101ST CONGRESS
*2d Session*

SENATE

REPORT
101-358

# AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 1991 FOR THE INTELLIGENCE ACTIVITIES OF THE U.S. GOVERNMENT, THE INTELLIGENCE COMMUNITY STAFF, THE CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM, AND FOR OTHER PURPOSES

JULY 10, 1990.—Ordered to be printed

Mr. BOREN, from the Select Committee on Intelligence, submitted the following

## REPORT

[To accompany S. 2834]

The Select Committee on Intelligence, having considered the original bill (S. 2834), authorizing appropriations for fiscal year 1991 for the intelligence activities of the U.S. Government, the Intelligence Community staff, the Central Intelligence Agency Retirement and Disability System, and for other purposes, reports favorably thereon and recommends that the bill do pass.

### PURPOSE OF THE BILL

This bill would:

(1) Authorize appropriations for fiscal year 1991 for (a) intelligence activities of the United States, (b) the Intelligence Community Staff, and (c) the other intelligence activities of the United States Government;

(2) Authorize the personnel ceilings as of September 30, 1991 for (a) the Central Intelligence Agency, (b) the Intelligence Community Staff, and (c) the other intelligence activities of the United States Government;

(3) Authorize the Director of Central Intelligence to make certain personnel ceiling adjustments when necessary to the performance of important intelligence functions;

(4) Make certain technical changes in the Central Intelligence Agency Retirement and Disability System;

(5) Authorize the Secretary of Defense to approve certain commercial activities to support intelligence activities abroad;

(6) Provide the Director of the National Security Agency with enhanced personnel authorities to protect classified information;

(7) Provide certain personnel authorities to enhance the intelligence functions of the Department of Energy; and

(8) Improve the Congressional oversight of U.S. intelligence activities.

## OVERALL SUMMARY OF COMMITTEE ACTION

[In million of dollars]

| | Fiscal year request | Committee recommendation |
|---|---|---|
| Intelligence activities: | | |
| IC Staff | 28.88 | 28.88 |
| CIARDS | 164.6 | 164.6 |

### THE CLASSIFIED SUPPLEMENT TO THE COMMITTEE REPORT

The classified nature of U.S. intelligence activities prevents the Committee from disclosing the details of its budgetary recommendations in this Report.

The Committee has, however, prepared a classified supplement to this Report, which explains the full scope and intent of its actions as set forth in the classified annex to the bill. This classified supplement, while not available to the public, is made available to effected department and agencies within the Intelligence Community. This supplement has the same legal status as any Senate Report, and the Committee fully expects the Intelligence Community to comply with the limitations, guidelines, directions, and recommendations contained therein.

The classified supplement to the Committee Report is also available for review by any Member of the Senate, subject to the provisions of Senate Resolution 400 of the 94th Congress.

### SCOPE OF COMMITTEE REVIEW

As it does annually, the Committee conducted a detailed review of the Intelligence Community's budget request for fiscal year 1991. This review included more than 30 hours of testimony from senior officials within the Intelligence Community as well as from other Executive branch officials with policy responsibilities.

In addition, the review entailed the examination of over 3,000 pages of budget justification documents, as well as the review of numerous Intelligence Community responses to specific issues raised by the Committee.

In addition to its annual review of the Administration's budget request, the Committee performs continuing oversight of various intelligence activities and programs. This process frequently leads to actions with respect to the budget of the activity or program concerned, which are initiated by the Committee itself.

Finally, the Committee also reviewed the Administration's budget request for Tactical Intelligence and Related Activities of the Department of Defense. The Committee's recommendations regarding these programs, which fall under the jurisdiction of the Armed Services Committee, have been provided separately to that Committee for consideration in the Defense Authorization bill.

## INTELLIGENCE REQUIREMENTS IN A CHANGING WORLD

In this year's hearings on the budget, the Committee adopted an approach different from previous years. Rather than having individual program managers appear before the Committee to defend their respective budgets, the Committee first heard testimony from various officials relating to the dramatic changes rapidly taking place in the world order. Following this series of presentations, senior officials in the Intelligence Community described how U.S. intelligence was responding, or was planning to respond, to such development, with emphasis upon any programmatic and budgetary shifts that may be necessary or desirable. While the Committee recognizes that such adjustments need to be made at a deliberate pace and continue over several years, this year's authorization bill does, in fact, reflect the beginning of a process to reorder priorities and objectives of U.S. intelligence activities.

For example, over the last 40 years U.S. intelligence has been properly consumed with developing, delivering and operating intelligence systems and activities aimed at countering the Soviet Union and its surrogates. In view of recent world events, it is clear that the underlying rationale for many of these programs is in serious need of review.

This is not to say that requirements for intelligence on the Soviet Union are behind us, only that they are likely to be very different in the future. It is clear that some intelligence activities which were important in the past, are no longer as important today. For example, there is a vast amount of openly available information about the Soviet Union and Eastern Europe that should offset the need for old strategies and investments. On the other hand, it is also clear that U.S. intelligence will have to cope with a more daunting arms control monitoring regime than heretofore envisioned. Cooperative measures being discussing in the Strategic Arms Reduction Talks (START) and other treaty negotiations may help improve our confidence in monitoring Soviet compliance, but such provisions have yet to be negotiated. Moreover, not all Soviet weapons systems will be covered by treaties. Weapons system research will continue without any obligation on the part of the Soviets to help us monitor them. In many respects, given our own lower force levels, these types of weapons may be of greater concern to us than those that are either limited or prohibited by arms control treaties. As a result, the Committee continues to believe that the Intelligence Community must continue to make investments that are helpful in verifying a START Treaty, in preventing technological surprise and in supporting U.S. policy and operation in crises.

In addition, the Committee believes that there are other intelligence requirements demanding attention in the future that have not received adequate resources given the intelligence community's long standing preoccupation with the Soviet threat. For example, intelligence support to low intensity conflict, counter-terrorism, and counter-narcotics are areas where intelligence capabilities require improvement. In addition, better intelligence on political and economic developments will have to be assigned a higher priority in the years ahead. Perhaps our most serious deficiencies over the

longer term lie in our ability to contend with the worldwide proliferation of sophisticated weaponry, to include nuclear, chemical, and biological weapons, and the long range missile systems to deliver them.

Finally, the Committee believes that human intelligence, information that has a direct bearing on gauging the intentions of both adversaries and friends, must be improved. Accordingly, the Committee has funded an initiative to augment our human collection against the economic, political and military threats which pose the greatest risk for U.S. security in the next decade and beyond.

The Committee's budgetary recommendations, which are addressed in the classified supplement to this report, seek to begin a process of shifting resources, reordering priorities, and meeting future needs. Moreover, the Committee has approached its budgetary responsibilities mindful of the serious need to reduce federal spending wherever possible. Hence, the Committee's recommendations achieve a significant net savings in the intelligence budget compared to the Administration's request, while at the same time strengthening certain mission areas commensurate with the need to meet new challenges.

## REORGANIZING DEPARTMENT OF DEFENSE INTELLIGENCE

Since the beginning of the last decade, there has been a tremendous expansion in intelligence budgets, which has continued, at least in relative terms, even after the overall national defense budget began to decline. In part, this expansion has been driven by requirements for new types of intelligence support (such as direct integration of intelligence systems with weapons systems and military operations); by new technology opportunities; by new target classes; and by the increasingly complex international security environment.

In the face of severe budget constraints, it is extremely difficult to sustain current programs, much less afford to invest in needed future capabilities and new requirements. Easing of requirements for very close scrutiny of the Warsaw Pact in some areas appears possible, but in other respects the need to monitor critical and dynamic events in the Soviet Union and along its periphery are as important as ever. In addition, a plethora of arms control agreements are likely to be signed and ratified in the near future, with potentially large verification requirements. The new emphasis on power projection support for global contingencies and counter-narcotic efforts will require re-orientation of some efforts as well as some new or different capabilities.

While new requirements and the increasing cost of collection systems have driven a share of the increase in intelligence, the cost of maintaining large numbers of intelligence organizations internal to the Department of Defense has also contributed. Every echelon from the Office of the Secretary of Defense, to the Service Departments, to the CINCs and below have their own organic intelligence arms. For each organization, we need separate buildings, separate administration, separate security, separate communications, and separate support services.

The existence of these multiple organizations raises other important concerns. Over the years, numerous individuals and reports, including a recent assessment by Admiral Crowe while he was serving as Chairman of the Joint Chiefs of Staff, have criticized the Defense Department for significant duplication of effort; insufficient integration and sharing of information; uneven security measures and regulations; pursuit of parochial service, CINC, other interests rather than joint intelligence interests; and gaps in intelligence support and coverage, despite the number of intelligence organizations.

Another problem, which transcends strictly Department of Defense intelligence, is that the tactical and national intelligence communities appear to be excessively isolated from one another, leaving each free to pursue self-sufficiency in their particular realms. Military commanders seek self-sufficiency through organic systems and organizations on the argument that national systems cannot be relied upon for support. The national community, likewise, emphasizes its peacetime missions and pays scant attention to the commander's need.

The Senate Select Committee on Intelligence and the Senate Armed Services Committee believe that a major review of intelligence priorities, resources, organizations, roles, and functions must be undertaken. A primary goal of the review is to identify all sensible opportunities for streamlining, consolidating, increasing "jointness," improving support to military commanders, and promoting independent intelligence input into the acquisition process of the military services. Expected economies from this review effort will help to ensure adequate investment for necessary capabilities and the elimination of coverage deficiencies. Another major goal must be to establish sound priorities and resource allocation in this period of dramatic changes in the security environment.

Accordingly, both Committees direct the Secretary of Defense and, where appropriate, the Director of Central Intelligence, to review all Department of Defense intelligence and intelligence-related activities and, to the maximum degree possible, consolidate or begin consolidating all disparate or redundant functions, programs, and entities and, concurrently, to above all strengthen joint intelligence organizations and operations. At a mimum, areas where substantial benefits could be derived from greater consolidation or strengthened joint operations include: the multiple science and technology centers; the multiple current intelligence centers; the overlap of intelligence production between component and unified/specified commands; the decentralized and uncoordinated programs for collection processing and reporting; and the disjointed program management within and between TIARA and NFIP. In addition, the Director of Central Intelligence, together with the Secretary of Defense, should study and improve the responsiveness of natural programs and organizations to CINC needs as well as seek ways to insure the utility (e.g., survivability, value of the information) of these national programs during wartime.

Both Committees expect the Secretary of Defense and the Director of Central Intelligence to report on their efforts to comply with this language no later than 1 March 1991. Both committees intend to initiate staff studies and to hold joint hearings to monitor the

progress of these efforts and, if necessary, to draft legislation to achieve the objectives outlined in this report.

### REVIEW OF GLOBAL PROLIFERATION DEVELOPMENTS

The United States and its allies face an increasing threat from the proliferation of chemical, biological, and nuclear weapons throughout the world. This threat is compounded by the fact that many of these same countries are acquiring or developing a ballistic missile or other advanced delivery system capability. This threat is certain to increase in the future.

As with any major threat to U.S. national security interests, the Congress and the American public must be fully and currently informed about the capabilities and intentions of nations involved in proliferation of weapons of mass destruction. Therefore, consistent with the protection of intelligence sources and methods, the Committee directs the Director, Defense Intelligence Agency, to produce an unclassified review of proliferation developments, similar in style and format to the annual DIA publication, "Soviet Military Power," providing information on this important issue. This unclassified document should be provided to the Congress no later than May 1, 1991, and should be accompanied by a statement from the Director, DIA, which states his position with respect to whether such report should be published on an annual basis.

At a minimum, the Committee believes the report should include: (1) a global assessment of the current state of nuclear, chemical, and biological weapon and delivery vehicle proliferation and an estimate of proliferation-related developments expected to occur within the next 5–10 years; (2) specific reports on regional developments (e.g. Latin America; Africa; Near East/South Asia; Far East) focusing on the impact of such developments on regional stability; (3) an assessment of compliance with existing treaties and other international agreements dealing with the proliferation of these weapons of mass destruction; (4) a table listing the confirmed and suspect proliferaton-related activities of nations and their capabilities; (5) a table describing the capabilities of ballistic missile and other delivery systems; (6) a table describing the characteristics of chemical and biological weapon agents and toxins; and (7) a map or maps showing the location of the sites of suspect and confirmed nations involved in the proliferation of weapons of mass destruction.

