe get this and save 6 million lives, and if news of it leaks, a panic such as you can't imagine will occur in New York. Biological warfare. It will be like a horror movie with a cast of millions.

Now, what is the President going to do? What is the President going to do if he has to tell Congress under the law? I am suggesting to you where hostages are taken, where terrorism exists and where life can be forfeited and our national security jeopardized, you have to give some flexibility to the next President.

Now, you are not bashing Reagan when you pass this. He will be leaving office in a few months, and I dare say he will never have occasion to report in 48 hours. And if he does, he will. Because he has obliged himself to do so under a National Security Decision Directive. But I am telling you it isn't worth it to bash and to punish an administration retroactively for some mistake they made, serious, egregious mistake they made, by tying a future President's hands in a situation that could really happen.

CONSULTATION WITHIN EXECUTIVE BRANCH

Mr. WEISS. Would the gentleman yield for a question or two?

To whom is this question, this hypothetical, going to be given by the Middle Eastern person?

Mr. HYDE. Vernon Walters goes to the President, then says, "Mr. President, we have this horrible situation."

Mr. WEISS. Thank you, and whom will the United Nations representative speak to, the President himself?

Mr. HYDE. Who will what?

Mr. WEISS. Who will he speak to, the President?

Mr. HYDE. I would say, yes.

Mr. WEISS. How many other people will the President call in for discussion?

Mr. HYDE. Probably the National Security Advisor, maybe the Secretary of State, maybe not, depending on what the instructions are from the third country that is going to risk its national survival by cooperating with us.

Mr. WEISS. So that at the very least, you will have a couple other people besides the President involved?

Mr. HYDE. Sure.

Mr. WEISS. In the executive branch.

Mr. HYDE. I ask unanimous consent I have three additional minutes.

Mr. WEISS. Thanks for yielding.

Chairman FASCELL. Without objection, the gentleman is recognized for three additional minutes.

FURTHER DETAILS ON HYPOTHETICAL

Mr. SOLARZ. Thank you for yielding. This is one of the most interesting hypotheticals I have heard in 14 years on the committee. It wasn't clear exactly what action the President was being asked to take by this Middle East——

Mr. HYDE. Supply intelligence, wire-tapping, electronic surveillance to find out the movements. I don't have to discuss that with you. Your imagination ought to be fertile enough to know what assistance we can give to what is going on in the U.N.

Mr. SOLARZ. I thought you said the country that alerted us to the danger had the capacity to spirit the perpetrator out of the country?

Mr. HYDE. Maybe not that, Mr. Solarz. Maybe get rid of him, I don't know. But if he has got biological culture that can kill six million people, something must be done. I could give you an exact example of this with another country and another situation that we leaked. It happens. And I am saying you can't tie the President down that tightly where our national security is involved.

48-HOUR REQUIREMENT TOO RESTRICTIVE

Now, let me just give you one quote from Lloyd Cutler, a pretty smart man who is hardly an adjunct of the Reagan Administration, but Lloyd Cutler told us it does seem to him that ". . . none of us is bright enough to devise an absolute 48-hour rule that will cover all situations and to drive the President into the refuge of a constitutionally inherent right to do something which Congress can't interfere with. It seems to go a bit too far. You are forcing a constitutional confrontation which we should avoid at all cost."

Now, Judge Webster is opposed to the 48 hours, he wants some wiggle room. He will buy this Broomfield amendment. Secretary

Carlucci is against it, William Colby, Stansfield Turner, Zbigniew Brzezinski, Lloyd Cutler, Henry Kissinger, Brent Scowcroft, these are people whose careers have revolved around questions like this. They are not acting as Democrats or Republicans, they are experienced Americans, and I plead with you to adopt the Broomfield amendment, which gives that little room for the extraordinary situation that can occur that will involve your country, my country and possibly the West.

So that is what I am pleading with you to think about. I just think this legislation is an over-reaction to something that was wrong and has not gone unpunished.

CANADIAN HOSTAGE SITUATION

Mr. LAGOMARSINO. The gentleman made a compelling case with his hypothetical, but what about the actual case that happened? Most of us are familiar with this. For the record, will you discuss the Canadian hostage situation. This actually happened.

Mr. HYDE. We have six people escape from our Embassy and find themselves in the Canadian Embassy in Tehran in 1980, and the Canadians said "We will help you get them out of the country", while 52 of their colleagues were held by the Revolutionary Guards for 444 days.

But the Canadians said, "Don't you tell anybody, don't you tell Congress", and we infiltrated CIA agents with false passports, German passports, and they got the six out of the country, and then after they had left, Congress was told by Admiral Turner and President Carter, and everybody applauded. It was a very successful operation that would have been impossible if this law had been in effect. It involved at least six lives.

Mr. BERMAN. Will the gentleman yield?

It is fair to point out this whole episode occurred prior to the 1980 amendments, prior to the creation of a group of eight.

Mr. HYDE. But Mr. Berman, the Hughes-Ryan law was in effect, and that required timely notice of Congress.

Mr. BERMAN. Of Congress. But the alternatives with the group of eight under rare and extraordinary circumstances were not in place at that time.

Mr. HYDE. Admiral Turner said we were told not to tell anybody because Canada's Embassy and Canadians' lives were at stake. And so we have followed their instructions, and it succeeded and saved six lives, and thank God it did. Now three months was no big deal, and everybody said all right. What Turner says, Admiral Turner says, you measure not by the tick of the clock, but by the nature of the operation. That is his standard for notifying Congress. I would go further than that. I would think the Broomfield amendment confines itself to extraordinary circumstances where our national security—it doesn't even say lives. I would want his amendment to say lives are at stake. It says national security interests. We are talking about the future, not the past.

Parenthetically, one of those phony passports was a German passport, the initial was H. in the middle, and they stopped our agent at the airport because German passports never use middle initials, and they said, "Why is the "H" there?" It is one of our

agents. He thought faster than anybody in recorded history, he said, "I am ashamed, I was born in 1935, my middle name is Hitler, and I don't want them to spell that out on the passport", and the guy bought it.

You don't want to stifle that kind of creativity, do you?

HOSTAGE SITUATION NOT NECESSARILY NATIONAL SECURITY ISSUE

Mr. SMITH of Florida. Certainly the gentleman is presenting a number of rather Plato-like theses because he is arguing only those sides he wishes to argue.

My question is even assuming, arguing everything you say has significant merit, does that warrant the United States changing the way it is to do business internally? Does another country theoretically have the right to create a situation where we suspend what we would otherwise honor as a tradition in this country of information, even at that level being shared with the leaders of the Branches, is that—some country is to make a policy different from the norm in this country?

I might add the gentleman has set up a scenario that doesn't exactly fit the national security waiver in this bill because, quite honestly, the hostage situation may not be a national security situation.

Mr. HYDE. I agree with you. If you want to talk about hostages, I think the Broomfield amendment would have to be stretched to its broadest implication to include the saving of human lives, and that is why I think it needs to be improved. But I am willing to accept it because the administration will accept it, and they will sign this bill.

I am suggesting you play it as it lays, you take the problem as it comes to you and you make a judgment. And if our national security interests are involved, you had better think about it.

CANADIAN REACTION TO UNITED STATES LEAKS OF CLASSIFIED INFORMATION

Mr. BEREUTER. Will the gentleman yield?

I thank the gentleman for yielding. We have heard the argument about the Canadians trying to dictate what our national policy should be. What it seems to me the Canadians were doing was reacting to a reality, pointing out a reality to us. That reality is that we have intentional leaking and accidental leaking through careless use of classified information going on in this government—in the executive and legislative branches.

What we are attempting to do is to find a way to limit the kind of consultation that goes on here as one means of dealing with the problem which the Canadians obviously recognize. I think what needs to be put on the record at this point is that the argument about someone dictating to us what is proper for us to do in our own governmental system is not really a relevant argument.

I thank the gentleman for yielding.

Chairman FASCELL. The gentleman's time has expired.

FINITE SITUATION VS. ONGOING ACTIVITY

Mr. KOSTMAYER. I ask unanimous consent the gentleman from Illinois have three additional minutes.

If I could ask the gentleman from Illinois a question. The scenario which you outlined is a finite situation, it has a beginning and end. Once this individual is spirited out of the country and once this material is neutralized or obtained, the incident comes to an end.

Mr. HYDE. Right.

Mr. KOSTMAYER. What if the incident were not a finite incident, what if it were an ongoing activity in which our security intelligence, or the intelligence needed to be provided to this hopeful Middle Eastern country for a period of two to three years. At what point then would the President be required to finally notify the Congress?

Mr. HYDE. I don't think you can quantify it. I think the President could follow the strictures of the Broomfield amendment, talk about the existence of something and every ten days look at the finding that is in the safe to make sure it doesn't get lost in the shuffle. But if it takes three years to get in there and get that culture, and you got somebody willing to risk his, her or their lives to do it and they set out those terms, I would, if I were the President, I would adhere to those terms.

POTENTIAL FOR ABUSE BALANCED AGAINST UNAUTHORIZED DISCLOSURE

Mr. KOSTMAYER. But doesn't this really allow the President to provide an excuse to simply never inform the Congress by allowing him to characterize this in the way in which the Broomfield amendment does characterize it, as an extraordinary and rare circumstance?

Mr. HYDE. Yes. As Secretary Shultz said, trust is the coin of the realm. It can be abused. It certainly can.

Mr. KOSTMAYER. And as the gentleman pointed out, it has been and——

Mr. HYDE. Mr. Kostmayer, balance against that the notion that some Members of Congress have that if they don't agree with the policy they have a duty to disclose it. Now that is on the record. Some prominent Senators have said that, and a prominent Member of this House once said it and did it, and you have to balance the possibility of abuse by a President, but also the subsequent political fallout that he will get, as President Reagan is getting now, against the destruction of the operation and the horrible consequences.

BROOMFIELD AMENDMENT GUTS 48-HOUR RULE

Mr. KOSTMAYER. If I could continue. I think it is possible to make a case for rare and extraordinary circumstances here and to create an exception to the 48-hour rule. But I don't think the Broomfield amendment does that. I think that the Broomfield amendment essentially guts the 48-hour rule and despite the fact the gentleman from Illinois has made, as he always does, a compelling and eloquent case, I think this essentially is a gutting amendment and fails to create an exception for which I think a valid case could under certain circumstances be made.

I appreciate the gentleman yielding to me.

Mr. HYDE. Just let me say "to meet rare extraordinary circumstances constituting a serious threat to the United States' national security interests," I think that is pretty tight language.

Mr. KOSTMAYER. If the Broomfield amendment is adopted under this administration, the law and the conduct of the administration would not change. This administration would not regard the adoption of this amendment as any change in current law, and their attitude and their behavior and their conduct would remain precisely the same as it has always been.

That is why they are for it, that is why they support it, that is why they want it. It opens up a loophole you can drive a Mack truck through.

Mr. HYDE. One sentence, this administration will pay the political price for that error in judgment. That is why we have elections. Thank you for giving me all this time.

BILL REDRESSES DEFICIENCIES IN PRESENT LAW

Chairman FASCELL. Mr. Hamilton.

Mr. HAMILTON. Thank you very much, Mr. Chairman.

Of course, I oppose the amendment. I want to say at the outset that I am impressed with the sincerity and the concern that our friends on the opposite side have displayed in their opposition to this bill. I think I understand that and appreciate it, although I do not agree with it.

But I recognize they argue from a point of some conviction, even passion, with respect to this problem. I hope they will acknowledge that from our side, we present this as a modest proposal to clarify what we think are ambiguities in the Intelligence Oversight Act and to encourage the administration, or to require the administration, to present a finding and to give notice whenever you engage in covert actions. We do not seek to punish the President of the United States. We simply believe there is a major deficiency in present law which was revealed in the Iran-Contra hearings and that this bill is a modest attempt to correct it.

OBJECTIONS NOT BASED ON CONCERN OVER LEAKS

Now, what are the arguments that are made against the bill? The first one is the problem of leaks or disclosures. It is interesting to me to note that the Executive Branch witnesses did not make that argument. Secretary Carlucci specifically said that he was not making a plea for this bill on the basis that the Congress might leak. Director Webster spelled out his objections to this bill, they did not include the possibility that the Congress would leak. Under Secretary Armacost spelled out his objections to the bill, they did not include, so far as I could remember, that the Congress of the United States would leak.

Mr. LEACH. Would the gentleman yield on that point, because it is a profound point.

Mr. HAMILTON. I yield.

Mr. LEACH. The testimony was that the Congress was in responsibility equal to the executive branch, neither worse nor better. Leaks do occur in this society.

Secondly, the evidence is that in terms of verbal expressions there might be less trouble, but we are talking about a paper flow of which far more than simply a few Members of Congress would be advised.

Mr. HAMILTON. May I suggest to the gentleman, if he looks at the stated objections by the administration to the bill, I think he will find they did not include there the problem of leaks.

Now, I want to say with respect to the problem of leaks that I don't dismiss it casually. We in the Congress have an important responsibility not to disclose information. It is, it seems to me, an extraordinary thing to say that we in this institution are not going to trust our most respected leaders.

When you have the gang of eight and the gang of four, you are not talking about 535 Members of the United States Congress. You are talking about the people we put in charge of the Intelligence Committees to handle the most trusted secrets of government, and you are talking about the senior Members of the Congress, our most distinguished Members who have been elected by their peers. And when you are saying these people are going to leak, it is an extraordinary statement of untrustworthiness in the leadership of the Congress.

If the bill provided that we are going to notify the Congress of the United States or the President must notify the Congress, I would agree with the statements that have been made. That would be far too many people, but the bill doesn't provide that. That is the first question on leaks.

BILL DOES NOT LIMIT PRESIDENT'S FLEXIBILITY

Now, I think the more serious second objection relates to the flexibility on the President, and our friends who oppose this bill are genuinely concerned about restrictions on the flexibility of the President. But I ask my colleagues this question: Where is the restriction on the President's flexibility? This bill does not limit what covert actions the President may take. It does not tell him how a covert action must be taken. It does not tell him the timing of the covert action.

The only thing that it does is to say that if he takes the covert action, and he may do it on his own initiative without the approval of the Congress, and we are not objecting to it, we are simply saying if he does it, then he must give notice to the Congress. And I do not see, frankly, that notice as requiring anything more than a reasonable and restrained approach to the abuse of the covert action process that we are all familiar with.

And I must say I have a difficult time understanding the argument that you are restraining the flexibility of the President. We are not doing that at all. We are merely saying when he acts, if he acts, how he acts, then he has got to tell us that he has done so.

CONGRESS CAN PROVIDE INDEPENDENT ADVICE ON COVERT ACTION

Now, what it all comes down to for me is a question of balance. On the one hand, you have to weigh the risks that our friends have stated, the risk of disclosure, the risk of restraint on flexibility to the degree that we think there is such a restraint exists on the one

hand. You have to weigh that risk against the value and the benefit of giving the President independent advice about the covert action.

What happens in the bureaucracy, it seems to me, in covert actions—and I am not critical of this—is that a bureaucracy tilts in favor of what the President wants to do. Not all of the good politicians in this town are in Congress. They are in the executive branch. They understand what direction the President is going to go, and they, therefore, marshal their arguments in support of that. There is nothing wrong about that. The President is the leader, the elected leader, and the bureaucracy ought to support him.

But what is lacking in that process so often is a voice that will come up to the President of the United States and say, "Mr. President, what you are trying to to is plain wrong, it is not going to work, and we think you need to reassess it." It can be raised much more effectively by Members of the Congress who have an independent political base, who are not beholding to the President of the United States, and who can give him an independent assessment of covert actions.

So in this balance, the value of that independent advice on these terribly important covert actions outweighs whatever risk you may have with respect to leaks or with respect to a restriction on disclosure. That is why I support the bill.

WITHHOLDING OF INFORMATION UNDERMINES LEGISLATIVE-EXECUTIVE EQUALITY

The final point I make simply relates to the constitutionality argument. The executive branch position with respect to the Constitution, is—if I understand it correctly—that a President of the United States has the power to withhold information from the Congress under extraordinary circumstances, and those extraordinary circumstances are not spelled out in any great detail.

Now, I want Members of Congress to think about that. If you grant the power to the President to withhold information from the Congress, then it seems to me that the whole oversight process is irreparably damaged and that you cannot argue at that point that you have co-equal branches of government.

We all know that information in this town is power, and if one side has the information and the other side doesn't have the information, the side that has got the information has the power.

I don't think Members of Congress accept the argument that is made with respect to the Constitution. This is one of these great constitutional questions that has not been litigated so far as I know. Maybe it is better that it never be litigated, because of the implications it has for the constitutional system.

But in this context it seems to me it is important for Members of Congress to acknowledge that if we are going to be a co-equal branch of government, if we are going to have full oversight responsibility, if we are going to be able to give independent advice on these terribly important questions of covert actions, then we have to have the same kind of information that the President of the United States has and we cannot accept a position by the Presi-

dent that "I can hold the information, I can hold it as long as I want to and not advise you of what that information is."

Chairman FASCELL. Mr. Lagomarsino?

Mr. LAGOMARSINO. Thank you, Mr. Chairman.

Mr. HYDE. Will the gentleman yield?

Mr. LAGOMARSINO. Yes.

GENERAL GRANT OF POWER OF EXECUTIVE VS. SPECIFIC GRANTS TO CONGRESS

Mr. HYDE. I would like to say to Mr. Hamilton, we are not giving the President the right to withhold the information. That is implicit in the Executive power which the Constitution grants him, and that is a general grant of the power of the Executive. The powers that Congress receives in the Constitution are to be strictly construed because they are specific grants, and the Constitution says in support of this specificity, those powers "herein granted". So that is my response to you.

TRUSTWORTHINESS OF MEMBERS OF CONGRESS

Secondly, you talk about how trustworthy Congress is. I think in general congressman are trustworthy, as are most human beings. However, the former Chairman of the Senate Intelligence Committee was recently criticized in some way or other by the Senate Ethics Committee for revealing something to a fundraising group in Florida that he shouldn't have. The former Vice Chairman of the Senate Intelligence Committee voluntarily left because he disclosed something that they had voted not to disclose. We have had a Member of the House Intelligence Committee leave because of certain disclosures. So I am just not all that sanguine about secrets not getting out.

But I would remind Mr. Hamilton, as co-Chairman of the Iran-Contra Investigation Commission, that you and Senator Inouye certainly took precautions that Admiral Poindexter's testimony, vis-a-vis "the smoking gun," didn't get out because you didn't permit any Members to attend his deposition—just the attorneys and staff, no members—because you didn't want that to leak out and of course blow the whole purpose of the investigation.

LIST OF LEAKS FROM IRAN-CONTRA COMMITTEE

Let me supply you with a redacted, sanitized, benign list of serious leaks out of that committee, which the cream of Congress, myself excepted, participated in.

"Inouye vowed to kick leakers off of the Iran-Contra panel for telling a reporter that former CIA Director Casey masterminded contra supply efforts;" Washington Times, March 26, 1987. "Details of Secretary of State George Shultz's private interview disclosed to Wall Street Journal days before Shultz appeared in public session;" the source: Wall Street Journal. "Two Senators and one Congressman, all members of the Iran-Contra Select Committee, revealed to the New York Times, on condition they not be identified, then-secret evidence regarding all Bill Casey's alleged efforts to mastermind the resupply efforts." March 25, 1987, New York Times. "Congressional and Administration sources disclosed details to the

Washington Post regarding secret findings concerning assistance to contras," The Washington Post, January 14, 1987. "Sources familiar with congressional investigation tell New York Times about McFarlane's then secret testimony regarding alleged country number two, financial support to the contras," New York Times, January 13, 1987. "Congressional sources tell Walter Pincus of the Washington Post details of a then-secret computer message Oliver North sent John Poindexter," source, Washington Post, January 14, 1987. "Congressional sources revealed to Walter Pincus of the Washington Post that Senate and House Select Committees are planning to investigate possible misuse or diversion of funds in an alleged CIA——"

Mr. KOSTMAYER. Would the gentleman yield?

Chairman FASCELL. Let him finish.

Mr. HYDE. I have five more.

"Congressional sources reveal to L.A. Times reporter Ronald Astrow the details of secret testimony of Assistant Attorney General William F. Weld," source, Philadelphia Inquirer, January 23, 1987—I have pages of this.

Mr. KOSTMAYER. Will the gentleman yield to me for one second?

Chairman FASCELL. Gentlemen, I have been very lenient. We will abide by the five-minute rule for recognition. The time belongs to Mr. Lagomarsino and his time is up.

Mr. Kostmayer.

The gentleman is recognized for five minutes.

DEFINING NATIONAL SECURITY SIGNIFICANCE OF LEAKS

Mr. KOSTMAYER. I think I can say in 30 seconds that the gentleman from Illinois has not provided one single, solitary example of a case in which a Member of the House or Senate leaked information which jeopardized our national security.

He has provided example after example of information which was leaked which jeopardizes the political security of this administration. And that is the distinction.

What they don't want is for the political security of this or any other administration to be jeopardized. What this would do is to protect the administration or any administration from having that occur.

These are not examples——

Mr. HYDE. Would my friend yield to me?

Mr. KOSTMAYER. Just a second.

These are not examples of national security leaks. These are examples of political leaks, and none of these members of either the Intelligence Committee in the House or Senate has been accused, to my knowledge, of jeopardizing the security of this country. They have, rather, been accused, perhaps justly, of jeopardizing the political security of this particular Administration.

I yield to the gentleman from Illinois.

Mr. HYDE. Thank you.

I have a book of leaks, classified leaks. The difficulty is in elucidating them here in open session, you confirm the accuracy of these operations. So I am at a considerable disadvantage. Mr. Tom

Smeeton of the House Permanent Committee on Intelligence keeps for me a thick book of leaks.

Chairman FASCELL. The time belongs to you, Mr. Kostmayer.

Mr. KOSTMAYER. I want to just insist again that the gentleman from Illinois can interpret these leaks any way he wants. No Member of Congress stands accused of jeopardizing the national security of the United States.

Mr. LEACH. Will the gentleman yield?

Mr. KOSTMAYER. I will not.

These are political facts, political leaks, not national security leaks.

Now I yield to the gentleman from Iowa.

CLASSIFICATION SYSTEM DEFINED BY LAW

Mr. LEACH. Thank you.

I think the gentleman from Pennsylvania absolutely defined the point that the gentleman from Illinois made earlier. He said in his judgment we have political leaks. But we have a system in this country that defines classifications. We have a congressional system that honors the classification system and, when a Member of Congress in their own judgment says this is political, that member is saying he can do what he wants despite the law of the United States of America that applies to Members of Congress as well as to the Executive Branch.

The point the gentleman from Illinois made earlier is absolutely profound in that regard.

Now, secondly, let me say that the one series of leaks that I think every Democrat in this committee ought to be very concerned about is that the paper trail that was leaked was presumably to the benefit of one of the presidential candidates on the Republican side, and all I can say is this bill in its current form includes the requirement that signed documents by a President of the United States go to the Senate among other places, a place where a lot of people are running for President of the United States.

We already have a record by which, for the benefit of candidates, certain papers were leaked. That is one of the lessons of the Iran-Contra affair. When you have Mr. Dukakis in the presidency and you have a record by which it appears that conservatives leaked as well as liberals, I think you should be very alarmed.

But the most important point is the point you made that people making their own judgment on what is a political leak of classified information is something that is disallowed under the law of the United States. It is something for which there have been numerous examples, some of which the gentlemen have cited that have occurred, and it isn't good enough to say that this Congress has been pristinely pure in that issue.

Chairman FASCELL. Mr. Burton, you are recognized for five minutes.

INCIDENT OF UNAUTHORIZED DISCLOSURE CITED

Mr. BURTON. I will just take a moment, Mr. Chairman.

I share the sentiments of my colleague, Mr. Leach, from Iowa, and I think he makes a very salient point.

I would like to point out, before the Iran-Contra hearings took place this committee held a secret, closed-door series of meetings with Mr. McFarlane, Mr. Poindexter—although he took the 5th Amendment, as I recall—Mr. Casey, I think Mr. Shultz even appeared, and during one of those meetings I asked the Chairman to restate the position that he had cited earlier in a meeting, and that was that nothing in the meeting should be divulged to the media, nothing.

At that meeting that Mr. Casey participated in, we had top secret information before us that was numbered. At the conclusion of our meeting, we had to turn that information back in or it had to be kept here in a safe in the Foreign Affairs Committee offices.

I brought up a second time that I wished the Chairman would restate that nobody in this committee go out in the hall and tell the media. The Chairman restated it a second time and at the conclusion of the meeting I brought it up a third time and the gentleman from Florida stood up and said, "I resent him impugning the integrity of this committee," and I said I wasn't impugning the integrity, I thought it should be clear to every member of this committee that we don't go out in the hall and leak information that was classified.

The meeting concluded and I walked out in that hall and three members of this committee, three members of this committee were standing before the cameras divulging information that they had been admonished three times not to reveal.

I won't yield at this moment.

And I think that that one example should be enough to defeat this measure. I think there is just no question that leaks do occur, and very important national security information should be kept to an absolute minimum as respects the numbers of Members of Congress.

To expand it I think would be detrimental to our national interest and I think it is something that should be defeated in this committee and shouldn't get to the Floor.

Chairman FASCELL. Mr. Gejdenson.

BILL RESTRICTS NOTIFICATION TO CONGRESSIONAL LEADERSHIP

Mr. GEJDENSON. I think that what this argument does is ignore what Mr. Hamilton pointed out to begin with. The bill does not provide additional information to all 535 Members in the House and Senate, but to the leadership of the House, which includes the chairpeople of the Intelligence Committee. If you look at the history of this and previous administrations, concerning leaks, I can guarantee you there have been more leaks out of the executive branch than out of the people listed in this bill.

Mr. BURTON. If I might reclaim my time.

Mr. GEJDENSON. I think it is my time at this point.

Chairman FASCELL. I recognized Mr. Gejdenson for five minutes, Mr. Burton. I thought you were finished.

Mr. GEJDENSON. And so the simple point is, does this body want its leadership to function in the dark or should we have the basic information available to the leadership of the Congress?

I think that it is critical to include the heads of the Intelligence Committees because, as good as the Majority Leader and the Speaker are it is the Chairmen of the Intelligence Committees that have day-to-day information and maintain an ongoing, continuous effort in the intelligence field.

I think it is ludicrous to assume that we ought to keep those key people in the dark.

Chairman FASCELL. Mr. Solomon is recognized for five minutes.

PENALTIES FOR UNAUTHORIZED DISCLOSURE

Mr. SOLOMON. Mr. Chairman, let me just be brief.

Mr. Leach, in responding to Mr. Kostmayer, hit the nail on the head. There are those of us in this country who think we can do anything we want to, politically. And Mr. Gejdenson brought out the fact that more leaks come out of the administration than out of Congress. I don't give a damn where the leaks are coming from, leakers ought to be penalized and go to jail for it.

I have an amendment that is coming up later on during this committee meeting which says, "Any person having received access to classified information prepared pursuant to the provisions of this title who knowingly and willingly discloses the substance of that information without the authorization of the President, or pursuant to the applicable Rules of the House of Congress of which that person is a Member, officer or employee, shall be fined not less than $1,000 nor more than $20,000 or imprisoned for not less than 90 days nor more than five years, or both." And that is the way it should be.

If it is classified information that is leaked, there ought to be a penalty, and this amendment that I will be offering will clarify and set forth these penalties.

VETERANS ORGANIZATIONS OPPOSE BILL

Now, let me say that Henry Hyde has talked at length on the kinds of leaks that take place. I just want you to know, as the ranking Republican on the Veterans Affairs Committee, that all of the veterans' organizations throughout this country have recently met, late last week, to be briefed on just what would happen if this legislation becomes law.

I won't take the time to read this resolution, which is typical of all of those veterans' organizations, but I assure you that every one of you are going to be contacted before this bill reaches the floor, to let you know that the American people don't want this bill.

I would submit this for the record. It is a resolution by the Reserve Officers Association of the United States.[3]

PERCEPTION OF CONGRESS AS SOURCE OF LEAKS

Mr. LAGOMARSINO. I thank the gentleman for yielding.

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[3] The resolution referred to appears in app. 10.

The gentleman from Illinois, Mr. Hyde, pointed out that members of the group that would be notified have leaked. And whether the administration or the Congress is more guilty of leaking is a debatable point; we could go on debating that.

But the perception is, with other countries and certainly Canada in the case of the hostages in our embassy there, that the Congress does leak, and the President wasn't supposed to tell anybody. That is a fact of life. Maybe we don't like it, but that is a fact. That perception is reality in the minds of those people.

So I think it is a very important point and we do have to allow some leeway—very limited, as it is in the Broomfield amendment—to the President.

HOSTAGE-TAKING AS NATIONAL SECURITY ISSUE

Mr. SOLOMON. Somebody mentioned over there that hostage-taking is not a national security issue.

Well, let me tell you one thing. You know, if 1 hostage is taken, fine; 2, 3, 4, 5, 10. What happens if thousands of American citizens are being taken hostage across this world? You don't think that will affect the national security? You don't think that will affect the judgment of how you people vote on legislation?

Let me tell you, that is blackmail and it affects the national security of this country. We ought to defeat this legislation.

Chairman FASCELL. Mr. Smith?

MAKING DETERMINATION ON CLASSIFIED INFORMATION

Mr. SMITH of New Jersey. I was intrigued by Mr. Kostmayer's discussion on the difference between political information and classified information and as to who makes the determination.

I was wondering if the gentleman would answer a question. Who does make that determination? Does he reserve unto himself the right to determine that? Mr. Leach's comments just a few minutes ago raised similar questions concerning the propriety of blabbing confidential information to the press.

Secondly, has the gentleman ever leaked classified information himself?

Mr. KOSTMAYER. I have never leaked classified information and, under current law, the Espionage Act covers Members of Congress and of the Executive Branch and everybody in this country. It is perfectly adequate law which we have now which prevents this kind of thing.

Mr. SMITH of New Jersey. The gentleman is saying that he has never leaked information that has been regarded as classified information from this——

Mr. KOSTMAYER. I certainly never leaked national security information.

Mr. SMITH of New Jersey. Who is making the determination?

Mr. KOSTMAYER. The Solomon amendment—if I could respond, the Solomon amendment, which we have not gotten to, would make that judgment the administration's judgment entirely, and allows them to remove any notification from the debate by simply classifying it. That is the danger.

Mr. SMITH of New Jersey. But you feel that you can make that determination also.

Mr. KOSTMAYER. You don't believe that a Member of the United States Congress can make a judgment about what kind of information would jeopardize the security of the country?

Mr. SMITH of New Jersey. You then feel you have an ability to leak it; is that what you are saying?

Mr. KOSTMAYER. It is inconceivable to me that the gentleman from New Jersey could believe that we are so bad here that we would, number one, not know what information would jeopardize the security of our country, and, number two, knowing it, leak it.

Mr. SMITH of New Jersey. The gentleman I think is very aware that Members of the House, the 535 Members, are not privy to the kind of information that the Intelligence Committee would be, and could very well leak information inadvertently, information that they thought was not going to jeopardize the national security. From the standpoint of a nation hostile to U.S. interests, the question of a Member's intent is entirely superfluous.

Mr. KOSTMAYER. Name the one time it has happened. Mr. Hyde didn't name a single incident in which the national security of the United States was jeopardized by a Member of Congress.

Mr. SMITH of New Jersey. Surely the gentleman was listening earlier in the debate when Mr. Hyde walked us through a large number of specific instances. I think privately he and other Members would gladly share additional examples with you.

I would point out to my colleague that when Mr. McFarlane appeared before this committee, I asked our distinguished Chairman Mr. Fascell, what happens if there is a breach of confidentiality by members or staff of this committee? I asked, "what happens when tomorrow we read almost verbatim what occurred in Executive Session—secret session—what kind of mechanism and procedure will be triggered to ascertain who leaked the information?" The Chairman noted that he wasn't going to put everybody under oath and no investigation whatsoever would ensue.

I would emphasize the point that the evidence clearly suggests that secrets, whether you classify them under your own subjective, highly questionable standard, Mr. Kostmayer, as political or of interest to national security, secrets have been leaked and trust has been broken.

Mr. KOSTMAYER. Can the gentleman tell me of an incident where a Member has been charged or prosecuted?

DIFFERENT STANDARDS FOR MEMBERS OF INTELLIGENCE COMMITTEE

Mr. SMITH of New Jersey. If the gentleman wants to know if there are incidents whereby members have compromised or leaked secret information, the answer is clearly yes. Earlier Mr. Hyde cited some examples here in open session of our Committee but said to comment extensively would in fact confirm the validity of some of the secrets that have been leaked. I trust that if the gentleman seeks several specific examples he can obtain that information, on a confidential basis, from the Chairman of the House Intelligence Committee, Mr. Stokes.

Moreover, there are two recent examples of Senators who were caught red-handed leaking secret information. Mr. Durenberger, former chairman of the Senate Intelligence Committee, has been criticized by the Senate Select Committee on Ethics for "appear[ing] that [he was] disclosing sensitive national security information and such appearance jeopardized the mutual confidence which must exist between the Congress and the intelligence community."

The other Senator I have in mind is Senator Patrick Leahy. He disclosed without authorization a committee document following a vote by the Iran-Contra panel not to release the report. His breach of trust and confidentiality resulted in his resigning from the committee.

Mr. KOSTMAYER. If you read the record in the case of the Senate, they are not charged with leaking national security information. And I happen to think that Mr. Leahy, although a member of my own party, acted inappropriately by leaking information.

Once you get on the Intelligence Committee, you don't do that. But it wasn't national security information, it was politically embarrassing information.

Mr. SMITH of New Jersey. Would the gentleman yield?

Chairman FASCELL. His time has expired.

Mr. BURTON. Will the gentleman yield?

When the bombing of the Gulf of Sidra in Libya took place, Sam Donaldson reported when the planes were in the air that there was a bombing mission that was in operation at that time. Two hours before the planes got there, he was talking on the White House lawn and one of the members of the Senate Intelligence Committee—I don't remember who it was, but I believe it was Senator Pell—was taken to task for that.

The gentleman from Pennsylvania keeps asking for an example of where national security was jeopardized, and I submit to you that what could be more of an example than the bombing of Libya when Muammar Qaddafi said we couldn't cross the line of death in the Gulf of Sidra. That took place. He is not answering right now, but I wish he would.

Chairman FASCELL. The gentleman's time has expired.

Mr. Bereuter?

MEMBERS OF CONGRESS SUBJECT TO CLASSIFICATION LAWS

Mr. BEREUTER. Thank you, Mr. Chairman.

In part we have a problem of definition of "national security." I look back at my own involvement as an army counterintelligence officer responsible for security matters and the guarding of classified information, and I am appalled at what I have seen in the Congress in the 10 years that I have been here.

If we had seen that situation in the military units, we would have issued court martials and people would have ended up in Leavenworth.

There are three general categories of classified information. All of those categories are based upon some degree of jeopardy to the national security—confidential, secret and top secret—and elaborations on those three basic categories. When Members here are ap-

prised about the fact that they are going to receive a classified briefing, they are often given in fact the level of classification. But it is not up to a Member of Congress to decide that this information is a political matter and not deserving of the classification. Those are national security classifications. That is how the law works. Members of Congress are subject to them as well.

The gentleman from California and the gentleman from Illinois have both pointed out how leadership, key leadership, has been found to be jeopardizing the national security. And it is only because of the ways of the Senate, the methods of the Senate, that in fact charges are not brought against the Members. They are simply given an opportunity to exit.

SYSTEM LIMITS PRESIDENTIAL FLEXIBILITY

I think we need to look also at what the gentleman from Indiana offers in his arguments. He makes as good a case as can be made, but in fact the disclosures have come there. In fact, there is a limit on Presidential flexibility. It is not specific by narrowing in the language of the bill the limits on the flexibility of the President. The limitation comes from the fact that the opportunities for covert action are narrowed by the probability, or at least the possibility, of disclosure. The range of actions that the President has available to him are limited by the kind of system that we have established.

BROOMFIELD AMENDMENT STRIKES PROPER BALANCE

Now, I think, despite the fact that we have had egregious problems with lack of notification to Congress by this administration and those bad situations tend to lead us toward bad law, the situation in the Broomfield amendment is very tightly defined and narrowly construed. I think it contains the proper balance between protecting the national security and truly exceptional cases and dealing with the problem that we have on inappropriate disclosure, because Members feel it is on their shoulders in certain cases to decide what is political information and what is classified information.

Gentlemen and ladies of the committee, we do not have that option. That is a problem here. The fact that we don't recognize it only leads us to the conclusion that we have to make, that a change is needed.

Chairman FASCELL. Mr. Torricelli.

BALANCING RISKS OF LEAKS VS. FAILED COVERT ACTIVITIES

Mr. TORRICELLI. I do not want to keep my colleagues long, but wanted to add a few thoughts. It appears to me that the committee is seeking a policy without any risk, in a procedure that has no danger, no danger of leaks, no problems of actions by the executive that are not, indeed, in the national interest.

I want to submit that those risks, a policy of no risk, simply cannot be achieved. No matter what the record, the possibility remains of a revealing of information by Members of Congress who are consulted. And if there is no notification, the continuing real prospect of policy initiatives that are at variance with the national interest.

The Broomfield amendment, it appears to me, the practical effect of it is to opt for the second danger. To recognize that there are twin problems. But that we would rather encounter the second problem of initiatives being taken by the executive that are not in our international interest and not identified by the Congress.

I believe that more than anything else, that amendment concludes that we have learned nothing from the Iran/Contra affair. Because contrary to what Mr. Hyde suggested, the real price of the Iran/Contra affair is not going to be borne by Ronald Reagan. It is not that the administration, this or others, have to answer for things that they do that are not in our national interests in a political price. That price is paid by the country. Continuously. And will be year after year.

As you look at the history of covert activities and the failure of the Congress to be informed, the expertise, the knowledge and experience of the Members of these institutions to come to bear on national policies, I believe you can see the policy procedures have been in error. The fact is that a U-2 policy by the Eisenhower Administration which had to come to this Congress for advice, to look at the consequences of failure, would have been difficult.

The Kennedy Administration, undertaking covert activities against Cuba, recognizing the potential price, the failures from the Bay of Pigs, the assassination attempts, would have been difficult, if Cambodia incursions having come before the Congress and the Iran/Contra affair, having to come before Congress to explain, to explain the consequences, would have been difficult.

No doubt Members of the minority who have cited the case that there are risks of Members of Congress revealing information, that risk is very real. But so, too, are these other consequences on national policy. This country is going to pay for the Iran/Contra affair for years. The credibility of this country, young sailors who might be killed by those weapons that were sold to the Ayatollah.

I don't quarrel with Mr. Hyde, leaking has taken place and it may take place again and it is dangerous, it is tragic, it is unlawful. But I don't know any other way to rein in this administration or any other administration, to use the expertise of this body, to insure the policies that are undertaken are thoughtful, are wise, and are in the national interest.

I believe we have a twin risk. I hope we can do our best to make the risk of leaks from this Congress at a minimum. But I believe as you look at those twin risks, we are the better for not having the Broomfield amendment and for insuring the administration must thoughtfully consider its own policies, come before this Congress, keeping the number of Members who are exposed to that information to a minimum and guaranteeing the national interests through this act.

Chairman FASCELL. Mr. DeWine.

CONGRESSIONAL LEAKS CITED

Mr. DEWINE. Let me briefly respond to Mr. Kostmayer's statement that there have been no examples given involving our nation-

al security. One that comes readily to mind appeared in a very public source, the Reader's Digest. I am not vouching for its validity, but it has not been disputed. And it had to do with the Achile Lauro, where it was reported that a prominent Member of the United States Senate went to the CIA, was briefed very early in the morning and got in his car and proceeded to one of the early morning talk shows and inadvertently, I assume and I honestly think so, made a mistake on national TV. He disclosed some information which compromised some of our sources. And I can get the gentleman the article that appeared and to my knowledge it has never been disputed at all. That is one example.

Another example that comes to mind and we don't know for sure the source, at least I don't. But six months or a year before our planes bombed Libya there was reported on the front page of the Washington Post an account about a proposed covert operation that was proposed against Libya.

I have no idea whether that was true or not and have no way to vouch for the story's validity, but if it was true it would indicate that there was a leak either in the administration or on Capitol Hill which apparently scuttled a covert operation that ultimately might have saved lives and been very effective.

So those are just two examples. The first we absolutely know because it has not been disputed; it was a congressional source. The Senator was on nation-wide TV. So you have the video tape to show it. So there is example after example. So I think the gentleman is simply incorrect when he states that all we have shown are political leaks and they are not leaks that compromised national security or in any way compromised our own men and women in the field which to me is the real threat.

This debate has gone on. I don't think anybody will be swayed by anything at this point. To me, the bottom line is this. If we vote for the bill the way it is written today, what we are saying is, we cannot envision that there never will be a circumstance where that 48-hour rule can be violated.

If we vote down the Broomfield amendment what we are saying is we have a crystal ball and we can look into the future and we know that there never will be an instance where we will need any escape hatch. You are eliminating any escape from this. You are saying that in every single circumstance you have to give the 48-hour notice, that there is no circumstance we can envision where it would be in our national interest not to give notice. So I am voting for the Broomfield amendment. I think that not only is it bad policy the way the bill is written today, I think it is unconstitutional.

Chairman FASCELL. Mr. Solarz.

CONSULTATION PROCESS INCREASES RISK OF LEAKS

Mr. SOLARZ. Thank you very much, Mr. Chairman. I think this is a very close question. And I think there are some very powerful arguments on both sides of the issue. I think it is unfortunate, Mr. Chairman, that this discussion has degenerated into a debate over leaks and the apparent incapacity of the Congress to keep confidences.

I think all of us can agree that from time to time there have been leaks emanating from the Hill. Those are unfortunate.

In some instances they may have caused severe damage to the nation. And surely we can all agree that steps need to be taken to diminish the possibility that these disclosures will take place in the future. But I would assume we could also all agree that the executive branch is also responsible for many leaks.

During the testimony we received on this bill, it became clear that within the framework of the procedures the administration itself has established for the consideration of covert operations, that there is a National Security Council planning group on which the Secretary of State and the Secretary of Defense and the Chairman of the Joint Chiefs and the Vice President and a number of other key officials in the administration serve.

When they are informed about the possibility of a covert operation, they in turn consult with a limited number of people within their agencies. At the end of the day there are a few dozen people, at the very least, within the executive branch who are informed about these covert operations and that certainly creates a certain risk that information with respect to the operation will be leaked.

We know, for every example that Mr. Hyde gave of a leak emanating from the Hill, other examples and probably more examples could be given of information which leaked from the executive branch. Yet if somebody were to say to the President, Mr. President, when a covert operation is being considered, you should cut the Secretary of State or the Secretary of Defense out of the loop or the Chairman of the Joint Chiefs out of the loop, because we know that State and Defense and the Chiefs, from time to time, have leaked information in the past and this could compromise the security of the country, I suppose the President would reject that recommendation out of hand, saying that he needs the advice of his most trusted advisors.

