The Director of Central Intelligence

Washington, D.C. 20505

27 FEB 1979

Dear Mr. Llewellyn,

I am pleased to contribute the enclosed article for the DICTA column of the Virginia Law Weekly. It addresses the extremely important and difficult task being carried out today to draft charter legislation for United States' intelligence agencies. I hope it will interest your readers.

I wish you and DICTA continued success.

Yours sincerely,

STANSFIELD TURNER

Enclosures

Mr. David J. Llewellyn
DICTA Editor
Virginia Law Weekly
School of Law, University of Virginia
Charlottesville, Virginia 22901

CHARTER LEGISLATION FOR THE INTELLIGENCE COMMUNITY

by STANSFIELD TURNER
Director of Central Intelligence
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This year, the executive and legislative branches of the government will attempt to develop legislative charters for America's intelligence agencies. This will be the most significant legislation related to intelligence activities since the National Security Act of 1947 which created those agencies. For the first time, legislation will specifically authorize activities in which intelligence agencies may engage, establish limiting boundaries, and proscribe some activities altogether. It will remove the umbra of uncertainty from this sensitive but vital function of government. It is a step welcomed by both the intelligence agencies themselves, which see it as a potentially helpful degree of guidance, and the public, for whom it will provide a reassuring element of accountability. At the same time, it is neither a simple task nor one without some degree of danger for the intelligence capabilities on which the nation depends.

The final report of the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (Church Committee) recommended

> "1. The National Security Act should be recast by omnibus legislation which would set forth the basic purposes of national intelligence activities, and define the relationship between the Congress and the intelligence agencies of the executive branch. This revision should be given the highest priority by the intelligence oversight committee(s) of Congress, acting in consultation with the executive branch.

2. The new legislation should define the charter of the organizations and entities in the United States intelligence community. It should establish charters for the National Security Council, the Director of Central Intelligence, the Central Intelligence Agency, the national intelligence components of the Department of Defense, including the National Security Agency and the Defense Intelligence Agency, and all other elements of the intelligence community, including joint organizations of two or more agencies.

3. This legislation should set forth the general structure and procedures of the intelligence community, and the roles and responsibilities of the agencies which comprise it.

4. This legislation should contain specific and clearly defined prohibitions or limitations on various activities carried out by the respective components of the intelligence community."

Last February, the Senate Select Committee on Intelligence tabled a draft set of charters (S.2525). Since that time, the Administration has been working closely with the members and staff of the Senate committee to examine the spectrum of views on each issue and move toward a mutually acceptable and workable draft. While there has not been uniform agreement, there has been a constructive dialogue during which differences have narrowed.

The main area of differences today relates to protecting Constitutional and privacy rights of American persons especially when those rights limit or inhibit the collection of legitimate foreign or counterintelligence information. All agree that these rights must be protected. But the degree of that protection, the methods by which that protection should be exercised, and the conditions under which exceptions may be made remain unresolved.

When considering the degree of control and how that control should be applied, either an over-reaction or an under-reaction to past alleged or real abuses would be a mistake. If we under-react by assuming that similar abuses will not recur, we would underestimate how quickly lessons can be forgotten. If we over-react by passing excessively restrictive legislation, intelligence capabilities could be emasculated. As with most things, a balanced approach offers the greatest chance of ensuring that we retain strong intelligence collection and analytic capabilities, yet restrict those capabilities to proper and legal use. Unfortunately that balance point has been elusive. It seems to be in different places depending on where one stands and the importance one gives to the sometimes elegant subtleties of the issues. How then to achieve that balance?

A simplistic approach advocated by some is to prepare a laundry list of all activities which offend our sense of justice or morality or fair play and prohibit them. While seeming to have the advantage of straightforwardness, it is easier said than done, and the danger of self-delusion is high. Any serious attempt to draw up such a list will demonstrate first that, given human inventiveness, it is probably impossible to anticipate every conceivable activity we might want to prohibit; second, a case for maintaining a capability in reserve can be made for even the most odious activity (e.g., assassination in the case of Hitler); and third, no two lists will be the same or, in some cases, even similar.

Instead, a two-part system comprised of regulations on the one hand and oversight on the other has a greater potential for effectively controlling intelligence activities without reducing overall capability or the ability to respond quickly to unique situations. Through regulations it may be possible to prohibit some few activities completely. For example, outside of wartime, assassination should be prohibited as it is now in Executive Order 12036. But, in many other cases, clear prohibition would be either impossible or unwise. Nonetheless, control can be exercised through guidelines or restrictions which establish boundaries within which the intelligence community would be expected to work. The scope and detail of specific prohibitions and guidelines are now being debated.

The second part of this system, oversight, can make accountability possible and preserve a degree of flexibility which is not possible with regulations alone. Here classification of documents and activities is a significant oversight problem. Much intelligence work cannot be done unless it is kept secret. Terrorist groups cannot be infiltrated to learn and thwart their plans; relationships cannot be established with foreigners willing to help us unless those relationships can be kept secret; friendly foreign intelligence services will not share information if we cannot keep both it and the fact that they gave it to us secret as well. Yet, the very freedoms we seek to protect by being better informed can be undermined by secrecy. Secrecy yields power. Any kind of power can be abused; secret power has an even greater potential for abuse.