### NOMINATION OF THE CIA INSPECTOR GENERAL

The Intelligence Authorization Act of 1990 included legislation establishing an independent statutory Inspector General at the Central Intelligence Agency. The Committee expresses its concern that a nomination for this important position has not been formally submitted to the Senate for its advice and consent. Based upon its review of the existing office of CIA Inspector General and the experience of other statutory inspector general offices within other departments and agencies, the Committee continues to believe that the establishment of an independent statutory Inspector General at the CIA will significantly improve the effectiveness and objectivity of this office.

Clearly, the Office of CIA Inspector General cannot properly function without the Presidential appointment of an individual to head this Office. Because of the importance the Committee attaches to the need both for an independent Office of CIA Inspector General and an individual to head this Office, the Committee reserves the right during Conference on the Intelligence Authorization Bill to give serious consideration to alternative means of strengthening this Office absent the appointment of an individual to serve as Inspector General. Such means may include, but not be limited to, the Committee directing a significant reallocation of CIA personnel to the Office of CIA Inspector General.

## COUNTERINTELLIGENCE INITIATIVES

### *The Jacobs Panel*

Responding to the large number of serious espionage cases since 1975, the Chairman and Vice Chairman constituted a group of distinguished private citizens in the fall of 1989 to review the statutory and policy framework for the conduct of U.S. counterintelligence activities to ascertain whether improvements could be made.

Chaired by Eli Jacobs, a businessman with substantial experience in the defense and foreign policy areas, the panel was composed of retired Admiral Bobby Inman, formerly Director of the National Security Agency and Deputy Director of Central Intelligence; Lloyd Cutler, former Counsel to President Carter; Warren Christopher, former Deputy Secretary of State and Deputy Attorney General; Sol Linowitz, former Ambassador to the Organization of American States; A.B. Culvahouse, former Counsel to President Reagan; Seymour Weiss, former State Department official and Chairman of the Defense Policy Board; Richard Helms, former Director of Central Intelligence and Ambassador to Iran; and Harold Edgar, Professor of Law at Columbia University.

After six months of meetings with Executive Branch officials and deliberations among themselves, the panel recommended thirteen statutory changes to improve the counterintelligence posture of the United States at a public hearing on May 23, 1990. As explained by the panel, the intent of their recommendations was to deter espionage where possible; where deterrence failed, to permit the government to detect it; and where detection was possible, to improve the government's ability to prosecute such conduct.

Based upon these recommendations, a new bill, S. 2726, was developed and introduced by Senators Boren and Cohen on June 13, 1990, and referred to the Committee. Deliberations on the bill are ongoing.

### *Counterintelligence oversight actions*

In addition to the work of the Jacobs panel, the Committee has continued to review the overall capabilities, direction, and effectiveness of U.S. counterintelligence efforts. The rapid changes in Eastern Europe and U.S.-Soviet relations have required careful attention to new developments as well as long-standing problems. As a result of its oversight of U.S. counterintelligence policies and programs, the Committee is making a series of recommendations in

this report and in the classified annex accompanying the Intelligence Authorization Act of FY91.

*FBI resources and arms control inspection*

Soviet intelligence operations continue to pose the most serious counterintelligence threat to the United States. During the 1980s the United States placed strict limits on the number of Soviet officials assigned to this country. Those limits are being relaxed, placing greater burdens on FBI counterintelligence resources. Further increases in the official Soviet presence will result from the inspection procedures of the Threshold Test Ban Treaty, a possible START agreement, and other arms control agreements. Because fiscal constraints have limited the growth of FBI counterintelligence resources in recent years, the Committee urges the Administration to request a supplemental appropriation to provide additional resources for the FBI's FY 1991 counterintelligence program so as to meet the requirements for implementation of arms control inspection agreements, including the Threshold Test Ban Treaty and preparation for a possible START agreement.

Since 1988 the INF Treaty has given the Soviets access to a total of 11 sites in the United States. At two of those sites the Soviets have a continuing presence of up to 20 inspectors to observe dismantlement. At a third site in Magna, Utah, the Soviets have a permanent presence of up to 30 inspectors for as long as 13 years and residential premises with diplomatic immunity. This Soviet presence has required a substantial increase in FBI foreign counterintelligence resources at these locations. During the Senate hearings on the verification and inspection provisions of the INF Agreement, the Committee examined carefully the provisions limiting the ability of the Soviets to exploit the inspection process for intelligence purposes. The Committee also reviewed the plans and programs of the On-Site Inspection Agency and the U.S. counterintelligence community to minimize the danger. In 1988 the Administration provided additional resources to the FBI to meet the added counterintelligence responsibilities imposed by the INF inspection process.

The pending Threshold Test Ban Treaty will probably, if ratified, involve another site in the United States where the Soviets would have a long-term presence, as well as several other temporary access sites. Under a START agreement, the Soviets may have additional permanently staffed sites in the United States and considerably more temporary access to many other sites. The U.S. Government must prepare for the possibility that the Soviets will attempt to exploit these verification arrangements for clandestine intelligence purposes. In response to a request after a Committee briefing on arms control counterintelligence issues, the FBI has provided a classified estimate of its needs. The minimum requirements for the Test Ban Treaty are estimated to be substantial. The FBI's figures for START have a wider range, depending on the final agreement. The minimum for START is estimated to be much greater than the requirements for the Test Ban Treaty, while the maximum could be far more if Soviet inspectors are not subject to the same regulations as are imposed under the INF Treaty. Whenever START is implemented, the counterintelligence personnel

shortfall in the FBI will be significant without additional positions. Thus far, however, the Administration has not proposed a budget amendment or other means to fund the FBI's requirements. With essentially static resources the FBI must respond to the great influx of Soviet visitors and emigres, as well as to arms control inspectors with official immunity.

The Committee believes the FBI's requirements associated with arms control inspections should be funded without requiring reductions in funds for other aspects of the FBI Foreign Counterintelligence Program or in other elements of the National Foreign Intelligence Program budget. It is the responsibility of the Administration to make the overall determination as to where the resources to meet these FBI requirements should come from. During the Committee's assessments of intelligence aspects of the Threshold Test Ban Treaty in the Senate ratification process, the Committee intends to consider the adequacy of the Administration's commitment to providing FBI resources for this purpose.

*Office of Foreign Missions Controls*

Apart from expanding opportunities for Soviet intelligence operations, other significant changes are taking place in the threats to the United States from foreign intelligence services. Pursuant to the Leahy-Huddleston amendment (Title VI of the Intelligence Authorization Act for FY 1985), the Committee receives an annual report from the President on reciprocity in numbers and treatment for officials assigned to the U.S. from countries that engage in "intelligence activities within the United States harmful to the national security of the United States." This includes controls on travel by foreign mission personnel, which are administered by the Office of Foreign Missions. In early 1990 the President lifted Office of Foreign Missions travel controls on Polish officials, based on a State Department recommendation submitted without prior consultation with the FBI or CIA. In light of this experience and the prospects for other similar decisions, the Committee sees a need to monitor the intelligence basis for changes in Office of Foreign Missions counterintelligence policies.

The decision to lift travel controls on Polish officials was questionable. Polish intelligence retains links with Soviet intelligence and continues to see NATO as an intelligence target. While changes in U.S. policy towards Poland are justified in many other areas, it may have been premature to modify U.S. counterintelligence safeguards without more sustained evidence of changed Polish behavior. The State Department has advised the Committee that the manner in which the decision was made to remove controls on Polish travel without interagency consultation was "an aberration." The Office of Foreign Missions subsequently acted to ensure proper compliance in the future "with the strict Foreign Missions Act waiver procedures for removal of such travel controls."

The Committee believes that counterintelligence-related controls administered by the Office of Foreign Missions should not be modified without an assessment of the impact from the FBI and other appropriate elements of the intelligence community. In view of the possibility that such issues may arise in the coming year, the Com-

mittee requests that the intelligence community submit to the President and to the Committee, at the time of the 1991 Leahy-Huddleston report, a detailed analysis of the intelligence activities of foreign countries in the U.S. harmful to national interests. The President's report should explain any changes in OFM policies or in the countries covered by the report, with specific reference to the intelligence community's analysis.

*Economic espionage*

During the Committee's close hearing on U.S. counterintelligence programs, the FBI Director and senior State Department, Defense Department, and CIA officials discussed the possibility of an emerging economic espionage threat, including the collection of U.S. proprietary and unclassified information by foreign powers. In the course of refocusing the national counterintelligence strategy for the 1990s, more attention is being given to the economic espionage issue. There is evidence that foreign intelligence services, including services that are not "traditional" adversaries, have conducted clandestine operations in the United States to obtain information to be used for their national economic advantage.

The Committee believes that the intelligence community should concentrate its efforts on determining the nature and extent of such operations, so that policymakers can assess whether they constitute a growing threat to U.S. interests and whether new counterintelligence, security, or other national policy initiatives are required. Therefore, the Committee is directing that the Director of Central Intelligence prepare a comprehensive intelligence community study by March 1, 1991 to evaluate the threat of economic espionage and foreign intelligence services' efforts to negate our nation's competitive advantage through such methods as technology transfer and international financial and trade transactions.

*Overseas construction security*

In January 1990 the State Department Inspector General reported that the Department was not in compliance with the statutory provisions requiring construction security certification. Projects had begun without certification to Congress, and the requirement to consult with the Director of Central Intelligence was interpreted as merely a requirement to notify the DCI without obtaining any input. The State Department subsequently determined that renovation projects costing less than $1 million would be considered "nonmajor" projects exampt from the certification and DCI consultation requirements of the law.

The Committee's 1987 report on "Security at the United States Missions in Moscow and Other Areas of High Risk" recommended that the DCI certify the security conditions of Embassy facilities, including al lnew facilities prior to their occupation. As enacted in the Foreign Relations Authorization Act, the statutory procedure gives this responsibility to the Secretary of State, who has delegated it to the Deputy Secretary. In additon to consultation with the DCI, the law requires that the DCI's objections be submitted to the Secretary of State in writing.

Since the Inspector General uncovered noncompliance, the State Department has made a concerted effort to comply with the con-

struction security certification requirements. In response to the Committee's inquiries, the Department has advised that it takes the law to mean, and it follows the principle that, no construction security certification can be completed without input from the DCI.

The Committee remains concerned that projects are going forward over the objections of the intelligence community and before the DCI has had an opportunity to express his personal views to the Secretary of State, in accordance with the statutory procedure. These situations could be minimized if the DCI's Security Evaluation Office were to participate formally in the design work of the the State Department's Foreign Buildings Office. The Committee encourages better communication and closer cooperation between the State Department and the intelligence community in the overseas construction process.

*Report on port security at Hampton Roads*

In 1972, with the adoption of National Security Decision Memorandum (NSDM) 340, Polish Merchant vessels were precluded from calling on the port of Hampton Roads based on an assessment of fleet vulnerabilities to intelligence collection by Warsaw Pact merchant ships. The Secretary of Transportation, who has overall responsibility for such policy decisions, reafirmed the 1972 Hampton Roads closed-port policy again in 1983, when the Navy completed a 10-year update of its original vulnerability study.

Because the 1983 Navy vulnerability study is now dated and in view of the dramatic political changes which have occurred in Eastern Europe, the Committee requests that the Secretaries of Defense and Transportation jointly conduct an interagency review of the continuing validity of closing Hampton Roads to Polish Merchant shipping.

As part of this review, the Navy should update its 1983 study on vulnerabilities, which should include the identification of any new equipment, operations, and security practices in the Hampton Roads area; an estimate of the number of Polish ships that would likely call on Hampton Roads were the closed-port policy terminated; alternative locations for docking and anchoring Polish Merchant vessels within the port; and alternative access and inspection policies which could be used aboard such vessels.

The study should also assess the impact of greater access of Warsaw Pact diplomats and citizens to the Hampton Roads area, and their technical capability to collect intelligence regardless of the access by Polish merchant vessels. Finally, since Polish merchant vessels were regular carriers at Hampton Roads prior to 1972, when East-West relations were at a low ebb, the report should summarize the security measures that were in effect prior to 1972, identifying those which could be usefully applied to today's vastly changed situation.