OPPOSITION TO EXCLUSION OF SENIOR INTELLIGENCE COMMITTEE MEMBERS

I believe it bears repetition that what the gentleman from Indiana, Mr. Hamilton said, is very relevant to this discussion. When Secretary Carlucci testified before our committee, he made it very clear that he was not opposing this legislation because of any concern on his part that the Gang of Eight would leak. I think he would be concerned if 535 Members of Congress had to be informed, but he wasn't concerned about the potential for leaks from the Gang of Eight because, as the gentleman from Indiana pointed out, these are the leaders of Congress. These are the ones in whom we have placed our trust.

And I might say parenthetically here that one of the problems I have with Mr. Broomfield's amendment is that he would reduce the Gang of Eight to a Gang of Four, eliminating the chairman and ranking minority Members of the Intelligence Committee who, by virtue of their experience as senior Members of the Intelligence Committee, are probably the four Members of the House and Senate who are in the best position to give advice to the President with respect to covert operations. By contrast, the Speaker or the

majority leader and the minority leader, while their wisdom is certainly to be sought, may not have the same kind of expertise as the senior Members of the Intelligence Committees. So if you were to narrow it to a Gang of Four, it would be better to have the four leaders of the Intelligence Committees rather than the four leaders of the House and Senate.

I think it is better to have a Gang of Eight and to combine the political wisdom with the expertise of the congressional leadership and the committee leadership.

BENEFITS OF CONSULTATION VS. RISKS OF DISCLOSURE

Let me just say in conclusion, Mr. Chairman, that what we have to do here is to balance conflicting interests. I certainly can conceive of circumstances where the President might feel it would be inappropriate to notify the Gang of Eight and there may be circumstances where most of us would agree that it probably would be better for him not to do so.

The problem is that there are also circumstances where we would all agree that it is in our interest for the President to share his plans for a covert operation with the Gang of Eight, precisely in order to get the benefit of a perspective from outside the ranges of his own administration.

There have been three instances since the Intelligence Act was adopted where the President did not consult with the Intelligence Committees. Two of those three turned out to be disasters for the United States: the attempted rescue mission in Iran and Iran/Contra affair. It is certainly possible and plausible that if the President had consulted with the Gang of Eight or with the Intelligence Committees about these two covert operations, that the nation would have been spared a great embarrassment and a great setback.

Finally, with respect to the Canadian exfiltration, I suspect that if the Canadians had been told that the President planned to consult not with 535 Members of the House and Senate, but with the Gang of Eight, that the Canadians would have withdrawn their objections. I rather doubt that there would have been any leaks which would have compromised that particular operation.

So when one has to balance the hypothetical possibility of a situation in which it would be best not to consult, against the fact that there are situations where we can benefit from these consultations and the mistakes which have been made without such consultation, I come down in favor of the legislation and against the Broomfield amendment because in the long run we will have a wiser and sounder policy if the leadership of the Congress is involved than if it is excluded.

Chairman FASCELL. Mr. Dornan.

INCIDENCE OF LEAKS BY MEMBERS OF CONGRESS

Mr. DORNAN. I agree with my colleague, Mr. Solarz, that there are strong arguments on either side and I will concede that the leakiest operation in the city of Washington, DC, is the White House itself. I just read Larry Speakes' book over the weekend. A more disgusting and craven chronology of leaking and back biting I

have never read in my life. In his public life, he deserves everything that has happened to him.

Nevertheless, I have in front of me, Mr. Chairman, and Chairman of the Subcommittee on Europe and Middle East, Mr. Hamilton, a letter you sent out, dated May 5, 1988. That letter refers to a group of members who were privileged to an executive session meeting with the Egyptian Minister, Field Marshall Abu Kazala.

Mr. Hamilton writes about an article which appeared in the March 28 issue of Near East Report, which contained details about what was discussed in the meeting, including direct quotes of the remarks of the Defense Minister. And the letter goes on with some annoyance to say, "I simply do not know who is responsible." But it is clear, Mr. Hamilton writes, "that someone went out of a closed session and reported in detail to the Near East Report."

I also have before me a letter that was just shown to Mr. Kostmayer that was written to Jim Wright, our Speaker, from Edward Fox, assistant secretary of legislative affairs who used to sit behind us here as one of our staffers. He says, "Dear Mr. Wright, the New York Times, May 2, carried a highly detailed story by reporter Robert Pear on this year's Javits Report," named after Jacob Javits. The report was provided to the New York Times by a Member of Congress.

"I wish to express the department's concern about this unauthorized disclosure of classified information." It goes on to say that "press stories such as this harm not only the administration, Congress, our foreign friends and allies as well, the article confused aid with cash sales, blurring the line between recipients of scarce security dollars and cash cuts."

"It overlooks the consultation process between Congress and the administration, gives the impression that the Javits Report is the basis of a master strategy rather than a best effort to project possible sales and unauthorized disclosure will raise doubts about the government's ability to maintain confidentiality with every one of the 32 nations listed in a report meant to provide focus for confidential discussions between Congress and the administration on aspects of our security relations worldwide."

Now I can recall, Mr. Chairman, the former Chairman saying to me personally in the doorway over here that he is sick of leaks coming out of our closed sessions and if it happens again, he will excoriate two Members publicly if they don't stop leaking. This was in 1982 after a session with Secretary of State Alexander Haig, shortly before he resigned.

I think it is peculiar when a Member like Mr. Kostmayer says that these are "political leaks" and not national security leaks. I have taken note that over 50 Members have stood in front of and crawled on top of the B-2 stealth bomber and not a whisper of that program was leaked to the press. Only a handful of Members know of the existence of the F-19 stealth fighter, not a whisper of that has gotten into the press. I believe it is because Members can see tangible evidence with weapons situations that a slip of the lip will sink the ship.

But when it comes to foreign policy matters, some Members feel that they are qualified to judge what is right and what is wrong. They make the determination whether or not their leak has any-

thing to do with national security policy. So they proceed to leak and then they will use as an excuse the leaks from the White House, as a precedent which has occurred even under a tough conservative President.

PRESIDENTIAL FLEXIBILITY NEEDED IN WAR AGAINST TERRORISM

For this reason I think that the Broomfield amendment is reasonable, it tightens up the focus of our responsibility under the Constitution to protect national security. I would even want a President Dukakis to have the same abilities that President Carter had when he was taking core samples of the sand trying to rescue our hostages in Iran. I think we are overreacting here to the Iran/Contra mess and that we should not take away from a Dukakis or Bush, the ability to handle terrorism. We have not had a declaration of war since December 8, 1941, and we probably won't have one for the rest of our lives.

Members should be put on notice that if they leak, it will be considered treason. We have to have this thing tightened up. I think we are wasting our time if we don't adopt the Broomfield amendment which is reasonable and logical and is consistent with the legal process. The President is certainly going to veto anything that restricts his ability to fight terrorism and to construct a foreign policy. This amendment represents the classic struggle between the executive branch and Congress over jurisdiction in the foreign policy field. Let's give our Commander-in-Chief maximum flexibility.

I would hope that the next White House will clean up the leaking syndrome. Vote for the Broomfield amendment because it reinforces our constitutional responsibilities in line with this rigorous debate that has gone on since the continental Congress.

I thank the Chairman.

Chairman FASCELL. Mrs. Meyers.

BROOMFIELD AMENDMENT OFFERS REALISTIC APPROACH TO CONSULTATION

Mrs. MEYERS. Mr. Chairman, I wonder if maybe we aren't having a somewhat naive discussion here. I ask the Members to picture themselves as President of the United States, and a country comes to you and says, we can give you a great deal of help with your hostages, some of them that we have in our embassy, but you are absolutely not to tell anyone.

Can any of you picture yourself looking at that person and saying, well, of course, the Secretary of State will know, a couple of my top security people here in the White House will know and then I will tell eight people on the Hill and, of course because of them, probably another three or four very top ranking staff people will know, so that there will only be about 20 people involved.

I don't see the President making that kind of a response. I don't care what we do here today. If lives are at stake, I think the President is going to do what is right and what he can do to save those lives. I am somewhat appalled, if I understood correctly, what is being said, or suggested, that if classified material is political in nature then it is all right to leak it. I am not sure that is

what was being said, but if it is, I am appalled. We have a kind of an adversarial kind of government and almost everything that we do is political in nature.

I think that we should be more realistic in our assessment of the situation. I, too, am appalled by the Iran/Contra affair and admittedly, everyone in this room is saying that it is the only time that the failure to tell Congress has happened, that any Member in this room could condemn. The other time was when Jimmy Carter made the attempt to rescue the hostages or when Reagan dealt with the Canadians over the Iranian hostages.

I think that we should be more realistic in our approach and support the Broomfield amendment.

BILL FULFILLS OVERSIGHT RESPONSIBILITY OF CONGRESS

Chairman FASCELL. Well, let the Chair say I am opposed to the Broomfield amendment. We either assume the responsibility of oversight or we don't. If leaks are the criteria, then we wouldn't let the administration do anything either because of all the leaks attributable to the administration. Not this one particularly, any administration.

It is just the nature of the beast. You have eight people on the national security planning group, and if we can't work it out between the Executive and the Congress with respect to those matters that are vital to the national security of the United States, maybe we ought to have a different system.

But I am not for a different system. We have to make this one work and we are going to have to do the best we can in an open society. This is a reasonable balance, it appears to me. The legislation doesn't stop a President. It simply requires him to give notice.

VOTE ON THE BROOMFIELD AMENDMENT

The question is on the Broomfield amendment and the clerk will call the role.

Mr. BRADY. Mr. Fascell.
Chairman FASCELL. No.
Mr. BRADY. Mr. Hamilton.
Mr. HAMILTON. No.
Mr. BRADY. Mr. Yatron.
Mr. YATRON. No.
Mr. BRADY. Mr. Solarz.
Mr. SOLARZ. No.
Mr. BRADY. Mr. Bonker.
Mr. BONKER. No.
Mr. BRADY. Mr. Wolpe.
Mr. WOLPE. No.
Mr. BRADY. Mr. Mica.
[No response.]
Mr. BRADY. Mr. Crockett.
Mr. CROCKETT. No.
Mr. BRADY. Mr. Gejdenson.
Mr. GEJDENSON. Pass.
Mr. BRADY. Mr. Dymally.

Mr. DYMALLY. No.
Mr. BRADY. Mr. Lantos.
[No response.]
Mr. BRADY. Mr. Kostmayer.
Mr. KOSTMAYER. No.
Mr. BRADY. Mr. Torricelli.
Mr. TORRICELLI. No.
Mr. BRADY. Mr. Smith.
[No response.]
Mr. BRADY. Mr. Berman.
[No response.]
Mr. BRADY. Mr. Levine.
[No response.]
Mr. BRADY. Mr. Feighan.
Mr. FEIGHAN. No.
Mr. BRADY. Mr. Weiss.
Mr. WEISS. Pass.
Mr. BRADY. Mr. Ackerman.
[No response.]
Mr. BRADY. Mr. Udall.
[No response.]
Mr. BRADY. Mr. Atkins.
Mr. ATKINS. No.
Mr. BRADY. Mr. Clarke.
Mr. CLARKE. No.
Mr. BRADY. Mr. Fuster.
[No response.]
Mr. BRADY. Mr. Bilbray.
Mr. BILBRAY. No.
Mr. BRADY. Mr. Owens.
Mr. OWENS. Pass.
Mr. BRADY. Mr. Sunia.
[No response.]
Mr. BRADY. Mr. Broomfield.
Mr. BROOMFIELD. Aye.
Mr. BRADY. Mr. Gilman.
Mr. GILMAN. Aye.
Mr. BRADY. Mr. Lagomarsino.
Mr. LAGOMARSINO. Aye.
Mr. BRADY. Mr. Leach.
Mr. LEACH. Aye.
Mr. BRADY. Mr. Roth.
[No response.]
Mr. BRADY. Ms. Snowe.
Ms. SNOWE. No.
Mr. BRADY. Mr. Hyde.
Mr. HYDE. Aye.
Mr. BRADY. Mr. Solomon.
Mr. SOLOMON. Aye.
Mr. BRADY. Mr. Bereuter.
Mr. BEREUTER. Aye.
Mr. BRADY. Mr. Dornan.
Mr. DORNAN. Aye.
Mr. BRADY. Mr. Smith.

Mr. SMITH. Aye.
Mr. BRADY. Mr. Mack.
[No response.]
Mr. BRADY. Mr. DeWine.
Mr. DEWINE. Aye.
Mr. BRADY. Mr. Burton.
Mr. BURTON. Aye.
Mr. BRADY. Mrs. Meyers.
Mrs. MEYERS. Aye.
Mr. BRADY. Mr. Miller.
[No response.]
Mr. BRADY. Mr. Lukens.
[No response.]
Mr. BRADY. Mr. Blaz.
Mr. BLAZ. Aye.
Mr. BRADY. Mr. Gejdenson.
Mr. GEJDENSON. No.
Mr. BRADY. Mr. Weiss.
Mr. WEISS. No.
Mr. BRADY. Mr. Owens.
Mr. OWENS. No.
Mr. SMITH of Florida. Mr. Chairman.
Chairman FASCELL. Mr. Smith.
Mr. SMITH of Florida. How am I recorded?
Chairman FASCELL. Nothing.
Mr. SMITH of Florida. I vote no.
Mr. BRADY. Anybody not recorded?
Mr. SMITH of Florida. I ask that roll be held open one additional minute.
Chairman FASCELL. Mr. Berman.
Mr. BERMAN. No.
Chairman FASCELL. Announce the vote.
Mr. BRADY. On this vote, there are 20 nayes, 13 ayes.
Chairman FASCELL. And so the amendment is not agreed to.

THE SOLOMAN AMENDMENT

Are there any further amendments?
Mr. Solomon?
Mr. SOLOMON. I have an amendment at the desk.
Chairman FASCELL. The Solomon amendment will please be distributed.
Mr. BRADY. Amendment to the Substitute for H.R. 3822, offered by Mr. Solomon, page 10, after line 24, insert the following: Unauthorized Disclosure of Classified Information, section 6——
Chairman FASCELL. Without objection, further reading of the amendment is dispensed with.
[The amendment offered by Mr. Solomon follows:]

AMENDMENT TO THE SUBSTITUTE FOR H.R. 3822 OFFERED BY MR. SOLOMON

Page 10, after line 24, insert the following:

UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION

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

"UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION

"SEC. 506. Any person who, being or having been an officer or employee of the United States or a person otherwise having had authorized access to classified information produced as a result of the provisions of this title, knowingly and willfully discloses the substance of that information to an individual who is not authorized to receive it, except with the authorization of the President or pursuant to the applicable rules of a House of Congress of which that person is a Member, officer or employee, shall be fined not less than $1,000 nor more than $20,000 or imprisoned for not less than ninety days nor more than five years, or both.".

Chairman FASCELL. The gentleman from Indiana.

Mr. HAMILTON. Mr. Chairman, I would like to reserve a point of order on this amendment.

Chairman FASCELL. The point of order is reserved.

The gentleman from New York is recognized in support of his amendment.

AMENDMENT IMPOSES PENALTIES FOR LEAK OF INFORMATION

Mr. SOLOMON. Since we have had some debate on this issue already, let me say that this amendment is straightforward and puts some teeth into this bill. Specifically, it would make clear to Members of Congress, to their staffs, and to the executive branch as well, that there will be a price to be paid for leaking information about the covert operations which are the subject of the notification requirement in this bill.

I just ask you all: Is that so terrible? I ask those of you who support this bill, why do you want to set up a procedure and then neglect to protect it? And that is all this amendment proposes to do, to impose penalties on any person in the legislative branch and the executive branch alike who leaks information about activities regulated by this particular bill.

Mr. Chairman, isn't it about time we started taking our responsibilities seriously? I don't need to go down a laundry list of leaks. Our colleague, Henry Hyde, did that for us earlier today, and at the hearing last week; every example he cited concerned the Iran-Contra Committee alone. Everything you can imagine: from the identity of a CIA under-cover officer; to the contents of the Secretary of State's private interview; to the secrets of an Assistant Attorney General's testimony; to secret documents; to the identities of foreign countries; and allegations of every stripe were fair game. And they all found their way into the press, courtesy of committee Members and staff.

Mr. Chairman, that is wrong. Here is a recent one for you which was mentioned I think by the gentleman from California, Mr. Dornan. But the ink wasn't even dry on this year's edition of the Javits report before a Member of Congress made sure the New York Times had a copy of it and was drawing its own inaccurate conclusions. And remember, the Javits report itself is a part of consultation or notification process between the executive branch and the Congress.

If we don't have enough self-respect, at least respect the sensibilities of our friends and allies around the world. Let's at least try to give them some assurance that they can deal with the United States with some measure of consistency and confidentiality. Let's make clear to them that we have one Secretary of State and not

535. Too many people in this town are seeking influence without responsibility. That is the problem, and all of the consultations and notifications in the world will not mean anything unless people understand there are consequences for their actions.

Mr. Chairman, existing espionage laws require prosecution to prove that there was intent to injure the United States or to give advantage to other countries. Dante Fascell has mentioned, and rightly so, that we ought to have oversight over covert activities; and, yes, Mr. Chairman, you are right, but we should not have veto power. And unless we enact this amendment imposing specific penalties for leaking classified information regarding the 48-hour notification, any member of this committee, any staff member out there, anybody can go out and leak it to the press and absolutely nothing will be done about it.

PENALTIES IMPOSED IN SOLOMON AMENDMENT

So Mr. Smith of Florida complained other countries were setting the policies of this government, but let me tell you when other countries lose confidence in us, it is going to affect the national security of this country. So I would hope this amendment would be enacted. Basically all it says is that there is going to be a minimum penalty, a minimum penalty of $1,000, or a maximum of $20,000, or there is going to be a minimum penalty of 90 days in jail or a maximum of five years, or both.

So really all we are saying is if any of you do leak classified information, the minimum penalty we are going to charge you is a lousy $1,000 for jeopardizing this country.

ADMINISTRATION POSITION ON SOLOMON AMENDMENT

Mr. WEISS. Will the gentleman yield?

Will you indicate to us whether, in fact, the administration has taken a position on this amendment and what that position is?

Mr. SOLOMON. The administration has not taken a position. We did not ask one of them.

Mr. WEISS. Thank you.

AMENDMENT EXCEEDS SCOPE OF COMMITTEE'S JURISDICTION

Chairman FASCELL. I would like to address myself to the amendment, if I may, and say I am in strong opposition to the amendment. The Parliamentarians of the House advise the committee this amendment technically is not in order, is not germane. But aside from that, let's examine what this amendment does.

First, it broadens the scope of the espionage laws as it may apply to an administration official who supplies the information to the Committee on Intelligence. That may be desirable, it may not be, I don't know. But that is what it does.

It also, of course, applies to Members and staff who in some way come into possession of the information as a result of information that goes to the Permanent Select Committee and provides for a criminal penalty. It may be desirable to write this into the criminal law of the United States, I don't know. It seems to me, however, that this is a serious matter which needs to be considered by the

Judiciary Committee, that committee having jurisdiction over the criminal statutes and not this committee.

Another important aspect of this matter, as I see it, is that it would certainly seem to change the whole constitutional concept of free speech and debate. I don't know that we want to make that quick a judgment on such an important constitutional issue.

Now, maybe the Congress ought to pursue the issue. But I am not prepared and I don't think this committee is prepared, to deal with the complex questions concerning free speech and the protection that surrounds a Member of Congress with respect to his right to speak in the pursuit of his duties in the Congress of the United States. I am not talking about outside, I don't know that we ought to take that lightly. We need testimony. Obviously, there are more than two sides on this matter, and it ought to be carefully considered by the committee of jurisdiction that deals with the criminal statutes. It is not a matter which ought to be considered by this committee.

I don't want to rule on the point of order, I would just as soon have a vote on this matter and let the appropriate committee of the Congress deal with the subject if that is the intent of proponents.

Mr. Kostmayer, for debate only.

EXISTING LAW ADEQUATELY ADDRESSES UNAUTHORIZED DISCLOSURE

Mr. KOSTMAYER. Mr. Chairman, we covered a lot of this territory in the discussion of the Broomfield amendment, but I would like to say a couple things without extending this debate much longer. I would like to point out the gentleman from New York raised the issue of disclosing the names of intelligence agents or CIA agents—all of us understand and recognize how dangerous that is—and he then said, and I quote, "that kind of thing currently is fair game."

The fact of the matter is that that information is just wrong, as is a lot of the information he has given. The fact of the matter is current law, 50 U.S. Code 421, a bill we passed in 1982, called the Intelligence Identities Protection Act of 1982, prohibits any individual from identifying or revealing the name of these individuals. So to suggest this amendment is necessary for that kind of thing is inaccurate.

Secondly, I want to say that existing law makes, I think, some important distinctions which the Solomon amendment fails to make when it comes to revealing this kind of information, I am talking about the Espionage Act, and in part it reads—and I quote—"For the purpose of obtaining information respecting the national defense, with intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of any foreign nation."

That characterizes the kind of information you can't leak. But the gentleman from New York's amendment changes that very dramatically. He would cover all information that the administration chooses to classify. Anything that this administration or any other administration wants to classify can't be leaked by members of the Intelligence Committee, and what that means is that the administration comes up before the Intelligence Committee and tells

the committee that leading members of the Salvadoran Government are responsible for killing American citizens in El Salvador, and they could call that classified information.

This amendment provides a mechanism to this administration, or to any other administration, to simply exclude from congressional and public debate any information they don't want covered because it doesn't speak just to information which would jeopardize our national security, it speaks to all classified information. I don't think we should give the executive the right to do that, not this executive, not any executive.

We have adequate law in this regard. We have the Espionage Act. In the Morrison ruling of not very long ago, the Fourth Circuit Court of Appeals ruled leaks are covered by the Espionage Act. Mr. Morrison himself is currently serving in prison for leaking information, not to a foreign government, but to a defense publication. The courts have now ruled that the Espionage Act covers leaks that members of the executive, that Members of Congress, that ordinary citizens, such as Mr. Morrison, make.

The proposed amendment would be bad law. It is unnecessary, it gives the administration the right to simply rule out any information which Congress wants to consider or which the public should have the right to know about because the administration finds it embarrassing. And the question of leaks is currently covered under law, and the amendment is unnecessary.

I urge it be defeated.

Chairman FASCELL. Mr. Lagomarsino.

AMENDMENT APPLIES TO INFORMATION RECEIVED UNDER 48-HOUR NOTIFICATION

Mr. LAGOMARSINO. I yield to the gentleman from New York, Mr. Solomon.

Mr. SOLOMON. I thank the gentleman from New York.

Let me point out to the chairman and Mr. Kostmayer, of course you know if it were not the question of leaks on this 48-hour notification, probably we would have unanimous support for the legislation. It is the concern about leaks.

Now, in spite of what the good chairman has said and what my good friend, Mr. Kostmayer has said, this amendment only deals with the 48-hour notification, it does not deal with any of the other espionage cases or any other leaking. As a matter of fact, what I am concerned about, if you look at existing law, it says, "which information the possessor has reason to believe is used to the injury of the United States or to the advantage of any other foreign nation." That is the construction of it.

Finally, as far as speech and debate are concerned, Mr. Chairman, if you read the language in the amendment, it says "Except with the authorization of the President or pursuant to the applicable rules of a House of Congress". Now, that means speech and debate on the Floor of this Congress and any other rules this Congress might adopt affecting House Members.

So, Mr. Chairman, I would urge support of the amendment. The only way you are going to get this bill through the House and to the President's desk for his signature is if we enact the Broomfield

amendment along with this penalty on leaks. Then you might have a bill that becomes law, which is what all of you on that side of the aisle want, and maybe what we want too.

Otherwise I think we are going to be able to sustain a veto. Think of that when you vote on this and when you have a chance to vote on the Broomfield substitute on the Floor of Congress.

Chairman FASCELL. Mr. Wolpe.

Mr. WOLPE. Thank you, Mr. Chairman.

The previous speaker just referred to the speech and debate clause. I think it is clear the amendment before us does, in fact, raise some serious constitutional questions. I understand House Counsel is present here. I wonder if we might ask him to share with us his opinion as to whether this amendment, as it is now crafted, raises constitutional concerns.

STATEMENT OF STEVEN ROSS, GENERAL COUNSEL TO THE CLERK OF THE HOUSE

Mr. Ross. Let me introduce myself. I am Steven Ross, General Counsel to the Clerk of the House. In that capacity, our office represents the House, its Members, officers and committees in litigation, and at various times our office is called upon to provide legal advice on matters respecting the prerogatives and privileges of the House.

EFFECT OF AMENDMENT ON SPEECH AND DEBATE PRIVILEGE

The question is whether the amendment would raise questions under the speech or debate privilege or would contravene the privilege. The amendment, as I read it, and I must say the interpretation given by its author in his remarks just a few seconds ago, differs from my understanding of the amendment as I read it. The amendment as I read it would apply to statements made by Members on the Floor since it simply says "any disclosure".

The gentleman from New York in his interpretive remarks indicated that it is his reading of his amendment that any remarks made that conform with any House rule would be permissible under the amendment. Presumably, that would allow any remarks made in committee sessions, any remarks made on the Floor, and since the House rules also provide in various aspects allowing Members prerogatives and staff to communicate to the public, I would have to get further amplification from the gentleman from New York whether remarks made to the public would be allowable.

It seems to me that if his reading of his amendment is going to be so narrow as to allow such remarks by Members, I am not sure what the amendment does. If the amendment is, as I have read it, which is any disclosure, then it would contravene the speech or debate clause because it would seem to seek to apply a criminal penalty for remarks made by Members in the course of legislative debate.

The Supreme Court has addressed the question on a couple of occasions as to whether or not there could be a narrow institutional waiver of the speech and debate clause. The Court in the *Brewster* decision raised the possibility that a narrowly crafted statute would serve as an institutional waiver of the speech or debate clause and

would permit criminalization or other penalty for legislative actions by Members.

In the *Helstoski* case, decided later, however, the Court held that the bribery statute would not constitute such a narrowly drawn statute to represent a waiver by the institution, and it seems to myself, and I believe to most who have looked at the decision and looked at the field, to foreclose the possibility that the House and Senate could draw a statute which would serve to waive the privilege.

So I would say that if it is the intention of the amendment to apply to any communications or actions of Members which would under current law be considered legislative, and those would be communications which are part of the deliberative and communicative process which constitutes the legislative process, the amendment could not be—the criminal penalty could not be applied consistent with the speech and debate clause.

AFFIRMATIVE DEFENSE

Mr. HYDE. May I ask a question of counsel?

Chairman FASCELL. Mr. Hyde.

Mr. HYDE. Thank you. Mr. Ross, but isn't that an affirmative defense? That doesn't invalidate or render the amendment unconstitutional. If a Congressman says something he shouldn't say and the speech and debate clause protects him, he asserts that that is not true.

Mr. Ross. I would disagree. The clause has not been read and applied by the courts to be an affirmative defense. The courts refer to the speech or debate clause as jurisdictional. It takes away from the jurisdiction of the courts——

Mr. HYDE. Insofar as that Member of Congress is concerned.

Mr. Ross. Insofar as a Member of Congress or any part of the legislative entities, because it has also been extended to staff. But the clause is the embodiment of the separation of powers doctrine and, as such, is a proscription not only to the court but to all aspects of our government as to how legislative actions by Members should be treated.

It says, "shall not be questioned in any other place", and I don't think it is a fair reading of the clause to limit it to an affirmative defense in light of its jurisdictional nature and in light of the fact that it is the, as I said, the embodiment of the separation of powers doctrine.

Mr. HYDE. Then under the Intelligence Identities Protection Act, are Members of Congress covered by that and staff and secretaries and however you want to string that out? Are they covered by that?

Mr. Ross. If a Member of Congress got up on the Floor of the House and in the course of a speech which constituted part of the legislative process, as speeches on the Floor do, revealed the identity of an agent or did anything else that would constitute a crime, the penalty could not be the application of a criminal penalty, that would contravene the speech and debate clause.

That is not to say that a Member who transgresses a standard is absent from penalty. The Constitution makes it clear that each House is empowered to punish its Members——

Mr. HYDE. In other words, turn them over to the Ethics Committee, right?

Mr. ROSS. That is one possibility, yes.

Mr. HYDE. Thank you.

SPEECH AND DEBATE CLAUSE APPLICABLE TO AMENDMENT

Chairman FASCELL. Mr. Kostmayer.

Mr. KOSTMAYER. The speech and debate clause is applicable to the Solomon amendment as well as to the Intelligence Identities Protection Act of 1982, isn't it?

Mr. ROSS. Yes. The only question I raised is that Mr. Solomon, in his remarks, seemed to indicate that it was not intended to apply to any legislative speech. As I read the amendment on paper, it certainly seemed to me to apply to legislative actions. If it is interpreted not to apply, then the question is never raised.

Mr. KOSTMAYER. Mr. Hyde indicated there was something faulty about the Intelligence Identities Protection Act because Members of Congress, if they are exercising their rights under the speech and debate clause, would not be penalized. That applies not only to the act just mentioned but the proposed amendment offered by Mr. Solomon.

Mr. ROSS. Or any other Act of Congress.

TYPE OF DISCLOSURES SUBJECT TO PENALTY UNDER AMENDMENT

Mr. KOSTMAYER. I would like to ask the gentleman from New York a question. During his discussion, I understood the gentleman from New York to say his amendment applied only to information contained in the findings submitted by the President to the Intelligence Committee. It was my understanding, and I think the understanding of the counsel, that the amendment applied to any information provided under Title V of the National Security Act to the Intelligence Committee.

Now does it pertain to anything the Intelligence Committee gets pursuant to Title V, which is a lot of information and quite broad, or does it apply only to that information which the Intelligence Committee receives which is in those findings?

Mr. SOLOMON. Will the gentleman yield?

If you read the third sentence, it says "access to classified information produced as a result of the provisions of this title." It deals only with this information produced as a result of the findings from the 48-hour notification. It doesn't deal with anything else.

Mr. KOSTMAYER. Mr. Chairman, I think that is fairly important——

Chairman FASCELL. Not only that, but I am sorry to say it is in error on its face. It clearly amends Title V of the National Security Act of 1947 and adds a whole new section.

Mr. KOSTMAYER. And I would hope the gentleman would amend his amendment to make clear this is not intended to be applicable to information provided to the Intelligence Committee pursuant to

Title V but rather only that information contained in those findings.

Chairman FASCELL. Mr. Weiss, do you have a question of counsel?

ACCOUNTABILITY OF MEMBERS OF CONGRESS

Mr. WEISS. Thank you, Mr. Chairman.

I want to really clarify the issue, and maybe it is a restatement, but I think it may be important. Are you telling us as counsel to the House that regardless of what the executive branch of government decides to classify as secret, or top secret, or restricted information, any Member of this body may in the course of regular speech and debate on the floor of the House or in appropriate committee, disclose and divulge that information in public session without having criminal penalties apply or any other penalties as set forth by either this proposed legislation or by the executive branch?

Mr. Ross. There are two aspects to your question. Let me take them in reverse order. In terms of whether or not a Member of Congress could be subject to criminal penalties for disclosure of information in the course of either a Floor presentation or a committee session, that question was answered by the Supreme Court in the *Gravel* case in which the Supreme Court held that Senator Gravel could not be questioned and, therefore, could not be held accountable, in a criminal sense, for his conduct, including the release of information at a committee session of the United States Senate. Separate questions are raised as to disclosures or disseminations outside the Senate.

LEGAL BASIS FOR DETERMINING CLASSIFICATION OF INFORMATION

As to the first part of your question, which raises a concern of the classification system, I must start my answer by saying that the classification system is not a creature of statute. The President has issued an Executive order in his authority as the Chief of the executive branch to classify and categorize certain information. Information that the Congress receives or that a committee receives once it is within the Congress is just as congressional as it is Executive and Congress could categorize it and treat it as it sees it.

It is not for the President, by issuance of an Executive Order, to tell this committee that it must treat information in one way or another. If this committee has received information by virtue of its constitutional authority to conduct oversight or to make inquiries in support of its legislative authority, then it is up to the committee and the House or the Congress to define how that information will be treated and how it should be treated.

Chairman FASCELL. Mr. Solarz.

AMENDMENT APPLICABLE TO EXECUTIVE AND LEGISLATIVE BRANCHES

Mr. SOLARZ. Thank you, Mr. Chairman.

Mr. Ross, in the amendment before us it says, it applies to any person otherwise having had authorized access to classified information produced as a result of the provisions of this title. As you interpret the amendment, does this mean that someone in the ex-

ecutive branch who was informed about a covert operation, let's say it was under discussion with the administration before it was submitted pursuant to this legislation to the Intelligence Committees, if such a person in the executive branch divulged information about the covert operation, would they be guilty of violating this amendment, or does this only apply to people who receive the information produced as a result of the provisions of this title, presumably meaning the Congress?

Mr. Ross. Let me make sure I understand your question. Is the question whether the amendment——

Mr. SOLARZ. Does this apply to members of the executive branch or only to Members of Congress and their staffs who receive the information as a result of the provisions of the title?

Mr. Ross. As I read Mr. Solomon's amendment, it is any person, executive branch or legislative branch, who has access to the information. And so it would not—Mr. Solomon's amendment would not be limited only to members of the legislative branch.

Mr. SOLOMON. And that is the intent of the amendment too.

VOTE ON SOLOMON AMENDMENT

Chairman FASCELL. Anything further?

The question is on agreeing to the amendment. All those in favor will say aye. All those opposed, no. The clerk will call the roll.

Mr. BRADY. Mr. Fascell.
Chairman FASCELL. No.
Mr. BRADY. Mr. Hamilton.
Mr. HAMILTON. No.
Mr. BRADY. Mr. Yatron.
Mr. YATRON. No.
Mr. BRADY. Mr. Solarz.
Mr. SOLARZ. No.
Mr. BRADY. Mr. Bonker.
[No response.]
Mr. BRADY. Mr. Studds.
[No response.]
Mr. BRADY. Mr. Mica.
[No response.]
Mr. BRADY. Mr. Wolpe.
Mr. WOLPE. No.
Mr. BRADY. Mr. Crockett.
Mr. CROCKETT. No.
Mr. BRADY. Mr. Gejdenson.
Mr. GEJDENSON. Pass.
Mr. BRADY. Mr. Dymally.
[No response.]
Mr. BRADY. Mr. Lantos.
[No response.]
Mr. BRADY. Mr. Kostmayer.
[No response.]
Mr. BRADY. Mr. Torricelli.
Mr. TORRICELLI. No.
Mr. BRADY. Mr. Smith.
[No response.]

Mr. BRADY. Mr. Berman.
[No response.]
Mr. BRADY. Mr. Levine.
[No response.]
Mr. BRADY. Mr. Feighan.
[No response.]
Mr. BRADY. Mr. Weiss.
Mr. WEISS. No.
Mr. BRADY. Mr. Ackerman.
[No response.]
Mr. BRADY. Mr. Udall.
[No response.]
Mr. BRADY. Mr. Atkins.
Mr. ATKINS. No.
Mr. BRADY. Mr. Clarke.
[No response.]
Mr. BRADY. Mr. Fuster.
[No response.]
Mr. BRADY. Mr. Bilbray.
Mr. BILBRAY. No.
Mr. BRADY. Mr. Owens.
Mr. OWENS. No.
Mr. BRADY. Mr. Sunia.
[No response.]
Mr. BRADY. Mr. Broomfield.
Mr. BROOMFIELD. Aye.
Mr. BRADY. Mr. Gilman.
Mr. GILMAN. Aye.
Mr. BRADY. Mr. Lagomarsino.
Mr. LAGOMARSINO. Aye.
Mr. BRADY. Mr. Leach.
[No response.]
Mr. BRADY. Mr. Roth.
[No response.]
Mr. BRADY. Ms. Snowe.
Ms. SNOWE. Aye.
Mr. BRADY. Mr. Hyde.
Mr. HYDE. Aye.
Mr. BRADY. Mr. Solomon.
Mr. SOLOMON. Aye.
Mr. BRADY. Mr. Bereuter.
Mr. BEREUTER. Aye.
Mr. BRADY. Mr. Dornan.
Mr. DORNAN. Aye.
Mr. BRADY. Mr. Smith.
Mr. CHRISTOPHER SMITH. Aye.
Mr. BRADY. Mr. Mack.
[No response.]
Mr. BRADY. Mr. DeWine.
Mr. DEWINE. Aye.
Mr. BRADY. Mr. Burton.
[No response.]
Mr. BRADY. Mrs. Meyers.
Mrs. MEYERS. Aye.

Mr. BRADY. Mr. Miller.
[No response.]
Mr. BRADY. Mr. Lukens.
[No response.]
Mr. BRADY. Mr. Blaz.
[No response.]
Mr. KOSTMAYER. Mr. Chairman, how am I recorded?
Mr. BRADY. Mr. Kostmayer did not vote.
Mr. KOSTMAYER. I would be recorded as voting no.
Mr. GEJDENSON. I would like to vote no.
Mr. BRADY. On this vote, 11 ayes, 13 nays.
Chairman FASCELL. So the amendment is not agreed to.

VOTE ON H.R. 3822

The question is now on the adoption of the bill. All those in favor, signify by saying aye. All those opposed, no. The ayes have it, and the bill is agreed to.
A roll call is demanded. The chief of staff will call the roll.
Mr. BRADY. Mr. Fascell.
Chairman FASCELL. Aye.
Mr. BRADY. Mr. Hamilton.
Mr. HAMILTON. Aye.
Mr. BRADY. Mr. Yatron.
Mr. YATRON. Aye.
Mr. BRADY. Mr. Solarz.
Mr. SOLARZ. Aye.
Mr. BRADY. Mr. Bonker.
Chairman FASCELL. Aye, by proxy.
Mr. BRADY. Mr. Studds.
Chairman FASCELL. Aye, by proxy.
Mr. BRADY. Mr. Mica.
[No response.]
Mr. BRADY. Mr. Wolpe.
Mr. WOLPE. Aye.
Mr. BRADY. Mr. Crockett.
[No response.]
Mr. BRADY. Mr. Gejdenson.
Mr. GEJDENSON. Aye.
Mr. BRADY. Mr. Dymally.
Chairman FASCELL. Aye, by proxy.
Mr. BRADY. Mr. Lantos.
[No response.]
Mr. BRADY. Mr. Kostmayer.
[No response.]
Mr. BRADY. Mr. Torricelli.
Mr. TORRICELLI. Aye.
Mr. BRADY. Mr. Smith.
Chairman FASCELL. Aye, by proxy.
Mr. BRADY. Mr. Berman.
Mr. BERMAN. Aye.
Mr. BRADY. Mr. Levine.
Chairman FASCELL. Aye, by proxy.
Mr. BRADY. Mr. Feighan.

Mr. FEIGHAN. Aye.
Mr. BRADY. Mr. Weiss.
Mr. WEISS. Aye.
Mr. BRADY. Mr. Ackerman.
Chairman FASCELL. Aye, by proxy.
Mr. BRADY. Mr. Udall.
[No response.]
Mr. BRADY. Mr. Atkins.
Mr. ATKINS. Aye.
Mr. BRADY. Mr. Clarke.
Chairman FASCELL. Aye, by proxy.
Mr. BRADY. Mr. Fuster.
[No response.]
Mr. BRADY. Mr. Bilbray.
Mr. BILBRAY. Aye.
Mr. BRADY. Mr. Owens.
Mr. OWENS. Aye.
Mr. BRADY. Mr. Sunia.
[No response.]
Mr. BRADY. Mr. Broomfield.
Mr. BROOMFIELD. No.
Mr. BRADY. Mr. Gilman.
Mr. GILMAN. No.
Mr. BRADY. Mr. Lagomarsino.
Mr. LAGOMARSINO. No.
Mr. BRADY. Mr. Leach.
Mr. LEACH. No.
Mr. BRADY. Mr. Roth.
Mr. BROOMFIELD. No, by proxy.
Mr. BRADY. Ms. Snowe.
Ms. SNOWE. Aye.
Mr. BRADY. Mr. Hyde.
Mr. HYDE. No.
Mr. BRADY. Mr. Solomon.
Mr. SOLOMON. No.
Mr. BRADY. Mr. Bereuter.
Mr. BEREUTER. No.
Mr. BRADY. Mr. Dornan.
Mr. DORNAN. No.
Mr. BRADY. Mr. Smith.
Mr. CHRISTOPHER SMITH. No.
Mr. BRADY. Mr. Mack.
Mr. BROOMFIELD. No, by proxy.
Mr. BRADY. Mr. DeWine.
Mr. DEWINE. No.
Mr. BRADY. Mr. Burton.
Mr. BROOMFIELD. No, by proxy.
Mr. BRADY. Mrs. Meyers.
Mrs. MEYERS. No.
Mr. BRADY. Mr. Miller.
Mr. BROOMFIELD. No, by proxy.
Mr. BRADY. Mr. Lukens.
Mr. BROOMFIELD. No, by proxy.
Mr. BRADY. Mr. Blaz.

Mr. BROOMFIELD. No, by proxy.

Mr. BRADY. Mr. Kostmayer votes aye.

On this vote, 22 ayes and 17 nays.

Chairman FASCELL. Mr. Berman.

Mr. BERMAN. Mr. Chairman, I would just ask the committee report make reference to and incorporate the colloquy engaged in between you and Mr. Stokes on the arms export legislation, H.R. 3651, that passed the House unanimously several weeks ago with respect to arms transfers as part of intelligence operations being part of the notification to the Intelligence Committees.

Chairman FASCELL. The bill is ordered favorably reported. The gentleman from California, if you will submit your language for the report. The minority has 3 days in which to file their views.

Mr. BERMAN. Thank you, Mr. Chairman.

Chairman FASCELL. All right. The committee stands adjourned subject to the call of the Chair.

[Whereupon, at 12:05 p.m., the committee was adjourned subject to the call of the Chair.]

APPENDIX 1

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
Telephone: 202-225-3951

June 13, 1988

The Honorable Dante B. Fascell
Chairman
Committee on Foreign Affairs
Washington, DC 20515

Dear Chairman Fascell:

I am writing to you because of my deep concern about the proposed leak amendment to the covert action oversight bill (H.R. 3822).

The adoption of a statute criminalizing the leaking of information has long been a goal of the current Administration -- one that Congress has long rejected. Yet, the proposed amendment would establish a leak offense.

It is ironic that the amendment is offered to the oversight bill, for it would seriously jeopardize the oversight process. Under the amendment, information received by Congress would be subject to criminal provisions of a type not applied to any other classified information. Members of Congress who received classified information in the course of their oversight duties would be subject to criminal provisions not applicable to executive branch officials.

Moreover, the amendment is not limited to information relevant to covert actions, the subject of the bill to which it is being offered. Rather, it applies to all information received by Congress pursuant to the oversight title of the National Security Act.

The amendment seems to concede the argument that Congress is the primary source of leaks of classified information, when we know that just the opposite is true.

The provision would be ripe for abuse by the Executive Branch since the Executive Branch would decide which leaks to overlook and which to prosecute. The provision would even inhibit Members from discussing information otherwise in the public domain if the information was still technically classified and had been provided to Congress.