Oversight must be able to exercise control over intelligence activity despite the need for secrecy. The means of ensuring this special kind of accountability exists today.

Effective oversight is exercised by the executive branch, by the Congress and by the public. Understanding their respective roles and incorporating them into the proposed legislation will make the drafting of prohibitions and restrictions easier. It can provide a workable solution to many of the seemingly intractible, substantive issues.

In the past, public oversight was impossible because the general public had no access to information. That is no longer true. Revelations, public inquiries and the Freedom of Information Act have made the intelligence community and what it does more visible and more accessible than ever before. Additionally, in the last two years the community has adopted a policy of greater openness. Intelligence community analysts attend professional conferences in greater numbers, present papers, and publish articles; a public affairs director attempts to answer press inquiries candidly; and there has been a major effort to share analysis through the declassification and publication of intelligence studies and analyses. More than two of these each week have reached the public for the past two years on subjects as diverse as Soviet civil defense capabilities, international terrorism, and the world energy situation.

The press has performed commendable journeyman's work for the public in overseeing the intelligence community. The renewed investigative bent of the press has been instrumental in probing areas heretofor completely unknown to the general public. While much of this has been

constructive, some has not been and has harmed important capabilities. These effects raise serious contradictions and potential problems for the long term unless the press demands of itself a consistently high level of responsibility. Unlike a court, the press can return a finding of guilty through accusation alone. The power to accuse in public is a profound power which is just as susceptible to abuse as any other power. Consequently, while the press performs an important oversight function, it must proceed with extreme caution. It must be conscious that it must deal generally with unclassified or, at best, leaked classified information. It seldom has all the facts. It is often at the mercy of sources whose motives are not always clear. It must often make judgments on how things seem rather than how they are. Conclusions drawn on the thin ice of conjecture can render a grave disservice to the press, the public it serves, and to the institutions of government.

Unlike the general public or the press, executive branch oversight has complete access to the intelligence community and its activities because the intelligence function is an instrument of that branch. The President is personally and directly responsible for all intelligence activities. Although he normally exercises that responsibility through the National Security Council, he is informed of sensitive programs and approves every covert action in writing. The concept of "plausible deniability" is no longer operative. Beyond that, his support of the community's full cooperation with the Congress is a vital link for a substantially stronger accountability. He requires that the Congress be kept fully informed and have access to all the information necessary to exercise oversight.

A second form of executive branch oversight is through the Intelligence Oversight Board. The IOB is comprised of three distinguished citizens from outside the government to whom anyone may go directly should they suspect that an intelligence agency is doing something illegal or improper. The IOB investigates allegations and reports findings directly to the President. The Director of Central Intelligence as well as all other officials of the intelligence agencies are removed from this process and can exert no influence on it.

Finally, the legislative branch oversees intelligence activities. The record of the Congress may instill no greater degree of confidence in skeptics than that of Presidents, but the fact remains that the Congress is the only elected body totally independent of the executive branch. There is, therefore, assurance that two independent branches of government have access to what the intelligence community is doing.

Two committees in the Congress are devoted exclusively to intelligence oversight: the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. They have clear jurisdictional lines to the intelligence community and have not been reluctant to exercise them. In the past, intelligence information was shared with a few key members of the Congress who generally wanted to know as little as possible. They in turn shielded the community from the rest of the Congress. Today, the two select intelligence committees aggressively concern themselves with all community activities and accept a degree of responsibility for those activities.

Oversight, as exercised today, is a success. The combination of informed inquiry, dialogue, and acknowledged accountability has permitted an unprecedented degree of control by overseers and, at the same time, an increased sense of responsiveness to the national will by the intelligence community. The fine tuning of this process continues but, by any standards, it is working well. Unfortunately, that very success could be the most serious threat to the completion of charter legislation in the near future.

If the major underlying reason for legislation has been to gain control over the intelligence process, that has been largely accomplished through existing oversight. Consequently, for that reason, if for no other, the pressure for formal charters is lessened. Further, any attempt to lay down definitive prohibitions and guidelines which can stand alone is so difficult and so controversial as to encourage participants to just give up if any other recourse can be found. Leaving it to oversight is a tempting recourse. But, to abandon present efforts there would be to leave the job half done and would be a mistake.

Charter legislation has two purposes: first, to impose external controls on intelligence activities and second, to provide both authority and guidance for those who must carry out those activities. Oversight can ensure the former, it cannot substitute for the latter. Intelligence professionals deserve a clear statement of what this nation wants and expects of its intelligence service. Comprehensive legislation must include that statement in the form of general prohibitions and restrictions

reflecting national values and desires balanced by an oversight process which can interpret those desires over time and in specific situations. By institutionalizing a two-part system as I have described, one part of which exists now, this legislation can be substantively simple yet serve its purposes well. This goal is within our reach and deserves all support and encouragement.