Finally, as part of this review, the Intelligence Community, joined by Coast Guard Intelligence, should provide a thorough threat assessment of the current and future capability, practices, and likelihood of Polish merchant vessels to conduct espionage at Hampton Roads, was well as the U.S. ability to detect such activity.

The Secretaries of Defense and Transportation shall report to the Committee the results of this review no later than six months after the enactment of the intelligence authorization bill.

In requesting such report, the Committee does not intend to indicate one way or the other its position on the policy issue. Clearly, we wish to ensure that U.S. security is not compromised by a precipitous change in policy. On the other hand, where security concerns have changed, the old policy may no longer be justified. The study required here should lay a solid foundation for determining whether a change of policy is justified and, if so, what security precautions should accompany such change.

*Security at U.S. test range facilities*

In May, 1990, the Committee received a report prepared by the Defense Intelligence Agency (DIA) regarding the effectiveness of security measures at several key U.S. test range facilities. The Committee had requested the Defense Department to prepare this report after confirming serious security deficiencies at the Kwajalein Atoll Test Range in 1989.

The classified DIA report confirmed that the problems detected by the Committee at Kwajalein Atoll Test Range were, indeed, indicative of a security deficiencies endemic to the Department's research, development, test and evaluation process. As the report states in its unclassified conclusion: "[t]he entire U.S. Department of Defense (DoD) research, development, testing and evaluation (RDT&E) security process needs to be reviewed thoroughly and improved accordingly."

The Committee commends the Defense Department for the candor and forthrightness of this important report. The Committee also notes that the problems indentified in the report have apparently existed for many years and appear to be the result of systemic and bureaucratic impediments rather than negligence or inaction on the part of responsible DoD officials.

Because of its continuing interest in this important matter, the Committee requests the Secretary of Defense to prepare a further report identifying the funds being set aside in the FY 1992 Defense Authorization bill to remedy the deficiencies identified in the DIA report, and describing the organizational and procedural changes being implemented to rectify the management and acquisition problems identified by the DIA report. Such report should be submitted no later than March 1, 1991 to the Committees on Armed Services and to the intelligence committees, of the House and Senate.

## DEPARTMENT OF DEFENSE DAMAGE ASSESSMENTS

Last year, the Committee directed the Department of Defense to establish a mechanism under the auspices of the Chairman, Joint Chiefs of Staff for the conduct of comprehensive, detailed, joint damage assessments of cases where U.S. classified information has been compromised. Members of the damage assessment analytical teams were to include both operators and intelligence analysts (cryptologic and all-source). The Department of Defense is in the process of establishing a senior OSD oversight group, and a work-

ing group within the JCS, headed by DIA, to conduct such assessments. The Department has assured the Committee that this working group will have access to all relevant classified, compartmented, and special access information, consistent with the requirements of legal proceedings. The Committee commends the Department of Defense for its efforts to date, and looks forward to receiving a report from the Department on the final codification of its structure and procedures.

### INTELLIGENCE OVERSIGHT

Title VII of the bill contains the same provisions regarding intelligence oversight as title IX of the Intelligence Authorization Act for FY 1990 (S. 1324, 100th Congress, 2nd Session) which passed the Senate by voice vote but was not adopted by the Conference Committee in order to provide additional time for the House Committee to consider and improve the Senate language. The conferees stated their intent to reconsider this title in the context of the FY 1991 Intelligence Authorization bill.

Title VII, in fact, would enact most of the provisions of an earlier bill, S. 1721, introduced in the 100th Congress which passed by the Senate on March 15, 1988 by a vote of 71–19, but was never considered by the House of Representatives.

*History of the legislation*

S. 1721 was introduced on September 25, 1987, by Senator Cohen on behalf of himself and Senators Boren, Inouye, Mitchell, Bentsen, DeConcini, Murkowski, and Rudman. The formal introduction of this legislation came many months after the Intelligence Committee had begun an intensive examination of the need to clarify and strengthen the statutory provisions for intelligence oversight. That process began in the fall of 1986, with the initial Committee inquiry into the Iran-Contra affair. It continued through the Committee's hearings on the nomination of a new Director of Central Intelligence and formal Committee recommendations to the Administration for changes in Executive branch procedures, many of which were embodied in a presidential directive (NSDD 286). Through its overlapping Members and staff, the Intelligence Committee benefited directly from the work of the temporary Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition. When that Committee completed its hearings and issued its report, the Intelligence Committee immediately began legislative hearings and consultations with Executive branch officials and outside experts leading to the mark-up of S. 1721.

*A. Preliminary Iran-Contra inquiry*

Following public disclosure of the Iran arms sales in November 1986, the Committee began a thorough review of how the laws and procedures for covert action might have been violated, disregarded or misinterpreted. Director of Central Intelligence William Casey testified initially on these issues on November 21, 1986. After the Attorney General's announcement of November 25, 1986, disclosed the diversion of Iran arms sale proceeds to the Contras, the Committee initialed a formal preliminary investigation which began on

December 1, 1986, and was completed with a public report on January 29, 1987, to the new Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition. S. Rep. No. 100–7.

The Committee's preliminary inquiry examined in depth the circumstances in which the statutes, Executive orders, and procedures for covert action approval and oversight were interpreted and applied in the Iran-Contra affair. Witnesses who discussed these issues included the Secretaries of State and Defense, the Attorney General, the President's Chief of Staff, one former National Security Advisor to the President, the Deputy Director of Central Intelligence and his predecessor, the CIA General Counsel and his predecessor, the CIA Deputy Director for Operations, the Chief of the CIA Central America Task Force, the CIA Comptroller General, the CIA Inspector General, the Assistant Secretary of State for Latin American Affairs, the Assistant Secretary of Defense for International Security Affairs, and other Executive branch officials. While this testimony was not public, it remains part of the legislative record of the Committee's consideration of this title.

The Committee's preliminary report identified key factual issues that needed to be addressed by the Select Iran-Contra Committee, whose ten members included four senior members of the Intelligence Committee—the Chairman, the Vice Chairman, and Senators Nunn and Hatch. Through this overlapping arrangement, which included significant involvement by Committee staff as well, the Intelligence Committee was able to benefit throughout the year from the findings and deliberations of the Iran-Contra Committee.

*B. DCI confirmation hearings*

At the outset, it became clear from the Intelligence Committee's intensive preliminary Iran-Contra inquiry that significant changes were required in the covert action oversight framework. Accordingly, the Committee discussed these issues at the hearings on the nomination of Robert Gates as Director of Central Intelligence in February, 1987. Nomination of Robert Gates, Hearings before the Senate Select Committee on Intelligence, 1987. After his nomination was withdrawn, the Committee again raised these issues with Judge William H. Webster at his confirmation hearings as DCI in April, 1987.

Under questioning from Committee members, Judge Webster agreed that Presidential findings for covert action should be in writing and should not be retroactive. He also agreed that covert action by components of the government other than the CIA, such as the National Security Council staff, should be reported to the Intelligence Committees in the same manner as CIA operations. Most importantly, he agreed that he would recommend to the President against withhholding notification under any but most extreme circumstances involving life and death and then only for a few days. Nomination of William H. Webster, Hearings before the Senate Select Committee on Intelligence, 1987, pp. 64, 68–69, 158.

*C. Letter to the National Security Advisor*

At the same time as the Iran-Contra Committee began its hearings, the Intelligence Committee proceeded to develop a set of recommendations for immediate action by the Executive branch under

current law that might also serve as the basis for legislation. At meetings in June, 1987, the Committee, after much discussion and detailed deliberation, approved a letter to the President's National Security Advisor, Frank Carlucci, setting forth detailed proposals for improved covert action approval and reporting procedures. These later became essential features of S. 1721 and this title. The President's response to that letter on August 7, 1987, was printed in the Congressional Record when S. 1721 was introduced on September 25, 1987.

The Committee's letter of July 1, 1987, to National Security Advisor Carlucci recommended that covert action approval and reporting procedures ought to incorporate the following points:

> In all cases there shall be a finding by the President prior to the initiation of any covert action. No finding may retroactively authorize or sanction any covert action not undertaken pursuant to, and subsequent to, a finding specifically approved by the President.
>
> To ensure accountability and to provide unambiguous direction for actions taken within the Executive branch, there will be no "oral" findings unless the President determines that immediate action is required of the United States to deal with an emergency situation affecting vital U.S. interests, and time does not permit the drafting of a written finding. In these circumstances, the "oral" finding shall be immediately reduced to writing and signed by the President. The written finding shall include the President's reasons for first proceeding with an "oral" finding.
>
> Each finding approved by the President shall specify any and all entities within the Executive branch that will fund or otherwise participate in any in carrying out the activities which are authorized, and shall set forth the nature and extent of such participation. The President shall be responsible for reporting all findings to the Intelligence Committees, regardless of which entity or entities within the Executive branch are designated to participate in the activity in question. At the time such reports are made, the President shall also identify to the Committee any third country and, either by name or descriptive phrase, any private entity or person, which the President anticipates will fund or otherwise participate in any way in carrying out the activities which are authorized and shall set forth the nature and extent of such participation. Any changes in such plans or authorizations shall be reported to the Intelligence Committees prior to implementation.
>
> Where the President determines to withhold prior notice of covert actions from the two Intelligence Committees, such prior notice may be withheld only in accordance with specific procedures. Such procedures shall, at a minimum, require that the President, or his representative, shall, in all cases without exception, notify contemporaneously, and in no event later than 48 hours, the Majority and Minority Leaders of the Senate and the Speaker and Minority Leader of the House, and the Chairmen and Vice Chair-

men of the two Intelligence Committees of the existence of the finding, which notification shall include a summary of the actions authorized pursuant thereto and a statement of the reasons for not giving prior notice.

*D. NSDD 286*

The Committee's dialogue with the Administration, through National Security Advisor Carlucci, did not result in full agreement on new Executive branch procedures. These extensive consultations did, however, contribute to the substantive provisions of a new National Security Decision Directive on Special Activities (NSDD 286) issued by the President to clarify the rules by which covert actions are reviewed, approved, and reported to Congress. As a result, because much of the NSDD was developed in close consultation with the Committee, many of its provisions were reflected in S. 1721.

This can be illustrated by comparing several provisions of the bill and the Presidential directive:

S. 1721 required that findings be in writing and could not be made retroactive. S. 1721 provided that findings may not violate existing statutes. Similar requirements are contained in the NSDD.

S. 1721 made clear that a Presidential finding must be obtained before any department, agency, or other entity of the U.S. Government could conduct a special activity. The Presidential directive affirms this principle.

S. 1721 required that the Intelligence Committees be informed when a special activity involved another U.S. Government agency or a third party who was not under the supervision of a U.S. Government agency. The NSDD requires that these issues be addressed in a statement accompanying the findings.

Of course, however, a Presidential directive is not the same as a statute and can be changed without warning by another President. Indeed, when the President's Chief of Staff, Donald Regan, was asked during the Committee's preliminary Iran-Contra inquiry about the previous NSDD procedures for approval of special activities, in effect when the Iran arms sales are approved, he professed ignorance of that NSDD. S. 1721 would have ensured that the requirements put in place by the Presidential directive could not so readily be ignored or set aside in the future.

In the consultations leading to the NSDD, the Committee and the Administration were unable to reach agreement on a requirement that the Intelligence Committees, or the group of leaders, be informed of covert actions within 48 hours of their approval by the President. The NSDD required a National Security Council planning group to reevaluate at least every 10 days a decision to delay Congressional notification of a given finding. While the rationale may have been to ensure that the delay would be kept to the absolute minimum length of time, the procedure contemplated that notice may be withheld indefinitely so long as NSC planning group members agreed.

Thus, the NSDD appeared to conflict with the current oversight statute which, in subsection 501(b) of the National Security Act, re-

quires notification "in a timely fashion" and does not permit such indefinite delay.