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The amendment also has serious implications for the ongoing dispute over the scope of the Speech and Debate Clause of the Constitution.

Although there is an unfairness issue -- and a separation of powers issue -- in making Members of Congress uniquely subject to criminal penalties, I do not think it would cure the provision to extend it to Executive Branch officials. Indeed, such a change would only compound the difficulties posed by the amendment, turning it into a general leak statute.

Because of these serious problems and because Members and their staffs are already subject to the full force of the espionage laws, I urge you to work against this amendment. I would be happy to do whatever I can to assist you.

With kindest regards.

Sincerely,

Don Edwards
Chairman
Subcommittee on Civil and
Constitutional Rights

DE:jdd

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

21 June 1988

Honorable Dante B. Fascell
Chairman
Committee on Foreign Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 3822, a bill relating to the system of congressional oversight of intelligence activities. The Department of Justice opposes enactment of this legislation because we believe it would unconstitutionally intrude on the President's authority to conduct the foreign relations of the United States.

H.R. 3822 would repeal the Hughes-Ryan Amendment, and substantially revise the congressional reporting requirements of the National Security Act. Besides appearing to broaden the congressional notification requirements, section 3 of H.R. 3822 would delete from section 501(a) of the National Security Act the present express acknowledgment that the Act imposes reporting requirements on the President only insofar as the requirements are consistent with his authorities and duties under the United States Constitution.[1] It would also delete the Act's provision

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

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

(continued...)

acknowledging the President's independent constitutional authority, namely section 501(b), which provides for presidential discretion in deferring notice to Congress concerning exceptionally sensitive intelligence activities.[2] In place of the current Act's provision acknowledging the President's authority to provide "timely notice" in such sensitive situations, section 3 of H.R. 3822 would purport to require that such notice be given within 48 hours after the initiation of such operations.

In keeping with the long-standing view of Presidents of every Administration that has considered this issue, the Department believes that these provisions of H.R. 3822 are unconstitutional. As you know, these same issues were the subject of thorough debate and extensive negotiation in 1980, when Congress was considering proposals for intelligence oversight legislation. It was the position of the Administration

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

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

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

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

then, as it is of this Administration now, that there may be exceptional occasions on which the President's exclusive and inalienable constitutional duties in the area of foreign affairs would preclude him from giving prior notice of very sensitive intelligence-related operations.

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

The Constitution confers on the President the authority and duty to conduct the foreign relations of the United States. Covert intelligence-related operations in foreign countries are among the most sensitive and vital aspects of this duty, and they lie at the very core of the President's Article II responsibilities. In this letter the Department will not seek to detail all the authorities and precedents relevant to our conclusion that an absolute prior notice requirement of the kind proposed in H.R. 3822 would be unconstitutional. In summary, however, the Department believes that the Constitution, as confirmed by historical practice and clear statements of the United States Supreme Court, leaves the conduct of foreign relations, which must include foreign intelligence operations, to the President except insofar as the Constitution gives specific tasks to the Congress.

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

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

The authority of the President to conduct foreign relations was first asserted by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain neutral in the war between France and Great Britain. The Supreme Court and Congress, too, have recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the Constitution itself, stating that "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress." 299 U.S. at 319-320 (emphasis added). Moreover, as the Curtiss-Wright Court noted, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history, stating that "the President is the constitutional representative of the United States with regard to foreign nations." The Committee also noted "that [the President's constitutional] responsibility is the surest pledge for the faithful discharge of his duty" and the Committee believed that "interference of the Senate in the direction of foreign negotiations [is] calculated to diminish that responsibility and thereby to impair the best security for the national safety." 299 U.S. at 319 (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). Curtiss-Wright thus confirms the President's inherent Article II authority to engage in a wide range of extraterritorial foreign policy initiatives, including intelligence activities -- an

authority that derives from the Constitution, not from the passage of specific authorizing legislation.

Despite this wide-ranging authority, Presidents have been careful to consult regularly with Congress to seek support and counsel in matters of foreign affairs. Moreover, we recognize that the President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court's Curtiss-Wright decision itself notes the President's exclusive power to negotiate on behalf of the United States. The Supreme Court has also, and more recently, emphasized that this core presidential function is by no means limited to matters directly involving treaties. In United States v. Nixon, 418 U.S. 683 (1974), the Court invoked the basic Curtiss-Wright distinction between the domestic and international context to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 710 (emphasis added).

We are unaware of any provision of the Constitution that affirmatively authorizes Congress to have the role provided in H.R. 3822. Congress' implied authority to oversee the activities of executive branch agencies is grounded on Congress' need for information to consider and enact needful and appropriate legislation. Congress in the performance of this legislative function, however, does not require detailed knowledge of virtually all intelligence activities particularly prior to initiation. Oversight of ongoing operations has the potential to interfere with the ability of the President to discharge the duties imposed on him by the Constitution. Accordingly, the President must retain his constitutional discretion to decide whether prior notice, in certain exceptional circumstances, is not appropriate.

Since the current legislation was adopted in 1980, of course, the President has provided prior notice of covert operations in virtually every case. Moreover, in acting to implement the recommendations of the Tower Board, the President recently reaffirmed his commitment to the current statutory scheme of notification. See the text of National Security

Decision Directive No. 266, which accompanied the President's message to Congress of March 31, 1987.

There are two other provisions of H.R. 3822 which raise similar constitutional problems. Proposed Section 502 would require that intelligence agencies disclose to Congress whatever information concerning intelligence activities, other than "special activities," that Congress deems necessary to fulfill its responsibilities. Proposed Section 503 has a similar provision requiring the Executive branch to disclose all information concerning special activities that is requested by the intelligence committees. These virtually absolute disclosure requirements raise much the same concern as the 48-hour notice provision. Both purport to sharply reduce the authority of the Executive branch to withhold from Congress information relating to the discharge of its responsibilities in the field of foreign affairs, even when the release of such information would interfere with the President's ability to fulfill his constitutional duties.

The provisions of H.R. 3822 requiring that the President provide all information requested by the intelligence committees raise a separate constitutional concern. Many of the documents retained by the intelligence agencies may constitute interagency communications. Although disclosure of these documents might not impair directly the President's authority in the area of foreign affairs, we nevertheless believe that the Executive branch may legitimately refuse to provide these documents to Congress. The Supreme Court in the Nixon case recognized that there is a "valid need for protection of communications between high government officials and those who advise and assist them." 418 U.S. at 705. While this decision was rendered in the context of Presidential communications, the same principles would apply with respect to communications containing the policy deliberations of other executive officials. The need to protect deliberative communications derives from the need for candor and objectivity in the policymaking decision of the government.

Of course, the Executive branch will attempt to cooperate with Congress. In all but the most exigent circumstances, this cooperation will take the form of providing the information that Congress requests. We cannot agree, however, that a blanket requirement of disclosure in all cases in appropriate. The President must retain the discretion to withhold information when its disclosure would impair his ability to fulfill his own constitutional responsibilities.

In closing, the Department notes that when proposals similar to those in H.R. 3822 were introduced in 1979 and 1980, it was recognized that no President has either the right or the power to alter the Constitution's allocation of powers among the

institutions of our government. This view was correct then and is correct now.

In light of our constitutional concerns, in the absence of amendments responsive to the constitutional issues, we would recommend to the President that he disapprove the proposed legislation.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report to Congress, and that enactment of H.R. 3822 would not be in accord with the President's program.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

APPENDIX 2

THE WHITE HOUSE

WASHINGTON

May 10, 1988

Dear Mr. Chairman:

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

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

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

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

Sincerely,

Colin L. Powell

Attachment: Definition

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

DEFINITION OF COVERT ACTION

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

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

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

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

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

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

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

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

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

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

HPSCI
May 9, 1988

AMENDMENTS TO H.R. 3822

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

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

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

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

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

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

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

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

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

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

"(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."

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

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

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

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

APPENDIX 3

10 May 1988

The Honorable Louis Stokes
Chairman
House Permanent Select Committee on Intelligence
U.S. House of Representatives
U.S. Capitol, Room H-405
Washington, D.C. 20515-6415

Dear Mr. Chairman,

As your Committee well knows, intelligence activities are not easy for an open, democratic society to conduct effectively; and for a society such as ours, covert action operations are particularly difficult.

The troublesome, complex issues they inevitably raise lead some to argue that the United States should eschew or abandon covert action operations altogether. In a perfect world, this might be desirable; but in the world in which we have no choice but to live, it would be folly. All of the undersigned endorse the conclusion of the Congressional committees investigating the Iran-Contra affair that (in their Report's words) "Covert operations are a necessary component of our Nation's foreign policy".

Current legislation covering such matters -- e.g., Section 501 of the National Security Act of 1947, as amended -- has a measure of flexibility and creative ambiguity that some find distressing and which certainly can be abused, but which is nonetheless essential in any statute dealing with a subject as complex and important as covert action. To prevent what are perceived as Iran-Contra abuses from recurring, the oversight bill your distinguished Committee is now considering -- H.R. 3822 -- would erase that ambiguity and virtually eliminate that flexibility.

Specifically, H.R. 3822 would strike the "in timely fashion" covert action notification provision of the National Security Act of 1947's current Section 501 and substitute two inflexible 48 hour requirements.

(1) Any Presidential determination that a given "special activity ... is necessary to support [U.S.] foreign policy objectives and is important to the national security of the United States" would have to "be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision

is made". Furthermore, a copy of each such finding, signed by the President, would have to be provided to the chairmen of each of the two Congressional oversight committees.

(2) Notice of each such "special activity" would have to be given to, at a minimum, the chairmen and ranking minority members of the two intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate -- eight specific individuals -- "as soon as possible but in no event later than forty-eight hours after the special activity [in question] has been authorized."

With respect to Congressional notification, H.R. 3822's proposed solutions to what are perceived as current problems would create new ones of at least equal gravity.

At one level, translating a Presidential determination into a written finding -- properly drafted, staffed, co-ordinated and signed -- within 48 hours would be virtually impossible if the decision in question had to be made over a holiday and/or when the President was out of Washington, for whatever reason. Notifying even the eight designated Congressional leaders within 48 hours after a Presidential authorization decision was made could be equally difficult if, at the time in question, Congress was out of session and the eight Congressional leaders involved were scattered all over the country, or the globe.

H.R. 3822 does say that in circumstances "where time is of the essence", the President may initiate a special activity before notice is given, even to the Congressional leadership; but the modest flexibility thus countenanced is largely illusory. H.R. 3822's forty-eight hour clock begins running at the moment the special activity in question is authorized. The drafters of H.R. 3822 seem to have ignored or forgotten that there is almost inveriably a lapse of at least 48 hours between the authorization, in Washington, of a given special activity and its initiation in some distant foreign land.

Had H.R. 3822 been on the statute books in 1980 -- to cite but one example of the kind of problems the language of its

Congressional notification provisions would create -- President Carter could not lawfully have enlisted the Canadian assistance that was essential to the successful exfiltration from Iran of the six American escapees from our seized Tehran embassy. Canada provided that assistance on the express condition that Congress not be notified while the operation in question was in progress, and the duration of that "special activity" was measured in weeks -- not hours.

All of the undersigned have had extensive personal experience in dealing with the concrete, practical problems faced by an open, democratic society endeavoring to conduct effective covert action. Several of us have testified, individually, on these matters before your Committee, in connection with this very legislation. With respect to covert action, we have some conceptual differences, and many disagreements over details; but on the following considerations and recommendations we are unanimous.

Particularly where matters as complex as covert action are involved, even the most astute, discerning legislators and staff drafters of legislation can not possibly forsee or codify with precision, in advance, all the concrete contingencies and difficult real life dilemmas that are bound to arise. If H.R. 3822, with its rigid, inflexible notification provisions, should become law in its present form, there is no way of telling what future President's hands that law may tie, under what particular circumstances, with what adverse impact on U.S. interests -- in ways likely to be rued by future Congresses as well as by future Presidents, regardless of party.

Most respectfully, Mr. Chairman, we urge that you and your distinguished Committee carefully weigh the advisability and risks of enacting covert action oversight legislation amid the mounting, inevitably partisan pressures of a Presidential and Congressional election year. If you and a majority of your colleagues feel that such legislation truly needs to be enacted in 1988, we urge that any bill endorsed by your Committee not contain inflexible notification requirements which an administration, of whatever party, would be required by law to follow, under any and all circumstances, within a narrow time

frame rigidly denominated in numerically specified hours, or even days.

Sincerely,

Zbigniew Brzezinski

George A. Carver, Jr.

William E. Colby

Richard Helms

Henry A. Kissinger

General Brent Scowcroft

GAC/kg

cc: The Honorable Henry Hyde
Ranking Minority Member
House Permanent Select Committee on Intelligence

APPENDIX 4

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

February 11, 1987

FROM : American Law Division

SUBJECT: Analysis of Constitutionality of Proposal Enhancing Congressional Oversight of Intelligence Activities

Reference is made to your inquiry of February 5, 1987 requesting a constitutional analysis of H.R. 1013, legislation intended to strengthen the system of congressional oversight of the intelligence activities of the United States.

Consistent with the objective of giving Congress a more effective voice in the conduct of foreign covert operations for other than information gathering purposes, H.R. 1013 amends two key legal provisions regarding intelligence activities and the conduct of congressional oversight of those activities: Section 662 of the Foreign Assistance Act of 1961 (FAA), 22 U.S.C. § 2422, and Section 501 of the National Security Act of 1947 (NSA), 50 U.S.C. § 413.

Section 662 of the FAA provides that ---

> No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947.

At the present time, before any appropriated funds may be expended by or on behalf of the CIA for foreign covert operations (other than intelligence gathering activities), the President is required to find that each individual operation is important to the national security of the United States. Moreover, each operation is deemed to be a significant anticipated intelligence activity for purposes of section 501 of the NSA, which, in turn, means that the Director of Central Intelligence has to keep the House and Senate Select Intelligence Committees "fully and currently informed of" that operation. The obligation imposed on the Director of Central Intelligence as well as the heads of other U.S. entities involved in intelligence activities by section 501 of the NSA and incorporated by section 662 of the FAA as it stands does not mean that congressional oversight committees have to approve an anticipated intelligence activity before it may be initiated. Moreover, if the President determines that it is essential to limit prior notice to meet extraordinary circumstances affecting vital interest of the United States, he may notify the chairmen and ranking minority members of the oversight committees, the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate. The latter is clearly an alternative procedure available in appropriate circumstances to avoid giving prior notice to the full intelligence committees.

By necessary implication, subsection (b) indicates that the President must fully inform the intelligence committees "in a timely fashion" of foreign intelligence operations for which no prior notice was given in the manner required by section 501(a).

Section 2 of H.R. 1013 proposes two significant changes to section 662 of the FAA. First it requires that the presidential finding which is essential to go ahead with a foreign covert operation has to be "in writing". Second, it requires that a copy of the written finding be given in advance of the conduct of the operation to the congressional oversight committees, or to the previously described eight persons identified in section 501(a)(1)(B) of the NSA, and to the Vice President, the Secretary of State, the Secretary of Defense and the Director of Central Intelligence. Briefly, section 662 as amended by section 2 of the proposal would retain its broad reporting features except that the report would have to be a written one and would have to be given to the four specified executive officers in addition to either the intelligence committees or the chairmen and ranking minority members of those committees and the House and Senate leaders.

Section 3 of H.R. 1013 amends section 501 of the NSA, portions of which have been just discussed because of the connection between significant anticipated intelligence activities and foreign covert operations under section 662 of the FAA. Section 501 provides that ---

> (a) Reports to Congressional Committees of current and proposed activities
>
> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution 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, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall—
>
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;

(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

(b) Failure to inform; reasons

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

(c) Establishment of procedures for relaying information

The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b) of this section.

(d) Protection from unauthorized disclosure

the [1] House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under this section. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

(e) Construction of authority conferred

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

Section 501 of the NSA, as added in 1980, is the basic congressional oversight provision of U.S. intelligence activities whether performed by the CIA or departments, agencies and other federal entities. The Director of Central Intelligence and the heads of any of the mentioned units of government that are involved in intelligence activities are required to keep the intelligence committees "fully and currently informed" of those activities, "including any significant anticipated intelligence activity." This reporting function is to be performed in a manner that is "consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches ..., and ... with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods ..."

Although section 501 clearly requires the intelligence committees to be informed in advanced (e.g., significant anticipated intelligence activity) committee "approval" is not a condition precedent to the initiation of any such anticipated intelligence activity. As previously noted, section 501 additionally provides that if the President determines that vital interests require it, notice concerning a significant anticipated intelligence activity can instead be given to the chairmen and ranking members of the intelligence committees, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate.

In addition to keeping the oversight committees "fully and currently" informed of intelligence activities, affected executive branch heads have to provide additional relevant information which is requested by the committees. Futhermore, these persons have to inform the committees "in a timely fashion" of "any illegal intelligence activity or significant intelligence failure" and corrective action taken or contemplated.

Section 501(b) is intended to apply to those situations when prior notice of intelligence operations has not been given to the oversight committees. In these situations the President is to "fully" inform them "in a timely fashion" of foreign covert operations and justify noncompliance with the prior notice requirement.

Section 501(c) directs the President and the intelligence committees to establish procedures for relaying sensitive information between them.

Section 501(d) requires the House and Senate to establish procedures to protect sensitive information given to the intelligence committees from unauthorized disclosure and directs the committees to keep committees and members of their respective houses advised of intelligence activities that require their attention.

Section 501(e) makes it clear that the intelligence committees may not be denied information because it is classified or relates to intelligence sources and methods.

Section 3 of H.R. 1013 affects directly or indirectly and to a greater or lesser extent all of the subsections of section 501 of the NSA. Symbolizing the bill's fundamental purpose of reducing the opportunities for evading the obligation of keeping the intelligence committees "fully and currently informed", the proposal eliminates the injunction that executive branch officials inform the committees to the extent consistent with "all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government ...." The elimination of the quoted language -- which connotes more than it denotes and likely reflects an excess of caution on the part of its drafters -- leaves only one statutory standard to guide executive branch officials in furnishing information concerning intelligence activities to the oversight committees, namely, to do it "with due regard for ... protect[ing] [it] from unauthorized disclosure".

Possessed of more than symbolic value, however, is the proposal's repeal of section 501(b) which allows the President to give subsequent notice to the intelligence committees when prior notice of an intelligence activity has not been given. This change largely but not totally eliminates the occasions for departing from the requirement of prior congressional notice.

The legislation makes a number of conforming changes required by elimination of section 501(b); it redesignates the subsections and corrects internal references to the redesignated subsections.

Finally, the proposal would add a new subsection (e) to section 501 of the NSA, which admits of a singular occasion for not giving prior notice of a significant anticipated intelligence activity. The exceptional circumstance is one "affecting the vital interest of the United States, and only where time is of the essence." Futhermore, unlike existing section 501(b) which allows reporting in analogous circumstances "in a timely fashion", the proposal's new subsection (e) provides that notice to Congress in the extraordinary circumstances that it postulates "may be deferred for not more than 48 hours after the initiation of such an activity or the signing of a finding pursuant to section 662 of the [FAA] of 1961." Briefly, the legislation in this regard narrows the circumstances for the conduct of foreign covert operations before informing Congress and effectively spells out "in timely fashion" by allowing only a two day deferral.

H.R. 1013 raises a number of constitutional issues, chief among which are whether Congress may compel the Executive Branch to provide it with advance information concerning intelligence operations and whether it violates separation of powers or other principles to require that similar information be given to such highly placed constitutional or executive officials as the Vice President of the United States, the Secretary of State, the Secretary of Defense, and the Director of Central Intelligence.

The first of these two issues, i.e., whether and to what extent the assumed constitutional power of the President to assure secrecy of sensitive national security information is assertable against Congress, was examined at some length in a report which was prepared in 1980. A copy of that report, which coincidentally was requested in connection

with consideration at that time of proposals which led to enactment of section 501 of the NSA, is annexed hereto. 126 Congressional Record 13096-1310 (1980). Decisional and other legal developments in the intervening six years do not appear to affect the general conclusion that intelligence activities are a joint responsibility of the President and Congress and, therefore, the latter is entitled to obtain advance notice of those activities. The congressional powers immediately implicated, among others, are the war powers, the power of the purse, and the fact that the authority of the Director of Central Intelligence to safeguard information is authorized by statute.

For related developments regarding the Nixon case approach of balancing the interests in a congressional demand for information from the Executive. United States v. Nixon, 418 U.S. 683 (1974). See, generally, Congressional Access to Information from the Executive: A Legal Analysis, CRS Rept. No. 86-50A, March 10, 1986.

The 1980 report concludes with an extended excerpt from Prof. Willoughby rejecting the notion that the President possesses power to refuse to execute laws which he deems unconstitutional. Litigation involving the Competition in Contracting Act (CICA), 31 U.S.C.A. § 3553 et seq. has occasioned judicial commentary in accord with Willoughby's views. Typical of these remarks is that of the Third Circuit in Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F. 2d 875, 889 (1986):

> This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best.[11]

11. *See Kendall v. United States*, 12 Pet. 524, 613, 37 U.S. 524, 613, 9 L.Ed. 1181 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissable.") The President's job is to execute law, not to create it. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S.Ct. 863, 866, 96 L.Ed. 1153 (1952). Moreover, "it is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). Absent a patently unconstitutional law or one infringing liberty interests or other fundamental rights of individuals, the President's asserted power and "duty" not to execute laws he finds to be unconstitutional is questionable. *See Hearings* at 39, 44 (testimony of Prof. Sanford Levinson); *id.* at 46–47 (testimony of Prof. Eugene Gressman).

Although the decision in Bowsher v. Synar, 106A Ct. 3181 (1986), invalidating the Gramm-Rudman-Hollings budget reduction law may have some adverse implications for the CICA, these do not detract from the conclusion, expressed immediately above, that "[t]he President's job is to execute law, not to create it."

Insofar as the second issue is concerned, the Supreme Court in Nixon v. Administration of General Services, 433 U.S. 425, 445 (1977) indicated that laws calling for the exchange of information within the Executive Branch do not violate the separation of powers doctrine. At issue in the case was the Presidential Recording and Materials Preservation Act which directed the Administrator of General Services, an official of the Executive Branch, to take custody of former President Nixon's papers and tape recordings and separate purely personal and private materials from public materials; the latter to be retained and made available for public access. The Court gave short shrift to appellant's separation of powers challenge to the Act. Noting that the latter was intended to maintain the proper balance between the coordinate branches, the Court found highly

relevant that the Act provided for the custody of materials in officials of the Executive Branch and that employees of that branch have access only for lawful Government use, subject to regulations. Id. at 445. The Court concluded that the "regulation of materials generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." Id. at 445.

The Court's observations on the separation of powers are reproduced in their entirety as follows:

> A
>
> *Separation of Powers*
>
> We reject at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality. Moreover, the control over the materials remains in the Executive Branch. The Administrator of the General Services Administration, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees. Appellant's argument is in any event based on an interpretation of the separation-of-powers doctrine inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system. True, it has been said that "each of the three general departments of government [must remain] entirely free from the control or

coercive influence, direct or indirect, of either of the others . . . ," *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629 (1935), and that "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." *Id.*, at 630. See also *O'Donoghue* v. *United States*, 289 U. S. 516 (1933); *Springer* v. *Philippine Islands*, 277 U. S. 189, 201 (1928).

But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story [5] was expressly affirmed by this Court only three years ago in *United States* v. *Nixon*, *supra*. There the same broad argument concerning the separation of powers was made by appellant in the context of opposition to a subpoena *duces tecum* of the Watergate Special Prosecutor for certain Presidential tapes and documents of value to a pending criminal investigation. Although acknowledging that each branch of the Government has the duty initially to interpret the Constitution for itself, and that its interpretation of its powers is due

[5] Madison in The Federalist No. 47, reviewing the origin of the separation-of-powers doctrine, remarked that Montesquieu, the "oracle" always consulted on the subject,

"did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, pp. 325–326 (J. Cooke ed. 1961) (emphasis in original).

Similarly, Mr. Justice Story wrote:

"[W]hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree." 1 J. Story, Commentaries on the Constitution § 525 (M. Bigelow, 5th ed. 1905).

great respect from the other branches, 418 U. S., at 703, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952).

> "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, *but the separate powers were not intended to operate with absolute independence.*" 418 U. S., at 707 (emphasis supplied).

Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight departments of government," 408 F. Supp., at 342.[6] Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States* v. *Nixon*, 418 U. S., at 711–712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Ibid.*

It is therefore highly relevant that the Act provides for custody of the materials in officials of the Executive Branch and that employees of that branch have access to the materials only "for lawful Government use, subject to the [Adminis-

[6] See also, *e. g.*, 1 K. Davis, Administrative Law Treatise § 1.09 (1958); G. Gunther, Cases and Materials on Constitutional Law 400 (9th ed. 1975); L. Jaffe, Judicial Control of Administrative Action 28–30 (1965); Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1387–1391 (1974); Ratner, Executive Privilege, Self Incrimination, and the Separation of Powers Illusion, 22 U. C. L. A. L. Rev. 92–93 (1974).

trator's] regulations." § 102 (d); 41 CFR §§ 105–63.205, 105–62.206, and 105–63.302 (1976). For it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function. While the materials may also be made available for use in judicial proceedings, this provision is expressly qualified by any rights, defense, or privileges that any person may invoke including, of course, a valid claim of executive privilege. *United States* v. *Nixon, supra.* Similarly, although some of the materials may eventually be made available for public access, the Act expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege," § 104 (a)(5), and to return purely private materials to appellant, § 104 (a)(7). These provisions plainly guard against disclosures barred by any defenses or privileges available to appellant or the Executive Branch.[7] And appellant himself concedes that the Act "does not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it." Brief for Appellant 119. The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch.

Thus, whatever are the future possibilities for constitutional

[7] The District Court correctly interpreted the Act to require meaningful notice to appellant of archival decisions that might bring into play rights secured by § 104 (a)(5). 408 F. Supp., at 340 n. 23. Such notice is required by the Administrator's regulations, 41 CFR § 105–63.205 (1976), which provide: "The Administrator of General Services or his designated agent will provide former President Nixon or his designated attorney or agent prior notice of, and allow him to be present during, each authorized access."

conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face. And, of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, *e. g.*, the Freedom of Information Act, 5 U. S. C. § 552 (1970 ed. and Supp. V); the Privacy Act of 1974, 5 U. S. C. § 552 (a) (1970 ed., Supp. V); the Government in the Sunshine Act, 5 U. S. C. § 552b (1976 ed.); the Federal Records Act, 44 U. S. C. § 2101 *et seq.*; and a variety of other statutes, *e. g.*, 13 U. S. C. §§ 8–9 (census data); 26 U. S. C. §6103 (tax returns). Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy. Cf. *EPA* v. *Mink*, 410 U. S. 73, 83 (1973); *FAA Administrator* v. *Robertson*, 422 U. S. 255 (1975).[8] Similar congressional power to regulate Executive Branch documents exists in this instance, a power that is augmented by the important interests that the Act seeks to attain. See *infra*, at 452–454.

[8] We see no reason to engage in the debate whether appellant has legal title to the materials. See Brief for Appellant 90. Such an inquiry is irrelevant for present purposes because § 105 (c) assures appellant of just compensation if his economic interests are invaded, and, even if legal title is his, the materials are not thereby immune from regulation. It has been accepted at least since Mr. Justice Story's opinion in *Folsom* v. *Marsh*, 9 F. Cas. 342, 347 (No. 4,901) (CC Mass. 1841), that regardless of where legal title lies, "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers." Appellant's suggestion that the *Folsom* principle does not go beyond materials concerning national security and current Government business is negated by Mr. Justice Story's emphasis that it also extended to materials "embracing *historical* . . . information." *Ibid.* (Emphasis added.) Significantly, no such limitation was suggested in the Attorney General's opinion to President Ford. Although indicating a view that the materials belonged to appellant, the opinion acknowledged that "Presidential materials" without qualification "are peculiarly affected by a public interest" which may justify subjecting "the absolute ownership rights" to certain

Id. at 441–446.

As an aspect of separation of powers intended to maintain the proper balance between coordinate branches the relevance of executive privilege to deny access to national security information to the chief national security officials of the Executive Branch seems both questionable and paradoxical.

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APPENDIX 5

MEMORANUM FOR THE ATTORNEY GENERAL CONCERNING

The President's Compliance with the "Timely Notification"

Requirement of Section 501(b) of the National Security Act;

PREPARED BY ASSISTANT ATTORNEY GENERAL CHARLES J. COOPER

APPENDIX N

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act

This memorandum responds to your request that this Office review the legality of the President's decision to postpone notifying Congress of a recent series of actions that he took with respect to Iran. As we understand the facts, the President has, for the past several months, been pursuing a multifaceted secret diplomatic effort aimed at bringing about better relations between the United States and Iran (partly because of the general strategic importance of that country and partly to help end the Iran-Iraq war on terms favorable to our interests in the region); at obtaining intelligence about political conditions within Iran; and at encouraging Iranian steps that might facilitate the release of American hostages being held in Lebanon. It is our understanding that the President, in an effort to achieve these goals, instructed his staff to make secret contacts with elements of the Iranian government who favored closer relations with the United States; that limited quantities of defensive arms were provided to Iran; that these arms shipments were intended to increase the political influence of the Iranian elements who shared our interest in closer relations between the two countries and to demonstrate our good faith; and that there was hope that the limited arms shipments would encourage the Iranians to provide our government with useful intelligence about Iran and to assist our efforts to free the Americans being held captive in Lebanon.

On these facts, we conclude that the President was within his authority in maintaining the secrecy of this sensitive diplomatic initiative from Congress until such time as he believed that disclosure to Congress would not interfere with the success of the operation.

As we indicated in our memorandum of November 14, 1986, section 501 of the National Security Act permits the President to

withhold prior notification of covert operations from Congress, subject to the requirements that he inform congressional committees of the operations "in a timely fashion," and that he give a statement of reasons for not having provided prior notice. We now conclude that the vague phrase "in a timely fashion" should be construed to leave the President wide discretion to choose a reasonable moment for notifying Congress. This discretion, which is rooted at least as firmly in the President's constitutional authority and duties as in the terms of any statute, must be especially broad in the case of a delicate and ongoing operation whose chances for success could be diminished as much by disclosure while it was being conducted as by disclosure prior to its being undertaken. Thus, the statutory allowance for withholding prior notification supports an interpretation of the "timely fashion" language, consistent with the President's constitutional independence and authority in the field of foreign relations, to withhold information about a secret diplomatic undertaking until such a project has progressed to a point where its disclosure will not threaten its success.[1]

I. The President's Inherent Constitutional Powers Authorize a Wide Range of Unilateral Covert Actions in the Field of Foreign Affairs

A. The President Possesses Inherent and Plenary Constitutional Authority in the Field of International Relations

"The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, sec. 1. This is the principal textual source for the President's wide and

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[1] The vagueness of the phrase "in a timely fashion," together with the relatively amorphous nature of the President's inherent authority in the field of foreign relations, necessarily leaves room for some dispute about the strength of the President's legal position in withholding information about the Iranian project from Congress over a period of several months. The remainder of this memorandum outlines the legal support for the President's position, and does not attempt to provide a comprehensive analysis of all the arguments and authorities on both sides of the question. This caveat, which does not alter the conclusion stated in the accompanying text, reflects the urgent time pressures under which this memorandum was prepared.

inherent discretion to act for the nation in foreign affairs.[2] The clause has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. The President's executive power includes, at a minimum, all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.

Before the Constitution was ratified, Alexander Hamilton explained in The Federalist why the President's executive power would include the conduct of foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate."[3] This fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" explains why the Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American

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[2] The Constitution also makes the President Commander in Chief of the armed forces (Art. II, sec. 2); gives him power to make treaties and appoint ambassadors, subject to the advice and consent of the Senate (Art. II, sec. 2), and to receive ambassadors and other public ministers (Art. II, sec. 3); the Constitution also requires that the President "take Care that the Laws be faithfully executed" (Art. II, sec. 3). These specific grants of authority supplement, and to some extent clarify, the discretion given to the President by the Executive Power Clause.

[3] The Federalist No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961). This number of the The Federalist was devoted primarily to explaining why the power of making treaties is partly legislative and partly executive in nature, so that it made sense to require the cooperation of the President and the Senate in that special case.

citizens.[4] As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of

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[4] Congress's power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," art. I, sec. 8, cl. 11, like the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," art. I, sec. 8, cl 10, and the power "[t]o regulate Commerce with foreign Nations," art. I, sec. 8, cl. 3, reflects the fact that the United States is, because of its geographical position, necessarily a nation in which a significant number of citizens will engage in international commerce. A declaration of war immediately alters the legal climate for Americans engaged in foreign trade and is therefore properly treated as a legislative act necessarily binding on an important section of the private citizenry. Similarly, Congress's broad power over the establishment and maintenance of the armed forces, art. I, sec. 8, cls. 12-16, reflects their obviously important domestic effects. In accord with Hamilton's distinction, however, the actual command of the armed forces is given to the President in his role as Commander in Chief. Treaties (in whose making the Senate participates under art. II, sec. 2) have binding legal effect within our borders, and are most notable for the significantly small role that Congress plays.

the "executive Power."[5]

The presumptively exclusive authority of the President in foreign affairs was asserted at the outset by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain impartial in the war between France and Great

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[5] As one would expect in a situation dealing with implied constitutional powers, argument and authority can be mustered for the proposition that Congress was intended to have a significant share of the foreign policy powers not specifically delegated by the Constitution. Perhaps the most oft-cited authority for this position is James Madison's "Helvidius Letters" (reprinted in part in E. Corvin, The President's Control of Foreign Relations 16-27 (1917)), where he cautioned against construing the President's executive power so broadly as to reduce Congress's power to declare war to a mere formality. Madison's argument was directed principally at countering some overstatements made by Alexander Hamilton in his "Pacificus Letters" (reprinted in part in E. Corvin, supra, at 8-15); Madison's argument is not properly interpreted to imply that Congress has as great a role to play in setting policy in foreign affairs as in domestic matters. Even Jefferson, who was generally disinclined to acknowledge implied powers in the federal government or in the President, wrote: "The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly. . . ." 5 Writings of Thomas Jefferson 161 (Ford ed. 1895). 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's 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 in carrying out, the nation's foreign policy.

Britain.[6] Similarly, the First Congress itself acknowledged the breadth of the executive power in foreign affairs when it established what is now the Department of State. In creating this executive department, Congress directed the department's head (i.e. the person now called the Secretary of State) to carry out certain specific tasks when entrusted to him by the President, as well as "such other matters respecting foreign affairs, as the President of the United States shall assign to the said department."[7] Just as the first President and the first Congress recognized that the executive function contained all the residual power to conduct foreign policy that was not otherwise delegated by the Constitution, subsequent historical practice has generally confirmed the President's primacy in formulating and

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[6] Proclamation of the President, April 22, 1793, reprinted in 1 Messages and Papers of the Presidents 156-157 (J. Richardson ed. 1896). President Washington also warned that his Administration would pursue criminal prosecutions for violations of his neutrality proclamation. Although such prosecutions were upheld at the time, a rule that would prohibit such prosecutions was recognized by the Supreme Court relatively soon thereafter. Compare Henfield's Case, 11 F. Cas. 1099, 1102 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.), with United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). It is worth emphasizing that Presidents have sometimes encountered constitutional obstacles when attempting to pursue foreign policy goals through actions in the domestic arena, but have rarely been interfered with in taking diplomatic steps, or even military actions short of war, outside our borders. The present significance of President Washington's proclamation has less to do with the particular actions he might have taken in the domestic sphere than with his claim that foreign affairs are generally within the constitutional domain assigned to the Executive. This claim is consistent with the Constitution and has now been reinforced by long historical practice.

[7] Act of July 27, 1789, 1 Stat. 28-29. See also Act of Jan. 30, 1799, 1 Stat. 613 (similar provision currently codified at 18 U.S.C. 953), which made it a crime for any person to attempt to influence the conduct of foreign nations with respect to a controversy with the United States.

carrying out American foreign policy.[8]

The Supreme Court, too, has recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the Constitution itself and that congressional efforts to act in this area must be evaluated in the light of the President's constitutional ascendancy:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of 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

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[8] The fact that Presidents have often asked Congress to give them specific statutory authority to take action in foreign affairs may reflect a practical spirit of courtesy and compromise rather than any concession of an absence of inherent constitutional authority to proceed. For example, President Franklin Roosevelt requested that Congress repeal a provision of the Emergency Price Control Act that he felt was interfering with the war effort; he warned, however, that if Congress failed to act, he would proceed on the authority of his own office to take whatever measures were necessary to ensure the winning of the war. 88 Cong. Rec. 7044 (1942).

As one would expect, of course, Congress has not always accepted the most far-reaching assertions of presidential authority. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Constitution did not authorize President to take possession of and operate privately owned steel mills that had ceased producing strategically important materials during labor dispute); id. at 635 (Jackson, J., concurring) ("[The Constitution] enjoins upon [the government's] branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful

results.[9]

Based on this analysis, the Supreme Court rejected the argument that Congress had improperly delegated a legislative function to the President when it authorized him to impose an embargo on arms going to an area of South America in which a war was taking place. The Court's holding hinged on the essential insight that the embargo statute's principal effect was merely to remove any question about the President's power to pursue his foreign policy objectives by enforcing the embargo within the borders of

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[9] 299 U.S. at 319-320 (emphasis added). See also Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948) (President "posseses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); id. at 109-112 (refusing to read literally a statute that seemed to require judicial review of a presidential decision taken pursuant to his discretion to make foreign policy); id. at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."), quoted with approval in United States v. Nixon, 418 U.S. 683, 710 (1974).

In Perez v. Brownell, 356 U.S. 44, 57 (1958) (citations omitted), the Court stated, "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." The Perez Court, however, was reviewing the constitutionality of a statute in whose drafting the Executive Branch had played a role equivalent to one of Congress's own committees. 356 U.S. at 56. Furthermore, the statute at issue in Perez provided that an American national who voted in a political election of a foreign state would thereby lose his American nationality. If the President lacks the inherent constitutional authority to deprive an American of his nationality, then the Perez Court's language about congressional "regulation of foreign affairs" may refer only to "regulation of domestic affairs that affect foreign affairs." In any case, Perez should not be read to imply that Congress has broad legislative powers that can be used to diminish the President's inherent Article II discretion.

this country.[10] As the Court emphatically stated, the President's authority to act in the field of international relations is plenary, exclusive, and subject to no legal limitations save those derived from applicable provisions of the Constitution itself.[11] As the Court noted with obvious approval, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history:

> "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution

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[10] See 299 U.S. at 327 (effect of various embargo acts was to confide to the President "an authority which was cognate to the conduct by him of the foreign relations of the government")(quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 422 (1935) (emphasis added)). This implies that while the President may in some cases need enabling legislation in order to advance his foreign policy by controlling the activities of American citizens on American soil, he needs no such legislation for operations and negotiations outside our borders.

[11] Because the presidential action at issue in Curtiss-Wright was authorized by statute, the Court's statements as to the President's inherent povers could be, and have been, characterized as dicta. See, e.g., Youngstown Sheet & Tube Co. v. Savyer, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring). We believe, however, that the Curtiss-Wright Court's broad view of the President's inherent powers was essential to its conclusion that Congress had not unconstitutionally delegated legislative authority to the President. Furthermore, the Supreme Court has since reaffirmed its strong commitment to the principle requiring the "utmost deference" to presidential responsibilities in the military and diplomatic areas. United States v. Nixon, 418 U.S. 683, 710 (1974).

> and unity of design, and their success frequently depends on secrecy and dipatch."

299 U.S. at 319 (emphasis added) (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). It follows inexorably from the Curtiss-Wright analysis that congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and that statutes infringing the President's inherent Article II authority would be unconstitutional.[12]

B. Secret Diplomatic and Intelligence Missions Are at the Core of the President's Inherent Foreign Affairs Authority

The President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court has repeatedly so held in modern times. For example:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over

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12 See e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (citations omitted):

> The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

See also Worthy v. Herter, 270 F.2d 905, 910-912 (D.C. Cir. 1959) (statute giving President authority to refuse to allow Americans to travel to foreign "trouble spots" simply reinforces the President's inherent constitutional authority to impose the same travel restrictions).

> internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (emphasis in original). The Court has also, and more recently, emphasized that this core presidential function is by no means limited to matters directly involving treaties. In United States v. Nixon, 418 U.S. 683 (1974), the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 710 (emphasis added).[13]

Such statements by the Supreme Court reflect an understanding of the President's function that is firmly rooted in the nature of his office as it was understood at the time the Constitution was adopted. John Jay, for example, offered a concise statement in The Federalist:

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[13] See also id. at 706 ("a claim of need to protect military, diplomatic, or sensitive national security secrets" would present a strong case for denying judicial power to make in camera inspections of confidential material); id. at 712 n.19 (recognizing "the President's interest in preserving state secrets").

Note also that the Curtiss-Wright Court expressly endorsed President Washington's refusal to provide the House of Representatives with information about treaty negotiations after the negotiations had been concluded. 299 U.S. at 320-321. A fortiori, such information could be withheld during the negotiations.

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.
>
> . . . So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.[14]

Jay's reference to treaties "of whatever nature" and his explicit discussion of intelligence operations make it clear that he was speaking, not of treaty negotiation in the narrow sense, but of the whole process of diplomacy and intelligence-gathering. The President's recent Iran project fits comfortably within the terms of Jay's discussion.

[14] The Federalist No. 64, at 392-393 (J. Jay) (C. Rossiter ed. 1961) (emphasis in original). Jay went on to note that "should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them." Id. at 393. Jay did not, however, suggest that the President would be obliged to seek such advice and consent for actions other than those specifically enumerated in the Constitution.

C. The President Has Inherent Authority to Take Steps to Protect the Lives of Americans Abroad.

Perhaps the most important reason for giving the federal government the attributes of sovereignty in the international arena was to protect the interests and welfare of American citizens from the various threats that may be posed by foreign povers. This obvious and common sense proposition was confirmed and relied on by the Supreme Court when it held that every citizen of the United States has a constitutional right, based on the Privileges or Immunities Clause of the Fourteenth Amendment, "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."[15] Accordingly, the Supreme Court has repeatedly intimated that the President has inherent authority to protect Americans and their property abroad by whatever means, short of war, he may find necessary.

An early judicial recognition of the President's authority to take decisive action to protect Americans abroad came during a mid-nineteenth century revolution in Nicaragua. On the orders of the President, the commander of a naval gunship bombarded a town where a revolutionary government had engaged in violence against American citizens and their property. In a later civil action against the naval commander for damages resulting from the bombardment, Justice Nelson of the Supreme Court held that the action could not be maintained:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof . . . .
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> Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the

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[15] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

> duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not infrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.

Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186) (emphasis added).