*E. Iran-Contra Committee*

Each of these issue was fully considered at great length by the Intelligence Committees and the Iran-Contra Committee in the months leading up to the introduction of S. 1721 and the approval of nearly identical Iran-Contra Committee recommendations. Much of the same ground covered in the Intelligence Committee's closed hearings in December, 1986, was covered again in the public Iran-Contra hearings and report in 1987. The witnesses discussed not only the facts of the Iran-Contra affair, but also the way covert action approval and oversight procedures were applied or, in many cases, misapplied. Accordingly, the exhaustive work of the special Iran-Contra Committee also served as a part of the legislative record of S. 1721.

And the work of the special Iran-Contra Committees was certainly significant. The staffs of the House and Senate Committees reviewed more than 300,000 documents and interviewed or examined more than 500 witnesses. The Committees held 40 days of joint public hearings and several executive sessions. The joint report of the Committees is over 690 pages long, including the minority report and supplemental and additional views of individual members.

The following recommendations from the joint report of the Iran-Contra Committees were reflected in S. 1721:

1. *Findings: Timely Notice.*—The Committees recommend that Section 501 of the National Security Act be amended to require that Congress be notified prior to the commencement of a covert action except in certain rate instances and in no event later than 48 hours after a finding is approved. This recommendation is designed to assure timely notification to Congress of covert operations.

Congress was never notified of the Iranian arms sales, in spite of the existence of a statute requiring prior notice to Congress of all covert actions, or, in rare situations, notice "in a timely fashion." The Administration has reasoned that the risks of leaks justified delaying notice to Congress until after the covert action was over, and claims that notice after the action is over constitues notice "in a timely fashion." This reasoning defeats the purpose of the law.

2. *Written Findings.*—The Committees recommend legislation requiring that all covert action findings be in writing and personally signed by the President. Similarly, the Committees recommended legislation that requires that the findings be signed prior to the commencement of the covert action, unless the press of time prevents it, in which case it must be signed within 48 hours of approval by the President.

The legislation should prohibit retroactive findings. The legal concept of ratification, which commonly arises in commercial law, is inconsistent with the rationale of find-

ings, which is to require Presidential approval before any covert action is initiated * * *.

3. *Disclosure of Written Findings to Congress.*—The Committees recommend legislation requiring that copies of all signed written findings be sent to the Congressional Committees * * *.

4. *Findings: Agencies Covered.*—The Committees recommend that a finding by the President should be required before a covert action is commenced by any department, agency, or entity of the United States Government regardless of what source of funds is used * * *.

5. *Findings: Identifying Participants.*—The Committees recommend legislation requiring that each finding should specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any way in a covert action and whether any third party, including any foreign country, will be used in carrying out or providing funds for the covert action. The Congress should be informed of the identiies of such third parties in an appropriate fashion * * *.

7. *Presidential Reporting.*—The Committees recommend that consistent with the concepts of accountability inherent in the finding process, the obligation to report covert action findings should be placed on the President * * *.

8. *Findings Cannot Supersede Law.*—The Committees recommend legislation affirming what the Committees believe to be the existing law: that a finding cannot be used by the President or any member of the Executive branch to authorize an action inconsistent with, or contrary to, any statute of the United States—S. Rept. No. 100-216, pp. 423-426.

The joint report of the Iran-Contra Committees, concluded its chapter on "Covert Action in a Democratic Society" with the following principles:

(a) Covert operations are a necessary component of our Nation's foreign policy. They can supplement, not replace, diplomacy and normal instruments of foreign policy. As National Security Advisor Robert McFarlane testified, "It is clearly unwise to rely on covert action as the core of our policy." The government must be above to gain and sustain popular support for its foreign policy through open, public debate.

(b) Covert operations are compatible with democratic government if they are conducted in an accountable manner and in accordance with law. Laws mandate reporting and prior notice to Congress. Covert action findings are not a license to violate the statutes of the United States.

(c) As the Church Committee wrote more than a dozen years ago, "covert actions should be consistent with publicly defined United States foreign policy goals." But the policies themselves cannot be secret.

(d) All government operations, including covert action operations, must be funded from appropriated monies or

from funds known to the appropriate committees of the Congress and subject to Congressional control. This principle is at the heart of our constitutional system of checks and balances.

(e) The intelligence agencies must deal in a spirit of good faith with the Congress. Both new and ongoing covert action operations must be fully reported, not cloaked by broad findings. Answers that are technically true, but misleading, are unacceptable.

(f) Congress must have the will to exercise oversight of covert operations. The intelligence committees are the surrogates for the public on covert action operations. They must monitor the intelligence agencies with that responsibility in mind.

(g) The Congress also has a responsibility to ensure that sensitive information from the Executive branch remains secure when it is shared with the Congress. A need exists for greater consensus between the Legislative and Executive branches on the sharing and protection of information.

(h) The gathering, analysis, and reporting of intelligence should be done in such a way that there can be no question that the conclusions are driven by the actual facts, rather than by what a policy advocate hopes these facts will be.—S. Rept. No. 100-216, p. 383-384.

*F. Hearings and consultations*

Pursuant to the terms of S. Res. 23, and in order to receive the final recommendations based on the extensive work of the Iran-Contra Committee, the Intelligence Committee postponed hearings on the specific proposals contained in S. 1721 until after final approval of the Iran-Contra Committee's Report in November, 1987. Thereafter, the Intelligence Committee immediately began the final phase of its work on oversight legislation. At a public hearing on November 13, 1987, the sponsors of legislation in this area, testified on their respective bills. Senator William S. Cohen testified on behalf of S. 1721. Senator Arlen Specter testified on behalf of S. 1818, which contained similar covert action finding and notice requirements and would have established a statutory Inspector General for the CIA and imposed a mandatory jail term for false statements to Congress. Senator John Glenn testified on behalf of S. 1458, which would have authorized the General Accounting Office to audit CIA programs and activities. Senator Wyche Fowler testified on behalf of S. 1852, which would have established standards for covert action.

At a closed hearing on November 20, 1987, DCI William Webster testified on the practical impact of the bills on the Intelligence Community. Director Webster identified specific concerns which the Committee subsequently took into account in revising the bill. At a public hearing on December 11, 1987, the Committee received testimony from the Vice Chairman of the Iran-Contra Committee, Senator Warren Rudman, who cosponsored S. 1721. Assistant Attorney General Charles Cooper testified at that hearing on how the Justice Department's view of constitutional law applied to the bill.

Also testifying at that hearing were the authors of similar House legislation, H.R. 1013, Representative Louis Stokes, Chairman of the House Permanent Select Committee on Intelligence, and Representative Matthew F. McHugh, Chairman of the Subcommittee on Legislation.

On December 16, 1987, the Committee received testimony at a final public hearing from Secretary of Defense Frank Carlucci and Under Secretary of State Michael Armacost, who expressed the Administration's opposition to the requirement in S. 1721 to report covert action findings to appropriate members of Congress within 48 hours, and from former Secretary of Defense Clark Clifford and former Deputy Director of Central Intelligence, John McMahon, who supported this requirement. On December 17, 1987, the Committee received a letter from FBI Director William Sessions raising questions about the application of the bill to FBI foreign counterintelligence and international terrorism investigative programs.

At the same time, the Committee consulted widely with knowledgeable people, including former senior U.S. Government officials, experts in intelligence law, and Executive branch representatives. Committee staff met personally with over two dozen experts who provided valuable assistance in helping to evaluate and refine the language of S. 1721, and results of that process were made available through their staff to all members of the Committee.

Representatives of serveral organizations submitted written comments on the bill. The American Civil Liberties Union recommended greater restrictions on covert action and officials of the following organizations recommended fewer restrictions: the Association of Former Intelligence Officers, the Hale Foundation, the National Intelligence Study Center, and the Security and Intelligence Foundation. Individuals submitting written comments in general support of the bill included former Secretary of State Cyrus Vance, Senator Patrick Leahy, Harry Howe Ransom of Vanderbilt University, Gregory F. Treverton and Laurence H. Tribe of Harvard University, and Loch Johnson of the University of Georgia. Individuals submitting written comments in general opposition included former Senator Barry Goldwater, former DCIs Richard Helms and Stansfield Turner, Robert F. Turner, former Counsel to the President's Intelligence Oversight Board, and John Norton Moore of the University of Virginia.

Therefore, the Committee's decision to report S. 1721 in January 1988, was the culimination of a long and exhaustive process of review and analysis of the need for specific changes in the current oversight statutes. Indeed, that process extends back to the very beginning of the Committee's experience under the present law. It has taken into account not only the lessons of the Iran-Contra Affair, but also the concerns and expertise of current and former policymaker and intelligence officials who were not involved in the Iran-Contra events.

### *G. Actions in the 100th Congress*

S. 1721 was reported by the Select Committee on Intelligence on January 27, 1988, by a vote of 13-2 (S. Report 100-276). After floor debates on March 3 and 4, 1988, it passed the Senate on March 15, 1988, by a vote of 71-19.

A counterpart bill, H.R. 3822, was reported by the House Permanent Select Committee on Intelligence and House Foreign Affairs Committee on July 6, 1988, but was never brought to a vote in the House of Representatives.

*H. Actions in the 101st Congress*

The Committee initially deferred further consideration of an oversight bill in the 101st Congress until it was able to ascertain whether a compromise could be reached with the new Administration on the so-called "48-hour" provision of the previous bill, requiring the President to report covert actions to the intelligence committees within 48-hours of their approval.

There ensued in the first nine months of 1989 a series of negotiations between Committee and White House representatives to this end, culminating in an October 30, 1989 letter to the Committee from President Bush stating his intent to return to the understandings that underlay the 1980 Act:

> I intend to provide notice in a fashion sensitive to congressional concerns. The statute requires prior notice or, when no prior notice is given, timely notice. I anticipate that in almost all instances, prior notice will be possible. In those rare instances where prior notice is not provided, I anticipate that notice will be provided within a few days. Any withholding beyond this period would be based upon my assertion of the the authorities granted this office by the Constitution.

With this commitment by the President not to withhold notice pursuant to the statute for more than a few days, the Committee believed the intelligence oversight improvements originally embodied in S. 1721, less an absolute statutory requirement to report covert actions to the committees within 48 hours, could and should be enacted. Accordingly, the Committee reported out, as title IX of the Intelligence Authorization Act for FY 1990 (S. 1324), most of the provisions of S. 1721 but left intact the basic formulation in existing law for reporting covert actions to the Congress. This language was included in the bill which passed the Senate by voice vote on November 7, 1989.

Title IX of the Senate bill was not adopted by the Conference Committee. The Conference Report on the bill (House Report 101–367) explained that while the conferees agreed that such title would make valuable changes to the oversight framework, the House conferees wished to defer consideration until the second session of the 101st Congress in order to explore whether further improvements might be necessary. With the understanding that the issues addressed in title IX of the Senate bill would be reconsidered by both committees in the second session of the 101st Congress, the Senate conferees receded to the House position.

The Committee reconsidered the oversight provisions as part of its mark-up of the FY91 Intelligence Authorization bill, approving the incorporation of these provisions as Title VII of the bill on June 28, 1990.

*Background of the legislation*

It is important to note that, prior to the Iran-Contra affair, the Intelligence Committee had continuously analyzed the issues raised by the ambiguities in the applicable oversight statutes. In fact, consideration of these issues dates back to 1981, almost immediately after enactment in 1980 of the Intelligence Authorization Act for Fiscal Year 1981 which established the essential features of the present oversight process.

*A. Intelligence Oversight Act of 1980*

The 1980 legislation, which was originally reported by the Committee and passed by the Senate as the Intelligence Oversight Act of 1980, made two fundamental changes to the statutory framework for intelligence oversight. First, it modified the Hughes-Ryan Amendment of 1974 to confine notice of Presidential findings for CIA's covert action to the two intelligence committees. This reduced from eight to two the number of committees notified of covert action findings.

Second, the 1980 legislation added a new Section 501 on Congressional oversight to the National Security Act of 1947. Section 501 established comprehensive oversight procedures for all departments, agencies, and entities of the United States engaged in intelligence activities. It required that the two intelligence committees be kept fully and currently informed of all intelligence activities, including significant anticipated intelligence activities. It also provided that when the President determined it was essential to meet extraordinary circumstances affecting vial U.S. interests, prior notice could be limited to eight Members of Congress—the Chairmen and Vice Chairmen of the Intelligence Committees, the Speaker and Minority Leader of the House, and the Majority and Minority Leader of the Senate.

Moreover, Section 501 was deliberately written with some ambiguity as a means of reaching agreement with the Executive branch. As a result, for example, the requirement for prior notice of covert action, to the committees or to the group of eight, was legally conditioned by two clauses that appear at the beginning of subsection 501(a)—referred to as "preambular clauses." The general reporting requirements were imposed "to the extent consistent with due regard" for the constitutional authorities of the Executive and Legislative branches and "to the extent consistent with due regard" for the protection of classified information and intelligence sources and methods from unauthorized disclosure.

The original Hughes-Ryan amendment of 1974 placed no such conditions on its requirement for notice of CIA covert action "in a timely fashion." Therefore, in order to preserve the full force of the Hughes-Ryan notice requirement for the two Intelligence Committees the authors of the 1980 statute added subsection 501(b) which was not qualified by the preambular clauses. This subsection said that the President must report to the Intelligence Committees "in a timely fashion" if prior notice is not given under subsection (a) and must explain the reasons for not giving prior notice.

*B. Consultations on Executive Order 12333*

Almost immediately after the 1980 law was enacted, the Committee began to examine its meaning and application. The first occasion to do so in 1981 was the confirmation hearing for William Casey as DCI. Mr. Casey was asked specifically about his intentions in the area where the statute left some ambiguity about notice of covert action. He replied that he intended "to comply fully with the spirit and the letter of the Intelligence Oversight Act." He also noted that there were "reservations * * * that relate to the President's constitutional authority." Mr. Casey went to add:

> I cannot conceive now of any circumstances under which they would result in my not being able to provide this committee with the information it requires. I would obviously have to be subject to and discuss with the President any particular situations which I cannot now foresee, and I would do that in a way that this committee would know about.—Nomination of William J. Casey, Hearing before the Senate Select Committee on Intelligence, January 13, 1981, p. 25.

Early in 1981, the Administration agreed to consult the Committee on any changes that might be proposed in the Executive Order on intelligence activities. This led to formal consultation on specific oversight issues addressed in Executive Order 12333, issued by President Reagan on December 4, 1981. The previous order issued by President Carter in 1978 had contained a section on Congressional oversight similar to what became the language enacted by statute in 1980. The Reagan order deleted this section and substituted a provision requiring compliance with the 1980 statute. Executive Order 12333, Sec. 3.1.

As a result of Committee consultation in 1981, Executive Order 12333 added a provision not included in the previous order to fill a gap in oversight law. The Hughes-Ryan Amendment required a Presidential finding for CIA covert action, but not for covert action by other parts of the government. This gap was thought to have been closed by a new Executive Order provision stating that the finding requirement of Hughes-Ryan "shall apply to all special activities as defined in this Order." Executive Order 12333, Sec. 3.1. However, as events later proved, the fact that this provision was contained in an Executive Order, but not in a statute, presented an opportunity for abuse.

The Committee was also consulted on revisions in the definition of "special activities" which permitted operations inside the U.S. in support of "national foreign policy objectives abroad" and which added language excluding operations "intended to influence United States political processes, public opinion, policies, or media." Executive Order 12333, Sec. 3.4(h).

Title VII of the bill, as S. 1721 before it, draws directly on these deliberations in 1981. It would incorporate into the oversight statute the Executive Order requirement of a Presidential finding for special activities by any part of the government. And it adopts the essential features of the definition of "special activities," including the ban on operations to influence domestic U.S. policies or media.

The cooperation between the Committee and the Executive branch in developing Executive Order 12333 reflected a commitment on both sides to working out any problems with the oversight procedures by mutual accommodation. A Committee report to the Senate on September 23, 1981, included as an appendix a summary of the legislative history of modification of the Hughes-Ryan Amendment. It cited the floor statement by the sponsor of the 1980 legislation, Senator Huddleston, that "the only constitutional basis for the President to withhold prior notice of a significant intelligence activity would be exigent circumstances when time does not permit prior notice." S. Rept. No. 97-193, pp. 31-45.

It became clear as a result of the Iran-Contra affairs, however, that the Executive branch did not agree with the intent of the sponsor of the oversight law. Instead, the Justice Department asserted the right to withhold prior notice from even the group of eight leaders on the grounds of protecting secrecy. In addition, the Department construed the "timely" notice provisions of the law to permit the President to withhold notice indefinitely.

These problems did not become apparent in the early 1980s, when the Committee was able to report that it "has received detailed reports and has heard testimony on covert action programs *before implementation,* and has actively monitored the progress of those programs once launched. Certain covert action programs have been modified to take into account views expressed by the Committee." S. Rept. No. 98-10, p. 2 (Emphasis added.) In this period, the Administration was able to comply fully with the prior notice provisions of the oversight statutes, and operations clearly benefited from that consultation.

*C. Nicaragua Harbor-Mining*

During 1983-84, problems with the Nicaragua covert action program led to a reassessment of covert action oversight procedures. In 1983, the Congress placed a $24 million ceiling on funds available for the Nicaragua covert action program in Fiscal Year 1984. Describing the events that led up to this action, including a Committee requirement that the Administration issue a new Presidential finding, the Committee explained the distinction between the powers of the Congress to appropriate funds and to obtain information and the power of the Executive to initiate operations:

> In this connection, it should be noted that, while the Committee may recommend whether or not to fund a particular covert action program and the Congress, pursuant to its power over appropriations, may prohibit such expenditures, the initiation of a program is within the powers of the President. The Committee is entitled by law to be informed of the President's finding authorizing such an action in advance of its implementation and to offer its counsel, but does not have the right to approve or disapprove implementation of the finding.—S. Rept. 98-655, p. 6.

This analysis of the constitutional powers of the respective branches continues to be the basis for the Committee's current consideration of oversight legislation.

In early 1984, the mining of Nicaraguan harbors disrupted the oversight relationship and led to the development of formal procedures to clarify reporting obligations. On June 6, 1984, Director Casey, with the approval of the President, signed a written agreement with the Committee setting forth procedures for compliance with the statutory requirements. The Committee summarized them in a report to the Senate.

A key component of the agreement that ultimately was achieved concerned recognition by the Executive branch that, while each new covert action operation is by definition a "significant anticipated intelligence activity," this is not the exclusive definition of that term. Thus, activities planned to be undertaken as part of ongoing covert action programs should in and of themselves be considered "significant anticipated intelligence activities" requiring prior notification to the intelligence committees if they are inherently significant because of factors such as their political sensitivity, potential for adverse consequences, effect on the scope of an ongoing program, involvement of U.S. personnel, or approval within the Executive branch by the President or by higher authority than that required for routine program implementation. S. Rept. 98-665, pp. 14-15.

Title VII builds directly upon the deliberations in 1984 by specifying in statute the requirement to report significant changes in covert actions under previously approved findings. The procedures developed in cooperation with the CIA in 1984 provide a substantial basis for the legislative history of this provision.

Subsequent experience indicated, according to the Committee's 1984 report, that "further steps were necessary to ensure that delays not inadvertently result in failure to notify the Committee prior to implementation of significant activities. The Chairman and Vice Chairman called this matter to the attention of the DCI, and he agreed to the establishment of specific time intervals for the notification process." S. Rept. 98-665, p. 15, note 4. This was the genesis of the concept in S. 1721 of notice within a fixed time period, such as 48 hours.

In the 99th Congress, the Committee and the DCI further refined these procedures. An addendum signed in June 1986 provided, for example, that advisories to the Committee would describe "any instance in which substantial nonroutine support for a covert action operation is to be provided by an agency or element of the U.S. Government other than the agency tasked with carrying out the operation, or by a foreign government or element thereof." Nomination of William H. Webster, Hearings before the Senate Select Committee on Intelligence, 1987, pp. 52-54.

The full texts of the 1984 agreement and the 1986 addendum appear in the hearings on Judge Webster's nomination as DCI in 1987. Both the original agreement and the addendum contained statements, insisted upon by the Executive branch, that the agreed procedures were "subject to the possible exceptional circumstances contemplated" in the 1980 oversight statute. Thus, they had neither the status of law nor the force of an unambiguous commitment. The problems associated with this fact became manifest in the Iran-Contra affair.

*Objectives of the legislation*

Title VII of the bill draws on this background and the intensive deliberations surrouding the Iran-Contra inquiries in 1986–87 to achieve three principal objectives.

The first is to clarify and emphasize the general responsibilities of the President to work with the Congress, through the House and Senate Intelligence Committees, to ensure that U.S. intelligence activities are conducted in the national interest. Current law does not fully address the obligations of the President. Nor does the existing statute reflect the results of the consultations that have taken place between the Committee and the Executive branch on measures to implement the lessons learned from the Iran-Contra inquiry.

The second objective is to eliminate unnecessary ambiguities in the law. Experience under the current statutes has indicated significant areas where Congressional intent may be subject to misinterpretation by Executive branch officials, as well as gaps in the law where Congress did not adequately anticipate the need for statutory guidance. Examples are the absence of an explicit provision for written Presidential findings, and the need to specify those responsible for implementing covert actions. The aim is to clarify the intent of Congress with respect to oversight of intelligence activities so as to reduce the possibilities for misunderstanding or evasion. For purposes of clarity, a distinction is made between the detalied provisions for covert actions, which are instruments of U.S. foreign policy, and the requirements for other intelligence activities (i.e., foreign intelligence and counterintelligence collection and analysis) that are less controversial.

A third objective is to provide general statutory authority for the President to employ covert actions to implement U.S. foreign policy by covert means. Congress has not previously done so, except to the extent that the CIA was authorized by the National Security Act of 1947 "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." Current law requires Presidential approval and reporting to the intelligence committees, but this does not provide affirmative statutory authority to employ covert means as a supplement to overt instruments of U.S. foreign policy. Nor does it specify what types of activity are intended to be covered by the legal requirements for covert action. This has called into question the legality of some covert actions, such as arms transfers, undertaken as alternatives to overt programs with express statutory authority and limitations. Congress should expressly authorize covert action as a legitimate foreign policy instrument, subject to clearly defined approval and reporting requirements.

It is important to emphasize the extent to which the amendment maintains existing law, including the core ban on CIA covert action without a Presidential finding and the general framework in Section 501 of the National Security Act for reporting to the intelligence committees. The bill makes no substantive change in the current statutory requirements for keeping the intelligence committees "fully and currently informed" of intelligence activities other than covert actions, including "any significant anticipated intelli-

gence activity" or "significant intelligence failure," except to make the President responsible for ensuring compliance and for reporting illegal activities. The bill restates the principles in current law that approval of the intelligence committees is not a condition precedent to the initiation of any intelligence activity. The bill redefines the term "covert action" to more accurately reflect existing practice. The requirements to keep the intelligence committees "fully and currently informed" of intelligence activities, including covert actions and significant failures, and to provide information upon request remain subject to a clause recognizing the need to ensure protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods and other exceptionally sensitive matters. The bill also reaffirms the obligation of both Houses of Congress under current law to establish procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods provided to the intelligence committees.

The overall purpose of title VII is to use the lessons of recent experience to establish a more effective statutory framework for Executive-Legislative cooperation in the field of intelligence. Such legislation is not a guarantee against conflicts between the branches or abuses of power. It can, however, help minimize such conflicts and abuses by emphasizing the mutual obligations of the President and Congress and by eliminating unnecessary legal ambiguities that invite misunderstanding on both sides.

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

## Title I—Intelligence Activities

*Section 101* lists the departments, agencies, and other elements of the United States Government for whose intelligence activities the Act authorizes appropriations for fiscal year 1991.

*Section 102* makes clear that details of the amounts authorized to be appropriated for intelligence activities and personnel ceilings covered under this title for fiscal year 1991 are contained in a Classified Schedule of Authorizations which is incorporated as part of the bill. Any limitation, requirement, or condition contained in such Schedule pertaining to the amount specified for any project, program or activity is incorporated by this section.

The Classified Schedule of Authorizations is available to Members of the Senate pursuant to S. Res. 400 (94th Congress).

Subsection (b) requires the President to make appropriate distribution of the Classified Schedule, or portions thereof, within the Executive branch.