Later, the full Court confirmed this analysis in an opinion holding that the President has inherent authority to provide bodyguards, clothed with federal immunity from state law, to protect judicial officers, even when they are travelling within the United States in the performance of their duties. In re Neagle, 135 U.S. 1 (1890). Rather than base its decision on a narrow analysis of the status of federal judges, the Court held that the presidential duty to "take Care that the Laws be faithfully executed"[16] includes "any obligation fairly and properly inferrible [sic] from" the Constitution.[17] The Court specifically stated that these were not limited to the express terms of statutes and treaties, but included "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[18] As the Court pointed out, Congress itself had approved this position when it ratified the conduct of the government in using military threats and diplomatic pressure to secure the release of an American who had been taken prisoner in Europe. Noting that Congress had voted a medal for the naval officer who had threatened to use force to obtain the American's release, the Court asked, "Upon what act of Congress then existing can any one lay his finger in

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[16] U.S. Const., art. II, sec. 3.

[17] In re Neagle, 135 U.S. at 59.

[18] Id. at 64 (emphasis added).

support of the action of our government in this matter?"[19] If military force may be used on the President's own discretion to protect American lives and property abroad, surely the less drastic means employed by President Reagan during the Iran project were within his constitutional authority.

II. Any Statute Infringing upon the President's Inherent Authority to Conduct Foreign Policy Would be Unconstitutional and Void.

Congress has traditionally exercised broad implied powers in overseeing the activities of Executive Branch agencies, including "probes into departments of the Federal Government to expose corruption, inefficiency or waste." Watkins v. United States, 354 U.S. 178, 187 (1957); see also McGrain v. Daugherty, 273 U.S. 135, 161-164 (1927). This power of oversight is grounded on Congress's need for information to carry out its legislative function. Because the executive departments are subject to statutory regulation and to practical restrictions imposed through appropriations levels, Congress can usually demonstrate that it has a legitimate and proper need for the information necessary to make future regulatory and appropriations decisions in an informed manner. McGrain, 273 U.S. at 178.

As the Supreme Court has observed, however, the congressional power of oversight "is not unlimited." Watkins, 354 U.S. at 187.[20] It can be exercised only in aid of a legitimate legislative function traceable to one of Congress's enumerated powers. See McGrain, 273 U.S. at 173-174. The power of oversight cannot constitutionally be exercised in a manner that would usurp the functions of either the Judicial or Executive Branches. Thus, the Supreme Court has held that by investigating the affairs of a business arrangement in which one of the government's debtors was interested, "the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature

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[19] Id. The fact that such a statute may have existed, see Expatriation Act of July 27, 1868, ch. 249, sec. 3, 15 Stat. 223, 224 (current version at 22 U.S.C. 1732) (authorizing the President to use such means, short of war, as may be necessary to obtain the release of Americans unjustly held prisoner by foreign governments), does not diminish the force of the Supreme Court's statement that no such statute would be needed to support such an exercise of executive power.

[20] It is worth observing that Congress's oversight powers are no more explicit in the Constitution than are the President's powers in foreign affairs. See McGrain, 273 U.S. at 161.

clearly judicial." Kilbourn v. Thompson, 103 U.S. 168, 192 (1881). The same principle applies to congressional inquiries that would trench on the President's exclusive functions. "Lacking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive." Barenblatt v. United States, 360 U.S. 109, 112 (1959) (emphasis added).[21]

It is undoubtedly true that the Constitution does not contemplate "a complete division of authority between the three branches." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). Nevertheless, there are certain quintessential executive functions that Congress may not exercise in the guise of its "oversight power." Congress, for example, may not give its own agents the power to make binding rules "necessary to or advisable for the administration and enforcement of a major statute." Buckley v. Valeo, 424 U.S. 1, 281 (1976) (White, J., concurring in part). Nor may Congress unilaterally alter the rights and duties created by a prior statutory authorization. INS v. Chadha, 462 U.S. 919, 951 (1983). In general, the management and control of affairs committed to the Executive Branch, even those given to the Executive by Congress itself, must remain firmly in the control of the President. Myers v. United States, 272 U.S. 52, 135 (1926). A fortiori, the conduct of affairs committed exclusively to the President by the Constitution must be carefully insulated from improper congressional interference in the guise of "oversight" activities.

This principle has three immediately relevant corrolaries. First, decisions and actions by the President and his immediate staff in the conduct of foreign policy are not subject to direct review by Congress. "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803).[22]

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[21] On its facts, Barenblatt did not involve an inter-branch dispute. The Court upheld a contempt citation issued by a House Committee against a witness who refused to answer questions about his ties with the Communist Party.

[22] Obviously, Congress may investigate and consider the President's past actions when performing one of its own assigned functions (for example, while giving advice and consent to treaties or appointments, deciding whether to issue a declaration of war, or during the impeachment process).

Second, while Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs. Just as an individual cannot be required to waive his constitutional rights as a condition of accepting public employment or benefits, so the President cannot be compelled to give up the authority of his office as a condition of receiving the funds necessary to carry out the duties of his office.[23] To leave the President thus at the mercy of the Congress would violate the principle of the separation of powers in the most fundamental manner. The Federalist indicates that one great "inconveniency" of republican government is the tendency of the legislature to invade the prerogatives of the other branches, and that one of the main concerns of the Framers was to give the other branches the "necessary constitutional means and personal motives to resist [such] encroachments."[24] In an effort to address this problem the Constitution provides that the President's personal compensation cannot be altered during his term of office,[25] and it must be acknowledged that the President's constitutional independence is even more precious and

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[23] The doctrine of unconstitutional conditions has pervasive application throughout the law. For a good general statement of the doctrine, see Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 594 (1926):

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

[24] The Federalist No. 51, at 321-322 (J. Madison) (C. Rossiter ed. 1961).

[25] U.S. Const., art. II, sec. 1, cl. 7; The Federalist No. 51, at 321 (J. Madison) (C. Rossiter ed. 1961); id. No. 73, at 441-442 (A. Hamilton).

vulnerable than his personal independence.[26]

Third, any statute that touches on the President's inherent authority in foreign policy must be interpreted to leave the President as much discretion as the language of the statute will allow. This accords with the well-established judicial presumption in favor of construing statutes so as to avoid constitutional questions whenever possible.[27] Because the President's constitutional authority in international relations is by its very nature virtually as broad as the national interest and as indefinable as the exigencies of unpredictable events, almost any congressional attempt to curtail his discretion raises questions of constitutional dimension. Those questions can, and must, be kept to a minimum in the only way possible: by resolving all statutory ambiguities in accord with the presumption that recognizes the President's constitutional independence in international affairs.

III. Statutory Requirements that the President Report to Congress about his Activities Must Be Construed Consistently with the President's Constitutional Authority to Conduct Foreign Policy.

In 1980, the National Security Act of 1947 was amended to provide for congressional oversight of "significant anticipated intelligence activities." This section now provides (section

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[26] See 41 Op. A.G. 230, 233 (1955):

> It is recognized that the Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy.

[27] "[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' a court should adopt that construction." Califano v. Yamasaki, 442 U.S. 682, 693 (1979) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

501(a) of the National Security Act, 50 U.S.C. 413(a)) (emphasis added):

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution 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, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --
>
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

For situations in which the President fails to give prior notice under section 501(a), section 501(b), 50 U.S.C. 413(b), (emphasis added) provides:

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

reasons for not giving prior notice.[28]

The delicate connection between the "timely notice" requirement of section 501(b) and the President's inherent constitutional authority, acknowledged in section 501(a), is dramatically confirmed by a colloquy between Senators Javits and Huddleston, both of whom were on the committee that drafted this provision. Senator Javits asked: "If information has been withheld from both the select committee and the leadership group (as section 501(b) envisages), can it be withheld on any grounds other than 'independent constitutional authority' and, if so, on what grounds?" Senator Huddleston answered: "Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operation [sic], but would not be able to claim the identical authority to withhold timely notice under section 501(b). A claim of constitutional authority is the sole grounds that may be asserted for withholding prior notice of a covert operation." 126 Cong. Rec. 17693 (1980)

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[28] Section 501 of the National Security Act does not contemplate that prior notice of "intelligence activities" will be given in all instances. Subsection (b) of section 501 makes specific provision for situations in which "prior notice was not given under subsection (a)." Because subsection (a) includes situations in which the President provides notice to the full intelligence committees under subsection (a)(1)(A) and situations in which he provides prior notice restricted to designated members of Congress, including the chairmen and ranking members of the House and Senate intelligence committees under subsection (a)(1)(B), it seems clear that subsection (b) contemplates situations in which no prior notice has been given under either of these provisions.

(emphasis added).[29] If, as Senator Huddleston contended, section

[29] A similar colloquy took place on the floor of the House between Rep. Boland, Chairman of the House Select Committee on Intelligence, and Rep. Hamilton:

> Rep. Hamilton: As I understand that subsection, it allows the President to withhold prior notice entirely: that is, he does not inform anyone in that circumstance. He only has to report in a timely fashion.
> Is that a correct view of subsection (b)?
>
> Rep. Boland: In response to the gentleman, let me say that the President must always give at least timely notice.

126 Cong. Rec. 28,392 (1980). Thus, Rep. Boland clearly, if reluctantly, confirmed Rep. Hamilton's interpretation. During the floor debates, several Senators also acknowledged that the proposed legislation did not require that Congress be notified of all intelligence activities prior to their inception. According to Senator Nunn, the bill contemplated that "in certain instances the requirements of secrecy preclude any prior consultation with Congress." 126 Cong. Rec. 13,127 (1980)(statement of Sen. Nunn). See also id. at 13,125 (statement of Sen. Huddleston)("Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operations . . . ."); id. at 13,103 (statement of Sen. Bayh).

In the course of the floor debates, some Senators stated that the situations in which prior notice was not required would be very rare. See, e.g., 126 Cong. Rec. 26,276 (1980) (remarks of Sen. Inouye). Such statements are of little relevance to determining the scope of the prior notice requirement. First, the executive branch has always agreed that instances of deferred reporting will be rare and has consistently given prior notice. Second, section 501 at the very least permits the President to defer notice when he is acting pursuant to his independent constitutional authority; the scope of this authority is determined, not by legislators' view of the Constitution, but by the Constitution itself. Third, the draftsmen of section 501 decided that because the scope of the President's constitutional "authorities and duties" was in serious dispute, the legislation would not attempt to resolve the issues separating the parties to the dispute. See 126 Cong. Rec. 13,123 (1980) (statement of Sen. Javits). The ambiguities of subsection (b) reflect Congress' inability to override the executive branch's view of the President's constitutional authority. That dispute cannot now be settled, contrary to the Executive's position, by reference to the statements of individual Congressmen who had a narrow view of the President's constitutional role.

501(b) is to be interpreted to require the President to act on his inherent authority in withholding notice of covert operations until after the fact,[30] then any further statutory limitations on the President's discretion should be narrowly construed in order to respect the President's constitutional independence. The requirement that such after-the-fact notification be made "in a timely fashion" appears to be such an additional limitation.

The entire analysis in this memorandum supports the proposition that the phrase "in a timely fashion" must be construed to mean "as soon as the President judges that disclosure to congressional committees will not interfere with the success of the operation." To interpret it in any other way--for example, by requiring notification within some arbitrary period of time unrelated to the exigencies of a particular operation--would seriously infringe upon the President's ability to conduct operations that cannot be completed within whatever period of time was read into the statutory provision.[31] Furthermore, several putatively discrete intelligence "operations" may be so interrelated that they should realistically be treated as a single undertaking whose success

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[30] Senator Huddleston's interpretation is not necessarily correct. As we indicated in our memorandum of November 14, 1986, the President may be able to withhold prior notice even without invoking his independent constitutional authority.

[31] On the floor of the Senate, the bill's sponsor indicated that his personal view of the President's constitutional powers was very narrow, and that he wanted the relevant congressional committees notified "as soon as possible." He acknowledged, however, that the executive branch took a different view, and that he expected "that these matters will be worked out in a practical way." 126 Cong. Rec. 13096 (1980) (remarks of Sen. Huddleston). These statements show that the legislation was not thought to preclude the President from acting on his own view of his own constitutional powers. In guarding against such improper interference, the President's own interpretation of his constitutional powers "is due great respect" from the other branches. See United States v. Nixon, 418 U.S. 683, 703 (1974).

might be jeopardized by disclosure prior to its completion.[32]

Thus, a number of factors combine to support the conclusion that the "timely fashion" language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification. The word

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[32] In his prepared testimony on S. 2284, President Carter's CIA Director, Stansfield Turner, stated (National Intelligence Act of 1980: Hearings before the Senate Select Committee on Intelligence, 96th Cong. 2d Sess. 17 (1980)) (emphasis added):

> Prior reporting would reduce the President's flexibility to deal with situations involving grave danger to personal safety, or which dictate special requirements for speed and secrecy. On the other hand, activities which would have long term consequences, or which would be carried out over an extended period of time should generally be shared with the Congress at their inception, and I would have no objection to making this point in the legislative history.

Turner's testimony cannot properly be interpreted to imply that all "long term," as opposed to "short term," projects require prior notice. First, Turner drew a distinction between projects involving great personal danger or requiring speed and secrecy and projects of long duration or with long term consequences. He did not address projects that are both long term and that involve danger to personal safety, such as the recent Iranian initiative. The inadvisability of prior reporting applies as forcefully to such a project as to "short term" projects that involve personal safety. Second, Turner was careful not to say that long term projects must always be reported at their inception: he said only that they will generally be so reported. In a colloquy with Senator Bayh concerning the word "generally," Turner stressed that "one has to be a little cautious" in making such a statement because "it will be quoted back from these hearings for years to come." Hearings, supra, at 32. Turner never stated that the Executive would or should give prior notice of all long term projects. Third, a distinction between long and short term projects would virtually force the President to prefer military to diplomatic initiatives in situations like the one at issue in this memorandum, which could not have been Congress' intent.

In any event, S. 2284 was not enacted, and the full Congress never had its attention directed to Turner's statements. Those statements are therefore not a significant aid in interpreting section 501(b). As we have shown, both the text of the statute and the colloquies on the floor of the House and Senate indicate that Congress did not require prior notice when the President was acting pursuant to his independent constitutional authority. In permitting "timely notice" in section 501(b), Congress made no distinction between long and short term projects, and no such distinction should be read into the statute.

"timely" is inherently vague;[33] in any statute, it would ordinarily be read to give the party charged with abiding by a timeliness requirement the latitude to interpret it in a reasonable manner. Congress apparently thought that the notification requirement was meant to limit the President's exercise of his inherent authority, while at the same time Congress acknowledged the existence and validity of that authority. Because the President is in the best position to determine what the most reasonable moment for notification is, and because any statutory effort to curtail the President's judgment would raise the most serious constitutional questions, the "timely fashion" language should be read, in its natural sense, as a concession to the President's superior knowledge and constitutional right to make any decision that is not manifestly and indisputably unreasonable.[34] This conclusion is reinforced by the nature of intelligence operations, which are often exceptionally delicate undertakings that may have to extend over considerable periods of time. The statute's recognition of the President's authority to withhold prior notification would be meaningless if he could not withhold notification at least until

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[33] The statute uses a more precise phrase in section 501(a), where it requires that certain committees be kept "fully and currently informed" of activities not covered by section 501(b). This phrase was interpreted by the Senate Committee to mean that "[a]rrangements for notice are to be made forthwith, without delay." S. Rep. No. 730, 96th Cong., 2d Sess. 9 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4192, 4199. No such interpretation was placed on the "timely fashion" language of section 501(b). See id. at 12, reprinted in U.S. Code Cong. & Admin. News, at 4202-4203.

[34] The legislative history of section 501(a) specifically indicated that "[n]othing in this subsection is intended to expand or to contract or to define whatever may be the applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative branches." S. Rep. No. 730, 96th Cong., 2d Sess. 6 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4192, 4196. Furthermore, the Senate Committee acknowledged that it was "uncertain" about the distribution of povers between the President and Congress in the national security and foreign policy area. See id. at 9, reprinted in 1980 U.S. Code Cong. & Admin. News, at 4199.

APPENDIX O

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POWER OF CONGRESS TO OBTAIN ADVANCE INFORMATION CONCERNING INTELLIGENCE OPERATIONS

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April 8, 1980

POWER OF CONGRESS TO OBTAIN ADVANCE INFORMATION CONCERNING INTELLIGENCE OPERATIONS

The recent controversy over the advisability and practicability of the Hughes-Ryan Amendment, 22 U.S.C. § 2422, has given rise to a more fundamental question regarding the constitutional boundaries between Congress and the President with respect to the national security power. The Hughes-Ryan Amendment, which added a new section 662 to the Foreign Assistance Act of 1961, as amended, limits the use of funds appropriated under any act, "by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress...." Excluded from the reporting requirements of law, at least insofar as they might necessitate pre-operational reports, are those intelligence operations which occur "during military operations initiated by the United States under a declaration of war approved by the Congress or an exercise of powers by the President under the War Powers Resolution."

The legislative history of the Hughes-Ryan Amendment makes clear that it was intended to give Congress some amount of control over covert activities (i.e., what popularly might be termed espionage activities) as distinguished from intelligence gathering activities and, thus, from proponents' perspective, prevent the conduct of the former particularly in friendly foreign countries. Throughout the debate on the amendment, the alleged involvement of the CIA in Chilean internal affairs was cited as the kind of operation which Congress

hoped to forestall or curb by conditioning the use of appropriated funds for covert operations upon compliance with the described reporting requirements.

During the recent controversy the Director of the CIA has disclosed that his agency did not read Hughes-Ryan as requiring advance notice to Congress of impending covert operations and he or others seem to suggest that a contrary reading of the law raised constitutional problems insofar as the Executive national security power is concerned. Although resolution of the relative strength of the constitutional interests of the Congress and the President in this context imports broad considerations, including such matters as the nature of the institutions created by the Framers, the power to legislate versus the power to faithfully execute the law, correlative powers of the political branches in the areas of war and external affairs, and the congressional power to raise and appropriate revenues and to determine by what manner and by what means they shall be spent, the legal issue raised by a reporting requirement may be stated in fairly narrow terms: whether and to what extent the assumed constitutional power of the President to assure secrecy of sensitive national security information is assertable against Congress.

Two matters should be noted at the outset. First, neither the congressional power to investigate and obtain information in aid of its legislative function nor the presidential power to safeguard national secrets (i.e. Executive Privilege) are expressly mentioned in the Constitution. Second, although decisional authority confirms the existence of both powers, the courts have yet to resolve in some definitive way the relevant legislative and executive interests when they clash head on. The Supreme Court in United States v. Nixon, 418 U.S. 683, 712 note 19 (1974), left open the question of the "balance...between the [presidential] confidentiality interest and congressional demands for information" and it has

yet to decide a case involving such inter-branch dispute. Cf. Nixon v. Administrator of General Services, 433 U.S. 425 (177) and Nixon v. Warner Communications, 435 U.S. 589 (1978).

Despite the Constitution's silence, the "Congressional power to investigate and acquire information by subpoena, is on a firm constitutional basis..." United States v. American Tel. & Tel Co., 551 F.2d 384, 393 (D.C. Cir. 1976). The Supreme Court in McGrain v. Daugherty, 273 U.S. 135 (1927), ruled that the congressional power in this regard inheres in its power to legislate. It said:

> We are of [the] opinion that the power of inquiry - with process to enforce it - is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history - the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action - and both Houses have emplbyed the power accordingly up to the present time. The Acts of 1798, and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both Houses and to enable them to employ it" more effectually" than before. So, when their practices in this matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short as a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

* * *

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information -- which not infrequently is true -recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry -- with enforcing process -- was regarded and employed as a necessary and appropriate attribute of the power to legislate -- indeed, was treated as inhering in it. Thus, there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised. 273 U.S. at 174-175 (footnote omitted).

The power to obtain information in aid of its legislative function is not confined to the framing and passing of laws, but also includes the oversight of the activities of government agencies and investigating matters of potential legislative concern. Thus, in Watkins v. United States, 354, U.S. 178, 187 (1957), the Court observed as follows:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

Justice Harlan summarized the matter in 1959 as follows:

> The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential

> power to enact and appropriate under the Constitution. Barenblatt v. United States, 360 U.S. 109, 111 (1959).

Although broad, the power to investigate is not unlimited. In this connection, the Supreme Court in Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 note 15 (1975) stated as follows:

> ... "[t]he scope of the power of inquiry ... is as penetrating and farreaching as the potential power to enact and appropriate under the Constitution." ... We have made it clear, however, that Congress is not invested with a "'general'power to inquire into private affairs." ... The subject of any inquiry always must be one "on which legislation could be had."

It should be noted that most of the cited cases have concerned the reach of the power to inquire into the activities of private citzens; inquiry into the administration of laws and departmental corruption, while of substantial political consequence, has given rise to fewer judicial precedents.

Against the power of the Congress to secure through its investigatory process information relevant to its legislative responsibilities, and its power of oversight as to the administration of the laws, stands the doctrine of Executive Privilege. The doctrine has been invoked by the President to refuse the release of information to congressional committees or to prohibit an executive official from testifying before committees.

The doctrine has been justified as being "necessary to exercise Executive functions effectively, i.e., where it is required for the proper conduct of the foreign affairs of the nation or in the interest of military security, or generally, for the furtherance of the efficiency and integrity of the Executive branch. [The latter is rationalized] as safeguarding of frank internal advice and discussion of information received in confidence, of sources of confidential

information, of methods of investigation, and of the reputation of possibly innocent persons from the disclosure of unreliable accusations." Leading Cases On Congressional Investigatory Power [Committee Print] Compiled by the Joint Committee on Congressional Operations, 94th Cong., 2d Sess. (1976) at 81, quoting Kramer and Marcuse, "Executive Privilege -- A Study of the Period 1953-1960," 29 Geo. Wash. L. Rev. 827, 899-900 (1961) (footnote omitted). Until very recent times, most disputes between the political branches have been resolved more or less by mutual compromise -- the degree of mutuality largely dependent on which branch's interests was matched by its constitutional strenghts and the willingness to exercise them.

Although the President's power to determine the need to maintain the secrecy of material touching on the areas of national security and foreign policy have long been recognized by the courts, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) and Chicago & Southeren Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948), judicial recognition of the constitutional basis of Executive Privilege has come about recently. United States v. Nixon, 418 U.S. 683 (1974). In the matter of secrecy in the areas of foreign affairs and national security, the Court in Curtiss-Wright, 299 U.S. at 319, quoting from a Senate report, said "The nature of transactions with foreign nations ... requires caution and unity of design, and their success frequently depends, on secrecy and dispatch." Similarly, the Court in the Waterman, S.S. case sustained the need for presidential secrecy in these areas, and stated that it was beyond the reach of judicial process. It said:

> ... The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intollerable that courts,

> without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary, has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. ... 333 U.S. at 111.

Without deprecating the support given by this judicial dicta regarding inherent presidential authority in foreign affairs, a number of points can and should be made. First, neither the cited cases nor others in this vein involved an interbranch dispute, but the United States and private parties. Second, the Court acknowledged the matters ultimately affected by the litigation involved areas of shared legislative-executive powers, not areas of unique presidential concern. Third, and significantly, the presidential authority in the cited cases was there exercised pursuant to statute, i.e., in conformity with the congressional will. As Justice Jackson pointed out in the Steel Seizure Case, the President's power in these circumstances is at its maximum.

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. ... Concurring, Youngstown Co. v. Sawyer, 348 U.S. 579, 634, 636 (1952).

Conversely, when the President acts in opposition to the will of Congress, his powers are at their "lowest ebb".

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. 343 U.S. at 637-638.

In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court addressed the issue of presidential confidentiality privileges in the context of an interbranch dispute for the first time. The controversy at issue involved the executive and the judiciary.

The decision unanimously affirmed a District Court's order requiring the President to respond to a subpoena calling for tape recordings of presidential conversations for in camera inspection and further proceedings prior to transmission to the Watergate Special Prosecutor for use in a criminal trial. The Court rejected the President's claim of absolute discretion to determine what information is to be withheld on the basis of Executive Privilege and held that the courts must weigh the competing interests involved in inter-branch disputes over information. Despite what the Court found to be "constitutional underpinnings" of the privilege, an unqualified privilege was seen as clashing with similarly constitutionally-based needs of the courts to do justice in criminal prosecutions. 418 U.S. at 706. The Court stated:

> ...[N]either the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national

> security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide. Ibid.

Having found no absolute privilege, the Court proceeded to weigh the competing, constitutionally-based interests, "in a manner that preserves the essential functions of each branch." 418 U.S. at 707. Recognizing the need for candor in high level presidential discussions and the necessity for privacy to facilitate candid conversation, the Court held that, while presidential communications may therefore be presumptively privileged, the privilege must yield in this case to the "right to production of all evidence at a criminal trial", a right which also has "constitutional dimensions". 418 U.S. at 711. The Court found that it must "weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against inroads of such a privilege on the fair administration of criminal justice." 418 U.S. at 711-712. It concluded:

> A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of converstions preliminarily shown to have some bearing on the pending criminal cases. 418 U.S. at 712-713.

Several important points must be noted with respect to United States v. Nixon. The Court emphatically held that it had the power to adjudicate the competing claims, rejecting the assertion by the President of discretionary power to withhold information. It also explicitly distinguished between the broad, generalized privilege asserted for presidential conversations and a "claim of

need to protect military, diplomatic or sensitive national security secrets" 418 U.S. at 706, to which "the courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 710. Finally, perhaps most importantly, the Court found a constitutional basis for the concept of Executive Privilege, stating that "[n]owhere in the constitution... is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." 418 U.S. at 711. The Court earlier, observed that---

> Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings. 418 U.S. at 705-6.

The Supreme Court also specifically left open the question of the "balance ... between the confidentiality interest and congressional demands for information" 418 U.S. at 712 note 19, and it has yet to decide a case involving such an interbranch dispute.

Other cases arising out of the Watergate affair suggest that the presumptive privilege of presidential confidentiality that must be overcome in order to obtain executive information "hold[s] with at least equal force" in the case of a congressional committee request. Senate Select Committee on Pres. Cam. Act. v. Nixon, 498 F.2d 725, 730-731 (D.C. Cir. 1974). In order to overcome the presumptive privilege in favor of nondisclosure there must be sufficient showing of need for the information before the Executive may be required to justify its claim of privilege. Ibid.

In these and other cases, the courts have employed a balancing test wherein the showing required by another branch of government to overcome the presumption favoring presidential confidentiality depended "on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment."

Perhaps not untypical of the factors to be balanced in these circumstances are those considered by the Court of Appeals for the District of Columbia Circuit in United States v. American Tel. & Tel. Co., 551 F.2d 384 (1976). The litigation involved a congressional investigative committee's request for documents which the executive claimed to be privileged on the basis of national security.

The documents, national security request letters sent by the FBI to A.T.&T. requesting taps on certain telephone lines, were subpoenaed by the House Committee on Interstate and Foreign Commerce for delivery to its Subcommittee on Oversight and Investigations. The subpoena was directed to A.T.&.T. After negotiations between the Subcommittee and the executive branch broke down, the Justice Department sued to restrain A.T.&.T. from complying with the committee's subpoena. The District Court, holding that the determination of the Executive that disclosure would jeopardize sensitive national security and foreign policy matters was entitled to great deference by the courts, enjoined A.T.&.T. from supplying the material to the subcommittee. 419 F. Supp. 454 (D.D.C. 1976).

The Court of Appeals, while leaving in place the injunction, took a novel approach to the case, which it viewed as presenting "nerve center constitutional questions." 551 F.2d at 394. After finding jurisdiction and standing on the part of Congressman Moss to intervene, the court surveyed congressional investigatory power and the executive's national security power. It rejected the District Court's deference to the executive, noting that the cases relied on by the

court "do not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers." 551 F.2d at 392. However, the court outlined problems in balancing the constitutional interests at stake:

> A court seeking to balance the legislative and executive interests asserted here would face severe problems in formulating and applying standards. Granted that the subpoenas are clearly within the proper legislative investigatory sphere, it is difficult to "weigh" Congress's need for the request letters. Congress's power to monitor executive actions is implicit in the appropriations powers. Here, for instance, if the President has the inherent power claimed to block the subpoena, how is Congress to assure that appropriated funds are not being used for illegal warrantless domestic electronic surveillance?
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> As to the danger to national security, a court would have to consider the Subcommittee's track record for security, the likelihood of a leak if other members of the House sought access to the material. In addition to this delicate and possibly unseemly determination, the court would have to weigh the effect of a leak on intelligence activities and diplomatic relations. Finally, the court would have to consider the reasonableness of the alternatives offered by the parties and decide which would better reconcile the competing constitutional interests. Id. at 394.

Pointing to the fact that the parties had come close to resolving their differences and that a court decision would tend to "tilt the the scales" in a legislative-executive branch dispute in a manner disruptive of the "country's constitutional balance", Ibid, the court remanded the case for further negotiations under the District Court's supervision. These negotiations did not produce a settlement and the case went back to the Court of Appeals. In its second opinion, the Court formally rejected the claims of both branches of unreviewable, absolute power, holding that "neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional

title, and it is or may be possible to establish an effective judicial settlement." 567 F.2d 121 (D.C. Cir. 1977.) The Court outlined the shared role of the President and Congress underlying the information dispute:

> The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. While powers relating to national security, including the functions of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the Senate, consent to treaties and the appointment of ambassadors.
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> More significant, perhaps, is the fact that the Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security. These powers have been viewed as falling within a "zone of twilight" in which the President and Congress share authority or in which its distribution is uncertain. The present dispute illustrates this uncertainty. The concern of the executive that public disclosure of warrantless wiretapping data may endanger national security is, of course, entirely legitimate. But the degree to which the executive may exercise its discretion in implementing that concern is unclear when it conflicts with an equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative functions. Id. at 128.

The court once again declined to rule in favor of either party, opting "to continue our approach of gradualism." Id. at 133. It suggested a means of sampling and verification with the District Court being available to resolve conflicts and take remedial action. Recognizing that its approach entailed delay and left in place an injunction frustrating a valid congressional investigation, the court nevertheless saw its course of action as supportive of the machinery of government:

> The Separation of Powers often impairs efficiency, in terms of dispatch and the immediate functioning of government. It is the long-term staying power of government that is enhanced by the mutual accommodation required by the Separation of Powers. Id. at 133.

On December 21, 1978, the case was dismissed on the joint motion of both parties, a Memorandum of Understanding having been entered into and implemented which provided the subcommittee with access sufficient to satisfy the subpoena. See, Joint Motion to Dismiss, in United States v. A.T.&T., Civ. No. 76-1372, filed, December 12, 1978.

Obviously, while the cases indicate the considerations to be taken into account in resolving an interbranch dispute, these are the beginning, not the end, of the inquiry. As respects information concerning covert activities undertaken by the Central Intelligence Agency, the respective interests of the political branches present "nerve-center constitutional questions." For these reasons the court in the American Tel. & Tel. Case strove mightly to effect a voluntary settlement and thus avoid difficult constitutional questions with assumedly unsettling political implications.

There is no gainsaying that the President has power to maintain the secrecy of information pertaining to national security as an aspect of his responsibility for foreign and military affairs. This power is at zenith, as indicated in United States v. Nixon, 418 U.S. at 706, when it regards a claim of need, "to protect military, diplomatic or sensitive national security secrets." Whether an executive claim to absolute discretion in the case of such information would prevail over a statutory requirement of prior notice to the congressional intelligence committees has not been clearly decided. In United States v. Nixon, the asserted privilege was a general confidentiality privilege which while important was subordinate to the requirements of due process in criminal proceedings. As noted, the Court did not answer what the consequences of Executive Privilege involving national security information might be on either judicial or legislative activities.

Traditionally, the courts have deferred to the executive in areas of military and foreign affairs. However, these cases have involved governmental clashes with private interests wherein the contested executive action has been in accord, not at variance, with the congressional will. These cases do not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers. In other words, the effect of sustaining execlusive presidential control in such a case is to disable the Congress from acting upon the subject.

Wide as the President's powers may be in this regard, the Constitution confers upon Congress other powers equally inseparable from the national security, including the power to declare war, raise and support armed forces and, in the case of the Senate consent to treaties and the appointment of ambassadors. The Congress cannot discharge any of these responsiblities without information. "The Constitution does not subject [the] lawmaking power of Congress to presidential or military supervision or control." Youngstown Co. v. Sawyer, 343 U.S. at 588. "That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history," Id., Jackson J., concurring, 343 U.S. at 644.

Ultimately at issue in a statutory requirement of prior notice are fundamental concerns of war and peace. In brief, the broadest of all constitutional powers -- "the power to wage war is the power to wage war successfully"-- underlies the whole subject. Insofar as the corresponding congressional - presidential powers in this area are concerned, it is given to Congress to make the fundamental policy decision that converts the Nation from peace to a war footing. Accordingly, congressional demands for information in advance of covert activities,

would seem reasonable to discharge this all important responsibility. An additional element inveighing in favor of the congressional side of an interbranch dispute referred to American Tel. & Tel. Case is the demanding committee's "track record" for security. Both the Senate and House Intelligence Committees have developed elaborate procedures governing public disclosures of sensitive information and their respective records to date seem good.

In our view, it follows from the foregoing that whether the Director of Central Intelligence can withhold information from a duly constituted committee of Congress under his statutory authority to protect intelligence sources and methods is a matter for Congress to determine. ~~As indicated~~, the Director's present authority to withhold information on the mentioned grounds derives from statute. See 50 U.S.C. § 403g. Although "[t]he legislative history of section 403g is scant," Baker v. Central Intelligence Agency, 580 F.2d 664, 668 (C.A.D.C. 1978), both in terms of its language (e.g., "provided, that in furtherance of this section the Director of the Bureau of the Budget [now Office of Management and Budget] shall make no reports to the Congress in connection with the Agency...") and seeming deference by Congress since the adoption of the Act in 1949, it constitutes arguable support for the view that the Director may withhold information from Congress. However, this result, in our view, is more a matter of congressional policy than constitutional compulsion and Congress in 1980 is not perpetually bound by the judgment of the Congress which adopted the Central Intelligence Agency Act of 1949. In other words, Congress can modify section 403g to make it clear that this authority does not apply to requests for information from a duly constituted oversight committee of Congress whose procedures (as those of the current Senate and House Intelligence

Committees) guarantee the security of such information. See United States v. American Tel. & Tel. Co., 551 F.2d 384, 394 (C.A.D.C. 1976).

To some extent, Congress has effectively modified section 403g by the adoption of the so-called Hughes-Ryan Amendment, 22 U.S.C. § 2422, which limits the use of funds appropriated under any act, "by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless ... the President ... reports ... such operation to the appropriate committees of the Congress...." Although differences of opinion exist regarding the timing of the specified reports as between coming before or after implementation of an intelligence operation, no one seems to have questioned Congress' right thereto. In any event, assuming arguendo that the President may invoke Executive Privilege to withhold specific information from a duly constituted oversight committee of Congress, Congress can condition appropriations in such a manner as to either obtain desired information or prohibiting the expenditure of public moneys for that purpose.

The appropriation of funds is clearly a legislative function. It derives from the constitutional provision which states that "no money shall be drawn from the treasury but in consequence of appropriations made by law." U.S. Const. Art. I, § 9, cl. 7. The Executive, except for recommendation and veto, has no legislative power. U.S. Cont. Art. I, Sec. 7 Cl. 2; Art. II, Sec. 3. Youngstown Co. v. Sawyer, 343 U.S. 519, 587-588 (1952). "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to a lawmaker. The Constitution limits his function in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither

silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'all legislative powers herein granted shall be vested in a Congress of the United States ...' After granting many powers to the Congress, Article I goes on to provide that Congress may 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof'... The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control." (Emphasis added.)

The absolute control of the moneys of the United States is in the Congress which is responsible for exercise of this power only to the people. Hart's Case, 16 Ct. Cl. 484 (1880), aff'd 118 U.S. 62 (1886). Thus, it has been said that -

> Congress in making appropriations has the power and authority to designate the purpose of the appropriation, but also the terms and conditions under which the executive department of the government may expend the appropriation. ...
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> The purpose of the appropriations, the terms and conditions under which said appropriations were made is solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same. Any attempt by the judicial branch of our government to interfere with the exclusive powers of Congress would be a plain invasion of the powers of said body conferred upon it by the Constitution of the United States. Spaulding v. Douglas Aircraft Co., 60 F.2d 419 (9th Cir. 1946). (Emphasis added.)

Another court has said:

> That the power to appropriate federal funds has been exclusively entrusted to Congress is too well established to be question or argued. It is equally well settled that Congress has the power to attach to its appropriations any legitimate conditions.

State of Ohio v. United States Civil Service Com'n, 65 F. Supp. 776, 780 (S.D. Ohio, 1946).

The fact that in the exercise of one of its constitutionally delegated powers Congress narrows the range of presidential options in his role as Commander-in-Chief does not render it infirm. Indeed, only two express executive powers, the power to pardon "offenses against the United States" and the power to "receive ambassadors and other public ministers", are autonomous and hence not subject to the legislative power. Otherwise, the President is dependent upor Congress for authority and money. In the words of an outstanding scholar on the American Presidency:

> Two points are worth remembering [re. the real power of Congress over the President], first, that no great policy, domestic or foreign, can be maintained effectively by a President without the approval of Congress in the form of laws and money, and second, that there is no way under our Constitution for a President to force Congress to pass a law or spend money against its will. Rossiter, The American Presidency 47 (1963).

As observed by Mr. Justice Jackson, concurring, Youngstown Co. v. Sawyer, 343 U.S. at 641, the words Commander-in-Chief "imply something more than an empty title."

> ... But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.
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> The Constitution expressly places in Congress power "to raise and support Armies" and "to provide and maintain a Navy." This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what

means they shall be spent for military and naval procurement.

There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him any army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.

That military power of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Thus, even in war time, his seizure of needed military housing must be authorized by Congress. It also was expressly left to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions ...." Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of war power as an instrument of domestic policy. Fulfilling that function, has authorized the President to use the army to enforce certain civil rights. On the other hand, Congress has forbidden him to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress.

His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the presidential office. 343 U.S. at 641-646. (Emphasis added.)

In sum while the President's military authority (i.e., commanding the armed forces) is supreme under the Constitution, he discharges his responsibilities within the confines of implementing legislation and appropriation of funds.

Does the President's duty to execute the laws enable him to disregard a statutory requirement calling for advance information of convert activities because of asserted unconstitutionality? The argument in opposition to such a proposition was stated by Willoughby, 3 The Constitutional Law of the United States § 983 (1299) as follows:

> That the President has the right to veto an act of Congress because he believes it to be an unconstitutional measure, even though he thus substitutes his judgment as to this for that of Congress, is beyond doubt. The objection which has sometimes been made that in so doing the President arrogates to himself a judicial function is without weight.
>
> In placing a veto upon a congressional enactment, the President is exercising, not a judicial, but a legislative function. His veto is of the nature of a powerful vote, and his decision as to the way his vote is to be cast must be formed from his own views and opinions. The Constitution gives him the power and he has a right to use it; indeed, it is his duty to use it. He has the right to use his veto upon the ground of unconstitutionality even when a measure of similar character has received previous interpretation by the Supreme Court, and has been sustained. His constitutional right or even duty of thus using his veto power has not been impaired by the manner in which any previous act has been treated. In 1832 Jackson vetoed the bill providing for a recharter of the National Bank. This he did mainly on the ground of unconstitutionality, notwithstanding the fact that in the case of McCulloch v. Maryland this institution had been carefully examined by the Supreme Court and pronounced constitutional. In support of his action, Jackson, in his veto message, said: "The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the constitution. Each public officer who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it is understood by others.

It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Court when it may be brought before them for a judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." Jackson was no lover of the Supreme Court, and in this instance certainly stated the case strongly, but in his action he was undoubtedly correct.[48] Whether he acted wisely, or even with proper respect toward the other branches of the government is another question.

Whether the President has the right to refuse to execute a law, passed during the term of a predecessor, or over his veto, because he deems it unconstitutional, is an entirely different question from that just considered. Here the President has to deal not with a measure in the process of enactment, as is the case when the veto is exercised, but with a bill that has passed through all the constitutional forms of enactment, and has become a law, and it would seem that he has no option but to enforce the measure. The President has not been given the power to defeat the will of the people or of the legislature as embodied in law. The reasons for maintaining a contrary opinion, as usually stated, are these: The Constitution of the United States is the supreme law of the President as well as of the private citizen. It is his duty to "take care that the laws be faithfully executed," but he is also sworn to "preserve, protect and defend the Constitution," and this he must do upon his own interpretation of the Constitution, and not upon that of others. The Constitution is but a law of high degree, and is, therefore, one of the very laws that he must take care are faithfully executed. Says one writer:[49] "If the President must execute all laws, he must execute an *ex post facto* law or any other law flying in the teeth of the constitution; a partisan statute passed over his veto can rob him of the right to be commander-in-chief, to nominate or remove from office, or of any other right expressly conferred upon him; and it is at once evident that in these cases Congress would be quite as plainly taking away from the President the power which the constitution has expressly given. A two-thirds majority could alter at will many important provisions of the constitution, and the members could only be called to account at a reëlection. That instrument in these cases would not be self-supporting, and would furnish none of those checks of which we have all heard so much. But if the contrary view is true, the check system comes into perfect play; for then the President's right to refuse his assistance to an unconstitutional law will check Congress, while the risk of impeachment will check the President."

[48] Von Holst holds a contrary view. *Constitutional History*, I, 46.

[49] *American Law Review*, XXIII, 375.

The errors in this argument are sufficiently plain. In the first place, the President does not stand upon the same footing as regards the Constitution, as does the private citizen. The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If, upon his own judgment, he refuse to execute a law and thus nullifies it, he is arrogating to himself controlling legislative functions, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President. That there is danger that Congress may by a chance majority, or through the influence of sudden great passion, legislate unwisely or unconstitutionally, was foreseen by those who framed our form of government, and the provision was drawn that the President might at his discretion use a veto, but this was the entire extent to which he was allowed to go in the exercise of a check upon the legislation. It was expressly provided that if, after his veto, two-thirds of the legislature should again demand that the measure become a law, it should thus be, notwithstanding the objection of the Chief Executive. Surely there is here left no further constitutional right on the part of the President to hinder the operation of a law.

It is the duty or privilege of a private citizen to refuse obedience to a law, if, upon careful consideration and investigation, he considers it to be unconstitutional, but he does so at his own risk, and if he is wrong he must abide by the legal consequences. Then, too, only his particular interest is directly involved. If, however, it be said that the President also refuses his obedience at his own risk, namely, the danger of impeachment and possible subsequent civil or criminal prosecution, the reply is that, in the first place, a refusal on his part to execute the law nullifies it in all its applications for all people; and in the second place, that impeachment is not a check. As an instrument for checking unconstitutional action on the part of the President, impeachment has been found too cumbersome. If, in the case of the extreme opposition and contest between both Houses of Congress and President Johnson, an impeachment was not successful, it must be admitted that as a means of future restraint upon the Chief Executive it will not be greatly feared.

That the President and all other officers of the government have not the right to refuse obedience to a judgment of the Supreme Court, because he or they believe such judgment to be based upon an incorrect interpretation of the Constitution, scarcely needs argument. This case is stronger than the former one by the additional support of the judiciary. To refuse now to execute the command of the court is to assume the judicial power of a court of appeals as well as legislative functions.