*Section 103* authorizes the Director of Central Intelligence (DCI) in fiscal year 1991 to expand the personnel ceilings applicable to the components of the Intelligence Community under Sections 102 and 202 by an amount not to exceed two percent of the total of the ceilings applicable under these sections. The Director may exercise this authority only when necessary to the performance of important intelligence functions or to the maintenance of a stable personnel force, and any exercise of this authority must be reported to the two intelligence committees of the Congress.

## Title II—Intelligence Community Staff

*Section 201* authorizes appropriations in the amount of $28,880,000 for the staffing and administration of the Intelligence Community Staff for fiscal year 1991. This includes $6,580,000 for the Security Evaluation Office.

*Section 202* provides details concerning the number and composition of Intelligence Community Staff personnel.

Subsection (a) authorizes 240 full-time personnel for the Intelligence Community Staff for fiscal year 1991, to include 50 full-time personnel who are authorized to serve in the Security Evaluation Office at the Central Intelligence Agency, and provides that personnel of the Intelligence Community Staff may be permanent employees of the Staff or detailed from various elements of the United States Government.

Subsection (b) requires that detailed employees be selected so as to provide appropriate representation from the various departments and agencies engaged in intelligence activities.

Subsection (c) requires that personnel be detailed on a reimbursable basis except for temporary situations.

*Section 203* provides that the DCI shall utilize existing statutory authority to manage the activities and to pay the personnel of the Intelligence Community Staff. This language reaffirms the statutory authority of the DCI and clarifies the legal status of the Intelligence Community Staff. In the case of detailed personnel, it is understood that the authority of the DCI to discharge personnel extends only to discharge from service at the Intelligence Community Staff and not from federal employment or military service.

## Title III—Central Intelligence Agency Retirement and Disability System

*Section 301* authorizes fiscal year 1991 appropriations in the amount of $164,600,000 for the Central Intelligence Agency Retirement and Disability Fund for fiscal year 1991.

## Title IV—Central Intelligence Agency Administrative Provisions

*Section 401* amends the Central Intelligence Agency Retirement Act of 1964 for Certain Employees to eliminate the statutory provisions requiring a 15 year career review and an election option for CIARDS and FERS Special Category participants to remain under CIARDS or in FERS Special Category status for the duration of their Agency service.

The current wording of section 203 regarding the "15 year" review and re-election option was established in the original CIA Retirement Act of 1964 for Certain Employees. Experience under current Agency policy since 1976 has confirmed, from Agency management viewpoint, that there is no longer a need for the 15 year review. Also, continuing the 15 year review entail an administrative burden on the Agency for what is in essence only a pro forma exercise. Section 401 will provide participants who accept the offer of designation under the system with the assurance that such an election will not be subject to subsequent review or change by the Agency.

*Section 401* amends the Central Intelligence Agency Retirement Act of 1964 for Certain Employees to establish that the five years of marriage spent outside the United States required to qualify for former spouse status must have been during periods of the participant's service with the Cental Intelligence Agency.

Under the current CIARDS provisions, the "ten years of marriage during periods of service by the participants * * * at least five years of which were spent outside the United States * * *" does not specify that any of this service must be with the CIA. The Foreign Service Retirement and Disability System (FSRDS) has comparable former spouse provisions but require, through amendments to the FSA in P.L. 100-238, January 8, 1988, that five years of the marriage/service period must have occurred while the participant was a member of the Foreign Service.

*Section 403* would require a surviving spouse, who remarries a retiree and becomes entitled to a CIARDS survivor annuity fund, to choose between such annuity and any other survivor annuity to which he or she may be entitled. CIARDS does not currently address the situation where a surviving spouse remarries after 60 (or the new 55), thus continuing to receive survivor benefits, and then again becomes a surviving spouse with survivor benefit entitlements payable by the federal government based on this second marriage. If the surviving spouse married a CIARDS participant the second time, the surviving spouse would be eligible to receive two survivor benefits. This provision would bring CIARDS survivor benefit entitlements into conformity with CSRS and reduce the possible incidence of surviving spouses receiving two survivor annuities payable from the same fund.

*Section 404* amends the Central Intelligence Agency Retirement Act of 1964 for Certain Employees to permit a retiree under CIARDS who was unmarried at the time of retirement to elect a survivor benefit upon marriage after retirement. Currently, an election for a current spouse can only be made to the extent that a previous election was made for a spouse to whom the participant was married at the time of retirement.

This section provides an option available to other government employees covered by the Civil Service Retirement and Disability System. Upon marriage after retirement, a retired participant in CIARDS whose annuity was not reduced or not fully reduced to provide a survivor annuity at the time of retirement, may irrevocably elect with one year of such marriage a reduction in his or her annuity to provide an annuity for his or her new spouse in the event such spouse survives the retired participant.

Participants who elect this option are required to deposit with the government a specified amount, to be established in a manner similar to the terms and conditions set forth in section 8339(j)(5)(C)(ii) of title 5, United States Code for government employees covered by the Civil Service Retirement and Disability System. This section requires in general that the retired participant deposit an amount by which his or her annuity would have been reduced if the election had been in effect since the date of retirement, or, if the annuity was subsequently reduced, the amount by which the annuity would have been reduced, had the election been in effect, since the date the previous reduction was terminat-

ed. The Committee anticipates the DCI will issue implementing regulations pursuant to this section which provide consistency so far as is practicable with section 8339(j)(5)(C)(ii) of title 5, United States Code, and any regulations issued by the Office of Personnel Management to implement this section.

*Section 405* contains several provisions which provide for the restoration of benefits to certain former CIA spouses whose benefits were terminated because of remarriage before the age of 55, and whose remarriage is later dissolved by death, annulment, or divorce. Former CIA spouses who were divorced after November 15, 1982 are already entitled to the restoration of benefits under these circumstances. But in providing benefits for former spouses divorced prior to November 15, 1982, Congress did not provide for such restoration. To correct this inconsistency and provide greater consistency with other federal retirement programs with similar provisions, the Committee believes such adjustment is desirable.

Subsection (a) amends the Section 224(b)(1) of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees to provide that survivor annuities provided by such section, which are terminated because of remarriage, shall be restored at the same rate commencing on the date such remarriage is dissolved by death, annulment, or divorce.

Similarly, subsection (b) amends section 225(b)(1) of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees to provide for restoration under similar circumstances of the retirement benefits provided by that section.

Subsection (c) amends section 16(c) of the CIA Act of 1949 to permit a former spouse whose eligibility to enroll in a health benefit plan because of remarriage before the age of 55 to enroll in such plan if such remarriage is dissolved by death, annulment, or divorce.

Subsection (d) provides that the benefits provided by this section shall take effect on October 1, 1990, and shall not be paid before such date.

Subsection (e) provides that any new spending authority created by this section (within the meaning of section 401(c) of the Congressional Budget Act of 1974) shall be effective only to such extent or in such amounts as are provided in appropriation Acts.

*Section 406* amends section 292 of the Central Intelligence Agency Retirement Act for Certain Employees of 1964 in order to give full force and effect to section 1, paragraphs (b) and (c) of Executive Order 12684, 27 July 1989. Section 291 authorizes the President to conform CIARDS to post-1984 amendments made to the Civil Service Retirement System (CSRS). Section 4(h) of the Civil Service Retirement Spouse Equity Act of 1984 (CSRSEA) specifically prohibited the use of section 292 to make changes to CIARDS if those changes are based upon sections 2 and 4 of the CSRSEA. (The same limitations was placed by section 4(h) upon conforming changes to the Foreign Service Retirement System.)

Notwithstanding the language in section 4(h) of the CSRSEA, Section 1, paragraphs (b) and (c) of Executive Order 12684, 27 July 1989, conformed CIARDS to the CSRS by lowering the age when surviving spouse annuities would terminate upon remarriage from

60 to 65. The effect of this change was to conform CIARDS to the change made in the CSRS by section 2 of the CSRSEA.

Thus, clarification is needed in terms of whether Congress, in enacting the limitation contained in section 4(h) of the CSRSEA, intended to preclude the President, acting pursuant to the authority contained in section 292 of the Central Intelligence Agency Retirement Act for Certain Employees, from making this particular conforming change by Executive Order.

Not insignificantly, Congress has previously enacted similar legislation regarding the Foreign Service Retirement System, which was also bound by section 4(h) of the CSRSEA, to permit the President to conform the Foreign Service Retirement System to the CSRSEA by lowering the remarriage age for surviving spouses from 60 to 55. (See 22 U.S.C. 4068).

Section 406 makes clear that section 1, paragraphs (b) and (c) of the Executive Order are fully effective.

*Section 407* authorizes the Director of Central Intelligence to apply any unused portion of the annual allocation provided by Section 7 of the CIA Act of 1949 (permitting the DCI to authorize entry into the United States for permanent residence up to 100 aliens annually), for fiscal years 1991 through 1996, to permit the entry into the United States of employees of the Foreign Broadcast Information Service in Hong Kong, and their dependents, prior to 1997.

The Administration had requested an amendment to the Immigration and Nationality Act for this purpose but the Committee believes it can be accomplished pursuant to existing law. Section 101(a)(27)(D) of the Immigration and Nationality Act provides special immigrant status for an individual who is an employee of the United States Government abroad, and who has 15 or more years of service. For those employees who will not have 15 years of service by 1997, additional authority exists under section 7 of the CIA Act of 1949 (50 U.S.C. 403h) for the DCI to authorize the entry into the United States of up to 100 aliens each year for permanent residence. Usually, this quota is not fully used.

By applying the unused portion of such annual allocation for fiscal years 1991 through 1996, section 407 permits the Director to provide immediate assurance to FBIS employees in Hong Kong that they will be able to immigrate to the United States, should they choose to do so, when Hong Kong reverts to PRC control in 1997.

## Title V—DOD Intelligence Enhancements

*Cover support for certain foreign intelligence activities*

*Section 501* adds a new chapter 21 to title 10 of the U.S. Code, authorizing the Secretary of Defense to engage in commercial activities to provide security for intelligence collection activities undertaken abroad by elements of the Department of Defense. It is similar to statutory authorities previously granted the Federal Bureau of Investigation. (See section 203(b) of P.L. 98-411.)

The purpose of the new chapter is to provide an exemption from certain federal statutes which deal with the administration and management of federal agencies, the requirements of which would

be inconsistent with establishing and maintaining a bona fide private commercial activity to protect foreign intelligence collection activities. It would excuse compliance with such statutes where compliance would compromise the commercial activity concerned as an agency or instrumentality of the U.S. Government.

The Committee is persuaded that there is a legitimate, albeit limited, need for such authority. Intelligence elements of the Department of Defense that carry out intelligence collection operations abroad currently lack the statutory authority to establish cover arrangements, similar to those of the FBI and CIA, that would withstand scrutiny from the internal security services of foreign governments that may be hostile to the United States. While it is relatively infrequent that DoD intelligence officers are placed in such circumstances, occasionally their duties require it when essential intelligence requirements cannot otherwise be met. The Committee believes that when military intelligence officers are placed in such circumstances, the Department ought to have the tools at its disposal to provide these intelligence officers with the maximum degree of security support. Not only should these authorities enhance the security of DoD intelligence operations, but they should permit greater access to essential information.

The Committee is not unmindful that such activities could, if not adequately coordinated and carefully regulated, lead to abuses and improprieties, or could lead to actions which might prove politically embarrassing to the United States. Such problems have only rarely, however, been experienced at the CIA and FBI, where similar activities have been undertaken for some time under strict internal and external oversight controls. In this regard, the Committee believes that the approval and coordination requirements imposed by this chapter, as well as the congressional oversight and reporting requirements contained therein, provide sufficient assurance that this authority will be exercised prudently under close and continuing scrutiny both within DoD and the Executive branch and by the two intelligence committees.

The Department of Defense has assured the Committee that it will, indeed, keep the Committee "fully and currently informed" of all actions taken pursuant to this chapter, including any significant anticipated activity. It has also provided the Committee with detailed information regarding its plans to implement and utilize this authority. On the basis of these commitments, the Committee believes this chapter should be enacted. Should it become clear in the future that this authority is no longer needed or that it is being abused in any manner, the Committee will ask the Senate to reconsider its action.

*Section 431* provides that the Secretary of Defense may carry out commercial activities, consistent with the other provisions of the chapter, for the purpose of providing security for intelligence collection activities undertaken by intelligence elements of the Department of Defense.

This section also requires that all such activities shall be carried out only with the approval of the Director of Central Intelligence, and, where appropriate, be supported by him. It is the Committee's intent that the DCI should provide both guidance and support for all such activities, and that he be in a position to disapprove such

activities should they conflict with other U.S. intelligence or foreign policy objectives, or if he does not consider them operationally sound. Similarly, this section requires that all such activities that might take place within the United States be coordinated with, and, where appropriate, be supported by, the Director of the Federal Bureau of Investigation. Again, it is the Committee's intent that the FBI Director provide both guidance and support for all such activities, and that he be in a position to disapprove such activities within the United States if they should conflict with other FBI operational activities, or if he does not consider them operationally sound.

*Section 432* permits the expenditure of non-appropriated funds generated by a commercial activity authorized pursuant to this chapter to offset the necessary and reasonable expenses arising from that activity. It also provides that such funds shall be kept to the minimum necessary to maintain the security of the activity concerned. Any funds in excess of those required for this purpose shall be deposited in the Treasury as often as may be practicable. It is the intent of the Committee that commercial activities conducted under this chapter shall be operated in a manner which limits the non-appropriated funds generated by such activities to those necessary to preserve the bona fides of the commercial activity concerned. It is also the intent of the Committee that excess funds not be maintained in large amounts for long periods of time but are deposited in the Treasury as often as may be practicable, consistent with the needs of the commercial activity and preservation of its security.

This section also provides that the disposition of non-appropriated funds generated by such activities shall be audited at least annually by the appropriate auditing element of the Department of Defense.

*Section 433* sets forth the relationship between the authority granted under this chapter and other federal laws.

Subsection (a) provides that except where permitted by subsection (b), which follows, the commercial activities conducted pursuant to this chapter shall be carried out in accordance with applicable federal law. For example, nothing in this chapter authorizes conduct that would violate any provision of federal criminal law contained in title 18, United States Code.

Subsection (b) provides that where the Secretary of Defense, or an official of no lower rank than an Assistant Secretary of Defense, or the Secretary of a Military Department, certifies that compliance with federal laws and regulations pertaining to the management and administration of federal agencies would create an unacceptable risk of compromise of authorized intelligence collection activities, he may authorize the establishment and operation of such activities notwithstanding the requirements of such laws and regulations, to the extent necessary to prevent the compromise of the commercial activity as an instrumentality of the United States Government. Such certifications and authorizations must be made in writing and the authorization must specify the particular laws and regulations for which noncompliance is authorized.

Subsection (c) sets forth by general category the types of federal laws and regulations which pertain to the management and admin-

istration of federal agencies. While the Committee intends that these categories be treated broadly, it does not intend that they be construed to encompass other than regulatory statutes applicable to the administration and management of federal agencies and related departmental or agency regulations.

The Committee recognizes that some commercial activities approved pursuant to this chapter might not require exemption from any federal law and regulation. For those which do require such exemption in order to satisfy the objectives of the chapter, it is the intent of the Committee that the Secretary, or other authorized official, will make such determinations, and authorize such exemptions, at the time such activity is approved based upon the anticipated needs of the commercial activity concerned.

*Section 434* provides that commercial activities authorized pursuant to this chapter may comply with applicable state, local, and foreign law, including fiscal and taxation requirements, without waiving the legal defenses or immunities of the United States. This provision recognizes that in order to preserve the operational security of the commercial activity concerned, such activity may have to comply with state, local, or foreign laws. This provision is intended to ensure that by submitting to such laws, the United States does not relinquish any rights to assert any legal defenses or immunities it may possess, should it later choose to assert such defenses or immunities in any judicial or quasi-judicial proceeding of a state, local, or foreign jurisdiction.

*Section 435* provides certain general limitations and conditions upon the commercial activities authorized pursuant to this chapter.

Subsection (a) provides that no corporation, partnership, or other legal entity may be established to carry out commercial activities pursuant to this chapter except with the approval of the Secretary of Defense or the Deputy Secretary of Defense, and such approval may not be further delegated.

It is the Committee's intent to ensure that regardless of whether or not the Secretary of Defense or Deputy Secretary of Defense make the certifications pursuant to subsection 433(b), above, that the creation of any commercial entity pursuant to this chapter must have the personal approval of one or the other official.

Inasmuch as the use of this authority is expected to be limited, the Committee does not view this as an unduly burdensome requirement.

Subsection (b) provides that nothing in the chapter authorizes the conduct of any intelligence activity which is not otherwise authorized pursuant to law or Executive Order. This provision makes clear that activities undertaken pursuant to this chapter may only be undertaken in support of lawfully-authorized intelligence activities.

Subsection (c) provides that such activities may be undertaken in the United States only as are necessary to support intelligence activities abroad or to continue intelligence activities initiated abroad. This provision makes clear that such activities in the United States shall not be used to support intelligence collection activities within the United States itself. While the Committee recognizes that DoD intelligence elements do, in fact, collect foreign intelligence within the United States, the Committee does not intend

that this authority be used to support such operations unless they are a continuation of a collection activity that had been initiated abroad. In particular, the Committee does not intend that such authority be utilized within the United States to obtain information from United States citizens or permanent resident aliens without their being aware such information is being provided the U.S. Government.

Subsection (d) provides that U.S. citizens and permanent resident aliens who are assigned to or employed by any entity engaged in a commercial activity authorized by this chapter shall be informed of the purposes of entity concerned. This provision ensures that such persons will not be employed by such entities without being aware of the relationship of the entity with an intelligence component of the United States Government.

*Section 436* provides that the Secretary of Defense shall issue implementing regulations within 180 days of enactment, which shall be provided to the intelligence committees prior to their issuance. This section provides that such regulation shall satisfy certain requirements.

First, they must specify all officials authorized to approve commercial activities pursuant to this chapter. As noted, heretofore, such activities may require exemption from compliance with federal laws and regulations in order to to avoid compromising the commercial entity as an instrumentality of the U.S. Government. On the other hand, certain commercial activities carried out by such entities may not be covered by federal law or regulation. Section 428 provides that when exemption from federal law or regulation is concerned, that only the officials designated in section 428 may approve such activities. In other cases, the Secretary may, by regulation, designate other appropriate officials to approve such activities.

Second, the Secretary's regulations must designate a single office within the Defense Intelligence Agency to implement and maintain accountability of all activities authorized pursuant to this chapter. It is the Committee's intent that while the authority to approve activities pursuant to this chapter may be delegated by the Secretary to appropriate subordinate officials, consistent with this chapter, the implementation of such activities should be carried out by a single office which performs this function as a service of common concern for appropriate DoD components. This function logically belongs under the Defense Intelligence Agency whose Director has responsibility for coordinating and supporting all DOD human intelligence activities. The Committee views the consolidation of such functions as desirable since: (1) the need for this authority is limited; (2) the implementation of this authority requires special skills and expertise which should not be duplicated in all DoD components that might avail themselves of this authority; and (3) consolidating the implementation responsibility will provide for better and more expeditious accountability and oversight.

Third, the Secretary's regulations must provide for prior legal review of all commercial activities authorized pursuant to this chapter. The determinations required under this chapter cannot be adequately made without review by an attorney.

Finally, the Secretary's regulations must provide for appropriate internal audit and oversight controls. These should ensure that audits and inspections are frequently and routinely conducted of all activities authorized pursuant to this chapter.

*Section 437* provides for annual and continuing reports to the intelligence committees.

Subsection (a) (1) requires the Secretary to ensure that the intelligence committees are kept fully and currently informed of actions taken pursuant to this chapter, including any significant anticipated activity to be authorized pursuant thereto. This provision makes clear that activities authorized pursuant to this chapter are, for purposes of oversight, to be treated as intelligence activities required to be reported to the intelligence committees pursuant to 50 U.S.C. 413(a).

Subsection (a) (2) specifically provides that the Secretary of Defense shall provide the intelligence committees with prior notice of the establishment of commercial entities pursuant to this chapter.

Once an element is authorized to engage in commercial activity for cover purposes, such activity and DOD oversight over that activity will both be subject to oversight of the intelligence committees. It is the intent of the Committee that the Secretary keep it fully and currently informed, pursuant to 50 U.S.C. 413 (a), of the activities of elements that are given authority to engage in commercial activity, including any significant anticipated activity by those elements. Thus, those elements' significant anticipated financial transactions (e.g., ones with a value in excess of $100,000) and intelligence operations (e.g., ones with a high risk of exposure or significant potential consequences for U.S. foreign or military policy in the event of disclosure) should be reported to the Committee, as should the results of all audits of their activities.

Subsection (b) requires an annual report, as of November 1 of each year, describing a report of all commercial activities authorized pursuant to this chapter that were undertaken during the previous fiscal year, including any exercise of the authorities specified in section 433(b), exempting commercial activities from the requirements of federal law and regulations. The report also must include a description of any expenditure of appropriated or non-appropriated funds made pursuant to this chapter.

*Section 438* contains definitions of terms used in the chapter.

Subsection (1) defines the term "commercial activities" as meaning activities conducted in a manner consistent with prevailing commercial practice in the area where such activities are undertaken, and includes the acquisition, use, sale, storage and disposal of goods and services; entering into employment contracts, leases, and other agreements for real and personal property; depositing funds into and withdrawing funds from domestic and foreign commercial businesses or financial institutions; and acquiring licenses, registrations, permits, and insurance.

Subsection (2) defines the term "intelligence activities" as meaning the collection of foreign intelligence and counterintelligence information.

*Post-employment assistance for certain NSA employees*

*Section 502* would amend the National Security Agency Act of 1959 (50 U.S.C. 402 note) to provide certain discretionary authority to the Director, NSA to utilize appropriated funds to provide assistance to former NSA employees for up to five years after leaving NSA employment where the Director determines such assistance is essential to avoid circumstances that might lead to the unlawful disclosure of classified information to which such employee or employees had had access. Annual reports are required to the Appropriations and Intelligence Committees of each House on the uses made of this authority.

The Committee is persuaded that the need for such authority exists to permit the Director of NSA to cope with problem cases. The Director of CIA has exercised similar authority pursuant to the CIA Act of 1949 and has, on occasion, found it an essential tool to prevent unlawful diclosure of CIA information.

In providing such authority, the Committee does not anticipate that it will often be needed. Clearly, it is intended to address highly unusual personnel situations where the national security is demonstrably threatened, and is not meant as authority, for example, to provide monetary assistance to former NSA employees solely because they are experiencing personal difficulties once they leave NSA employment. Should the Committee find, in reviewing the annual reports of the Director, NSA, that this authority is being used for other than its intended purpose, the Committee would have no choice but to reconsider this authority.

*Reimbursement rate for certain airlift services*

*Section 503* permits the Secretary of Defense to authorize use of the reimbursement rate in effect for Defense Department components in establishing reimbursement costs under the Economy Act (31 U.S.C. 1535(b)) for airlift services provided by DoD components to the CIA. The DoD Office of General Counsel has interpreted such Act as requiring that DoD charge non-DoD agencies a reimbursement rate for such services that includes the costs of military labor involved in providing such service. This provision makes clear the Secretary's authority to charge the lower reimbursement rate to CIA if he determines that such services are being provided for activities related to national security objectives.

## Title VI—Department of Energy Personnel Authority

*Section 601* amends the Department of Energy Reorganization Act to provide that all positions within the Department which are determined by the Secretary to be devoted to intelligence and intelligence-related activities are excepted from the competitive service.

The Department of Energy has embarked during the past year on a program to consolidate and upgrade its intelligence functions, an initiative strongly supported by the Committee. It has become clear in the process of this development, however, that the Department has difficulty filling intelligence and intelligence-related positions in a timely manner and in competing with other agencies in the Intelligence Community for qualified personnel. Many of these

agencies already are exempted from the requirements of the competitive service.

While the Committee does not anticipate a large number of positions falling within this category, the Committee believes that even a limited number of excepted service positions will significantly improve the Department's ability to attract and hire qualified intelligence staff and thus enhance its intelligence functions.

## Title VII—Intelligence Oversight

*Section 701* of the bill repeals the Hughes-Ryan Amendment of 1974 so as to consolidate intelligence oversight provisions at a single place in the law and expand the requirement for Presidential approval of covert action to all entities of the United States Government (to parallel Executive Order 12333).