APPENDIX P

Congressional Research Service
The Library of Congress

PREPARED BY RAYMOND J. CELADA, SENIOR SPECIALIST IN AMERICAN PUBLIC LAW, LIBRARY OF CONGRESS

February 11, 1987

TO : House Permanent Select Committee on Intelligence
Attn: Bernard Raimo

FROM : American Law Division

SUBJECT: Analysis of Constitutionality of Proposal Enhancing Congressional Oversight of Intelligence Activities

Reference is made to your inquiry of February 5, 1987 requesting a constitutional analysis of H.R. 1013, legislation intended to strengthen the system of congressional oversight of the intelligence activities of the United States.

Consistent with the objective of giving Congress a more effective voice in the conduct of foreign covert operations for other than information gathering purposes, H.R. 1013 amends two key legal provisions regarding intelligence activities and the conduct of congressional oversight of those activities: Section 662 of the Foreign Assistance Act of 1961 (FAA), 22 U.S.C. § 2422, and Section 501 of the National Security Act of 1947 (NSA), 50 U.S.C. § 413.

Section 662 of the FAA provides that ---

> No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947.

At the present time, before any appropriated funds may be expended by or on behalf of the CIA for foreign covert operations (other than intelligence gathering activities), the President is required to find that each individual operation is important to the national security of the United States. Moreover, each operation is deemed to be a significant anticipated intelligence activity for purposes of section 501 of the NSA, which, in turn, means that the Director of Central Intelligence has to keep the House and Senate Select Intelligence Committees "fully and currently informed of" that operation. The obligation imposed on the Director of Central Intelligence as well as the heads of other U.S. entities involved in intelligence activities by section 501 of the NSA and incorporated by section 662 of the FAA as it stands does not mean that congressional oversight committees have to approve an anticipated intelligence activity before it may be initiated. Moreover, if the President determines that it is essential to limit prior notice to meet extraordinary circumstances affecting vital interest of the United States, he may notify the chairmen and ranking minority members of the oversight committees, the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate. The latter is clearly an alternative procedure available in appropriate circumstances to avoid giving prior notice to the full intelligence committees.

By necessary implication, subsection (b) indicates that the President must fully inform the intelligence committees "in a timely fashion" of foreign intelligence operations for which no prior notice was given in the manner required by section 501(a).

Section 2 of H.R. 1013 proposes two significant changes to section 662 of the FAA. First it requires that the presidential finding which is essential to go ahead with a foreign covert operation has to be "in writing". Second, it requires that a copy of the written finding be given in advance of the conduct of the operation to the congressional oversight committees, or to the previously described eight persons identified in section 501(a)(1)(B) of the NSA, and to the Vice President, the Secretary of State, the Secretary of Defense and the Director of Central Intelligence. Briefly, section 662 as amended by section 2 of the proposal would retain its broad reporting features except that the report would have to be a written one and would have to be given to the four specified executive officers in addition to either the intelligence committees or the chairmen and ranking minority members of those committees and the House and Senate leaders.

Section 3 of H.R. 1013 amends section 501 of the NSA, portions of which have been just discussed because of the connection between significant anticipated intelligence activities and foreign covert operations under section 662 of the FAA. Section 501 provides that ---

> (a) Reports to Congressional Committees of current and proposed activities
>
> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution 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, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall—
>
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;

(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

(b) Failure to inform; reasons

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

(c) Establishment of procedures for relaying information

The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b) of this section.

(d) Protection from unauthorized disclosure

the [1] House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under this section. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

(e) Construction of authority conferred

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

Section 501 of the NSA, as added in 1980, is the basic congressional oversight provision of U.S. intelligence activities whether performed by the CIA or departments, agencies and other federal entities. The Director of Central Intelligence and the heads of any of the mentioned units of government that are involved in intelligence activities are required to keep the intelligence committees "fully and currently informed" of those activities, "including any significant anticipated intelligence activity." This reporting function is to be performed in a manner that is "consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches ..., and ... with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods ..."

Although section 501 clearly requires the intelligence committees to be informed in advanced (e.g., significant anticipated intelligence activity) committee "approval" is not a condition precedent to the initiation of any such anticipated intelligence activity. As previously noted, section 501 additionally provides that if the President determines that vital interests require it, notice concerning a significant anticipated intelligence activity can instead be given to the chairmen and ranking members of the intelligence committees, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate.

In addition to keeping the oversight committees "fully and currently" informed of intelligence activities, affected executive branch heads have to provide additional relevant information which is requested by the committees. Futhermore, these persons have to inform the committees "in a timely fashion" of "any illegal intelligence activity or significant intelligence failure" and corrective action taken or contemplated.

Section 501(b) is intended to apply to those situations when prior notice of intelligence operations has not been given to the oversight committees. In these situations the President is to "fully" inform them "in a timely fashion" of foreign covert operations and justify noncompliance with the prior notice requirement.

Section 501(c) directs the President and the intelligence committees to estsblish procedures for relaying sensitive information between them.

Section 501(d) requires the House and Senate to establish procedures to protect sensitive information given to the intelligence committees from unauthorized disclosure and directs the committees to keep committees and members of their respective houses advised of intelligence activities that require their attention.

Section 501(e) makes it clear that the intelligence committees may not be denied information because it is classified or relates to intelligence sources and methods.

Section 3 of H.R. 1013 affects directly or indirectly and to a greater or lesser extent all of the subsections of section 501 of the NSA. Symbolizing the bill's fundamental purpose of reducing the opportunities for evading the obligation of keeping the intelligence committees "fully and currently informed", the proposal eliminates the injunction that executive branch officials inform the committees to the extent consistent with "all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government ...." The elimination of the quoted language — which connotes more than it denotes and likely reflects an excess of caution on the part of its drafters — leaves only one statutory standard to guide executive branch officials in furnishing information concerning intelligence activities to the oversight committees, namely, to do it "with due regard for ... protect[ing] [it] from unauthorized disclosure".

Possessed of more than symbolic value, however, is the proposal's repeal of section 501(b) which allows the President to give subsequent notice to the intelligence committees when prior notice of an intelligence activity has not been given. This change largely but not totally eliminates the occasions for departing from the requirement of prior congressional notice.

The legislation makes a number of conforming changes required by elimination of section 501(b); it redesignates the subsections and corrects internal references to the redesignated subsections.

Finally, the proposal would add a new subsection (e) to section 501 of the NSA, which admits of a singular occasion for not giving prior notice of a significant anticipated intelligence activity. The exceptional circumstance is one "affecting the vital interest of the United States, and only where time is of the essence." Furthermore, unlike existing section 501(b) which allows reporting in analogous circumstances "in a timely fashion", the proposal's new subsection (e) provides that notice to Congress in the extraordinary circumstances that it postulates "may be deferred for not more than 48 hours after the initiation of such an activity or the signing of a finding pursuant to section 662 of the [FAA] of 1961." Briefly, the legislation in this regard narrows the circumstances for the conduct of foreign covert operations before informing Congress and effectively spells out "in timely fashion" by allowing only a two day deferral.

H.R. 1013 raises a number of constitutional issues, chief among which are whether Congress may compel the Executive Branch to provide it with advance information concerning intelligence operations and whether it violates separation of powers or other principles to require that similar information be given to such highly placed constitutional or executive officials as the Vice President of the United States, the Secretary of State, the Secretary of Defense, and the Director of Central Intelligence.

The first of these two issues, i.e., whether and to what extent the assumed constitutional power of the President to assure secrecy of sensitive national security information is assertable against Congress, was examined at some length in a report which was prepared in 1980. A copy of that report, which coincidentally was requested in connection

with consideration at that time of proposals which led to enactment of section 501 of the NSA, is annexed hereto. 126 Congressional Record 13096-1310 (1980). Decisional and other legal developments in the intervening six years do not appear to affect the general conclusion that intelligence activities are a joint responsibility of the President and Congress and, therefore, the latter is entitled to obtain advance notice of those activities. The congressional powers immediately implicated, among others, are the war powers, the power of the purse, and the fact that the authority of the Director of Central Intelligence to safeguard information is authorized by statute.

For related developments regarding the Nixon case approach of balancing the interests in a congressional demand for information from the Executive. United States v. Nixon, 418 U.S. 683 (1974). See, generally, Congressional Access to Information from the Executive: A Legal Analysis, CRS Rept. No. 86-50A, March 10, 1986.

The 1980 report concludes with an extended excerpt from Prof. Willoughby rejecting the notion that the President possesses power to refuse to execute laws which he deems unconstitutional. Litigation involving the Competition in Contracting Act (CICA), 31 U.S.C.A. § 3553 et seq. has occasioned judicial commentary in accord with Willoughby's views. Typical of these remarks is that of the Third Circuit in Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F. 2d 875, 889 (1986):

> . . . This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best.[11]

11. *See Kendall v. United States*, 12 Pet. 524, 613, 37 U.S. 524, 613, 9 L.Ed. 1181 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissable.") The President's job is to execute law, not to create it. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S.Ct. 863, 866, 96 L.Ed. 1153 (1952). Moreover, "it is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). Absent a patently unconstitutional law or one infringing liberty interests or other fundamental rights of individuals, the President's asserted power and "duty" not to execute laws he finds to be unconstitutional is questionable. *See Hearings* at 39, 44 (testimony of Prof. Sanford Levinson); *id.* at 46-47 (testimony of Prof. Eugene Gressman).

Although the decision in Bowsher v. Synar, 106A Ct. 3181 (1986), invalidating the Gramm-Rudman-Hollings budget reduction law may have some adverse implications for the CICA, these do not detract from the conclusion, expressed immediately above, that "[t]he President's job is to execute law, not to create it."

Insofar as the second issue is concerned, the Supreme Court in Nixon v. Administration of General Services, 433 U.S. 425, 445 (1977) indicated that laws calling for the exchange of information within the Executive Branch do not violate the separation of powers doctrine. At issue in the case was the Presidential Recording and Materials Preservation Act which directed the Administrator of General Services, an official of the Executive Branch, to take custody of former President Nixon's papers and tape recordings and separate purely personal and private materials from public materials; the latter to be retained and made available for public access. The Court gave short shrift to appellant's separation of powers challenge to the Act. Noting that the latter was intended to maintain the proper balance between the coordinate branches; the Court found highly

relevant that the Act provided for the custody of materials in officials of the Executive Branch and that employees of that branch have access only for lawful Government use, subject to regulations. Id. at 445. The Court concluded that the "regulation of materials generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." Id. at 445.

The Court's observations on the separation of powers are reproduced in their entirety as follows:

> A
>
> *Separation of Powers*
>
> We reject at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality. Moreover, the control over the materials remains in the Executive Branch. The Administrator of the General Services Administration, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees. Appellant's argument is in any event based on an interpretation of the separation-of-powers doctrine inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system. True, it has been said that "each of the three general departments of government [must remain] entirely free from the control or

coercive influence, direct or indirect, of either of the others . . . ," *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629 (1935), and that "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." *Id.*, at 630. See also *O'Donoghue* v. *United States*, 289 U. S. 516 (1933); *Springer* v. *Philippine Islands*, 277 U. S. 189, 201 (1928).

But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story[*] was expressly affirmed by this Court only three years ago in *United States* v. *Nixon*, *supra*. There the same broad argument concerning the separation of powers was made by appellant in the context of opposition to a subpoena *duces tecum* of the Watergate Special Prosecutor for certain Presidential tapes and documents of value to a pending criminal investigation. Although acknowledging that each branch of the Government has the duty initially to interpret the Constitution for itself, and that its interpretation of its powers is due

[*] Madison in The Federalist No. 47, reviewing the origin of the separation-of-powers doctrine, remarked that Montesquieu, the "oracle" always consulted on the subject,

"did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, pp. 325–326 (J. Cooke ed. 1961) (emphasis in original).

Similarly, Mr. Justice Story wrote:

"[W]hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree." 1 J. Story, Commentaries on the Constitution § 525 (M. Bigelow, 5th ed. 1905).

great respect from the other branches, 418 U. S., at 703, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952).

> "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, *but the separate powers were not intended to operate with absolute independence.*" 418 U. S., at 707 (emphasis supplied).

Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight departments of government," 408 F. Supp., at 342.[6] Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States* v. *Nixon*, 418 U. S., at 711–712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Ibid.*

It is therefore highly relevant that the Act provides for custody of the materials in officials of the Executive Branch and that employees of that branch have access to the materials only "for lawful Government use, subject to the [Adminis-

[6] See also, *e. g.*, 1 K. Davis, Administrative Law Treatise § 1.09 (1958); G. Gunther, Cases and Materials on Constitutional Law 400 (9th ed. 1975); L. Jaffe, Judicial Control of Administrative Action 28–30 (1965); Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1387–1391 (1974); Ratner, Executive Privilege, Self Incrimination, and the Separation of Powers Illusion, 22 U. C. L. A. L. Rev. 92–93 (1974).

trator's] regulations." § 102 (d); 41 CFR §§ 105–63.205, 105–62.206, and 105–63.302 (1976). For it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function. While the materials may also be made available for use in judicial proceedings, this provision is expressly qualified by any rights, defense, or privileges that any person may invoke including, of course, a valid claim of executive privilege. *United States* v. *Nixon*, *supra*. Similarly, although some of the materials may eventually be made available for public access, the Act expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege," § 104 (a)(5), and to return purely private materials to appellant, § 104 (a)(7). These provisions plainly guard against disclosures barred by any defenses or privileges available to appellant or the Executive Branch.[7] And appellant himself concedes that the Act "does not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it." Brief for Appellant 119. The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch.

Thus, whatever are the future possibilities for constitutional

[7] The District Court correctly interpreted the Act to require meaningful notice to appellant of archival decisions that might bring into play rights secured by § 104 (a)(5). 408 F. Supp., at 340 n. 23. Such notice is required by the Administrator's regulations, 41 CFR § 105–63.205 (1976), which provide: "The Administrator of General Services or his designated agent will provide former President Nixon or his designated attorney or agent prior notice of, and allow him to be present during, each authorized access."

conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face. And, of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, *e. g.*, the Freedom of Information Act, 5 U. S. C. § 552 (1970 ed. and Supp. V); the Privacy Act of 1974, 5 U. S. C. § 552 (a) (1970 ed., Supp. V); the Government in the Sunshine Act, 5 U. S. C. § 552b (1976 ed.); the Federal Records Act, 44 U. S. C. § 2101 *et seq.*; and a variety of other statutes, *e. g.*, 13 U. S. C. §§ 8–9 (census data); 26 U. S. C. §6103 (tax returns). Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy. Cf. *EPA* v. *Mink*, 410 U. S. 73, 83 (1973); *FAA Administrator* v. *Robertson*, 422 U. S. 255 (1975).[8] Similar congressional power to regulate Executive Branch documents exists in this instance, a power that is augmented by the important interests that the Act seeks to attain. See *infra*, at 452–454.

[8] We see no reason to engage in the debate whether appellant has legal title to the materials. See Brief for Appellant 90. Such an inquiry is irrelevant for present purposes because § 105 (c) assures appellant of just compensation if his economic interests are invaded, and, even if legal title is his, the materials are not thereby immune from regulation. It has been accepted at least since Mr. Justice Story's opinion in *Folsom* v. *Marsh*, 9 F. Cas. 342, 347 (No. 4,901) (CC Mass. 1841), that regardless of where legal title lies, "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers." Appellant's suggestion that the *Folsom* principle does not go beyond materials concerning national security and current Government business is negated by Mr. Justice Story's emphasis that it also extended to materials "embracing *historical* . . . information." *Ibid.* (Emphasis added.) Significantly, no such limitation was suggested in the Attorney General's opinion to President Ford. Although indicating a view that the materials belonged to appellant, the opinion acknowledged that "Presidential materials" without qualification "are peculiarly affected by a public interest" which may justify subjecting "the absolute ownership rights" to certain

Id. at 441-446.

As an aspect of separation of powers intended to maintain the proper balance between coordinate branches the relevance of executive privilege to deny access to national security information to the chief national security officials of the Executive Branch seems both questionable and paradoxical.

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APPENDIX 6

[June 21, 1988]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3822

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

SHORT TITLE

SECTION 1. This Act may be cited as the ``Intelligence Oversight Act of 1988''.

REPEAL OF HUGHES-RYAN AMENDMENT

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

OVERSIGHT OF INTELLIGENCE ACTIVITIES

SEC. 3. Title V of the National Security Act of 1947 is amended by striking out section 501 (50 U.S.C. 413) and inserting in lieu thereof the following new sections:

``GENERAL PROVISIONS

``SEC. 501. (a)(1) 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.

``(2) 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.

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

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

``(e) Nothing in this Act shall be construed as authority

to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.

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

``REPORTING INTELLIGENCE ACTIVITIES OTHER THAN COVERT ACTION

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

``(1) keep the intelligence committees fully and currently informed of all intelligence activities, other than a covert action as defined in section 503(e), which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and any significant intelligence failure; and

``(2) furnish the intelligence committees any

information or material concerning intelligence activities, other than covert actions, which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

``PRESIDENTIAL APPROVAL AND REPORTING OF COVERT ACTIONS

``SEC. 503. (a) The President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government unless the President determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States, which determination shall be set forth in a finding that shall meet each of the following conditions:

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

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

``(3) Each finding shall specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such actions. Any employee, contractor, or contract agent of a department, agency, or entity of the United States Government other than the Central Intelligence Agency directed to participate in any way in a covert action shall be subject either to the policies and regulations of the Central Intelligence Agency, or to written policies or regulations adopted by such department, agency, or entity, to govern such participation.

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

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

``(b) To the extent consistent with due regard for the protection from unauthorized disclosure of classified

information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a covert action--

``(1) 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

``(2) 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 actions authorized by the finding, except as otherwise provided in paragraph (2) and paragraph (4).

``(2) 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.

``(3) In a case under either paragraph (1) or (2), 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 specified in paragraph (2), a statement of the reasons for limiting such access shall also be provided.''

``(4)(A) 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.

``(B) The President shall ensure that notice of a covert action undertaken pursuant to this paragraph is provided to the intelligence committees, or to the Members of Congress specified in paragraph (2), 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 this paragraph 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)(2), 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 covert activities (other than activities described in paragraph (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.''.

LIMITATIONS ON USE OF FUNDS

SEC. 4. Section 502 of the National Security Act of 1947 (50 U.S.C. 414)--

(1) is redesignated as section 504;

(2) is amended in subsection (a)(2) by striking out ``501'' and inserting in lieu thereof ``503''; and

(3) is amended by adding at the end the following:

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

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

TRANSFERS OF DEFENSE ARTICLES OR SERVICES

SEC. 5. Section 503 of the National Security Act of 1947 (50 U.S.C. 415)--

(1) is redesignated as section 505; and

(2) is amended in subsection (a)(1) by inserting ``or the anticipated transfer in any fiscal year of any aggregation of defense articles or defense services,'' after ``service''.

APPENDIX 7

Q: Don't you find it instructive that the only covert action that has not been the subject of prior notice since the passage of the Oversight Act was one that was formulated and executed by mid-level NSC personnel, was poorly planned and staffed, was opposed by the Secretary of Defense and the Secretary of State, and has received resounding bi-partisan condemnation in the Congress and in the Executive Branch? Doesn't this situation demonstrate precisely why prior notice is necessary and why informed but outside advice is important?

A: -- The problems experienced in the Iran-Contra affair, in our view, were not due to the lack of prior notice to Congress. They were due in large part to a failure to follow established procedures and policies within the Executive Branch. We believe that the President has taken significant steps to ensure that this will not reoccur, including rigorous internal procedural requirements in NSDD 286 to ensure the knowledge and participation of the President's senior advisers.

-- Nonetheless, we recognize the importance of prior notice, and do normally provide such notice. As I indicated in my testimony, there have only been three instances since the enactment of the Hughes-Ryan Amendment of 1974 in which prior notice of a covert action was not given. The only significant issue in our view is whether notice should be required within 48 hours in all cases, without exception. We continue to believe that a rigid, standard is inadvisable.

Q: Do you view covert actions as ordinary off-the-shelf tools of American foreign policy, or do you see them as significant undertakings to be used only in extraordinary circumstances? If the latter, isn't the fact that they significant and extraordinary precisely the reason Congress should be notified in advance, and the more extraordinary it is, the more reason for such notification in order to develop a consensus on such a significant undertaking?

A: -- Covert action can be a critical tool of foreign policy. Covert actions require the personal approval of the President, and this in itself ensures that covert actions are not undertaken lightly and without a significant rationale.

-- However, I would hestitate to say categorically that covert actions are only undertaken in extraordinary circumstances as such. Covert actions are undertaken in circumstances where the acknowledgement of U.S involvement would hinder our foreign policy goals or increase the possibility of confrontation. That is the main criteria for covert actions.

-- I would like to emphasize, however, that any program of secret or covert action by the U.S. Government to shape events in foreign countries should be something that the American people would support. The President has stated that we must ensure that if a covert action is disclosed, the American people would say that it "makes sense." The

covert action should be supported by Congress, and we generally do provide advance knowledge to Congress in order to help develop a consensus within the U.S. Government.

-- I do not agree that the President should be denied flexibility to defer Congressional notification in extraordinary cases simply because they are extraordinary. On rare occasions, such a deferral may become necessary because of unique circumstances which require an exceptional measure of security. An example is the case of the Canadian Embassy in Iran and U.S. hostages, where absolute secrecy was vital.

Q: You prefer, I take it, that the current statutory provision requiring, as a minimum, "timely" notice not be changed. What is your definition of "timely." (The Justice Department has stated that "timely fashion is whatever the President say it is.")

A: Section 501(b) of the National Security Act provides that the President shall inform the intelligence committees in a timely fashion of certain intelligence activities in foreign countries. The Justice Department has provided Congress with a December 17, 1986 memorandum on the legal definition of "timely fashion."

-- That opinion concluded that this provision had to be construed in light of the President's broad constitutional authority to conduct foreign policy, and in such a manner as to leave the President with discretion to postpone notification until he determines that the success of an operation will not be jeopardized.

-- In our view, the decision on when to provide notice must ultimately be made by the President based on the particular facts surrounding a covert action. I do not believe that it would be appropriate for me to second-guess the President.

Q: Could you explain precisely how giving prior notice of covert actions to the congressional leadership will, as you note in your statement, "fail to preserve the flexibility and authority the President needs?"

A: --Giving such notice to Congress is clearly not objectionable in principle. Indeed, the President has made it clear that Congress shall normally be informed within 48 hours of the approval of any finding.

-- However, there may be situations where prior notice of an operation or a rigid standard on notification would jeopardize an operation. For example, Judge Webster and other Administration witnesses have pointed out the unusual situation with the Canadian Embassy several years ago in Iran. Our concern is with such extraordinary and unforseable cases. A rigid and inflexible 48 hour standard would hamper our ability to respond in a flexible and successful manner.

Q: Secretary Armacost, in testimony before the House Intelligence Committee you testified," that a covert action must be consistent with U.S. law, U.S. policy and consistent with natural values. ... and the process needs comprehensive review and support from and accountability to the Congress." H.R. 3822 puts that laudable premise into legislation and yet you don't support H.R. 3822. Why not?

A: -- It has been the consistent view of the Administration since the introduction of S.1721 and H.R. 3822 that additional legislation is not necessary to deal with covert action. The President's NSDD 286 is an excellent procedure to deal with this matter.

-- Like the NSDD, H.R. 3822 is based on the second premises referred to in your question. However, it contains a rigid and inflexible 48 hour provision, which in our view is unconstitutional. That is the reason why we must oppose this bill.

Q: Secretary Armacost, your statement implies that the Iran Arms sales policy was an exception and not the rule. Do you agree that the decision by the President to sell arms to Iran was a major policy decision of the U.S. and was totally contradictory to our stated counter-terrorism policy?

Why, in your opinion, should prior notice have not been given?

A: -- The decision was clearly one with major policy implications, and the Secretary of State has made our views on this matter clear last year during his testimony before the House and Senate Select Committees. I do not have anything to add to his testimony.

APPENDIX 8

Question: In testimony before the Senate Intelligence Committee, John McMahon, former Deputy Director for Operations and former Deputy Director Central Intelligence, when asked if he supported the 48-hour requirement, stated:

> I do. I come from the position that the Intelligence oversight Committee has to be an integral part of our intelligence program. And as such it has to be a partner, particularly since it holds the purse strings, as well as the conventional wisdom of our Nation. And I also believe very strongly that unless covert action has bipartisan support it is eventually doomed for failure.

Judge Webster, given Mr. McMahon's long tenure in the CIA at a very senior level, what is your reaction to this statement?.

Answer: I agree with Mr. McMahon statement that covert action needs to have bipartisan support as a key ingredient for success. I disagree with him, of course, on the wisdom of requiring, without exception, notification of a Finding within 48 hours. As I stated during my appearance before the Committee, I believe Mr. McMahon supported the 48 hour notification requirement because of the harm that would befall the CIA as an institution if it conducted a covert action without notifying Congress. While I can understand Mr. McMahon's concerns, I must also be mindful of the necessity for a President to have the flexibility in rare and extraordinary circumstance to delay notification beyond 48 hours.

Question: In testimony before the House Intelligence Committee, Professor Allan Goodman, a former CIA officer, now at the Georgetown School of Foreign Service, stated:

> I think the younger people at Langley understand this, appreciate it, and see the need for it because they see the negative consequences.
>
> The Intelligence officer today, and especially, tomorrow, who may have to carry out a covert operation is going to want to know two things: First, that the operation can be kept secure, and the other thing they will want to know is that Congress has been duly and properly informed and that they are going to undertake an activity that is fully consistent with U.S. laws.
>
> Because not to have than kind of assurance results as it did in the Iran-Contra affair in ruined careers, recriminations, low morale, and ultimately the exposure of a covert operation through the investigation and hearing process.
>
> So it seems to me that from the perspective 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.
>
> Would you comment on these statements?

Answer: I agree that an intelligence officer carrying out a covert action operation must have confidence that the operation is secure and that it is consistent with U.S. laws. I also believe that our officers need to operate on the assurance that Congress has been notified of the activity in accordance with the requirements of the law. Accordingly, if the law does allow the President the flexibility to delay notification beyond 48 hours, I believe our officers will not have a problem participating in a covert action for which notification has been delayed since it would be consistent with the requirements of the law.

Question: What, in your opinion, is the duty of a Member of the Intelligence Committee when he or she is briefed on a covert action and honestly believes it would be harmful to the national interest.

Answer: A Member can bring his views to the attention of other Committee Members, the Chairman, the DCI, the National Security Advisor, or the President if he or she believes a particular covert action would not be in our national interest. If the Member is not satisfied with the response he receives, the Member has the option of recommending to his collogues on the Committee that they prohibit further expenditures for the covert action in the classified annex to the Intelligence Authorization bill. If the Committee and the Congress adopt this position, the covert action will be terminated.

Question: During the hearings before the House Intelligence we heard that a prior notice requirement with a 48 hour delay for rare cases when time is of the essence would somehow destroy the President's ability to respond to adequately and flexibly to crises, yet the Iran caper, which all seem to condemn, is the only example of lack of prior notice since passage of the Oversight Act of 1980.

We also have heard that in some situations, where lives are on the line, prior notice should be avoided, yet the intelligence committees apparently routinely receive information of greater sensitivity that (sic) most covert actions, some of it pertaining to life or death situations. The thesis behind these dubious positions is that the information might leak.

--Isn't political risk the prime concern here? The justification to not notify--certainly it was in the case of Iran--and not constitutional principle or threat to life?

Answer: Political risk is not a proper justification to delay congressional notification of a covert action. Thus, if the the basis of the decision to delay notice of the Iran Finding had been domestic political risks, it would have been improper to do so. Threat of loss of life, on the other hand, can constitute a legitimate basis upon which to delay notification.

Question: Do you view covert actions as ordinary off-the-shelf tools of American policy, or do you see them as significant undertakings to be used only in extraordinary circumstances? If the latter, isn't the fact that they are significant and extraordinary precisely the reason Congress should be notified in advance, and the more extraordinary it is, the more reason for such notification?

Answer: I believe covert action is a significant undertaking that should only be used in selected circumstances. I would generally agree that because of their significance Congress should be notified in advance of covert action. However, I do not agree with the proposition that the more extraordinary the covert action is, the greater the need to inform Congress in advance. As I stated in my testimony, there may be rare and extraordinary instances where it is necessary to delay notice to ensure the successful completion of a covert action where, for instance, lives of Americans are at stake.

Question: Judge Webster, it is my understanding that in your testimony before the Senate Intelligence Committee during confirmation hearings on your nomination as DCI you stated, that you couldn't conceive of a situation in which notice of a covert action should not be given to the intelligence committees within a few days of its initiation, and that if the President ordered you to do otherwise, you would resign.

Is that an accurate statement of your position then?

Answer: It is accurate that during my confirmation hearings, I testified that I had difficulty in thinking of a situation that is so sensitive and life threatening that Congress could not be advised of it. However, I also made clear at the time that I did not want Congress to legislate a mandatory 48 hour notification requirement. In addition, I made clear that the President may take a different view on the issue of congressional notification where an extraordinary, potentially life threatening initiative could be damaged or lives put in jeopardy by premature disclosure.

It is not exactly accurate that I testified I would resign if the President ordered me to withhold notification for longer than two days. I did state I would resign if presented with the hypothetical situation in which the President withheld notice for prolonged periods of time over my repeated objections that withholding notice violated the spirit of the law.

Question: Does the Intelligence Committees have access to National Security Decision Directives?

Answer: National Security Decision Directives are Presidential documents and are in the custody of the NSC. I am informed that the NSC will consider access by the intelligence committees to NSDDs on a case-by-case basis. The request for NSDDs should be made in writing by the committee or subcommittee chairman and addressed to the Executive Secretary at the NSC.

Question: Do you believe it is wise for a Finding to be in writing and signed by the President? Do you believe signed Findings should be transmitted to the Intelligence Oversight Committees?

Answer: I believe it is appropriate for a Finding to be put in writing and signed by the President. Such a requirement will help to ensure that there will be no dispute on the scope of actions authorized by the Finding and Presidential approval for such actions.

The President has agreed to provide copies of signed Findings to the Intelligence Oversight Committees at the express request of the Committees. The Administration was told that some Members of Congress believed the Intelligence Committees could not be assured that the text of the Findings Congress receives would be the same as that signed by the President unless a copy of the Finding as signed by the President was provided to Congress. The President memorialized the agreement to meet the request of the Intelligence Committees for signed Findings in the National Security Decision Directive on special activities.

I share the concern that the risk of disclosure of a Finding increases when more copies of it are made available. The risk of disclosure must be weighed against the benefits Congress obtains by receiving a signed Finding. Should Congress determine that procedures other than those that provide the Intelligence Committees with copies of Findings as signed by the President would meet the requirements for notification of Congress as required by law, we would be prepared to work with Congress to develop such procedures.

Question: Has there been any instance of advance notification of a covert action to the intelligence committees that has resulted in a leak from those committees before the covert action has been initiated?

Answer: This is a difficult question to answer because it is generally not clear where a leak of classified information originates. On the one hand, no instance comes to mind where we can say with certainty that covert action information has been disclosed by the intelligence committee prior to the initiation of the activity. On the other hand, there have been leaks concerning such activities, accompanied by allegatons that the leaks came from the Congress. Overall, the intelligence committees have a good record of protecting classified information.

APPENDIX 9

HENRY HYDE'S SPEECH ON LEAKS AND CONGRESSIONAL OVERSIGHT

HON. ROBERT H. MICHEL
OF ILLINOIS
IN THE HOUSE OF REPRESENTATIVES

Thursday, March 31, 1988

Mr. MICHEL. Mr. Speaker, on Wednesday, March 30, 1988, my distinguished Illinois colleague and our good friend, HENRY HYDE, delivered a speech before a conference cosponsored by the American Bar Association Standing Committee on Law and National Security, the George Mason University School of Law, the Student Bar Association, and the International Law Society. I want to insert Mr. HYDE'S remarks in the RECORD at this point because I believe what he has to say about "'Leaks' and Congressional Oversight" reflects his usual good judgment, common sense, and uncommon wisdom.

"LEAKS" AND CONGRESSIONAL OVERSIGHT

(By Henry J. Hyde)

The grave effects of unauthorized disclosures upon U.S. intelligence and our foreign policy is a proolem we had better begin thinking about with some urgency.

The seriousness and universality of "leaks" are oovious. Yet many continue to maintain there's no "proof" that Congress leaks or that it leaks significantly. And, even when acknowledging problems in the executive branch or Congress, powerful legislative figures habitually object to virtually every initiative for investigating and punishing these occurrences, while failing to offer alternative solutions. My proposal for a Joint Intelligence Committee, which would replace the existing two House and Senate committees and reduce the number of Members and staff with access to intelligence information, has been resisted since 1984, when I first introduced the idea. Other suggestions, e.g., increasing use of the polygraph for investigative purposes, strengthening nondisclosure agreements and legal action against disclosers or the media, are branded as paranoia and violations of first amendment rights. But the critics never offer a better solution, and most seem content to drift with the tide—or, more accurately, the tidal wave.

If the Iran/Contra affair had one salutary effect, it was to highlight policymakers' fear of leaks and distrust of congressional discretion, and to expose dramatically the destructive effects this can have. Maximum compartmentalization within the executive branch and failure to notify Congress of the Iran initiative invited judgmental errors and courted political disaster. These steps were taken out of determination to explore a policy option considered potentially promising only if, by avoiding normal procedures, it could be kept secret. An unanswered question is how many times the opposite happens—how many times are innovative approaches to difficult foreign policy problems rejected or not even considered because their success depends upon a secrecy which probably could not be maintained?

Regardless of claims that Congress must be considered innocent until proven guilty of security lapses, damage to the oversight process occurred as soon as a widespread perception developed that the legislative branch could not be trusted. This perception has seriously affected executive branch cooperation with intelligence oversight committees. A similar attitude is harbored by allied intelligence services who decide whether to trade information with U.S. intelligence, what quality of information they will provide and whether they will actively cooperate with us in other ways. In testifying against proposals for mandatory and more detailed prior notifications to Congressional Intelligence Committees, Secretary of Defense Frank Carlucci, who formerly was a Deputy Director of Central Intelligence under President Carter and more recently served as President Reagan's National Security Adviser, stated that foreign governments cooperating on special activities are wary because they don't trust Congress to keep secrets:[1]

"'It is a matter of perceptions,' said Mr. Carlucci. 'Other Governments are extraordinarily sensitive on this point * * *.'"

"If our intelligence assets around the world, particularly cooperating organizations, perceive that the CIA is obliged to disgorge whatever the [Intelligence Committees] may want, then it is very clear based on my experience that our intelligence assets would dry up."

Carlucci said he knew of "numerous" occasions when foreign governments had said they would not share information if CIA provided it to Congress.[2]

Congressmen by nature have strong political views, cater to and depend on the press, and are not imbued with the security habits of intelligence professionals. Thus, they naturally fall under suspicion. And let's not forget that congressional oversight in the aftermath of Vietnam and Watergate strained relations between Congress and the intelligence community almost to the breaking point. Ex-CIA Director Colby recalls in his memoirs that every new covert action disclosed to Congress in 1975 was leaked. "And the 'covert' part of CIA's covert action seemed almost gone."[3] The notorious laxity of the Church and Pike investigations tainted the more rigorous Intelligence Committees which took their place.

No less a journalistic authority on leaks than Daniel Schorr noted in a Washington Post article[4] "* * * that it has never been suggested that a Member of Congress could be disciplined other than by Congress itself. This is relevant because (I don't think that I am baring any great journalistic secrets) the exposure of covert intelligence questions is frequently a form of congressional whistleblowing. A leak often occurs when a clandestine plan runs into substantial opposition during a briefing for congressional committees." Schorr went on to cite a number of specific examples involving reported congressional leaks of information on Angola, Chile, Nicaragua, El Salvador, and Libya.

Recently, there have been several known and serious disclosures on each of the Oversight Committees. Those who nonetheless continue categorically to defend the committees' records apparently depend upon congressional courtesy to forestall a "name names" rebuttal. In the congressional Select Committees' final report on the Iran-Contra affair, the minority report devoted a chapter to the need to patch leaks.[5] It pointed out the early history of problems with unauthorized disclosures in Congress and gave more recent examples of alleged congressional leaks published in other sources, including use of the threat of disclosure by several individuals in order to block executive branch actions of which they disapproved. That the majority report didn't consider leaks a fundamental issue is in itself a real measure of the problem.

From the outset of the congressional Iran-Contra probe, there was a steady stream of leaks. Interestingly, House Chairman Lee Hamilton and his Senate counterpart, Daniel Inouye, followed their best instincts on how to keep secrets when it came time to depose admiral Poindexter. As the minority report observes:

"The two Select Committees recognized that the Admiral's testimony on the diversion of funds was the pivotal, and potentially most explosive political question of this whole investigation. As a result, extraordinary steps were taken to protect the information. Specifically, only three staff attorneys and no members of either committee participated in the secret questioning. The success of these procedures speaks volumes on how to protect secrets."[6]

Officially "proven" sourcing of leaks on the Hill or elsewhere, however, is extremely rare. Only a handful of leaks ever have been traced through investigation to the culpable individual, so lack of proof hardly establishes that Congress has a good record.

A Senate intelligence committee study released to the press reportedly found that in selected leaks of classified information, journalists referenced congressional sources only 8-9% of the time, but cited Reagan administration officials 66% of the time. This research methodology is suspect, since journalists are alleged frequently to protect their most vulnerable sources, and persons on the intelligence oversight committees would in many cases be particularly exposed by virtue of being the only knowledgeable "congressional" sources. Let us take the Senate study at face value, however, and also generously assume that Congress has 2,500 people with clearances as opposed to 2.2 million in the executive branch and military. Reliance on the Senate study forces us to conclude that Congress maintains just over 0.1% the number of executive branch clearances, but is responsible for 8-9% of the leaks on national security issues. Specifically, on average, a cleared person in Congress is 60 times more likely than his counterparts elsewhere to engage in unauthorized disclosures.

Evidence that news leaks quite commonly originate on the Hill also was developed in a summer 1987 survey among the readership of the periodical, American Politics. The journal, circulated almost entirely within the Washington area, asked its readership to respond to a wide-ranging poll which included the question, "Have you ever leaked information to the news media?" over 900 persons, considered to be a reliable cross-section of the readership, responded. Results on the leak question were considered so dramatic that they were published early and separately, in an August 1987 article entitled "Leak City."[7] More than one in four

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[1] Bill Gertz, "Carlucci: Cohen Bill Will Plus CIA Sources," Washington Times, Dec. 17, 1987.
[2] Bob Woodward and Walter Pincus, "Carlucci Warns of Veto on Covert-Action Notice," Washington Post, Dec. 17, 1987.
[3] William Colby, "Honorable Men" (1978), p. 423.
[4] Daniel Schorr, "Cloak and Dagger Relics," Washington Post, Nov. 14, 1985, A23.
[5] "Report of the Congressional Committees Investigating the Iran-Contra Affair" (Washington, DC: GPO, 1987), pp. 575-79.
[6] Ibid, p 579.
[7] Results on the leak portion are published in Robert Garcia, "Leak City," American Politics, August 1987, pp. 23-24. Methodology is explained and some additional pertinent information is given in Robert Garcia, "And Other Results of the First Annual 'Inside the Beltway' Readers Poll," American Politics, Sept. 1987, pp. 14-17. Respondents on the leak section included, *inter alia*, 16 politicians, 193 Capitol Hill staffers, six members of the Diplomatic Corps and 66 Federal employees.

persons—over 28%—conceded at some time having shared a secret with the media. Capitol Hill staffers, sporting a 31% rating, were higher than average. But they were pikers compared to the "politician" category, alone at the pinnacle of the chart, in which 62% of 16 respondents admitted to having leaked information. This contrasted with 23% in the "Federal employees" category. Media information sources tended to have higher salary and educational levels. Contrary to some recent accusations, conservatives were found to leak less than liberals and moderates. And, in delicious irony, leakers named journalists as the group they trusted the least. (Among respondents as a whole, "politicians" had a slight edge over journalists in competition for this award.)

The situation has been allowed to deteriorate so far that the task of changing this permissive culture is now monumental. Success will come very slowly indeed, and will result only from a persistent and aggressive attack across a broad front, in both Congress and the executive branch.

One option is stricter security procedures and increased compartmentalization. Capitol Hill is very quick to claim this is the preferred solution for the executive branch problems, thereby avoiding the need to grapple with difficult civil and press liberties issues. But Congress is loathe to apply this option to its own operations by consolidating its oversight into one joint committee. However, consolidation and compartmentalization is a far more promising option for the congressional Intelligence Committees than for policy agencies. Effective congressional oversight doesn't require Intelligence Committees with 32 (plus 4 ex-officio) members and 55-plus staff. Moreover, additional staff, as well as 31 Senators and Congressmen serving on the Defense Appropriations Subcommittees in both Houses of Congress, also have access to extremely sensitive intelligence. Altogether, therefore, 67 Members of Congress are in the "loop" for such information.

For the policy agencies, who already have cut back on access to classified material, further restrictions on the dissemination of information may be helpful in some cases. But if compartmentalization is not carefully applied, the additional advantages could be limited and the drawbacks serious. Already there is concern that the most sensitive intelligence goes only to top policymakers who are too busy to read or act upon it. Analysts who are supposed to make sense of collected intelligence cannot do their job if pertinent information is withheld from them. Finished intelligence analyses, in turn, are less useful if they are not distributed to those with an interest in the subject. If policy action is considered or attempted, the circle of knowledgeable parties inevitably widens so that some people will become involved who may disagree with the proposed action or who for some other reason will be inclined to leak; and there will be too many people involved at this stage to have much hope of finding the leaker. Even the Ollie North Iran/Contra operation, compartmentalized as it was, eventually involved great numbers of people within and outside the Government. In fact, the Iran overture was indeed leaked rather early in a little-noticed Jack Anderson column, by some still unknown person. Future use of established covert action and policy deliberation procedures, insisted upon by the Tower Review Board and in congressional reports on the Iran/Contra affair, will ensure that a sizable number of people always are involved.

But rather than accept for itself the medicine that it has sometimes proposed for the executive branch, Congress is now proposing that it expand the definition of its own "need to know." In what Secretary Carlucci has aptly labeled a misguided effort to "close every conceivable loophole" despite resulting damage to U.S. foreign policy, the Intelligence Committees now are promoting legislation requiring that they almost immediately receive information on every single covert action undertaken. We should instead be confident that the political fallout from the Iran/Contra affair has provided far greater assurance than ever before that notification will not be withheld temporarily unless there is very good reason. Indeed, the executive branch doubtless in the future will take pains to share critical information and attendant political risks with Congress.

If the first thing Congress should do is to vote down this mandatory early notification legislation and the second is to form a compact Joint Oversight Committee, the third must be to study carefully our options for action and legislation to prevent future Government leaks and to investigate and punish them when they occur.

The law on punishing those disclosing classified information is frequently an effective barrier to successful prosecution. Specifically, it is extremely hard to prove in leak cases, as the law generally requires, that there was "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." [4]

Government prosecutors are faced with a similar hurdle when it comes to convicting journalists who reveal the identities of undercover intelligence personnel. The law governing this kind of disclosure requires the Government to prove that such an individual engaged in "a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States".[5]

In short, although there are inherent difficulties in apprehending a leaker, neither Congress nor the executive branch can claim that vigorous or competent attempts to do so have been undertaken or that punishment is swift and sure.

Given the difficulty of identifying those who have leaked classified material, we should also face the question of whether, under what circumstances, and how we should take action against the known party to the deed—the reporter and media outlet in question. Although the media sometimes have exercised restraint in these issues, here again the culture has become so permissive that potential damage to U.S. intelligence collection and foreign policy often receive short shrift when authors and editors are deciding whether or not to publish. Moreover, like the leakers themselves, journalists purporting to weigh carefully the national security implications of such writings often display notoriously poor judgment in this regard. Yet they contend that they alone should be the judge and, for instance, hold in their hands agents' lives and the future effectiveness of intelligence collection systems costing billions of dollars of taxpayer money. I believe it is beyond dispute, moreover, that the excuse of "the public's right to know," used as a defense in these cases, is a rationale that would be rejected by the vast majority of the public itself.

Ideally, the press should agree among themselves on some explicit or implicit code of conduct to curtail these abuses. At present, however, this seems unlikely. As the media appears more and more inclined toward "investigative" reporting and advocacy journalism, the demand for leaks appears to be rising in tandem with the supply. We can also expect a further escalation of disputes over release of classified materials as satellite photography of sensitive events and installations becomes available to the media.

In the 1970's, investigative reporter Seymour Hersh reportedly told a Navy War College seminar that as a reporter his job was to break into the Pentagon if he could and steal all the classified documents he could, and that their job was to stop him.[6] We have to ensure somehow that the Government and the media remain fundamentally on the same side where national security is concerned. But the media is becoming more rather than less aggressive with regard to acquisition or publication of classified information. And its enormous collective resources instantly are marshalled to stigmatize as unconstitutional extremism any suggestion that the press must be held legally accountable if it does not police itself more effectively.

Unwilling to grapple with these intractable, messy, and politically volatile problems, some people insist that the damage we have suffered is overstated, and that no matter how great it may be, it does not justify tampering with press liberties or even congressional perquisites. But if our Government cannot keep a secret and Congress displays no sense of urgency in solving this problem, we will become ever more severely crippled in a dangerous world where the margin for error is fast disappearing.

[4] Chapter 37 (Espionage and Censorship) of Title 18, United States Code, section 793.
[5] National Security Act of 1947 (50 U.S.C. 422), Title VI, section 602.

Chapter 13
The Need To Patch Leaks

Throughout the majority report, much is made of the Administration's concern for secrecy. That concern is portrayed almost exclusively, if not exclusively, as the desire of some lawbreakers to cover the tracks of their misdeeds. We agree that the National Security Council staff, under Admiral Poindexter, let its concern over secrecy go too far. We should not be so deceived by self-righteousness, however, that we dismiss the Admiral's concern as if it had no serious basis. Our national security, like it or not, does depend on many occasions on our ability to protect secrets. It is easy to dismiss the specific Iran arms sales decisions about executive branch compartmentalization, and about withholding information from Congress for almost a year, as having been excessive. Everyone on these Committees would agree with that conclusion. But unless we can understand the real problems that led the NSC staff to its decision, future Administrations will once again be faced with an unpalatable choice between excessive secrecy, risking disclosure or foregoing what might be a worthwhile operation.

Time after time over the past several years, extremely sensitive classified information has been revealed in the media. Predictably, both Congress and the Administration have blamed each other. In fact, both are culpable. It is important for these Committees to recognize this truth forthrightly. As Secretary Shultz said, quoting Bryce Harlow, "trust is the coin of the realm." [1] But trust has to be mutual. Some people on these Committees seem to want to bring criminal prosecutions against former Administration officials for not speaking candidly to Congress. It is true that the business of government requires the Administration to be considered trustworthy by Congress. But so too must Congress prove itself trustworthy to the Administration.

We do not mean, by our focus on congressional leaks, to suggest that we turn our eyes from the same problem in the executive branch. Executive branch leaks are every bit as serious as legislative branch ones. But as long as there is a consensus on this point, we do not feel a need to dwell on it here. At the end of this chapter, we will recommend legislation to help address the issue of executive branch leaks along with our suggestions for the legislative branch.

There is much less consensus in Congress, however, about leaks from the legislative branch. Those problems are real. As Representative Hyde wrote in a recent article, the fact that the executive branch leaks more, does little to get Congress off the hook.

> *Proven* Congressional transgressions admittedly are relatively rare, but so are proven executive-branch leaks. In truth, only a handful of leaks ever have been definitively traced to their source, so lack of proof establishes nothing. A partial Senate Intelligence Committee study often quoted by Mr. Beilenson reportedly found that journalists referenced congressional sources only 8–9 percent of the time, but cited Reagan Administration officials 66 percent of the time. Reporters may not be entirely candid about their sources. But generously assuming that Congress has 2,500 people with clearances as opposed to 2.2 million in the executive branch and the military, reliance on the Senate study forces us to conclude that Congress maintains just over 0.1 percent the number of executive branch clearances, but is responsible for 8–9 percent of the leaks on national security issues. Specifically, on average, a cleared person in Congress is 60 times more likely than his counterparts to engage in unauthorized disclosures.[2]

We believe that these problems—rather than a desire to cover up a supposed lawlessness whose existence we do not concede—contributed significantly to the Administration's posture in 1985–86.

Protecting Secrecy in the Early Congress

To put the issue in perspective, it is worthwhile to consider how the country's Founders dealt with the problem. Those hardheaded realists understood that breaches of security during that perilous revolutionary period could mean the difference between life and death. Consequently, only five members of the Second Continental Congress sat on the Committee of Secret Correspondence, the foreign intelligence direc-

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torate that was mentioned in our earlier historical chapter.

The Continental Congress was especially careful about protecting sources and methods. For example, the names of those employed by the Secret Correspondence Committee were kept secret, as were the names of those with whom it corresponded. Even then, there was concern about Congress keeping a secret. As a result, when the Committee learned that France would covertly supply arms, munitions and money to the revolution, Ben Franklin and another Committee member, Robert Morris, stated: "We agree in opinion that it is our indispensable duty to keep it a secret, even from Congress. . . . We find, by fatal experience, the Congress consists of too many members to keep secrets."*

To underscore the importance of protecting sensitive information, the Continental Congress on November 9, 1775, adopted the following oath of secrecy which should still be in effect today:

> Resolved That every member of this Congress considers himself under the ties of virtue, honour and love of his country, not to divulge, directly or indirectly, any matter or thing agitated or debated in Congress before the same shall have been determined, without the leave of the Congress, nor any matter or thing determined in Congress, which a majority of the Congress shall order to be kept secret. And that if any member shall violate this agreement, he shall be expelled this Congress, and deemed an enemy to the liberties of America, and liable to be treated as such, and that every member signify his consent to this agreement by signing the same.[3]

This oath was not taken lightly and no less a revolutionary figure than Thomas Paine, the author of "Common Sense," was fired as an employee of the Continental Congress for disclosing information regarding France's covert assistance to the American Revolution. Interestingly, Congress then resorted to its own covert action and passed a blatantly false resolution repudiating Paine's disclosure.[4] Obviously, the Founding Fathers realized that there are some circumstances when a well-intentioned "noble lie," as Plato put it, is a necessary alternative to the harsh consequences of the truth. They also believed in punishing leakers, a practice their modern counterparts in both the executive and legislative branches need to emulate more consistently.

Let us move forward in history now, to the early years of the Constitution. President Washington learned quickly that once information is shared with Congress, it is up to Congress—often the opposition party in Congress—to decide when or how it will be made public.

> During the time the Federalists controlled the House, they enforced a rule that excluded the public during any debate concerning material sent to the House by the President "in confidence." After the Republicans gained control, they changed this rule to allow the majority to vote for public debate on confidential communications on an ad hoc basis. Soon thereafter, the House voted to lift an injunction of secrecy they had placed on some letters sent by the President "in confidence." A similar rebellion of sorts took place in the Senate after the Jay Treaty was conditionally ratified. The President wanted the treaty kept secret until all negotiations were complete. The Senate voted, however, to rescind its injunction of secrecy, although it continued to enjoin "Senators not to authorize or allow any copy [to be made] of the said communication . . . ." Both Senators Pierce Butler of South Carolina and Stevens T. Mason of Virginia smuggled copies out of the Senate chamber, apparently before the secrecy injunction was lifted, and on the same day that the Government planned to make the treaty public, the Republican Aurora beat it to the punch by printing an abstract of the terms.[5]

The Leaky 1970s

Some things never change and as we celebrate our constitution's bicentennial, Congress is still prone to unauthorized and sometimes damaging disclosures. The worst period in recent history was during the 1970s, when the legitimacy of the CIA and covert operations were under attack. What follows are some examples of alleged congressional leaks during that period. Rather than rely on classified material, we have chosen here to protect still secret information by relying on accounts from secondary sources. The inclusion of this material is not meant to confirm or deny the veracity of the specific disclosures alleged. We begin with a 1972 example from Arthur Maass' book, *Congress and the Common Good.*

> On April 25, 1972, Senator Mike Gravel (D. AK) asked unanimous consent to insert in the *Congressional Record* excerpts from a top-secret National Security memorandum. The 500-page document concerning policy options in the Vietnam War had been prepared for Richard Nixon in 1969 by the National Security Council staff under Henry A. Kissinger. The senator's normally routine request was blocked temporarily by minority whip Robert P. Griffin (R. MI). The Senate met on May 2 and 4 in closed executive sessions to consider Gravel's request, but no decision was

*For an earlier discussion of this committee, including this quotation, see supra, ch. 3, p. 470.

reached. Then on May 9, Gravel, without advance notice, read into the *Record*, during debate on the annual State Department authorization bill, excerpts from the memorandum dealing with proposals to mine North Vietnamese ports, an action that had been announced by the President on the previous day. Senator Griffin, who entered the chamber during Gravel's statement, criticized him for acting before the Senate had disposed of the question. The Senator responded: "I have an obligation to the American people . . . to let the American people have the information that he [Richard Nixon] has."

Congressman Ron V. Dellums (D.CA) then obtained from Gravel a copy of the full document which he placed in the *Congressional Record* on May 11, by simply asking unanimous consent to extend his remarks in the *Record* without giving any hint of their contents.[6]

Maass' book followed this example with two others from the committees that investigated the CIA.

> In January 1976, the House Intelligence Committee, under Chairman Otis G. Pike (D. NY) sought to make public a report containing information that the White House considered to be top secret. The House intervened, voting 246 to 124 to block the committee from releasing its report until the President certified that it did not contain information that would adversely affect the nation's intelligence activities. Whereupon Daniel Schorr of CBS *News*, having obtained a copy of the report presumably from a House member or staffer, gave it to the *Village Voice*, which published it, thereby frustrating an overwhelming majority of the House. Schorr was subsequently fired by CBS and became a cult hero on the college lecture circuit, commanding top fees for one-night stands.
>
> . . . The Senate Intelligence Committee chairman, Frank Church (D. ID), went to the full Senate in November 1975 for approval of release of the committee's report on CIA involvement in assassination attempts against foreign leaders. The report included secret information that the President believed should not be made public. The Senate met in executive session, that is, secret session, and when considerable opposition to release of the report developed, more opposition than Church had anticipated, he and the Democratic majority adjourned the session without a vote, and the committee released the report on its own authority.[7]

It is clear that leaks during this period were often motivated by an animus toward the CIA's mission in general or as a way of killing individual operations.

The same Daniel Schorr who leaked the *Pentagon Papers* to the *Village Voice* wrote about leaks in a 1985 *Washington Post* article. "*The late Rep. Leo Ryan,*" Schorr wrote, "told me (in 1975) that he would condone such a leak if it was the only way to block an ill conceived operation."[8] In fact, wrote former Director of Central Intelligence William Colby, "every new project subjected to this procedure [informing eight congressional committees] leaked, and the 'covert' part of CIA's covert action seemed almost gone."[9]

The Still Leaky Congress During the Reagan Years

By the late 1970s, the House and Senate had formed intelligence committees, reducing the number of committees to which intelligence agencies had to report. That clearly improved the situation, but it did not cure all problems. Senator Joseph Biden, then a member of the Select Committee on Intelligence, sounded a bit like the late Leo Ryan in a 1986 Brit Hume article from *The New Republic*. Biden reportedly said he had "twice threatened to go public with covert action plans by the Reagan administration that were harebrained."[10]

In 1984, according to an article by Robert Caldwell, CIA officials briefed the same Senate Select Committee on Intelligence about information indicating that the Government of India was considering a preemptive strike against Pakistan's nuclear facility. When word of the briefing leaked, the operation was halted. According to Caldwell, the leak showed India that it had a security breach at a high level. The breach was discovered and a French intelligence ring was put out of business.[11]

The Senate Select Committee on Intelligence was one of the bodies to which the President would have had to report the Iran arms sales. Of course the President could have limited the report to the committee chairmen and ranking minority members as well as the party leaders of the House of Representatives and Senate. The problem with this scenario is that some senior members of the committee have been suspected of leaking, as was discussed in the Committees' hearings.[12] The House committee has also been the source of some damaging disclosures. Bob Woodward's book, *Veil*, describes one incident that allegedly happened after members of the committee had sent a secret letter to President Reagan to protest an operation about which Director Casey had just briefed them.

> **Representative Clement J. Zablocki, the chairman of the House Foreign Affairs Committee and a member of the House Intelligence Committee, had reviewed the . . . finding and the letter to Reagan. The sixty-nine-year-old lawmaker leaked**

to *Newsweek* that the letter to Reagan about the yet unnamed operation in Africa was a plan to topple Qaddafi . . . .

Newsweek reporters went back to House Foreign Affairs Chairman Zablocki after the Libya plan was denied. Zablocki went to House staff members, tipping them that he had been a source for *Newsweek*. He was set straight, but the House Intelligence Committee chairman, Edward Boland, decided to take no action against Zablocki, since leaks were epidemic.[13]

Complaints and investigations about subsequent incidents involving the House committee so far remain at the informal stage.

To complete this picture of the world about which Poindexter had to make judgments: on November 3, 1985—in the weeks just before the November arms transaction—a *Washington Post* article by Bob Woodward broke a story about a "CIA Anti-Qadhafi Plan Backed."[14] Director Casey responded to this article with a blistering letter to the President about executive and legislative branch leaks. *The Washingtonian* magazine, accurately in our view, linked the atmosphere in the White House immediately after this leak to the decision not to notify Congress about the Iran arms sale.[15]

It may be that not all these reported details about named Members of Congress are true. True or not, they fit in with a real pattern. As such, they form part of the background Director Casey and Admiral Poindexter had to consider in November 1985. It seems clear, with 20/20 hindsight, that Casey and Poindexter overreacted. They may even have used the *Post* story as a convenient peg in their ongoing battle over secrecy with Secretary Shultz and others. But even if they did overreact, it is irresponsible to dismiss their fears as being simply irrational, power hungry or nefarious.

Yes, some foreigners—Ghorbanifar, the Israelis, Khashoggi, the first and second Iranian channels—did have to know what was going on. That is the nature of any secret international dealing. The issue is how much should be told to anyone who did not have a need to know to complete the operation successfully. The simple fact is, we had no way of knowing whether our sources in Iran were endangering their lives by dealing with us. Judging from the thousands executed in the early days of the Khomeini regime and the recent execution of Mehdi Hashemi, the threat seemed real enough.[16] Nor could we know whether the slightest misstep might get the hostages killed. Certainly, such threats against the hostages lives have been a part of the hostage takers' media events, and Kilburn's death was real. Given the track record, no one in Congress or the executive branch can afford to be smug about these concerns. Trust is a two-way street, and each end of Pennsylvania Avenue had good reasons to doubt the other.

Problems In These Committees

Past leaks contributed to decisions that in turn led to these investigations. The leaks did not stop, however, when the committees started to work. The Committees began with every good intention. Recognizing that it was dealing with highly sensitive information, the leadership made a concerted effort to prevent leaks. The complexity and short time frame of the probe, however, led to a decision not to compartmentalize sensitive information. Consequently, everyone on the joint staff of some 165 people had multi-compartmented clearances and access to the highest levels of classified material. The same access held true, of course, for the 26 members of the two Select Committees. Given the number of people with access to these secrets, it is surprising there were not more revelations.

We are reluctant to identify leaks with too much precision, because confirmation may help adversaries sort out the ones we consider harmful. Suffice it to say that the types of leaks included misleading the media on the nature of a witness' secret testimony several days before he appeared as a public witness as well as revealing intelligence collection methods, the identities of undercover personnel, and the names of a number of countries which, in one way or another, were trying circumspectly to be helpful to the United States in a variety of foreign policy undertakings. Needless to say, these disclosures, and others, are causing these and other countries to have serious reservations about future cooperation with the United States. That turn of events should give us real pause. This is a highly interdependent world. It no longer is possible for the United States to go it alone, whether to combat terrorism or contain Soviet/Cuban expansionism in Central America.

Consider one example. On Friday, May 29, the Committees took testimony in closed executive session from "Tomas Castillo," the former CIA station chief in a Central American country. At the end of Castillo's testimony, the following colloquy took place:

Mr. RUDMAN. I just want to make one comment. It is my understanding that the [declassified] transcript is going to be made available sometime tomorrow to the press.

Chairman HAMILTON. That is correct.

Mr. RUDMAN. It is also my understanding that under the rules of Congress and the Intelligence Committees that it would be inappropriate for any members or staff or anyone else to comment

on these proceedings without specific permission in some way from the chairman.

Chairman HAMILTON. That is correct. Under the rules of the House Committee at least, you cannot release classified information without a vote of the committee and in the Senate my understanding is it is a similar procedure.

Chairman INOUYE. That is correct.[17]

Despite these explicit statements, articles appeared in May 30 newspapers with May 29 datelines accurately summarizing the testimony, and quoting named members of the Committees giving broad characterizations of the testimony.* The declassified transcripts were not available until Sunday night, May 31. There were no Committee votes in the interim.

Some of these revelations by staff and Members, as well as current and former Administration officials, occurred during intense questioning and cross examination of witnesses and appeared to be inadvertent. Such mistakes, however, suggest in retrospect that this nation's security interests would have been much better served had we decided to take more testimony in closed session. Potentially damaging slips of the tongue could then have been redacted before a transcript was made available to the public.

As a consequence of this probe, and that of Judge Walsh, this nation's intelligence community could be facing the same situation it confronted more than a decade ago after the Church and Pike Committees investigations. Leaks from those inquiries seriously debilitated our overall intelligence capabilities and it took us over a decade to repair the damage. A rerun of that sorry chapter would have grave national security implications, coming on the heels of a series of very damaging spy scandals epitomized by the Walker family case.

What happened to Castillo's testimony, which was open to all Committee members and many staff, contrasts sharply with the executive session deposition of Admiral Poindexter on May 2, 1987. The two select Committees recognized that the Admiral's testimony on the diversion of funds was the pivotal, and potentially most explosive political question of this whole investigation. As a result, extraordinary steps were taken to protect the information. Specifically, only three staff attorneys and no Members of either Committee participated in the secret questioning. The success of these procedures speaks volumes on how to protect secrets. In the final analysis, as Chairman Hamilton noted in a perceptive article on protecting secrets that appeared in the September 4, 1985 *Congressional Record*, "Leaks are inevitable when so many people handle secrets."[18] The most effective way of ensuring secrecy is to restrict access to sensitive information to just a handful of responsible people.

*See, for example, R.A. Zaldivar and Charles Green, "CIA station chief wasn't renegade, congressmen say," *The Miami Herald*, May 30, 1987, p. 16A; Fox Butterfield, "Ex-C.I.A. Officer Tells of Orders to Assist Contras," *The New York Times*, May 30, 1987, p. 7; *Associated Press*, "Contra role told by ex-CIA agent," *Chicago Tribune*, May 30, 1987, p. 5. Interestingly, *The Washington Post*, the same newspaper that publishes Bob Woodward's intelligence disclosures, distinguished itself from the others this day by refusing to publish certain classified information. The *Post* also gave no details about Castillo's testimony and quoted Sen. Rudman refusing to give information. Dan Morgan, "Higher-Level CIA Officials May Be Subpoenaed on Contra Aid," *The Washington Post*, May 30, 1987, p. A9.

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2. Henry J. Hyde, "How To Reduce The Leaks, Case for a Joint Intelligence Committee," The Washington Times, October 12, 1987, pp. D1, D4.
3. U.S. Central Intelligence Agency Bicentennial Publication, Intelligence in the War of Independence, published by the Nathan Hale Institute (1976), p. 14.
4. Edward F. Sayle, The Historical Underpinnings of the U.S. Intelligence Community, reprinted by the Intelligence Publishing Groups Inc., from 1 Journal of Intelligence and Counterintelligence (1986).
5. Sofaer, War, Foreign Affairs and Constitutional Power at 96-97.
6. Arthur Maass, Congress and the Common Good (1983), p. 241.
7. *Id.* at 243.
8. Daniel Schorr, Cloak and Dagger Relics, The Washington Post, November 14, 1985, A23.
9. William Colby, Honorable Men (1978), p. 423.
10. Brit Hume, Mighty Mouth, The New Republic, September 1, 1986, p. 20..
11. Robert J. Caldwell, "Button the loose lips in Congress," The San Diego Union, July 26, 1987, pp. 1,8.
12. Meese Test., *Hearings*, 100-9, 7/29/87, at 350-51.
13. Bob Woodward, Veil: The Secret Wars of the CIA 1981-1987 (1987), pp. 158, 160.
14. Bob Woodward, CIA Anti-Qadhafi Plan Backed, The Washington Post, November 3, 1985, pp. A1, A19.
15. Barbara Matusow, "Woodward Strikes Again," The Washingtonian (Sept. 1987), pp. 114, 234.
16. See Chapter 8 of the Minority Report, "The Iran Initiative," at p. 520.
17. Castillo testimony, May 29, pp. 85-86.
18. Hon. Lee H. Hamilton, Protecting Secrets, Congressional Record, September 4, 1985, pp. E3855-56.

APPENDIX 10

Resolution No. 88-10
(National Security)

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

Notification of Covert Operations

WHEREAS, the responsibility for the conduct of foreign relations and for ensuring the security of the United States is vested in the Executive by the Constitution and has rested with the President since the founding of the nation; and

WHEREAS, the current statutory framework governing the management of covert actions within the Executive Branch is working well and only very rarely has the Executive failed to notify the Congress of covert operations within 48 hours; and

WHEREAS, because there is a worldwide perception that sensitive information is not safe with those not directly involved with a covert activity, congressional notification could discourage foreign cooperation; and

WHEREAS, in reacting to what the Congress concluded in its investigation of the Iran-Contra Affair was "the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance", the Congress now proposes legislation which would require the President, in every case, to notify Congress within 48 hours of covert operations; and

WHEREAS, this legislation could preclude the President from acting in the national interest and place the United States at a potential disadvantage in responding to situations which may threaten our national security; and

WHEREAS, opposition to the 48-hour provision is bipartisan and includes nearly every former national security advisor and senior national security official of past administration; and

NOW, THEREFORE, BE IT RESOLVED that the Reserve Officers Association of the United States, chartered by Congress, urge the Congress not to impose a mandatory requirement for the President to notify Congress of covert operations within 48 hours to allow the Executive the needed flexibility intended by the Constitution.

Adopted by the National Convention
25 June 1988

Attest: Evan L. Hultman
Evan L. Hultman
Major General, AUS (Ret.)
National Executive Director

48-Hour Provision a Threat to National Security

The Congress is considering legislation that, without exception, would require the President to inform the Congress of any and all covert operations within 48 hours.

The responsibility for the conduct of foreign relations and for ensuring national security is vested in the Executive by the Constitution. The current statutory framework governing the management of covert actions within the Executive Branch is working well and only very rarely has the Executive failed to notify the Congress of covert operations within 48 hours. The Congress concluded in its investigation that the Iran-Contra Affair was "the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance."

The requirement to notify the Congress of every covert action within 48 hours is an overreaction to the actions of zealous individuals which may or may not have been precluded by law. More importantly, there probably have been and conceivably could be rare instances when, because of sensitivity, time or communication restraints, the requirement to notify anyone outside the Executive Branch could jeopardize a covert operation. The legislation could preclude the President from acting in the national interest and place the United States at a potential disadvantage in responding to situations which threaten our national security.

In March the Senate adopted S. 1721, a measure which includes the 48-hour provision, by a large margin. The House Foreign Affairs Committee approved a similar bill (H.R. 3822) the week of 20 June by a 22-17 vote. House approval is anticipated, but the narrower House margin suggests that opponents of the bill are being heard. The President has promised to veto the bill, and opponents believe a veto can be sustained by the House.

The integrity of Congress or the security of the information is not an issue here, but as long as there is a widely held perception that sensitive information is not always safe with those not directly involved with a covert activity, the requirement to notify the Congress can preclude necessary cooperation of those whose identities must remain secret.

Opposition to the 48-hour provision is bipartisan and includes nearly every former national security advisor and senior security official of past administrations.

At its National Convention in Las Vegas, ROA unanimously adopted a resolution opposing a requirement for the President to notify the Congress of all covert operations within 48 hours. In giving the Executive the responsibility for national security, the Constitution provides flexibility. ROA urges the Congress not to take away needed flexibility by a 48-hour notification requirement. The Congress is urged to consider very carefully changes to a system which is not broken.

APPENDIX 11

People For The American Way
ACTION FUND

John H. Buchanan, Jr.
Chairman of the Board

June 17, 1988

Honorable Dante Fascell
Chairman
House Committee on Foreign Affairs
2170 Rayburn
Washington, D.C. 20515

Dear Chairman Fascell,

I am writing to you on behalf of the People for the American Way Action Fund, a 270,000-member nonpartisan consitutional liberties organization. I also write as one who served on the Foreign Affairs Committee for 14 years.

On Tuesday, June 21, 1988, the Foreign Affairs Committee will conduct its mark-up of H.R. 3822, the "Intelligence Oversight Act of 1988." I testified before the House Intelligence Committee in support of the bill, and the People for the American Way Action Fund strongly urges you to support H.R. 3822.

Enclosed you will find a short memorandum which explains why the "Intelligence Oversight Act of 1988" is an essential piece of legislation, a statutory reform mandated not only by the Iran-contra affair, but also by the rightful role of congressional oversight in our constitutional government. In addition, our memorandum addresses the weakness of the administration's National Security Council directive on covert action as a long-term solution to the problem of strengthening congressional oversight of intelligence activities. Lastly, we have outlined the unconstitutional nature of a proposed amendment to the bill which would create criminal penalities, a new felony, against Members of Congress and their staff for disclosing classified information received pursuant to intelligence oversight.

We also ask that you oppose amendments which will weaken the bill, in particular one which creates criminal penalties against Members of Congress and their staff for disclosing information received pursuant to intelligence oversight. We have enclosed a summary legal analysis prepared by the Washington, D.C. law firm of Wilmer, Cutler & Pickering which concludes that such an amendment would violate the Constitution.

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We will also be sending you a copy of the complete analysis. Although the objective of safeguarding sensitive national security information is important and legitimate, under our Constitutional framework it is both necessary and possible to attain that objective through means other than the amendment to be proposed. We recommend that the Congress hold hearings on the subject of safeguarding against disclosures in both the Congress and the Executive Branch.

My sixteen years as a Member of Congress has led me to certain personal convictions about the institutional responsibilities of the Congress in our constitutional form of government. Congressional oversight of the intelligence community, particularly "special" or covert activities, is central to the legitimate foreign policy and national security role of Congress. This goes beyond the fundamental oversight role of Congress in authorization, appropriations, and execution of government programs and policies. The Constitution gives both the Congress and the Executive specific foreign policy powers. It does not make foreign policy the exclusive domain of one branch of government. The result is a system of checks and balances which ensures that our nation's foreign policy and national security framework is consistent with the policy, law, and interests of our nation.

On behalf of the People for the American Way Action Fund, I urge you to support H.R. 3822, the Intelligence Oversight Act of 1988." Recently the Senate, in a strong show of bipartisan support, passed its version of the bill by a vote of 71-19. We believe that H.R. 3822 deserves the support of the Foreign Affairs Committee, the entire Congress, and of the president.

Thank you.

Most Sincerely,

John H. Buchanan Jr.
Chairman

People For The American Way
ACTION FUND

June 17, 1988

MEMORANDUM IN SUPPORT OF H.R. 3822, "THE INTELLIGENCE OVERSIGHT ACT OF 1988," AND IN OPPOSITION TO AN AMENDMENT TO CRIMINALIZE DISCLOSURE OF INFORMATION BY MEMBERS OF CONGRESS AND THEIR AIDES

I. A STATUTORY SOLUTION FOR INTELLIGENCE OVERSIGHT VERSUS A SECRET DIRECTIVE.

The administration and the Congress both have proposed ways to change the current system of intelligence oversight. One will result in more effective oversight, the other in less.

The administration doesn't want the law changed and has promised that President Reagan will veto legislation to this effect. Instead, President Reagan has issued a secret directive through the National Security Council that he says will prevent future covert action scandals. The directive, "NSDD 296" is just one in a series called National Security Decision Directives (NSDDs) created by President Reagan. He has issued almost 300 NSDDs.

However, to ensure that covert actions are conducted in accordance with established law and policy, Congress through its select intelligence committees, must know what the administration's policies are and how they are being carried out. Covert actions must, by definition, remain secret. This is all the more reason such actions should be conducted according to a public statute, not a secret directive.

NSDDs are by nature a particularly poor substitute for a change in law because they are: (1) "Born classified," and unlike other presidential instruments such as executive orders, they are not published in any register. (2) Only revealed to Congress under irregular, arbitrary, or accidental circumstances. Even the Intelligence Committees do not receive copies of NSDDs when they are issued.

The uncertain legal character of NSDDs make them poor long-term solutions: (1) Each president can change or abolish the national security directives of previous presidents. (2) The president's "solution" on covert action could evaporate in less than a year. It could also be amended by another NSDD about which Congress might not be notified.

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II. H.R. 3822: A SOUND STATUTORY SOLUTION

H.R. 3822, the "Intelligence Oversight Act of 1988" is preferable in both form and substance to the president's directive NSDD 286. The bill deserves the support of the Foreign Affairs Committee, the entire Congress, and of the president.

A. The bill responds to the recommendations of the Iran-Contra Committee. It ensures that our system of checks and balances is operating smoothly. It emphasizes the responsibility of elected officials -- the president and Congress -- for actions of un-elected officials like Lt. Col. North and Admiral Poindexter.

B. The bill creates clear standards of accountability and communication for the Executive Branch and Congress. The aspect of the bill that has attracted the most attention is the so-called "48-hour" rule. This requires that the president notify the House and Senate Intelligence Committees in advance of all covert operations, except, as the bill clearly states "on rare occasions when time is of the essence." In such cases, the president must still inform the two committees about the operation, but no later that 48 hours after its authorization by the president. The 48-hour rule is essential to close the loophole that the Reagan administration used to conduct the Iran-contra operation. The rule would added needed objectivity to the standard by which the Executive Branch is guided in notification. In addition the notification is limited to the eight most trusted elected officials in Congress.

C. The bill does not allow Congress to usurp presidential power by controlling covert operations. The House bill puts into law a specific definition of covert activities and gives the president sole responsibility for carrying them out. Congress can't veto a covert operation or otherwise override the president's decision, except through the power of the purse, which it has always had. The only presidential power that is limited by the legislation is the president's power to deny Congress information that in our democracy it is entitled to have.

III. THE AMENDMENT TO CRIMINALIZE "LEAKS" BY MEMBERS OF CONGRESS AND THEIR AIDES

Opponents of H.R. 3822 will likely propose an amendment at the Foreign Affairs Committee mark-up which would impose criminal liability on Members of Congress and their aides for disclosures of classified information supplied to them pursuant to

intelligence oversight law. Although the objective of safeguarding sensitive national security secrets is important and legitimate, under our Constitutional framework it is both necessary and possible to attain that objective through means other than this proposed amendment.

The amendment was first offered by Representative Robert Livingston (R-LA) in the House Intelligence Committee where it failed to win support. Representative Henry Hyde (R-IL) a member of both the Intelligence and Foreign Affairs Committees is expected to propose the amendment again on Tuesday.

The amendment offered by Rep. Livingston reads as follows:

> Sec. 506. "Any person who, having received classified information pursuant to the provisions of this title, knowingly and willfully discloses the substance of that information without the authorization of the President, unless pursuant to the applicable rules of the House of Congress of which that person is a Member, officer or employee, shall be fined not less than $1000 nor more than $20,000 or imprisoned for not less than ninety days nor more than five years, or both."

The People for the American Way Action Fund has asked the Washington, D.C. law firm of Wilmer, Cutler, and Pickering to prepare a legal analysis of the proposed amendment. The analysis concludes that the proposed amendment, and thus its counterpart to be offered in the Foreign Affairs Committee, appears to violate the United States Constitution in several respects. A summary, and a copy of the memorandum are attached.

A. <u>Separation of Powers</u>

The amendment raises serious questions under the doctrine of separation of powers. The amendment empowers the Executive branch to interfere with the constitutional functions of Congress in several ways:

* Creating a criminal statute targeted exclusively at the Legislative Branch and its Members.

* Requiring Presidential authorization of disclosures, effectively allows the Executive Branch to define what acts by Members and their aides are criminal.

* Incorporation of the Executive Branch's classification system effectively allows the Executive Branch to control the information which Members and their aides may use to debate and discuss issues within the legitimate national security and foreign policy jurisdiction of Congress.

B. The Speech and Debate Clause

The amendment appears to violate the Speech and Debate Clause of the Constitution because it would reach a wide range of disclosures that occur within the sphere of legislative activity. The following acts could be characterized as conveying "classified" information to anyone -- even other Members of Congress or their own aides --

* Speeches or debates on the floor of the House or Senate or during a committee or subcommittee proceeding.

* The introduction of legislation, such as a bill or resolution proclaiming that a particular intelligence activity is illegal.

* The preparation, drafting, and publishing of Committee reports.

* Private discussions among Members who are not both members of the intelligence committees, such as discussions about the wisdom of particular covert action.

* Inquiries by a Member to an Executive Branch official about an intelligence activity, even if the recipient is "cleared" to receive classified information of the sort being conveyed.

* Private discussions between professional staff persons, unless both are members of an intelligence committee staff.

C. The First Amendment

The proposed nondisclosure amendment would appear to violate the First Amendment rights of Members and their aides for reasons of "overbreadth" and "vagueness."

Overbreadth. First, the amendment would have a detrimental chilling effect upon their communications among themselves with their constituents and the public about important matters of national policy. Second, the amendment is overly broad because the Executive Branch classifies a huge quantity of information that is not sensitive from a national security standpoint. Thus, the amendment's incorporation of the classification system as the standard for criminal liability would prohibit the disclosure of a substantial amount of communication that cannot be prohibited under the First Amendment.

Vagueness. In purporting to criminalize disclosures of "the substance" of classified information, the proposed amendment appears to contravene the First Amendment. Documents and briefings that are generally denominated as "classified" frequently convey a great deal of information which in fact is not classified, but which is not specifically designated as such. Thus the line between what is classified and what is not is often unclear. The proposed criminal provision appears to be impermissibly vague and would improperly chill the disclosure of information that is not classified.

Although the objective of safeguard sensitive national security information is important and legitimate, under our Constitutional framework it is both necessary and possible to attain that objective through means other than this proposed amendment. The People for the American Way Action Fund strongly recommends that the Congress hold hearings about the need for safeguards against disclosures of sensitive national security information by both the Executive Branch and the Congress.

IV. CONCLUSION

The People for the American Way Action Fund urges you to support H.R. 3822, the Intelligence Oversight Act of 1988." Recently the Senate, in a strong show of bipartisan support, passed its version of the bill by a vote of 71-19. We believe that H.R. 3822 deserves the support of the Foreign Affairs Committee, the entire Congress, and of the president. We also urge you to oppose amendments which will weaken the bill, particularly the proposed amendment to create criminal penalties against Members of Congress and their aides for disclosing sensitive information obtained during the intelligence oversight process. We strongly recommend that Congress hold hearings on the need for safeguards against such disclosures by the Executive Branch and the Congress.

FORUM
ESSAY & COMMENT

Keeping covert action within the law

By LOUIS STOKES

It is unfortunate that the Reagan administration must be dragged kicking and screaming into meaningful efforts to prevent another Iran-contra affair.

The public outrage over the Iran-contra affair showed that citizens want their government to operate in the sunlight, not the dark. The current system, which allowed the White House to string Congress along while it ran an illegal covert operation, must be changed. The administration and the Congress both have proposed ways to do so. One will result in more effective oversight, the other in less.

The administration doesn't want the law changed and has warned that President Reagan will veto legislation to this effect. Instead, President Reagan has issued a secret presidential directive through the National Security Council that he says will prevent future covert action scandals. The directive is just one in a series called National Security Decision Directives (NSDDS) created by President Reagan. He has issued almost 300 NSDDs. You are not alone if you haven't heard of them; neither have most members of Congress.

The president's effort misses the point: To ensure that covert actions are conducted in accordance with established law and policy, the president must be held accountable, and Congress, through its select intelligence comittees, must know what the administration's policies are and how they are being carried out. Covert actions must, by definition, remain secret. This is all the more reason such actions should be conducted according to a public statute, not a secret directive.

The very nature of NSDDs shows that they are a particularly poor substitute for a change in law. NSDDs are "born classified," and unlike other presidential instruments such as executive orders, they are not published in any register. They are only revealed to Congress under irregular, arbitrary, or accidental circumstances.

The secret nature of NSDDs also makes them vulnerable to abuse. For example, NSDD 159, which was to set the rules for covert operations, required agencies outside the CIA to obtain a presidential "finding" before they could undertake covert action. But two National Security Advisors, as we know all too well, failed to comply.

Moreover, the uncertain legal character of NSDDs make them poor long-term solutions. Each president can change or abolish the national security directives or previous presidents. So President Reagan's "solution" on covert action could evaporate in less than a year.

During the recent hearings before the House Intelligence Committee, I found myself in agreement with several witnesses who stressed that presidential directives are not a legitimate substitute for a change in public law. John Buchanan, chairman of People for the American Way, put it succinctly: "The bottom line is that NSDD's cannot be a solution because they are part of the problem!"

Congress has offered another way to prevent an Iran-contra affair from occurring in the future. It is called the Intelligence Oversight Act of 1988 and is preferable in both form and substance to the president's directive. Recently, the Senate, in a strong show of bipartisan support, passed its version of the bill by a vote of 71-19. The House of Representatives will consider its version of the bill, H.R. 3822, in an upcoming vote in the House Intelligence Committee. The bill deserves the support of the entire Congress and of the president.

First, the bill responds to the recommendations of the Iran-contra Committee. It ensures that our system of checks and balances is operating smoothly. It emphasizes the responsibility of elected officials — the president and Congress — for actions of un-elected officials like Lt. Col. North and Admiral Poindexter.

Second, the bill creates clear standards of accountability and communication for the Executive Branch and Congress. The aspect of the bill that has attracted the most attention is the so-called "48-hour" rule. This requires that the president notify the House and Senate Intelligence Committees in advance of all covert operations, except, as the bill clearly states, "on rare occasions when time is of the essence." In such cases, the president must still inform the two committees about the operation, but no later than 48 hours after its authorization by the president. The 48-hour rule is essential to close the loophole that the Reagan administration used to conduct the Iran-contra operation.

While the administration now seems willing to admit that the Iran-contra affair was a mistake, it opposes the House and Senate legislation. It claims that the bill would let Congress usurp presidential power by controlling covert operations. This is misleading. The House bill puts into law a specific definition of covert activities and gives the president sole responsibility for carrying them out. Congress can't veto a covert operation or otherwise override the president's decision, except through the power of the purse, which it has always had. The only presidential power that is limited by the legislation is the president's power to deny Congress information that in our democracy it is entitled to have.

The administration also claims that the bill will increase the risk of leaks. In fact, in very sensitive cases the bill permits the president to restrict notification to eight of the most trusted elected officials in Congress rather than to the intelligence committees. This small number of elected leaders is far outnumbered by the numerous un-elected officials and staff in the Executive Branch who possess information about covert operations.

Like most Americans, I believe the Iran-contra affair was a national disgrace. It is unfortunate that the Reagan administration must be dragged kicking and screaming into meaningful efforts to prevent another Iran-contra affair.

Rep. Stokes is chairman of the House Permanent Select Committee on Intelligence, and served as a member of the Iran-contra committee. He has represented the 21st Congressional District of Ohio since 1968.

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GOVERNMENT SECRECY: DECISIONS WITHOUT DEMOCRACY

by
Steven L. Katz

Preface by
Arthur Schlesinger, Jr.

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Chapter 2
The President's "Secret Laws"

A window through which to view the problems of excessive secrecy is the series of directives termed the president's "secret laws" by Rep. Jack Brooks (D-TX), Chairman of the House Government Operations Committee. The concept of a "secret law" in America conflicts with every basic notion of democracy under the Constitution, and yet such laws exist. They are created by the president as national security directives and have been issued through the National Security Council (NSC) by each president since President Truman.[1] In 1976, a special Senate committee studying presidential power concluded:

> In recent years, the National Security Action Memorandums of Presidents Kennedy and Johnson and the National Security Action Directives of President Nixon represent a new method for promulgating decisions, in areas of gravest importance. Such decisions are not specifically required by law to be published in any register, even in a classified form; none have prescribed formats or procedures; none of these vital Executive decisions are revealed to Congress or the public except under irregular, arbitrary, or accidental circumstances.[2]

President Reagan has designated these "national security decision directives," (NSDDs). He has used NSDDs to authorize an array of activities which included the Libyan disinformation campaign[3] and the use of Presidential Findings by agencies other than the Central Intelligence Agency (CIA), such as the NSC, to conduct covert operations.[4] In 1987, the public learned that in 1983 President Reagan had authorized, through an NSDD, CIA training and support of secret counter terrorist squads in the Middle East to be used for "preemptive strikes."[5]

As of June 24, 1987, President Reagan had signed and issued at least 280 NSDDs [Appendix A]. Today, as in years before, Congress remains uninformed about the issuance and content of these directives. No complete list of them is publicly available because the National Security Council claims that such a list of the president's NSDDs is classified. One public requester seeking unclassified information about an NSDD received the following response from the National Security Council: "The NSC has no publications program and, most of the information in our files is classified and, therefore unavailable to the public."[6] These directives illustrate some of the problems which exist on a much wider scale in the government secrecy system.

"NATIONAL SECURITY" CAN BE USED TO HIDE NATIONAL POLICYMAKING

"National security" can be invoked to shroud many decisions concerning United States policy and activity, hiding these from congressional and public view. In this regard, President Reagan defined the NSDDs which he issues through the National Security Council:

> This series shall be used to promulgate Presidential decisions implementing national policy and objectives in all areas involving national security.[7]

Indeed, NSDDs issued by President Reagan involve a variety of national policies for which responsibility is shared by Congress and which affect various existing statutes. An examination of approximately 50 NSDDs reveals their application to many national policies: civil defense, world economic summits, telecommunications, commercial satellites and space vehicles, resettlement of Indochinese refugees in the United States, production and handling of nuclear materials, and terrorism.[8] Other NSDDs issued by President Reagan have involved measures affecting millions of the nation's civil servants and have been viewed as both extreme and unconstitutional approaches to government. These have included, for example, NSDDs requiring government employees to sign secrecy contracts, agree to lifetime government censorship of any writing they seek to publish, and to undergo periodic lie-detector tests.[9]

NSDDs that involve the United States militarily in other countries are especially worthy of scrutiny. They demonstrate unaccountable use of presidential power and potentially damaging consequences for the nation. By secretly engaging our nation in military activity, the president jeopardizes the essential support of Congress and the American public. Recent examples include U.S. operations in Nicaragua and the surrounding region and military preparations for the invasion of Grenada.

In July 1983, President Reagan issued NSDD 100, "Enhanced U.S. Military Activity and Assistance for the Central American Region." The president achieved three military goals with NSDD 100: U.S. military activity in Nicaragua, military training in El Salvador, and placing U.S. forces in the Caribbean three months before the October 1983 invasion

of Grenada. In addition, the president required that the Secretary of Defense and the Secretary of State, without revealing the secret law or fully disclosing the administration's plans, persuade Congress and the public to support the administration's actions. President Reagan stated in NSDD 100:

> The increasing threat to U.S. national interests in Central America requires that we strengthen our diplomatic and security efforts in the region. The consolidation of a Marxist-Leninist regime in Nicaragua, committed to the export of violence and totalitarianism, poses a significant risk to the stability of Central America. Our ability to support democratic states in the region, and those on the path to democracy, must be visibly demonstrated by our military forces.
>
> A program of expanded U.S. military activities and exercises both in the Caribbean Basin and on the Pacific coast of Central America will commence as soon as possible.
>
> The Secretary of State and the Secretary of Defense will prepare a coordinated legislative, diplomatic, and public affairs strategy that supports these initiatives.[10]

The Iran-contra scandal reflects the serious consequences of secretly planned U.S. military involvement in which Congress and many government foreign policy professionals are kept ignorant of preparations. More importantly, it reveals the potential for secret development of U.S. foreign policy -- one perhaps contradicting and superseding publicly proclaimed policy.

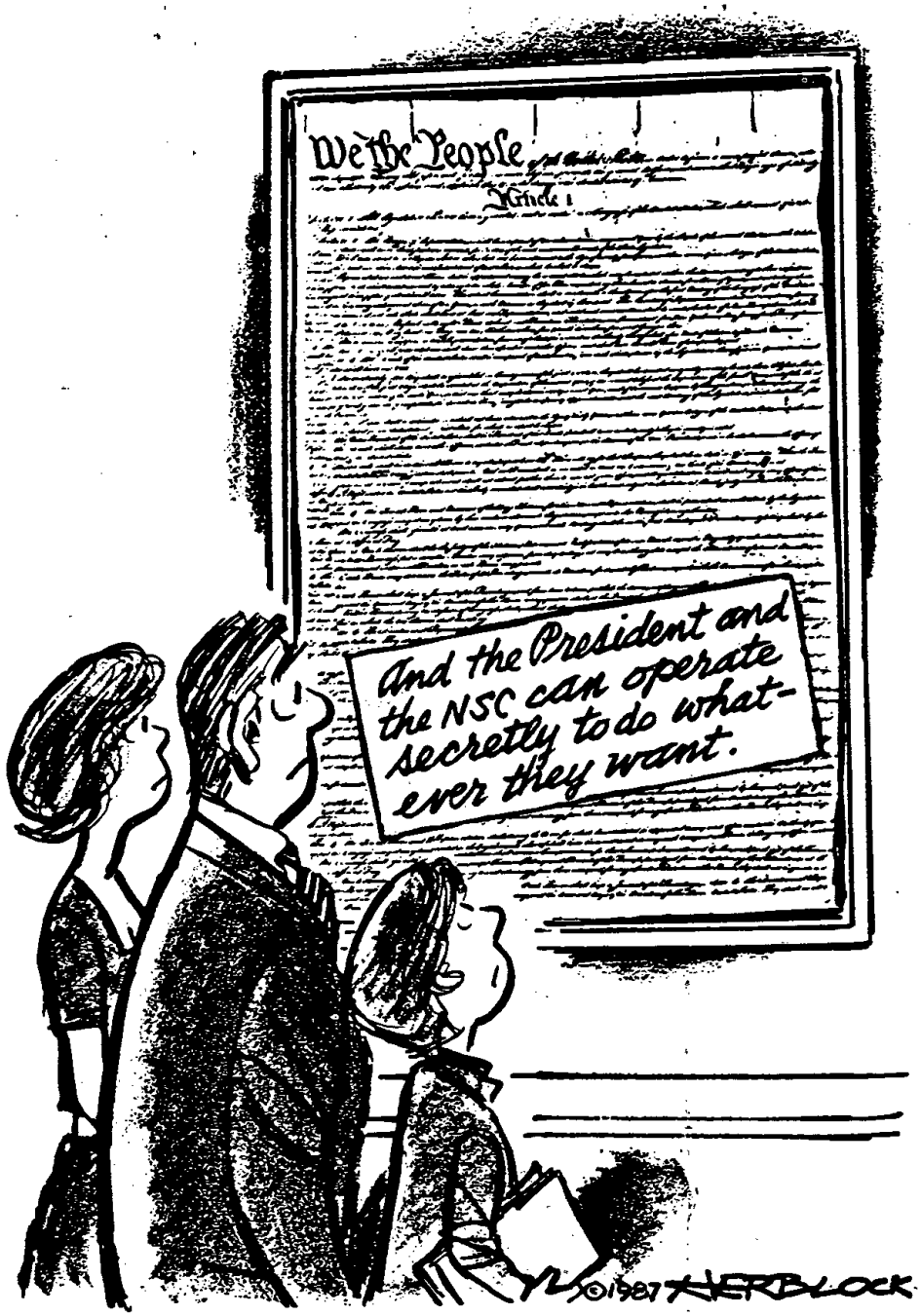
SECRECY PROMOTES FUGITIVE POLICYMAKING

The problem worsens where such secret laws are fugitive instruments for policymaking, mobilizing executive branch personnel and federal resources in ways that conflict with national policy and may violate our laws.

NSDDs that sustain covert activity abroad by the United States merit especially careful examination. While covert activity may be necessary in certain situations, it must be conducted in accordance with procedures for informing Congress and only as necessary to protect America's vital interests.

The use of NSDDs for covert operations occurred very early in the Reagan administration, initiating what has been called the president's "secret war" in Nicaragua.[11] In November 1981, President Reagan, in response to a proposal by CIA Director William Casey, issued NSDD 17 establishing a $19 million CIA covert operation in Nicaragua and authorizing the CIA to recruit a force of 500, to be supplemented by at least 1,000 Nicaraguan rebels being trained in Argentina.[12] In 1987, reports indicated that NSDD 17 directed an estimated $50 million to Argentina to train Nicaraguan rebels.[13]

ALTERED DOCUMENT



THE PRESIDENT'S "SECRET LAWS"

The Iran-contra scandal demonstrated that covert operations are vulnerable to the abuse of authority, secret development of questionable American foreign policy, and misrepresentation of United States interests. Foremost among the instruments of secrecy authorizing these activities was a single NSDD issued by President Reagan. It contravened the president's own public policy on covert action, embodied in the president's executive order on covert action which explicitly limited "special activities" to the CIA.[14] Nonetheless, the National Security Council engaged in secret activities in the Middle East and Central America, and bypassed the required reporting of covert operations to Congress.

National Security Decision Directive 159, entitled "Covert Action Policy Approval and Coordination Procedures" was issued by President Reagan on January 18, 1985 [Appendix B]. It has two important components. First, President Reagan authorized agencies other than the CIA, such as the National Security Council, to undertake covert operations by virtue of a Presidential Finding. A Finding is a document signed by the president, required by law, granting intelligence agencies permission to undertake specific covert operations. Findings are required by law specifically so that covert activities are accountable through the president. Second, President Reagan exempted a broad range of covert activities by agencies other than the CIA from being labelled covert action. This provision functions as an escape clause because it eliminates the need for a covert action Finding, and eliminates the requirements for reporting to Congress.

Specifically, NSDD 159 was central to White House arms-for-hostages transactions with Iran, allowing the National Security Council to mount a covert operation and directing that it be excluded from the law requiring that it be reported to Congress. The arms sale to Iran was a radical departure from ongoing U.S. policy -- an arms embargo had been in effect since the Shah was deposed by the Ayatollah Khomeni. In fact, Secretary of Defense Weinberger and Secretary of State Schultz opposed the secret law. Secretary Weinberger stopped a June 1985 attempt to issue an NSDD establishing essentially the same plan.[15] Nonetheless, the "Covert Action Finding Regarding Iran" was signed by the president, prompting shipment to Iran of 4000 TOW antitank missiles, spare parts for radar systems purchased by the Shah and other military equipment. The CIA played an integral role, serving as a conduit for three shipments of more than 2000 missiles in 1986.[16] The new arms sale effort violated current prohibitions on such transactions set in U.S. foreign policy and the Arms Export Act.[17]

The second application of NSDD 159 for fugitive U.S. policymaking was its use by Oliver North and others who did not want their covert activity in Central America to be reported to Congress. North and others interpreted the president's directive to mean that a Presidential Finding was not required. North's interpretation was based on an escape clause in NSDD 159, in which President Reagan states:

> However, the provision of routine support in the form of personnel, funds, equipment, supplies, transportation, training, logistics, and facilities by Government components other than the CIA to support a covert action shall not in itself be considered a separate covert action by the supplying agency.[18]

Essentially everything the NSC and its "enterprise" did in Nicaragua can be included in the above list of "routine support." Relying on the above provision in NSDD 159, the result, however, was that the NSC operation was not considered a covert operation, Congress was uninformed, and the NSC's secret war in Nicaragua continued. It was only at a later date that a veteran CIA official, accustomed to the use and intent of Presidential Findings for accountability of covert operations, required that one be obtained from President Reagan. During the Iran-contra hearings in the summer of 1987, former National Security Advisor John Poindexter claimed that he destroyed the only copy of the Finding ultimately obtained to authorize NSC operations in Central America. The NSC, however, continued to insist that it was not accountable. On July 13, 1987, the following exchange occurred between U.S. Senator George Mitchell (D-ME) and Oliver North:

> *Senator Mitchell:* Since the law requires that before any covert action could be conducted, the President must specifically authorize it, since you've testified that you conducted a covert operation, and since you've further testified that the President neither designated the National Security Council to conduct covert operations nor did he make a Finding authorizing this covert operation, what was the legal basis for your activities with respect to this covert operation?
>
> *Oliver North*: The National Security Council staff is not included within the constraints that are depicted in either the executive order [on covert operations] or the NSDD [159] as an intelligence agency. And thus, in neither case does the law provide that the president had to do what you are saying he had to do.[18]

SECRECY DEFEATS THE CHECKS AND BALANCES SYSTEM

The secret laws reflect the extent to which the president and the executive branch exercise unreviewable authority and escape accountability. Regardless of the relationship of such directives to current policy, Congress has virtually no knowledge of their issuance; even in the case of pertinent national security matters, the appropriate committees of Congress are not informed. Even specific requests from Congress, seeking to fulfill its intelligence oversight responsibilities under the law, have been ignored by current and past administrations.[19]

These points were underscored at a 1987 hearing of the House Government Operations Subcommittee. The chairman of the Oversight and Evaluation Subcommittee of the House Select Committee on Intelligence, Congressman Anthony Beilenson (D-CA):

> What I have to say about NSDDs, as they are called, will be brief. It is based on an incomplete understanding of this form of Presidential decision. That is because the Permanent Select Committee on Intelligence does not receive copies of NSDDs.[20]

SECRECY DEFEATS ACCOUNTABILITY

The lack of congressional access to NSDDs creates special problems of accountability. Even when these laws are discovered and Congress, for example, calls for partial or complete revocation, the executive branch continues, undetected, to implement its original plans.

The problem is put in perspective by the more conventional system of presidential proclamations and executive orders. These are issued according to a numerical accounting system and by law must be published in the *Federal Register* and reproduced in the *Code of Federal Regulations*.[21] Furthermore, while confidential or classified executive orders have been issued and not published, they are accounted for in the numbering system. Congress, particularly its intelligence committees, has been granted access to these records. This system is particularly useful to ensure that executive orders that have been rescinded are in fact "off the books."[22]

Two recent examples illustrate that the same is not true with the NSDDs. Even when the president has promised to rescind a particular NSDD program, there is no way to monitor such action.

National Security Decision Directive 84. NSDD 84, "Safeguarding National Security Information," was issued by President Reagan in 1983 as a major policy initiative of the administration to stop unlawful disclosures of classified information by government employees. Its requirements include a secrecy contract for certain government employees, possibly every Cabinet official, pledging lifetime government censorship of all writings.

The directive was publicly revealed as a Department of Justice memorandum. U.N. Ambassador Jeane Kirkpatrick refused to sign her lifetime censorship contract, which was presented to her by the State Department as she prepared to leave her U.N. post.[23] Congress, government employees, and the public reacted negatively to the plan.

On February 15, 1984, President Reagan agreed to suspend the lifetime censorship provision of NSDD 84 -- but the practice in fact widened. Unknown to Congress, the Reagan administration had already been using a censorship contract developed by the CIA.[24] NSDD 84 had merely revised this contract and extended its application throughout the government.

President Reagan interpreted suspension of the censorship portion of NSDD 84 in the narrowest possible terms: refrain from using the revised censorship contract. The president then continued a widespread program of censorship agreements using the original CIA contract. In September 1986, the General Accounting Office revealed several startling statistics resulting from a study that did not even include the Central Intelligence Agency or the National Security Agency: 11 agencies alone reported 290,000 government workers had been required to sign the lifetime censorship contract because of access to intelligence information, and the policy continued in numerous agencies ranging from the Agency for International Development to the Securities and Exchange

Commission.[25] The practice has also been extended to hundreds of government contractors and university research scientists who have received federal grants. Thus, executive branch practice has been a far cry from rescinding the censorship program. Moreover, Congress could not hold the president to his word: NSDD 84 remains effectively intact today.

National Security Decision Directive 145. NSDD 145, "National Policy on Telecommunications and Automated Information Systems Security," was issued by President Reagan in 1984 to govern the security of telecommunications and computerized information systems. It set unprecedented restrictions on access to computerized information that is not classified and is held not only by the federal government but also by private companies, libraries, and universities. Furthermore, the president gave the enforcement authority for the new policy to a highly secretive military entity -- the National Security Agency.

Public awareness of this directive, a very technical subject area, occurred almost by accident: the resignation of former White House National Security Advisor John Poindexter for his role in the Iran-contra scandal. Although the directive was known to a small number of exceptionally well-informed citizens, public awareness of NSDD 145 heightened during the investigation of Poindexter's final days at the National Security Council. Among the orders and directives that drew attention was a Poindexter memorandum that was the Reagan administration's first attempt to implement NSDD 145.[26]

Congress, librarians, scientists, information companies, and concerned citizens reacted quickly and demanded withdrawal of the Poindexter memorandum. The reasons for concern were obvious: awesome reach beyond the government, its military authority, and questionable constitutionality. Congress also responded with legislation to address the legitimate needs for computer security, creating more reasonable controls and supplanting NSDD 145.[27]

In this case, the administration was eager to disassociate itself from Poindexter and withdrew the implementing memorandum on March 17, 1987. While NSDD 145 appears to be dormant, strong evidence exists that another implementing memorandum will be produced.[28]

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National policymaking, fugitive policy instruments, and the lack of accountability for action authorized by the president are troubling qualities of National Security Decision Directives and presidential power. By using the National Security Council to create unreviewed policies, the president has ignored our constitutional system of separation of powers and checks and balances. However, the use of such directives and the propensity for excessive secrecy is an institutional problem. It is not unique to the Iran-contra affair or the Reagan administration, and it is not likely to disappear in 1988.

NOTES : THE PRESIDENT'S "SECRET LAWS"

1. National Security Decision Directives (NSDD) under President Reagan; Presidential Directives (PD) under President Carter; National Security Decision Memorandums (NSDM) under Presidents Ford and Nixon; National Security Action Memorandums (NSAM) under Presidents Kennedy and Johnson; and National Security Council Presidential ("P") and "Mill" Papers under Presidents Truman and Eisenhower. Source: Judicial, Fiscal, and Social Branch. The National Archives. Washington, D.C.

2. Special Committee on National Emergency and Delegated Emergency Powers, "National Emergencies and Delegated Emergency Powers," U.S. Senate, 94th Congress, 2nd Session, S. Rept. No. 94-922, 28 May 1976, p. 16.

3. "State Dept. Acted to Block U.S.-Egypt Attack on Libya," *Washington Post*, 20 February 1987, p. A1, A27.

4. National Security Decision Directive 159, "Covert Action Policy Approval and Coordination Procedures," 18 January 1985.

5. Bob Woodward, *VEIL: The Secret Wars of the CIA 1981-1987* (New York: Simon and Schuster, 1987), p. 394.

6. Office of Information Policy and Security Review, National Security Council, Letter from the Director, 26 April 1984.

7. National Security Decision Directive 1, "National Security Council Directives," 25 February 1981, Revised 17 December 1981.

8. National Security Decision Directive 23, "U.S. Civil Defense Policy," 3 February 1982.

   National Security Decision Directive 25, "Preparations for the Economic and NATO Summits June 1982," 12 February 1982.

   National Security Decision Directive 60, "Preparations for the 1983 Summit," 9 October 1983.

   National Security Decision Directive 145, "National Policy on Telecommunications and Information Systems Security," 17 September 1984.

   National Security Decision Directive 94, "Commercialization of Expendable Launch Vehicles," 16 May 1983.

   National Security Decision Directive 68, Nuclear Materials, 18 November 1982. (official title not public).

NOTES : THE PRESIDENT'S "SECRET LAWS"

National Security Decision Directive 138, International Terrorism, 1984. (official title and exact date not public).

9. National Security Decision Directive 84, "Safeguarding National Security Information," 11 March 1983.

National Security Decision Directive 196, "Counterintelligence/Countermeasure Implementation Task Force," 1 November 1985.

10. National Security Decision Directive 100, "Enhanced U.S. Military Activity and Assistance for the Central American Region," 23 July 1983.

11. John Prados, *Presidents' Secret Wars*, (New York: Wm. Morrow & Co., 1987).

12. Ibid., pp. 371, 379.

See above, n. 5, pp. 173, 174, 187.

13. "Rebel Fund Diversion Rooted in Early Policy," *Washington Post*, 1 January 1987, p. A1, A24.

14. Executive Order 12333, Sec. 3 (4 December 1981).
The order provides that "no agency except the CIA ... may conduct any special activity (elsewhere defined to include covert actions overseas) unless the President determines that another agency is more likely to achieve a particular objective."

In its final report issued in 1987, the Iran-contra Committee concluded: "There was no Presidential determination that the NSC staff should conduct the Contra covert operation, and thus the NSC staff's covert action in support of the Contras violated the President's executive order." "Report of the Congressional Committees Investigating the Iran-Contra Affair," H. Rept. No. 100-433 and S. Rept. 100-216, 100th Congress, 1st Session, November 1987, p. 416.

15. Testimony by John Poindexter, Iran-contra Hearings, Federal News Service transcript, 20 July 1987, p. 12-1.

16. "Pentagon Fumbled on TOWS for Iran," *Washington Post*, 1 August 1987, p. A11.

17. "Weinberger Highlights a Problem: Did '85 Sales to Iran Break Law?" *Washington Post*, 1 August 1987, p. A10.

18. See above, n.6.

19. *Taking the Stand: The Testimony of Lt. Col. Oliver L. North*, (New York: Pocket Books, 1987), p. 527.

NOTES

20. The Intelligence Oversight Act requires that the intelligence committees of Congress be provided on request "any information or material concerning intelligence activities" in the possession of the intelligence community.

21. Prepared testimony of Rep. Anthony C. Beilenson, Committee on Government Operations Subcommittee on Legislation and National Security, 17 March 1987, p. 1.

22. This system began in 1907 and publication has been required since passage of the Federal Register Act in 1935 [44 U.S.C. 1505(a)].

23. Prepared statement of Harold Relyea, Specialist in American National Government, Congressional Research Service, Library of Congress. Before the House Committee on Government Operations, 17 March 1987, p. 2.

24. Angus MacKenzie, "Fit To Be Tied," *Quill*, July/August 1985, p. 13.

25. Form 4193.

26. General Accounting Office, "Information and Personnel Security: Data on Employees Affected by Federal Security Programs," GAO/NSIAD-86-189FS, September 1986, p. 3.

27. National Security Council, "National Policy on Protection of Sensitive, but Unclassified Information in Federal Government Telecommunications and Automated Information Systems," NTISSP No. 2, 29 October 1986.

28. The Computer Security Act of 1987, H.R. 145. Introduced 6 January 1987. Passed by the House of Representatives 22 June 1987.

"To provide for a computer standards program within the National Bureau of Standards, to provide for Government-wide computer security, and to provide for the training in security matters of persons who are involved in the management, operation, and use of Federal computer systems, and for other purposes."

"Reagan Rebuffed on Computer Files: House Bill Wrests Control of Access From the Military," *New York Times*, 23 June 1987.

29. Ross Gelspan, "Reagan Seeks Controls On Database Access," *Boston Globe*, 20 April 1987, p. 36-7.

Appendix A

NATIONAL SECURITY DECISION DIRECTIVES

National Security Decision Directives (NSDD) do not appear in published records of the president or the National Security Council. The following list of NSDDs has been compiled from those publicly known to exist. Some are now declassified, in partial or whole form, and are in the National Archives, Washington, D.C., Record Group 273, Records of the National Security Council.
* Indicates general subject and/or date, but specific title and/or date not public.

NSDD 1	"National Security Council Directives," February 25, 1981. Revised, December 17, 1981.
NSDD 2	"National Security Council Structure," January 12, 1982.
NSDD 3	"Crisis Management -- Special Situation Group," 1981. *
NSDD 5	"Conventional Arms Transfer Policy," July 8, 1981.
NSDD 6	"United States Non-Proliferation and Peaceful Nuclear Cooperation Policy," July 16, 1981.
NSDD 8	Space Transportation System Policy, 1981. *
NSDD 12	"Strategic Forces Modernization Program," October 1, 1981.
NSDD 13	"Nuclear Weapons Employment Policy." *
NSDD 17	Deterring Cuban Models / Covert Action in Nicaragua, November 23, 1981. *
NSDD 19	"Protection of Classified National Security Council and Intelligence Information," January 12, 1982.
NSDD 22	"Designation of Intelligence Officials Authorized to Request FBI Collection of Foreign Intelligence," January 29, 1982.
NSDD 23	"U.S. Civil Defense Policy," February 3, 1982.
NSDD 25	"Preparations for the Economic and NATO Summits, June 1982," February 12, 1982.
NSDD 26	"U.S. Civil Defense Policy," March 16, 1982.
NSDD 30	Anti-terrorist Policy / State Department, 1982. *
NSDD 32	National Strategy, May 1982. *
NSDD 35	MX Basing Mode, May 17, 1982. *
NSDD 38	"Staffing At Diplomatic Missions and Their Constituent Posts," June 2, 1982.
NSDD 42	National Space Policy, 1982. *
NSDD 47	"Emergency Mobilization Preparedness," July 22, 1982.
NSDD 50	Space International Payloads, August 6, 1982. *
NSDD 60	"Preparations for the 1983 Summit," October 9, 1982.
NSDD 68	Nuclear Materials, November 18, 1982. *
NSDD 75	Strategy Regarding Soviet Union/Covert Operation. *

NSDD 77	"Management of Public Diplomacy Relative to National Security," January 14, 1983.
NSDD 80	"Shuttle Orbiter Production Capability," February 3, 1983.
NSDD 84	"Safeguarding National Security Information," March 11, 1983.
NSDD 85	"Eliminating the Threat from Ballistic Missiles," March 25, 1983.
NSDD 89	"The Export Administration Act," April 11, 1983.
NSDD 90	"United States Arctic Policy," April 14, 1983.
NSDD 91	ICBM Guidance, April 1983. *
NSDD 93	"Refugee Policy and Processing Refugees from Indochina," May 13, 1983.
NSDD 94	"Commercialization of Expendable Launch Vehicles," May 16, 1983.
NSDD 97	"National Security Telecommunications Policy," August 3, 1983.
NSDD 99	Lebanon. *
NSDD 100	"Enhanced U.S. Military Activity and Assistance for the Central American Region," July 28, 1983.
NSDD 102	"U.S. Response to Soviet Destruction of KAL Airliner," September 5, 1983.
NSDD 111	Middle East Policy, October 29, 1983.*
NSDD 113	Radio Telephone COMSEC Government Limousines. *
NSDD 119	Strategic Defense Initiative, 1984. *
NSDD 124	U.S. Objectives in Central America and Mexico, February 1984.*
NSDD 127	Strategic Policy. *
NSDD 138	International Terrorism, 1984. *
NSDD 143	"U.S. Third World Hunger Relief: Emergency Assistance," July 9, 1984.
NSDD 144	National Space Strategy, August 15, 1984. *
NSDD 145	"National Policy on Telecommunications and Automated Information Systems Security," September 17, 1984.
NSDD 156	"U.S. Third World Food Aid: A 'Food For Progress' Program," January 3, 1985.
NSDD 159	"Covert Action Policy Approval and Coordination Procedures," January 18, 1985.
NSDD 164	"National Security Launch Strategy," February 25, 1985.
NSDD 166	U.S. Support to Afghan Rebels, April, 1985. *
NSDD 167	"Food For Progress Program Implementation," April 29, 1985.
NSDD 168	"U.S. Policy Towards North Africa," April 30, 1985.
NSDD 172	Strategic Defense Initiative, 1985. *
NSDD 175	"Establishment of a Blue Ribbon Commission on Defense Management," June 17, 1985.
NSDD 178	Strategic Policy. *
NSDD 179	"Task Force on Combating Terrorism," July 20, 1985.
NSDD 181	Space Shuttle Pricing Policy, August 1, 1985. *
NSDD 189	"National Policy on the Transfer of Scientific, Technical, and Engineering Information," September 21, 1985.
NSDD 192	SDI/Narrow Interpretation of ABM Treaty, October 12, 1985. *
NSDD 196	"Counterintelligence / Countermeasure Implementation Task Force," November 1, 1985.
NSDD 197	"Reporting Hostile Contacts and Security Awareness," November 1, 1985.
NSDD 201	"National Security Emergency Preparedness Telecommunications Funding," December 17, 1985.

NSDD 202	Arms Control. *
NSDD 207	Protection of Spouse of Foreign Heads of State. *
NSDD 219	Blue Ribbon Commission on Defense Management, April 1, 1986. *
NSDD ?	"Narcotics and National Security," April 8, 1986.
NSDD 254	"United States Space Launch Strategy," December 27, 1986.
NSDD 259	"U.S. Civil Defense Policy," February 9, 1987.
NSDD 266	"Implementation of the Recommendations of the President's Special Review Board," March 31, 1987.
NSDD 276	"National Security Council Interagency Process," June 9, 1987.
NSDD 280	"National Airlift Policy," June 24, 1987.

Appendix B

Extract From National Security Decision Directive 159

January 18, 1985

COVERT ACTION POLICY APPROVAL AND COORDINATION PROCEDURES

Approval Procedures for Intelligence

1. Presidential Findings. The President shall approve all covert action findings in writing. Under Section 662 of the Foreign Assistance Act of 1961, as amended, all covert actions undertaken by the Central Intelligence Agency must be authorized by a Presidential Finding that each such operation is important to US national security. E.O. 12333 and this Directive establish that covert actions (intelligence "special activities") undertaken by components other than CIA also require a Presidential Finding. Each covert action is also considered a significant anticipated intelligence activity under Section 501 of the National Security Act and is subject to certain Congressional reporting procedures. The Congressional reporting procedures for significant intelligence activities apply to all agencies of the intelligence community. Findings shall remain valid until formally cancelled.

2. In accordance with Executive Order 12333, the Central Intelligence Agency shall conduct covert actions unless the President specifically designates another agency of the government. When the provision of substantial support by one government component to another is essential to the conduct of a covert action, indication of the extent and nature of that support shall be included as part of the Finding or Memorandum of Notification. However, the provision of routine support in the form of personnel, funds, equipment, supplies, transportation, training, logistics, and facilities by Government components other than CIA to support a covert action shall not in itself be considered a separate covert action by the supplying agency.

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June 14, 1988

EXECUTIVE SUMMARY OF MEMORANDUM CONCERNING THE CONSTITUTIONALITY OF A PROPOSED AMENDMENT TO H.R. 3822 WHICH WOULD CRIMINALIZE DISCLOSURES OF CLASSIFIED INFORMATION BY MEMBERS OF CONGRESS AND THEIR AIDES

Set forth below is an Executive Summary of a memorandum being prepared by this Firm for People for the American Way concerning the constitutionality of a proposed amendment to the Intelligence Oversight Act of 1988 (H.R. 3822) which would impose criminal liability on members of Congress and their aides for disclosures of classified information supplied pursuant to the statute, except as authorized by the President or the rules of the House or Senate.

The proposed amendment to make it a crime for any Member or Congressional employee to disclose certain "classified" information without authorization of the President, unless pursuant to House or Senate rule, appears to violate the United States Constitution in several respects. Although the objective of safeguarding sensitive national security secrets is important and legitimate, under our Constitutional framework it is both necessary and possible to attain that objective through means other than this proposed amendment.

First, the amendment raises serious questions under the doctrine of separation of powers. As a criminal statute targetted exclusively at the Legislative Branch and its Members, the amendment empowers the Executive Branch to interfere in the constitutional functions of Congress. The degree of inter-branch interference that would be brought on by the amendment results from the amendment's targetting of the Legislative Branch, its incorporation of the Executive Branch's classification system, and its provision for Presidential authorization of disclosures, which effectively confer upon the Executive Branch the authority to define what acts by Members and their staffs constitute a crime.

Second, the amendment appears to violate the Speech and Debate Clause of the Constitution because it would reach a wide range of disclosures that occur within the sphere of legislative activity. Thus, the amendment would improperly criminalize any act -- even speeches on the floor or during a committee session -- by a Member which could be characterized as conveying "classified" information to anyone -- even other Members of Congress or their staffs -- unless there is permission from the President or compliance with House or Senate procedures.

Third, the amendment would appear to violate the First Amendment rights of Members and their staffs, and would have a detrimental chilling effect upon their communications among

themselves and with their constituents and the public about important matters of national policy. To be sure, the government has a legitimate interest in safeguarding national security secrets. However, notwithstanding remarks to the contrary by former Executive Branch officials such as Oliver North and John Poindexter, it has not been established that the existing framework of statutes and Congressional rules fails adequately to protect this governmental interest. Moreover, because the Executive Branch classifies a huge quantity of information that is not sensitive from a national security standpoint, the amendment's incorporation of the classification system as the standard for criminal liability appears to result in prohibiting the disclosure of a substantial amount of communication that cannot be prohibited under the First Amendment.

Finally, in purporting to criminalize disclosures of "the substance" of classified information, the proposed amendment appears to contravene the First Amendment because of the vagueness of the standard. Documents and briefings that are generally denominated as "classified" frequently convey a great deal of information which in fact is not classified but which is not specifically designated as such. Thus, the line between what is classified and what is not is often unclear. The proposed criminal provision appears therefore to be impermissibly vague and would improperly chill the disclosure of information that is not classified.

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June 17, 1988

MEMORANDUM TO PEOPLE FOR THE AMERICAN WAY

SUBJECT: THE CONSTITUTIONALITY OF A PROVISION THAT WOULD CRIMINALIZE DISCLOSURES OF CLASSIFIED INFORMATION BY MEMBERS OF CONGRESS AND THEIR STAFFS

This memorandum examines the constitutionality of a proposed statute that would impose criminal liability on Members of Congress and their aides for "knowingly and willfully" disclosing "the substance" of any "classified information" that has been provided to Congress pursuant to the Executive Branch's statutory duties to inform Congress of "all intelligence activities." An amendment aimed at creating such a new felony was offered during the House Intelligence Committee's consideration of the proposed Intelligence Oversight Act of 1988, H.R. 3822.[1/]

1/ The amendment reads as follows:

UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION

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

[Footnote continued next page]

Although the amendment was rejected in that Committee by a tie vote, its sponsors have announced that they plan to reintroduce it before either the House Foreign Affairs Committee or the full House of Representatives.[2/] Some Members have expressed an interest in examining questions as to the provision's constitutionality.

I. EXECUTIVE SUMMARY

The proposed amendment to make it a crime for any Member or Congressional employee to disclose certain "classified" information without authorization of the President, unless pursuant to House or Senate rule, appears to violate the United States Constitution in several respects. Although the objective of safeguarding sensitive national security secrets is important and legitimate, under our Constitutional framework it is both necessary and possible to attain that objective through means other than this proposed amendment.

[Footnote continued from preceding page]

than $20,000 or imprisoned for not less than ninety days nor more than five years, or both.

A copy of H.R. 3822 is Attachment A to this Memorandum.

2/ See House Panel Backs Covert-Action Notice Bill, Congressional Quarterly 1295 (May 14, 1988).

First, the amendment raises serious questions under the doctrine of separation of powers. As a criminal statute targeted exclusively at the Legislative Branch and its Members, the amendment empowers the Executive Branch to interfere in the constitutional functions of Congress. The degree of inter-branch interference that would be brought on by the amendment results from the amendment's targeting of the Legislative Branch, its incorporation of the Executive Branch's classification system, and its provision for Presidential authorization of disclosures, which effectively confer upon the Executive Branch the authority to define what acts by Members and their staffs constitute a crime.

Second, the amendment appears to violate the Speech and Debate Clause of the Constitution because it would reach a wide range of disclosures that occur within the sphere of legislative activity. Thus, the amendment would improperly criminalize any act -- even speeches on the floor or during a committee session -- by a Member which could be characterized as conveying "classified" information to anyone -- even other Members of Congress or their staffs -- unless there is permission from the President or compliance with House or Senate procedures.

Third, the amendment would appear to violate the First Amendment rights of Members and their staffs, and would have a detrimental chilling effect upon their communications among themselves and with their constituents and the public about important

matters of national policy. To be sure, the government has a legitimate interest in safeguarding national security secrets. However, notwithstanding remarks to the contrary by former Executive Branch officials such as Oliver North and John Poindexter, it has not been established that the existing framework of statutes and Congressional rules fails adequately to protect this governmental interest. Moreover, because the Executive Branch classifies a huge quantity of information that is not sensitive from a national security standpoint, the amendment's incorporation of the classification system as the standard for criminal liability appears to result in prohibiting the disclosure of a substantial amount of communication that cannot be prohibited under the First Amendment.

Finally, in purporting to criminalize disclosures of "the substance" of classified information, the proposed amendment appears to contravene the First Amendment because of the vagueness of the standard. Documents and briefings that are generally denominated as "classified" frequently convey a great deal of information which in fact is not classified but which is not specifically designated as such. Thus, the line between what is classified and what is not is often unclear. The proposed criminal provision appears therefore to be impermissibly vague and would improperly chill the disclosure of information that is not classified.

II. THE PROPOSED LEGISLATION

A. The Intelligence Oversight Act.

The Intelligence Oversight Act of 1988, H.R. 3822, is the centerpiece of the legislative response to the unlawful covert activities that comprised the Iran-Contra Affair.[3/] The Act would repeal the Hughes-Ryan amendment of the Foreign Assistance Act of 1961 (22 U.S.C. § 2422) and amend Title V of the National Security Act of 1947 so as to consolidate and strengthen the statutory provisions that require the President and the heads of agencies to keep Congress fully and timely informed of all intelligence activities, including covert actions. Among the key provisions of the bill is a requirement that the President give the intelligence committees[4/] prior notice of all covert actions, or, when time is of the essence, notice as soon as possible but in no event later than 48 hours after the President has authorized covert action.[5/] A similar bill, S. 1721, passed the

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3/ Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No. 433, 100th Cong., 1st Sess. 13 (1987)("Iran-Contra Report"). The Bill adopts several recommendations expressly advanced by the Iran-Contra Committees. See id. at 423-24.

4/ The Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives.

5/ Other provisions include a prohibition on Presidential authorization of covert actions except pursuant to a written Finding signed by the President and a ban on expending appropriated funds on a covert action unless there is such a Finding.

Senate by a bipartisan majority of 71-19 on March 15, 1988.

B. The Proposed Amendment Concerning Disclosure of Classified Information.

On May 11, 1988, Representative Livingston proposed an amendment to H.R. 3822 during the House Intelligence Committee's mark-up of the bill. The amendment would create a new crime for disclosing the "substance" of "classified" information received pursuant to the reporting requirements contained in the bill.

This provision is extraordinary in at least two respects. First, if enacted, it would mark the first time that Congress has incorporated the Executive Branch's classification system as a general standard for criminalizing communication activity.6/ Second, it would single out members of Congress and their staffs as the only potential targets for criminal liability.

The impetus for this proposed amendment appears to be a perception by some that Members and their staffs should be subject to criminal prohibitions not applicable to others in the public or private sector who have access to information that the Executive Branch has "classified."

6/ Congress has repeatedly rejected proposals which would generally make disclosure of classified information a crime. See infra notes 81-82.

The proposed amendment would apply to a large volume of information. Historically, the Executive Branch designates much of the information provided to the intelligence committees pursuant to the existing reporting statutes as classified under the general executive order setting forth standards and procedures for limiting access to "national security information."7/ We assume that the Executive Branch would continue this practice under the strengthened reporting requirements contained in H.R. 3822.

The proposed amendment would exempt from the criminal prohibition two narrow categories of disclosures of classified information. First, disclosures that have "the authorization of the President" would be permitted. The President's discretion to authorize such disclosures is not limited in any way, nor are procedures established to ensure prompt consideration of an authorization request.

The provision would also exempt disclosures made "pursuant to the applicable rules" of the House or the Senate.8/

7/ At present, the applicable order is Exec. Order No. 12,356, 3 C.F.R. 165 (1983), reprinted in 50 U.S.C. § 401, at 51 (1982).

8/ H.R. 3822, Section 501(d), would retain essentially verbatim the requirement, now contained in 50 U.S.C. § 413(d), that each House of Congress, in consultation with the Director of Central Intelligence, establish by rule or resolution procedures "to protect from unauthorized disclosure all 'classified' information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this title."

Rules are already in place in both houses specifying detailed and exclusive procedures by which the intelligence committees may "disclose publicly any information in the possession of such committee after a determination by such committee that the public interest would be served by such disclosure."[9/] In the case of classified information provided by the Executive Branch, these rules permit public disclosure only after a majority vote in favor of disclosure by the committee, notification of the President, and, if the President objects, a majority vote in favor of disclosure by the entire house.[10/] These rules permit the intelligence committees to disclose such information to other committees or members only in accordance with regulations of the intelligence committees,[11/] and prohibit such other committees and

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9/ Rules of the House of Representatives, Rule XLVIII, § 7(a); Senate Manual, Standing Order 79.13, § 8(a).

10/ Rules of the House of Representatives, Rule XLVIII, § 7(b); Senate Manual, Standing Order 79.13, § 8(b).

11/ The rules of the intelligence committees strictly limit the circumstances in which such disclosures may be made. For example, in the House, access by individual members who are not on the intelligence committee to classified information held by the committee may only be granted upon (1) written notice to the clerk of the committee by the Member seeking access and (2) a record vote by a majority of the committee approving such access. Rules of the House of Representatives, Permanent Select Committee on Intelligence, Rule 10(b). Members and staff of the the House committee are barred from disclosing classified information to anyone who is not a member of the committee or its staff, except as directed or authorized by the committee in accordance with House Rule XLVIII and the committee's own rules. Rules of the House of Representatives, Permanent Select Committee on Intelligence, Rules 8 and 10(e). The rules for the Senate committee are similar. See Rules of Procedure for the Select Committee on Intelligence, Rules 9.4, 9.6, and 10.5.

members from making any disclosures except in a closed session of the entire body.[12/] The House Committee on Standards of Official Conduct and the Senate Select Committee on Ethics are charged with investigating disclosures of information that do not comply with these rules and may recommend "appropriate action such as censure, removal from committee membership, or expulsion from the House [Senate], in the case of a Member, or removal from office or employment or punishment for contempt, in the case of an officer or employee."[13/]

The effect of the proposed amendment to H.R. 3822 is in most circumstances to prohibit individual members and their staffs from disclosing without permission of the President information that has been provided by the Executive Branch and designated as classified by the Executive Branch.

12/ Rules of the House of Representatives, Rule XLVIII, § 7(c)(2); Senate Manual, Standing Order 79.13, § 8(c)(2).

13/ Rules of the House of Representatives, Rule XLVIII, § 7(e); Senate Manual, Standing Order 79.13, § 8(e).

III. THE CONSTITUTIONALITY OF THE PROPOSED AMENDMENT.

Although Congress normally can appropriately enact legislation despite the existence of doubts as to its constitutionality,[14/] "[i]n the performance of its constitutional duties [Congress] must initially interpret the Constitution"[15/] and should not enact legislation that it concludes is unconstitutional. Congress should be especially sensitive to constitutional concerns where either its own institutional prerogatives are at stake or when important First Amendment issues are present. The proposal to criminalize disclosures of classified information by members of Congress and their aides raises these concerns.

A. Separation of Powers.

The proposed amendment raises serious questions under the doctrine of separation of powers by extending to the Executive Branch authority to control basic functions of the Legislative Branch. The amendment would apply only the Legislative Branch. The Executive Branch would be given the authority to determine what should be classified in the first place, when

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14/ See, e.g., Letter of President Franklin D. Roosevelt to Congressman Hill (July 6, 1935), printed in 4 The Public Papers and Addresses of Franklin D. Roosevelt 297-98 (1938), and quoted in G. Gunther, Constitutional Law 24 (1985).

15/ United States v. Nixon, 418 U.S. 683, 703 (1974).

disclosures are permissible, and when prosecutions should be initiated.

The Constitution "sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial. . . ."[16/] Many provisions of the Constitution, and indeed perhaps its most dominant and overarching theme, are directed at keeping "the three great branches of the National Government . . . largely separate from one another."[17/] "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty."[18/] As the Supreme Court recently reaffirmed, the tri-partite structure of co-equal branches is the very cornerstone of this Nation's democratic processes:

> That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.[19/]

16/ INS v. Chadha, 462 U.S. 919, 951 (1983).

17/ Buckley v. Valeo, 424 U.S. 1, 120 (1976).

18/ Bowsher v. Synar, 478 U.S. 714, ___, 106 S. Ct. 3181, 3186 (1986) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).

19/ Id. at 3187.

The doctrine of separation of power prohibits two major types of governmental action. First, it makes it impermissible for one branch to interfere with another's performance of its constitutionally assigned function.[20/] The Supreme Court recognized this fundamental aspect of the doctrine of separation of powers in Humphrey's Executor v. United States:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality.[21/]

The doctrine likewise prohibits one branch from usurping or being assigned "a function that more properly is entrusted to another."[22/] Thus, each branch is constitutionally bound to confine its exercise of authority to the function uniquely assigned to it, namely legislative, executive, or judicial.[23/]

20/ INS. v. Chadha, 462 U.S. at 963 (Powell, J., concurring). Cases analyzing this aspect of the problem include Nixon v. Administrator of General Services, 433 U.S. 425, 433 (1977) and United States v. Nixon, 418 U.S. 683 (1974).

21/ 295 U.S. 602, 629-30 (1935).

22/ INS v. Chadha , 462 U.S. at 963 (Powell, J., concurring).

23/ See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Springer v. Government of the Philippine Islands, 277 U.S. 189, 203 (1928).

The proposed amendment raises both of these concerns. By creating a crime of disclosure that is targeted exclusively at the Legislative Branch, it would empower the Executive Branch to interfere directly in necessary and important functions of the Legislative Branch, namely communications among Members of Congress, communications between Members and their staffs, and communications between Members and their constituents and the public. Such communication is the lifeblood of the constitutional function of legislating that is uniquely conferred upon the Congress under the Constitution.24/

The amendment would have the effect of transferring to the Executive Branch substantial authority to direct legislators how to handle and use information which the Constitution and statute entitles Congress to receive and utilize. Information about intelligence activities relating to national security is a matter that does not lie within the exclusive province of the Executive Branch. It has long been recognized that authority over national security matters is "confided by our Constitution to the political departments of the government, Executive and Legislative."25/ Congress, as a co-equal branch of government,

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24/ U.S. Const., art. I, § 1.

25/ Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (emphasis added). See also United States v. American Tel. & Tel. Co., 567 F.2d 121, 128

[Footnote continued next page]

has a constitutional mandate to obtain information relating to national security and defense and to use it in the process of legislating. This mandate -- which of course entails corresponding obligations to protect information which must be secret to prevent damage to national security -- flows from the Congress' power to inquire into and monitor the executive's activities[26/] as well as its express constitutional powers in the realm of national defense and foreign policy.[27/]

Hand-in-hand with Congress' constitutional and statutuory authority to receive information that relates to national security goes the authority to use it, which necessarily incorporates the authority to disclose it. This is not to

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(D.C. Cir. 1977) ("While the Constitution assigns to the President a number of powers relating to national security . . ., it confers upon Congress other powers equally inseparable from the national security. . . ."); Iran-Contra Report at 414-15. ("notification enables Congress to fulfill its constitutionally mandated role of monitoring Executive actions in the area of national defense and foreign policy").

26/ E.g., Barenblatt v. United States, 360 U.S. 109, 111 (1959); Watkins v. United States, 354 U.S. 178, 187 (1957) (power of Congressional inquiry "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.").

27/ The Constitution reserves to Congress the powers to "declare War," "make Rules concerning Captures on Land and Water," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. 1, § 8. In addition, all treaties must be ratified by the Senate. Id., art. 2, § 2, cl. 2.

suggest that there should not be restrictions and safeguards to protect against disclosures that would be harmful to national interests, nor even that there is no place for consultation between the political branches concerning the best methods for protecting sensitive information.28/ Rather, such restrictions should be imposed and enforced as they are now, by Congress through its own internal rules and processes or through generally applicable legislation. To transfer to the Executive the role of supervising Congress in this area, particularly through the mechanism of a criminal law, risks precisely the sort of interference by one branch in the affairs of another that the doctrine of separation of powers prohibits. As the Supreme Court recognized in Chadha,

> [t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.29/

The degree to which the proposed amendment invites interference by the Executive Branch in the affairs of the Congress is multiplied because the amendment would convey to the Executive Branch the authority to define which disclosures by Members or their aides constitute a crime and which are

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28/ Such consultation is already contemplated by provisions of the existing intelligence oversight laws which would be carried forward in H.R. 3822. See 50 U.S.C. § 413(d) (1982).

29/ INS v. Chadha, 462 U.S. at 951.

permissible. Under the scheme that the amendment would establish, the Executive Branch wields two distinct powers to pick and choose what information may be lawfully disclosed by individuals within the Legislative Branch. First, the classification system that the amendment would incorporate is a creature of the Executive Branch, and it reflects solely the decisions of executive officers about what information should be kept secret.[30/] Neither the amendment nor any other statute enacted by Congress erects standards by which classification decisions are to be made.[31/] As we discuss below, much information that does not threaten national security is classified.[32/] Nor is there any assurance that even under the current executive order agencies will not classify information for improper reasons.[33/]

30/ The "classification" system is a creation of the Executive Branch. While some statutes (for example, the Freedom of Information Act, 5 U.S.C. § 552(b)(1)) refer to the system, Congress has never authorized it. Greene v. McElroy, 360 U.S. 474 (1958). See Comment, A Nation Less Secure: Diminished Public Access to Information, 21 Harv. C.R.-C.L. L. Rev. 409, 433 (1986). The Department of Defense has in the past conceded that "[t]here is no statute which explicitly authorizes [it] to classify information." 118 Cong. Rec. S8854 (1972).

31/ Moreover, unlike the Freedom of Information Act's exemption for certain national security information, the proposed amendment includes no requirement that the information be "properly" classified. See 5 U.S.C. § 552(b)(1) (1982).

32/ See infra pp. 34-36.

33/ There is evidence that in practice embarrassment to the Administration sometimes plays a role in the Executive's classification decisions. See Note, Developments in the Law: The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1201-02 (1972).

Second, while disclosure may be authorized by the rules in either the House or the Senate, the amendment conveys to the President an ad hoc authority to exempt particular disclosures of classified information from the criminal prohibition.

The possibility of abuse of executive secrecy is not far-fetched. As two well-recognized scholars of the problem of secrecy in government have noted:

> The ad hoc quality of executive lawmaking will be exacerbated when the assessment of secrecy needs is tied to current political sympathies and antipathies. Moreover, the Executive is inherently self-interested in expanding the scope of matters deemed "secret"; the more that is secret, the more that falls under executive control. There is surely room in our separation of powers dialectic, confused as it is, to doubt the wisdom of allowing the fox to define the parameters of -- not to mention guard -- the chicken coop.34/

While somewhat ameliorated, the foregoing defects of the proposed amendment would not be cured by the fact that the amendment would allow disclosures to take place without the President's authorization if they are made pursuant to the rules of either the House or the Senate. As a practical matter, there will be many instances in which one or more Members will believe that a disclosure should be made either internally or publicly,

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34/ Edgar & Schmidt, Jr., Curtiss-Wright Comes Home: Executive Power and National Security Secrecy, 21 Harv. C.R.-C.L. L. Rev. 349, 354 (1986).

but will be unable to mobilize the cumbersome machinery of the entire House or Senate as is necessary to obtain a formal authorization for disclosure.[35/] Although the provision for disclosures pursuant to rule might in some instances protect some of the Congress' institutional prerogatives, the principles of separation of powers prohibit not only interferences at an institutional level, but also interferences by one branch with the activities of individual officials of another branch.[36/]

It is also no answer that the separation of powers issues here would arise as a result of a congressional enactment. The Constitutional structure of separate powers cannot be eviscerated merely because one branch is willing to abdicate to another its constitutionally mandated role and authority. Just as the issue of whether a statute unconstitutionally tramples upon the authority of the Executive Branch is never resolved by the mere fact that a President signed the bill into law,[37/] a

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35/ See supra pp. 7-9 & notes 8-12.

36/ Thus, in Bowsher v. Synar the concern was not that Congress possessed authority to interfere with the activities of the entire Executive Branch, but rather with the activities of one individual officer (the Comptroller) who was exercising executive authority. Likewise, several of the courts that have struck down the sentencing guidelines have held that the doctrine of separation of powers is violated because three individual judges who sit on the sentencing commission are subject to removal from the commission by the President. See, e.g., United States v. Brodie, 1988 U.S. Dist. Lexis 4646 (D.D.C.).

37/ For example, the constitutionality of the Gramm-Rudman-Hollings statute was not assured by the fact that the President

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statute that unconstitutionally diminishes the role of the legislature cannot stand just because a majority in both the House and the Senate vote for it. Illustrating this point, the Supreme Court has on more than one occasion struck down statutes passed by Congress that constituted transfers to the executive of legislative functions.38/

In sum, the amendment would upset the delicate system of checks and balances among the political branches and raise serious questions under the doctrine of separation of powers.

B. The Speech or Debate Clause.

As a criminal statute directed specifically at the conduct of Members of Congress and officers and employees of the Legislative Branch, and concerned specifically with disclosure of information received by Congress in connection with ongoing legislative functions, the proposed criminal nondisclosure amendment also appears to conflict with the Speech or Debate Clause of the

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signed it into law. See Bowsher v. Synar, 106 S. Ct. at 3181. The current litigation over whether the Independent Counsel provisions of the Ethics in Government Act contravenes Executive Branch authority likewise illustrates this principle. See In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988), prob. juris. noted, 56 U.S.L.W. 3568 (Feb. 22, 1988).

38/ See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 421-30 (1935).

United States Constitution. That clause provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."39/ It lies at the very heart of the democratic system of separate powers "so deliberately established by the Founders."40/ As the Supreme Court explained in Gravel v. United States, the "central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."41/

39/ U.S. Const. art. I, § 6, cl. 1. This clause states in full:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

40/ United States v. Johnson, 383 U.S. 169, 178 (1966). See also Reinstein & Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113, 1144-46 (1973).

41/ Gravel v. United States, 408 U.S. 606, 617 (citing United States v. Johnson, 383 U.S. 169, 181 (1966)). See also United States v. Brewster, 408 U.S. 501, 524 (1972) (purpose of clause is "to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process"); Reinstein & Silverglate, supra note 40, at 1144 (the "privilege arose dynamically to preserve the functional independence of the legislature").

The Speech and Debate Clause has been interpreted "broadly" to prohibit imposing liability, either civil or criminal, upon Members of Congress for a wide category of activities.[42/] Its scope extends well beyond "words spoken in debate," and encompasses "anything 'generally done in a session of the House by one of its members in relation to the business before it.'"[43/] In addition, the clause protects not only Senators and Representatives, but their "agent[s] and assistant[s]" as well.[44/]

The proposed amendment conflicts with the Speech or Debate Clause in at least two critical respects. First, by its terms the amendment would criminalize a substantial category of disclosures by Members and their staffs during the course of legislative proceedings or as a direct part of the legislative process. While the provision would exempt disclosures made "pursuant" to the applicable rules of the House or Senate, many types of disclosures within the scope of the legislative process are possible which would not be "pursuant" to such rules.[45/]

42/ United States v. Johnson, 383 U.S. at 180.

43/ United States v. Brewster, 408 U.S. at 509; United States v. Johnson, 383 U.S. at 179; Kilbourn v. Thompson, 103 U.S. (13 Otto) 168, 204 (1881).

44/ Gravel v. United States, 408 U.S. at 616 ("for the purpose of construing the privilege a Member and his aide are to be 'treated as one.'" (citation omitted)).

45/ Significantly, the Speech and Debate Clause extends to all legislative acts, whether in accordance with or in violation

[Footnote continued next page]

The proposed amendment would criminalize any of the following acts whenever they could be characterized as conveying "classified" information to anyone -- even other Members or a Member's own staff -- unless all of the special procedures for disclosure spelled out in the House and Senate rules had been fully complied with:

- Speeches or debates on the floor of the House or Senate or during a committee or subcommittee proceeding.
- The introduction of legislation, such as a bill or resolution proclaiming that a particular intelligence activity is illegal.
- The preparation, drafting, and publishing of Committee reports.
- Private discussions among Members who are not both members of one of the intelligence committees, such as discussions about the wisdom of a particular covert action.
- Inquiries by a Member to an Executive Branch official about an intelligence activity, even if the recipient is "cleared" to receive classified information of the sort being conveyed.
- Private discussions between professional staff persons, unless both are members of an intelligence committee staff.

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of the rules of the house. See Kilbourn v. Thompson, 103 U.S. (13 Otto) at 203 (quoting Coffin v. Coffin, 4 Mass. 1 (1808)).

All of these activities, and many others like them, fall well within the "sphere of legitimate legislative activity" that the Speech and Debate Clause protects from civil and criminal liability.[46/]

As the Supreme Court squarely held in Gravel v. United States, disclosures of allegedly sensitive national security information by Members of Congress and their staffs in the course of the legislative process cannot be the subject of a criminal investigation or prosecution. In that case, Senator Gravel had convened an open meeting of a Senate subcommittee, at which he first read portions of the Pentagon Papers and then placed the entire 47 volumes of the Pentagon Papers in the public record. Thereafter, a federal grand jury commenced an investigation into, inter alia, allegedly unlawful gathering and transmitting of national defense information by Senator Gravel. The Court found "incontrovertible" the Senator's claim that the Speech or Debate Clause protected him from all "criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record."[47/] The Court went on to state:

46/ Tenney v. Brandhove, 341 U.S. 367, 376 (1951). See Gravel, 408 U.S. at 624.

47/ Gravel, 408 U.S. 615.

> The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer -- either in terms of questions or in terms of defending himself from prosecution -- for the events that occurred at the subcommittee meeting.48/

For these reasons, the proposed criminal provision appears to constitute an unconstitional intrusion upon the legislative process in violation of the Speech and Debate Clause. This does not mean that there can be no sanctions upon Members of Congress or their staffs for improper disclosures of sensitive national security information. Rather, it means that within our constitutional framework those sanctions in the legislative sphere may come only through mechanisms -- such as those that are already in place -- that are internal to the Legislative Branch and that are consistent with the Speech or Debate Clause.

48/ Id. at 616. To be sure, under the Gravel case some applications of the proposed amendment would not violate the Speech or Debate Clause. However, in view of the immediately narrow application to Members and their staffs, its failure to exempt legislative activity appears to lead to substantial overbreadth. See infra pp. 32-39.

C. The First Amendment.

As a criminal statute that proscribes the "disclosure" of certain types of information, the criminal nondisclosure provision would punish speech and other forms of communication. Accordingly, the provision must be strictly scrutinized to determine if it is constitutional under the First Amendment. This is especially so because this provision would ban communications about activities of the federal government in the areas of foreign policy and national defense -- speech which is surely at the core of the First Amendment. As the Supreme Court has stated, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966).49/

49/ See also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'").

1. In Light Of The Laws And Rules That Already Exist To Protect Sensitive National Security Information, There Appears To Be No Compelling Government Interest To Be Served By The Proposed Criminal Amendment.

As a general matter, the Supreme Court has stated that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."[50/] Any law that punishes such speech or other communicative conduct violates the First Amendment unless it serves a compelling governmental interest.[51/] As the Supreme Court recently reaffirmed in City of Houston v. Hill, communicative conduct is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[52/]

Of course, the government has a legitimate and important interest in safeguarding secrets that are vital to national security. To protect this interest, the government may, within the confines of the First Amendment, prohibit individuals with access to truly sensitive material from disclosing it to others

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50/ Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

51/ Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

52/ City of Houston v. Hill, 107 S. Ct. 2502, 2509 (1987) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)). See also Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842-43 (1978); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969); Bridges v. California, 314 U.S. 252, 263 (1941); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

to the detriment of national security. But "national security" is not a talisman that renders the principles of free speech and free press inapplicable.53/

One critical question is whether the proposed criminal provision's additional burdens on First Amendment freedoms are justified by a government interest in national security that is not already adequately addressed within the existing legal framework. As the Supreme Court has made clear, when the interest asserted by the government is already protected by exisiting law, there can be no claim that a restriction on speech substantially advances that interest so as to survive First Amendment scrutiny.54/

When the proposed criminal provision is viewed in the context of laws that are already on the books, it becomes clear that no "compelling" need for the provision exists. Congress has already erected a delicately balanced structure of criminal and other statutes that are aimed at safeguarding national security

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53/ Nimmer, National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case, 26 Stan. L. Rev. 311, 328 ("the mere label of 'national security' or 'government secrecy' does not foreclose a first amendment inquiry"). See United States v. Robel, 389 U.S. 258, 264 (1967) (First Amendment freedoms may not be subverted "in the name of national defense"); NAACP v. Button, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional rights by mere labels.").

54/ FCC v. League of Women Voters, 468 U.S. 364, 386-93, 397-99 (1984).

secrets. The criminal provisions include the Espionage Act of 1917, as amended, and related espionage statutes;[55/] Section 798 of Title 18; the Atomic Energy Act;[56/] and the Intelligence Identities Protection Act.[57/] The espionage statutes have generally been used to prosecute transmissions of sensitive information "relating to the national defense" to agents of hostile foreign governments.[58/] The latter three statutes prohibit disclosures of especially sensitive information relating to cryptography, atomic weapons and the identities of covert agents, respectively. In addition to these criminal statutes of general application, each house of Congress, acting pursuant to its constitutional power to discipline its own members,[59/] has

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55/ 18 U.S.C. §§ 793(d)-(e) (1982); 18 U.S.C. § 952 (1982); and 50 U.S.C. § 783(b) (1982).

56/ 42 U.S.C. §§ 2014(y)(1), 2274, 2277 (1982).

57/ 50 U.S.C. § 421 (1982).

58/ E.g., Gorin v. United States, 312 U.S. 19 (1941); United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982). The scope of the espionage statute, specifically sections 793(d) and (e) of Title 18, and its applicability to disclosures to the press, was at issue in United States v. Morison, 1988 U.S. App. Lexis 4066 (4th Cir.). In that case, the United States Court of Appeals for the Fourth Circuit upheld the conviction of a defense department employee under 18 U.S.C. §§ 793(d) and (e), and the general theft statute, 18 U.S.C. § 641, for disclosing information classified "secret" to a British publication.

59/ The Constitution empowers each House to "determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and with the Concurrence of two thirds, expel a Member." U.S. Const., art. I, § 5, cl. 2.

established for itself a carefully crafted set of rules for safeguarding national security information and for punishing any Member or aide who violates those rules.60/ Notably, the sanctions which Congress has identified by rule as applicable to unauthorized disclosures by its own Members and employees -- namely "censure, removal from committee membership, or expulsion . . . or removal from office"61/ -- are at least as severe as those which the Executive Order governing classification imposes upon Executive Branch officers or employees and outside contractors.62/

There has been no showing that these statutes and rules do not adequately serve the government's interest in protecting legitimate national security secrets. It is true that during the joint hearings before the Congressional Iran-Contra Committees, some administration witnesses, particularly Oliver North and John Poindexter, asserted that they withheld information from Congress out of a belief that Congress could not be trusted with sensitive information.63/ Of course, such declarations by former Executive

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60/ Rules of the House of Representatives, Rule XLVIII; Senate Manual, Standing Order 79.13.

61/ Rules of the House of Representatives, Rule XLVIII, § 7(e); Senate Manual, Standing Order 79.13, § 8(e).

62/ Exec. Order No. 12,356, § 5.4(c) ("reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation").

63/ Iran-Contra Report at 14.

Branch officials do not of their own force establish that the existing legal structure is inadequate to serve the government's legitimate interests in national security. The Iran-Contra Committees found that this rationale was a pretext for concealing violations of law and policy and concluded that "Congress has the capability of protecting secrets entrusted to it."[64/] The Committees stated:

> While Congress's record in maintaining the confidentiality of classified information is not unblemished, it is not nearly as poor or perforated as some members of the NSC staff maintained. If the Executive Branch has any basis to suspect that any member of the Intelligence Committees breached security, it has the obligation to bring that breach to the attention of the House and Senate Leaders -- not to make blanket accusations. Congress has the capability and responsibility of protecting secrets entrusted to it. Congress cannot fulfill its legislative responsibilities if it is denied information because members of the Executive Branch, who place their faith in a band of international arms merchants and financiers, unilaterally declare Congress unworthy of trust.[65/]

A further indication that there is no compelling interest to be served by the proposed amendment is that its coverage is limited to Members of Congress and their aides rather than to

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64/ Id. See also Note, supra note 33, at 1209 ("Congressmen have a good record for observance of security . . . of classified information.").

65/ Iran-Contra Report at 14.

all persons with access to the information in question. Thus, while a Member who receives a "classified" briefing from an Executive Branch official could be criminally punished under the proposed provision for any unauthorized disclosure, the Executive Branch official himself would not be subject to this or any other similar criminal provision.[66/] This imbalance is not explained by any evidence that an unauthorized disclosure of information by a Congressman is more damaging than such a disclosure of the same information by an Executive Branch employee. Nor, as we have noted, is it explained by any evidence that Senators and Representatives and their staffs are less trustworthy recipients of sensitive information than other people. The Supreme Court has previously held that precisely this sort of "underinclusiveness" in a statute that restricts speech demonstrates that the statute "provides only ineffective or remote support for the government's purpose" and thereby "undermines the likelihood of a genuine [governmental] interest."[67/]

In light of the foregoing considerations, it appears that this proposal is not supported by a compelling government interest sufficient under the First Amendment.

66/ Of course, other criminal statutes that have general application and are not limited to the Legislative Branch might be applicable to unauthorized disclosures by either an Executive or Legislative Branch official, but as noted above they do not generally punish disclosures of classified information per se.

67/ FCC v. League of Women Voters, 468 U.S. at 396.

2. The Amendment Also Appears to Be Substantially Overbroad.

Any restriction on speech must be "narrowly drawn to prevent the supposed evils."[68/] Because the First Amendment needs "breathing space," statutes which regulate expressive conduct must be voided entirely if, in addition to reaching legitimately prescribed activity, they also reach a "substantial" amount of protected activity.[69/] The Supreme Court has repeatedly made clear that "even if some of the hazards at which [a statute restricting speech] are sufficiently substantial," if "the restriction is not crafted with sufficient precision to remedy those dangers" the statute violates the First Amendment.[70/]

The proposed criminal nondisclosure provision appears to be unconstitutionally overbroad because, in addition to reaching disclosures which would significantly threaten national security, it would punish a substantial amount of communication that would create no such risk. This overbreadth arises from the Executive Branch's classification system, which the proposed amendment would mechanically adopt as the standard for

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68/ Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964) (quoting Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)).

69/ Broadrick v. Oklahoma, 413 U.S. 601 (1973). See also United States v. Robel, 389 U.S. 258, 266 (1967).

70/ FCC v. League of Women Voters, 468 U.S. at 398.

determining which disclosures of information constitute a crime. Both in theory and in practice, that system is not narrowly tailored to protection of national security. Thus, "[f]ar from providing the 'breathing space' that 'First Amendment freedoms need . . . to survive,'" the criminal nondisclosure amendment would "criminalize[] a substantial amount of constitutionally protected speech."[71/]

The basic criteria for classifying documents set forth in the current and previous executive orders appear to be too broad to serve as a standard for making expressive conduct a crime. Executive Order 12,356, the current Administration's order, directs that information shall be classified at the "Confidential" level (the lowest level of classification) if "unauthorized disclosure" of the information "reasonably could be expected to cause damage to the national security."[72/] Once classified, the executive order directs that information remain classified "as long as required by national security considerations."[73/] Both courts and commentators have suggested that this definition covers material the disclosure of which cannot be prohibited. Thus, in McGehee v. Casey, the United States Court of

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71/ City of Houston v. Hill, 107 S. Ct. at 2512 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

72/ Exec. Order No. 12,356, § 1.1(a)(3).

73/ Id., § 1.4(a).

Appeals for the District of Columbia stated that an earlier, and narrower, version of the "confidential" standard "does, under some constructions, touch constitutionally protected speech."74/ It has indeed been suggested that even higher levels of classification may reach protected speech because they "completely ignore[] the elements of likelihood and imminence" of harm.75/ The provision permitting material to remain classified indefinitely also raises serious First Amendment overbreadth problems.76/

Putting aside the question of whether the basic criteria for classification could on their face survive First Amendment scrutiny, the historically pervasive problem of rampant overclassification by Executive Branch officials appears to render the proposed criminal amendment substantially overbroad. Recognizing "the well-documented practice of classifying as confidential much relatively innocuous or noncritical information," the United States Court of Appeals for the District of Columbia Circuit has stated: "we cannot conclude automatically that

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74/ 718 F.2d 1137, 1146 (D.C. Cir. 1983) (analyzing Exec. Order No. 12,065, § 1-103).

75/ Nimmer, supra note 53, at 332. Professor Nimmer was criticizing a predecessor to the current "Top Secret" standard. However, he indicated that differences between the earlier standard and the current one were "insignificant". Id.

76/ See Comment, A Nation Less Secure: Diminished Public Access to Information, 21 Harv. C.R.-C.L. L. Rev. 409, 434 n.122 (1986).

revelation of all 'top secret' documents will endanger national security."[77/] Similarly, nearly twenty years ago -- when the problem of overclassification was by most accounts less serious than today, Former United Nations Ambassador and Supreme Court Justice Arthur Goldberg told a Congressional Committee:

> Anyone who has ever served our Government has struggled with the problem of classifying documents to protect national security and delicate diplomatic confidences. I would be less than candid if I did not say that our present classification system does not deal adequately with this problem. . . . I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another fifteen percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time.[78/]

As one scholar has argued, such overclassification appears to be inevitable for a wide variety of reasons:

77/ Halperin v. Kissinger, 606 F.2d 1192, 1204 n.77 (D.C. Cir. 1979), aff'd by an equally divided court, 452 U.S. 713 (1981).

78/ H.R. Rep. No. 221, 93d Cong., 1st Sess., at 40-41 (1973) (emphasis added). An experienced Air Force classification expert testified before the same committee that "the disclosure of information in at least 99½% of . . . classified documents could not be prejudicial to the defense interests of the Nation." Id. at 42. When Chief Justice Rehnquist was Assistant Attorney General and chaired a committee to review the classification system, he observed that virtually every member of his committee believed there was a tendency in the Government to overclassify. U.S. Government Information Policies and Practices: The Pentagon Papers, Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 92d Cong., 1st Sess. Pt. 3, at 791 (1971).

> [t]here would be the bureaucrat's usual incentive to exaggerate the significance of his own responsibilities by assigning high security classifications to what he reviews; the expert's predictable bias toward overemphasizing the considerations that flow from that expertise; the government official's understandable tendency to discount the broader societal interest in controlling government; and the executive officer's inevitable temptation to suppress information that might prove embarrassing or damaging to his conception of the national interest. There would, in short, be an inherent proclivity toward pervasive and uncontrollable overbreadth in the classification of official secrets.79/

While during the 1970s the problem of overclassification seemed to abate somewhat, the present Administration, under a new and broader executive order, dramatically reversed that trend.80/

As a result of the proposed amendment's substantial overbreadth, enactment of it would have a serious chilling effect on communications of Members and their staffs, both among themselves and with their constituents. Out of a desire scrupulously

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79/ Jeffries, Rethinking Prior Restraint, 92 Yale L.J. 409, 435 (1983).

80/ See English, Congressional Oversight of Security Classification Policy, 1 Government Information Quarterly 165, 167-68 (1984). As one measure of this trend, from 1979 to 1985, the number of documents classified each year annually increased progressively from 14.8 million to 22.3 million -- a fifty percent increase. See Information Security Oversight Office ("ISOO"), Annual Report to the President 1980-1981, at 10; ISOO, Annual Report to the President FY 1982, at 8; ISOO, Annual Report to the President FY 1985, at 13.

to obey the law and a wariness of even coming close to the line between what is permissible and what is not, there is a risk that targets of the prohibition would inform the public less extensively about important business of the federal government. There is also a risk that members of the intelligence committees would unnecessarily limit their private discussions with colleagues who are not on the Committees, who in turn will unnecessarily limit their consultations with their staffs. The result could well be significantly less informed decision-making by Congress, and a significantly less informed citizenry. It is precisely to avoid such harmful chilling of vital communication activity that the First Amendment bars overbroad criminal statutes.

In light of these serious constitutional infirmities, Congress has heretofore declined to enact an "Official Secrets Act" of the sort that exists in Great Britain, and has steadfastly refused to make the mere act of disclosing classified information a crime. Bills to prohibit generally the disclosure of any classified information have been introduced numerous times during the last 50 years, but all of them were rejected.81/

81/ Congress has consistently refused to enact broad prohibitions on the disclosure of "classified" information. For example, in 1946, a joint investigative committee urged Congress to enact legislation prohibiting the disclosure of any classified information. See Report of the Joint Committee on the Investigation of the Pearl Harbor Attack, S. Doc. No. 244, 79th

[Footnote continued next page]

While in rare instances Congress has enacted laws that prohibit certain disclosures of "classified" or "restricted" information, in each instance other substantive limitations narrowly confine the scope of the information subject to the criminal ban.82/ The main obstacle to any broader use of the classification system in the criminal arena, not surprisingly, has been concern that doing so would trample First Amendment rights.83/

[Footnote continued from preceding page]

Cong., 2d Sess. 252-531 (1946). Congress rejected such a broad prohibition, and instead enacted the much narrower § 798 of Title 18. Similar broad initiatives to criminalize all disclosures of classified information were proposed in 1957, 1958, 1962, 1973 and 1983, but none was successful. See Senate Select Comm. on Intelligence, Subcomm. on Secrecy and Disclosure, National Security Secrets and the Administration of Justice, 95th Cong., 2d Sess. 18 (Comm. Print 1978) (summarizing past legislative initiatives); H.R. 66 (1983).

82/ Section 798 of Title 18 criminalizes the knowing and willful disclosure of specifically defined categories of classified information regarding communications intelligence. The report on this legislation stated that this provision covers only "a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree." H.R. Rep. No. 1895, 81st Cong., 2d Sess. 2 (1950). Similarly, the Atomic Energy Act of 1954 makes it a crime to reveal "restricted data" -- defined as data concerning, inter alia, the "design, manufacture, or utilization of atomic weapons" -- with an intent to injure the United States. 42 U.S.C. §§ 2014(y)(1), 2274, 2277 (1982). The Intelligence Identities Protection Act of 1982, 50 U.S.C. § 421 (1982), prohibits a person with authorized access to classified information from disclosing any such information identifying a covert agent. Finally, 50 U.S.C. § 783(b) (1982) purports generally to prohibit any communications of "classified" information, but only when the recipient is known or believed to be a foreign agent or member of a Communist organization.

83/ See Report of the Senate Select Comm. on Intelligence, Subcomm. on Secrecy and Disclosure, National Security Secrets and the Administration of Justice, 95th Cong., 2d Sess. 18-19 (Comm. Print 1978).

In sum, the proposed amendment would prohibit disclosure of a substantial amount of information where no significant national security interest in favor of secrecy exists. Because the provision would thereby sweep within its ambit a substantial amount of constitutionally protected speech, it appears to violate the First Amendment.[84/]

D. The Criminal Prohibition Of Disclosure Of The "Substance" Of "Classified" Information Creates A Further Chilling Effect.

The Supreme Court has repeatedly held that laws, regulations, and policies seeking to regulate speech on the basis of its content must be clear and precise so that those subject to regulation are given adequate notice, and so that the regulation does not cause speakers to "steer far wider of the unlawful zone."[85/] In the First Amendment area, "the conduct to be prohibited must be adequately defined by the applicable . . . law, as written or authoritatively construed."[86/] The Court held long

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84/ This memorandum does not consider whether the existing House and Senate rules barring disclosure raise overbreadth problems under the First Amendment. It should be noted, however, that the rules are not criminal and that imposition of legislative discipline is not automatic. The rules indeed may not lead to discipline at all in those situations where there has been no disclosure of sensitive national security information.

85/ Speiser v. Randall, 357 U.S. 513, 526 (1958); see Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

86/ New York v. Ferber, 458 U.S. 747, 764 (1982).

ago that "a governmental purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.87/ The Court has also stated:

> [S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.88/

The proposed criminal nondisclosure amendment may well be unconstitutionally vague because it fails to draw a clear line between those disclosures of information by a Member or an aide that would constitute a crime and those which would not. This vagueness stems from the language of the amendment and from the manner in which the Executive Branch classification system operates. It is an additional flaw in the amendment, and a further ground for Congress to reject it.

The vagueness problem starts with the amendment's use of the term "substance." The proposed statute does not merely prohibit disclosures of particular documents that are designated classified. Rather, its coverage extends to disclosures of the "substance" of any classified information that may have been

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87/ NAACP v. Alabama, 377 U.S. 288, 307 (1964).

88/ Smith v. California, 361 U.S. 147, 151 (1959).

conveyed to Congress either in writing or orally. This formulation by itself creates significant uncertainty: while a person who transmits a document marked "classified" to another person may have certainty that he is thereby disclosing the "substance" of "classified" information, a person who transmits to another person ideas or facts drawn wholly or partly from such a document, using his own words, is likely to be much less certain.

The uncertainty introduced by the amendment's language is compounded many times over by the fact that documents or briefings which carry an overall designation of "classified" almost invariably contain a range of "classified" and "unclassified" information, some of which may be sensitive but much of which is innocuous and perhaps already in the public domain. While Executive Order 12,356 requires that "classified" documents be "portion-marked" to designate which specific information is classified,[89/] this requirement is in practice frequently ignored,[90/] may be waived by agency heads,[91/] and in any event is wholly inapplicable to oral briefings, which are a frequent vehicle for Executive Branch reports to Congress. As a result, Members and other legislative officers and employees who receive documents or briefings that the Executive Branch labels

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89/ Section 1.5(b).

90/ See Note, supra note 33, at 1200.

91/ Section 1.5(b).

"classified" can never be certain as to precisely what part of what they have read or been told is in fact classified. Accordingly, the potential targets of the criminal prohibition would be forced to guess about its application and to engage in communicative conduct at their peril.92/

CONCLUSION

For the foregoing reasons, we believe the proposed amendment to H.R. 3822 to criminalize disclosures of classified information by Members or their staffs at best raises very serious constitutional questions, and, if enacted, would likely be found to be unconstitutional.

Timothy B. Dyk
Patrick J. Carome

92/ The mere fact that documents and information relate to national security or defense does not eliminate the importance of a specific definition of what is covered by the prohibition. This much is clear from Gorin v. United States, 312 U.S. 19, 27-28 (1941). There the Court acknowledged that the phrase "relating to the national defense" would raise serious vagueness problems absent a specific scienter requirement not present in the proposed amendment.

ATTACHMENT A:

H.R. 3822

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3822 OFFERED BY MR. MCHUGH

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

SHORT TITLE

SECTION 1. This Act may be cited as the "Intelligence Oversight Act of ~~1987~~ 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 lan-

guage 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 to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.

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

"(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence

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

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

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

"REPORTING INTELLIGENCE ACTIVITIES OTHER THAN COVERT ACTION ~~SPECIAL ACTIVITIES~~

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

(1) keep the intelligence committees fully and

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of all intelligence activities, other than a ~~special activity~~ covert action as defined in subsection 503(e), which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and any significant intelligence failure; and

~~"(b) The Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities~~ (2) furnish the intelligence committees any information or material concerning intelligence activities, other than ~~special activities~~ covert actions, which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

"PRESIDENTIAL APPROVAL AND REPORTING OF ~~SPECIAL ACTIVITIES~~ COVERT ACTIONS

"SEC. 503. (a) The President may not authorize the conduct of a ~~special activity~~ covert action by departments, agencies, or entities of the United States Government unless ~~only when~~ he determines such an ~~activity~~ action is necessary to support ~~the~~ identifiable foreign policy objectives of the United States and is important to the national security of the United States, which determination shall be set forth in a finding that shall meet each of the following conditions:

"(1) Each finding shall be in writing, unless immediate action by the United States is required and

time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision is made; Except as permitted by subsection (a)(1) of this section, a

"(2) finding may not authorize or sanction ~~special activities~~ covert actions, or any aspect of such ~~activities~~ actions, which have already occurred:

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

"(4) Each finding shall specify whether it is contemplated that any third party which is not an element of, or a contractor or contract agent of, the United

States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the ~~special activity~~ covert action concerned, or be used to undertake the ~~special activity~~ covert action concerned on behalf of the United States;

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

"(b) To the extent consistent with due regard for the protection from unauthorized disclosure of classified information or other exceptionally sensitive matters relating to sensitive intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a ~~special activity~~ covert action shall keep the intelligence committees fully and currently informed of all ~~special~~ covert actions ~~activities~~ which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, and shall furnish to the intelligence committees any information or material concerning ~~special activities~~ 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 ~~special activity~~ 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 ~~special activity~~ covert action before the notice required by paragraph (1) can be given, such ~~activity~~ action may be initiated without such notice.

"(3) The President shall ensure that notice of a ~~special activity~~ 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 ~~special activity~~ 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), are notified of any significant change in a previously-approved ~~special activity~~ covert action, or any significant undertaking pursuant to a previously approved ~~funding~~ finding, in the same manner as findings are reported pursuant to subsection (c).

See Insert A

~~"(e) As used in this section, the term 'special activity' means, with respect to the Central Intelligence Agency, operations in foreign countries other than activities intended solely for obtaining necessary intelligence, and, with respect to any other department or agency of the United States, any activity conducted in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, and does not include activities to collect necessary intelligence, or diplomatic activities carried out by the Department of State or persons otherwise acting pursuant to the authority of the~~

Insert A

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

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

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

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

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

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1 ~~President~~. A request by any agency or department of the
2 United States to a foreign ~~country~~ government or a private citizen to
3 conduct a ~~special activity~~ covert action on behalf of the United States shall
4 be deemed to be a ~~special activity~~ covert action.

5 "(f) No ~~special activity~~ covert action may be conducted if it is intend-
6 ed to influence United States political processes, public opin-
7 ion, policies, or media.".

8 SEC. 4. Section 502 of title V of the National Security
9 Act of 1947 (50 U.S.C. 414) is redesignated as section 504
10 of such Act, and is amended by deleting "501" in subsection
11 (a)(2) of such section and inserting in lieu thereof "503" ~~by~~
12 ~~striking "Appropriated funds" at the beginning of such sec-~~
13 ~~tion and inserting in lieu thereof "Funds"~~, and by adding the
14 following ~~new subsection (d):~~

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

→ See Insert B

SEC. 5. Section 503 of title V of the National Security Act of 1947 (50 U.S.C. 415) is redesignated as section 505 of such Act, and subsection (a)(1) of such section is amended

Insert B

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

by adding, "or the anticipated transfer in any fiscal year of any aggregation of defense articles or defense services." after "service".

APPENDIX 12

The Hale Foundation

June 9, 1988

Hon. Dante B. Fascell, Chairman
Hon. William S. Broomfield, Ranking Minority Member
Committee on Foreign Affairs
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Fascell and Rep. Broomfield:

The Hale Foundation appreciates the opportunity to submit its views on H.R.3822, proposed legislation relative to intelligence oversight. The Hale Foundation, designated a 501(c)(4) organization under the Internal Revenue Code, advocates a strong United States intelligence capability. It represents many thousands of Americans in all parts of the country to that end. The Hale Foundation recieves no government support of any kind. For my part, I have spent almost 25 years in the intelligence profession, mostly as an intelligence operations officer, mostly overseas. I left government service as a Deputy Assistant Secretary of State, Bureau of Intelligence and Research.

The Hale Foundation strongly supports the principle of covert action, or "special activities," which in American history date from at least the Revolutionary War. Captain Nathan Hale, after whom The Hale Foundation is named, in addition to his more famous intelligence activities, was widely acclaimed in the Continental Army for his leadership in daring and dangerous special operations. Without successful covert action in conjunction with its European allies, our Republic probably would have failed to survive in its struggle for independence.

The Hale Foundation approves of the purpose of H.R. 3822 to consolidate the provisions of intelligence oversight by amending the National Security Act of 1947 to repeal the Hughes-Ryan language in the Foreign Assistance Act of 1961. By placing the substance of the latter section in an amended National Security Act, the Congressional intelligence committees apparently would acquire jurisdiction in intelligence matters to the exclusion of any other committee. Hale believes that the two legislative intelligence committees should have such exclusive jurisdiction. In this connection, The Hale Foundation supports the establishment of a Congressional joint intelligence committee along the lines of H.J. Res. 48 to consolidate oversight and improve security, essential to the effective conduct of U.S. foreign affairs.

• THF •

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On the other hand, The Hale Foundation opposes language that would impose new and, in Hale's opinion, inflexible restrictions on the Executive Branch regarding deferral of congressional notifcation of covert action. Hale believes that such restrictions would imperil the success of important and particularly sensitive covert action operations, a danger especially grave where the lives of intelligence personnel and agents are at risk. Some covert action requires a long gestation period, during which secrecy is essential. A requirement that a president's decision to authorize a covert action (and his subsequent written finding to that effect) must be reported to Congress within a strictly delimited time would amount effectively in some important cases to prior notice, a condition Hale strongly opposes. Such a strict requirement raises the constitutional question of presidential prerogative. The standard of "timely fashion," a reasonable one in the view of The Hale Foundation, responds to the constitutional requirements of both branches of government.

As a practical matter, as Executive Branch testimony before the Congress has demonstrated, most covert action operations have been reported in advance to the appropriate committees or the alternate selective group of Congressional leaders (the so-called "gang of eight"). Hale believes, nonetheless, that it is essential to maintain flexibility on the question of deferral in unusual cases.

The Hale Foundation agrees with Judge Griffin Bell, former Attorney General of the United States, when he testified in 1980 as follows on proposed restrictions on covert action: "To the extent these provisons might serve to prevent the President and senior intelligence officials from carrying out vital activities with the requisite dispatch and secrecy, I believe them to be unwise, unnecessary and perhaps unconstitutional. From the earliest days of this Republic, it has been recognized that the foreign affairs function is necessarily the primary province of the Executive. ...The legislative function must be a reasonable one, adding its strengths to the process while not sapping the strengths of the Executive. There should be a continuing dialogue between the Executive and the Congress. But the Congress should not, in effect, be inserted into the councils of the Executive. This should alter fundamentally the checks and balances relationship intended by the framers of the Constitution." (Hon. Griffin Bell, testimony on S. 2284, 1980, pages 326-7.)

Finally, The Hale Foundation believes that, however worded, any legislation with respect to Executive Branch reporting to the Legislative Branch on <u>either</u> intelligence collection operations <u>or</u> covert action should retain the stipulations of the National Security Act of 1947 that such reporting be "consistent with all applicable authorities and duties, including those conferred by the Constitution ...and...with due regard for the protection from unauthorized

disclosure" of sensitive classified information.(Sec. 501. 50 U.S.C.413) The loss to either collection operations or to covert action of these protections would, Hale believes, seriously damage United States intelligence capabilities with respect to cooperative foreign governments and endanger the lives of unilateral foreign assets and American intelligence personnel, themselves.

Thank you for considering the views of The Hale Foundation on the proposed legislation.

Sincerely,

Lawrence B. Sulc
President