Current statutory provisions for intelligence oversight include the general requirements to inform the House and Senate Intelligence Committee in Title V of the National Security Act of 1947, as amended in 1980, and the requirement of Presidential approval for CIA covert action in Section 662 of the Foreign Assistance Act of 1961, as amended in 1974 (22 U.S.C. 2422—the Hughes-Ryan Amendment). The differences in language and scope between these provisions, which appear at different places in the statutes, have been a source of unnecessary confusion and disagreement between the branches. Therefore, Section 701 of the bill would repeal the Hughes-Ryan Amendment in order to substitute a new Presidential approval requirement as an integral part of a more coherent and comprehensive statutory oversight framework for covert action and other intelligence activities to be set forth at one place in the law. The superseding Presidential approval requirement is contained in the proposed new section 503 and 504(d) of the National Security Act of 1947, discussed below.

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

*Section 702* of the bill would replace the existing Section 501 of the National Security Act of 1947 with three new sections that prescribe, respectively, general provisions for oversight of all intelligence activities, reporting of intelligence activities other than covert actions, and Presidential approval and reporting of covert actions.

*Section 501. General Provisions.*—The new section 501 of Title V of the National Security Act of 1947 would specify the general responsibilities of the President and the Congress for oversight of in-

telligence activities and reaffirm the basic principles in current law for keeping the House and Senate Intelligence Committees fully and currently informed of intelligence activities, including any significant anticipated intelligence activity, without requiring approval by the Committees.

*(a) Presidential duty to ensure Congress informed*

Subsection (a) would place a statutory obligation upon the President to ensure that the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (referred to in the bill as the "intelligence committees") are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity, as required by this title. Current law imposes such duties on the DCI and agency heads, but not on the President himself. Overall responsibility should be vested in the President because of the importance and sensitivity of secret intelligence activities that may affect vital national interests, and because the President, who exercises authority over all departments, agencies and entities in the Executive branch, may have unique knowledge of such activities. It is contemplated that the President would carry out this statutory responsibility by promulgating policies applicable to the Executive branch which would implement the statutory requirements contained in the bill. Such policies and any changes therein should be reported to the intelligence committees.

The specific terms and conditions for keeping the committees "fully and currently informed" are those set forth in sections 502 and 503, discussed below. The requirement found in existing law that the intelligence committees be advised of "significant anticipated intelligence activities" is carried over in this subsection, and has the meaning discussed below with respect to the same term in section 502 and with respect to the prior notice provisions in subsections 503(c)(1) and 503(d).

Subsection (a) would also retain the qualification in current law that nothing contained in the prior notice requirements shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities. The parallel provision of existing law is clause (A) of paragraph 501(a)(1).

Subsection (a) also contains a second proviso, not expressly found in existing law, which emphasizes that nothing contained in the bill shall be construed as a limitation upon the power of the President to initiate an intelligence activity in a manner consistent with powers conferred by the Constitution. This provision is intended to make clear that the requirements contained in the bill to keep the intelligence committees advised of "significant *anticipated* intelligence activities" (emphasis added) in section 502, below, and to give prior notice of covert actions in accordance with subsections 503(c)(1) and 503(d), below, should not be construed as a limitation upon the power of the President to initiate such activities in a manner consistent with his powers under the Constitution. This maintains the distinction between acting and reporting. This provision is not, however, intended to affect in any way any other requirement contained in the bill, including the requirements for

presidential authorization in subsection 503(a) and the requirements for notice to appropriate members of Congress in paragraphs 503(c)(3)–(4).

Although the bill itself does not draw a distinction in terms of the approval and reporting of covert actions in peacetime, and approval and reporting of such activities when a state of war has been declared by the Congress, the Committee recognizes that the President's constitutional responsibility as commander-in-chief would require greater flexibility in a wartime setting and that appropriate adjustments could be needed.

*(b) Illegal activities*

Subsection (b) would require the President to 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. Under current law, paragraph 501(a)(3) imposes this duty on the Director of Central Intelligence and agency heads, subject to certain qualifications. The purpose of this revised provision is to place an unqualified statutory obligation on the President to ensure reporting of such matters to the committees. It is contemplated the President would carry out this statutory responsibility by promulgating policies applicable to the Executive branch which would implement the statutory requirements in the bill. The definition of illegal activity remains unchanged, but the responsibility to ensure the reporting of such activity is shifted to the President.

The President should establish procedures within the Executive branch for review of intelligence activities that may have been illegal and for reporting to the intelligence committees upon confirmation that the activity was a probable violation of the Constitution, statutes, or Executive orders. The current provision requires the reporting of illegal activity "in a timely fashion." This phrase does not appear in subsection (b). The intent is that the committees should be notified whenever a probable illegality is confirmed under the procedures established by the President.

It is recognized that the President may require time to investigate an activity to determine that a probable violation has occurred before reporting to Congress. The procedures will facilitate reporting to the committees appropriate to their oversight responsibilities while protecting the integrity of the criminal investigative process (including grand jury secrecy) and the rights of potential defendants and witnesses. The procedures shall establish criteria for determining whether a probable violation has been confirmed, and may take into account the need to protect sensitive intelligence sources and methods, so long as all germane evidence of the violation is reported. These procedures, and any changes thereto, shall be reported to the intelligence committees.

*(c)–(e) Other general provisions*

Subsections (c) and (d) would retain provisions of existing law. Subsection (c) is identical to the current subsection 501(c) that authorizes the President and the intelligence committees to establishes procedures to carry our their oversight obligations. With the exception of a minor technical change having no substantive effect,

subsection (d) is the same as the current subsection 501(d) that requires the House and Senate to establish procedures to protect the secrecy of information furnished under this title and to ensure that each House and its appropriate committees are advised promptly of relevant information.

Subsection (e) states that the term "intelligence activities," as used in this section, includes, but is not limited to, "covert actions," as defined in subsection 503(e), discussed below.

*Section 502. Reporting Intelligence Activities Other Than Covert Actions.*—The new section 502 is intended to impose the same reporting requirements imposed by current law insofar as intelligence activities other than covert actions are concerned. This distinction between covert actions and other intelligence activities is discussed more fully with respect to section 503, below.

Section 502 would continue to impose two duties upon the Director of Central Intelligence (DCI) and the heads of all departments, agencies and other entities of the United States involved in intelligence activities. Both duties would continue to be conditioned upon the preambular clause beginning the section which recognizes the need to protect sensitive classified infomation, discussed more fully below.

*Fully and currently informed*

The first duty is set forth in subsection 502(a) which requires the officials designated in the introductory clause to keep the intelligence committees fully and currently informed of all intelligence activities, other than covert actions as defined in subsection 503(e), which are the responsibility of, engaged in by, or are carried out for or on behalf of, any such department, agency, or entity of the United States engaged in intelligence activities, including any significant anticipated intelligence activity and signficant failures. This maintains obligations imposed by current law. The requirement to report significant anticipated activities means, in practice, that the committees should be advised of important new program initiatives and specific activities that have major foreign policy implications. The obligation to report significant intelligence failures is contained in subsection 501(a)(3) of current law. In addition, the bill deletes the special procedures for prior notice of intelligence activities other than covert actions to eight congressional leaders in the current clause (B) of paragraph 501(a)(1) of current law, because it was primarily intended to apply to covert actions to be governed by section 503, discussed below.

In carrying out these obligations, it is not intended where multiple agencies or entities are involved in carrying out a particular activity, or where multiple levels of bureaucracy are involved in approving a particular activity, that duplicative reports need be made to the committees by every element of the Government so involved. It is intended that the DCI and the heads of all departments, agencies or entities involved in intelligence activities all be obligated in terms of ensuring that the committees are kept fully and currently informed. But duplicative reports of the same activity are not required. Where lines of authority and command exist between such officials, the official of highest authority may represent subordi-

nate agencies or entities to the committees. In this respect, there is no change from practice under existing law.

As mentioned above, this requirement is subject to the preambular clause regarding the protection of sources and methods, discussed below.

*Furnishing pertinent information*

Subsection 502(b) would impose a second obligation upon the officials designated in the introductory clause to 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. This provision maintains existing law, and is subject to the preambular clause regarding the protection of sources and methods, discussed below.

*Protection of sensitive sources and methods*

The obligations imposed by this section to keep the intelligence committees fully and currently informed and to provide information upon request are to be carried out to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods and other exceptionally sensitive matters. The language is similar to the second preambular clause in subsection 501(a) of the current law, which imposes duties "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 proposed new language more accurately reflects and is intended to have the same meaning as the legislative history of the similar preambular clause in existing law. It is intended to apply only to classified information relating to sensitive intelligence sources and methods and to "other exceptionally sensitive matters." This latter phrase is intended to refer to other extremely sensitive categories of classified information such as information concerning the operational details of military deployments, and extraordinarily sensitive diplomatic contacts, which the intelligence committees do not routinely require to satisfy their responsibilities.

One change is made in existing law. Thie first preambular clause in the current subsection 501(a) would be deleted. It imposes obligations "[t]o the extent consistent with all applicable authorities and duties, including those conferred upon the Executive and Legislative branches of Government." This clause creates unnecessary ambiguity in the law, because it has been interpreted by some as Congressional acknowledgment of an undefined constitutional authority of the Executive branch to disregard the statutory obligations. Recent expertise indicates that legislation qualifying its terms by reference to the President's constitutional authorities may leave doubt as to the will of Congress and thus invite evasion. Legitimate Executive branch concerns are adequately met by the provision for due regard for protection of certain sensitive classified information, discussed above. Moreover, the absence of the current preambular clause does not affect the ability of the Executive branch to object

to the production of information based upon the assertion of the constitutional claim of Executive privilege, to the extent that such privilege exists in law.

*Section 503. Presidential Approval and Reporting of Covert Actions.*—Covert actions raise fundamentally different policy issues from other U.S. intelligence activities because they are an instrument of foreign policy. Indeed, constitutional authorities draw a distinction between Congressional power to restrict the gathering of information, which may impair the President's ability to use diplomatic, military, and intelligence organizations as his "eyes and ears," and Congressional power to regulate covert action that goes beyond information gathering. Congress has the constitutional power to refuse to appropriate funds to carry out covert actions and may impose conditions on the use of any funds appropriated for such purposes.

Under current law, however, the Congressional mandate is ambiguous, confusing and incomplete. There is no express recognition in statute of the President's authority to conduct covert actions; the requirement for Presidential approval of covert actions applies only to the CIA; and Presidential approval procedures are not specified. There is arguably a question whether Congress has intended that the President have authority to conduct covert actions that may violate other applicable statutes. The statutory requirements for informing the intelligence committees of covert actions are subject to misinterpretation, and the scope of activities covered by the law is undefined. This bill seeks to remedy these deficiencies so that covert actions are conducted with proper authorization in the national interest as determined by the elected representatives of the American people—the President and the Congress—through a process that protects necessary secrecy.

*(a) Presidential findings*

Subsection (a) would provide statutory authority for the President to authorize the conduct of covert actions by departments, agencies or entities of the United States, including the Executive Office of the President, only when he determines such activities are necessary to support the foreign policy objectives of the United States and are important to the national security of the United States. This determination must be set forth in a "finding" that meets certain conditions. The importance of this requirement is underscored by Section 803 of the bill, discussed later, which prohibits expenditure of funds available to the U.S. Government to initiate any covert action unless and until such a presidential finding has been signed or otherwise approved in accordance with section 503.

The current presidential approval provision in the Hughes-Ryan Amendment (22 U.S.C. 2422) requires a finding by the President "that each such operation is important to the national security of the United States." The proposed new subsection 503(a) would require the President to make an additional determination that the activities "are necessary to support the foreign policy objectives of the United States." This conforms the statute to the Executive branch definition of "special activities" in section 3.4(h) of Executive Order 12333 which refers to "activities conducted in support of national foreign policy objectives abroad." The President should de-

termine not only that the operation is important to national security, but also that it is necessary to support U.S. foreign policy objectives. It is intended that the intelligence committees will establish procedures to obtain an analysis of this issue with respect to each finding as part of their routine oversight functions.

In addition to reflecting these presidential determinations, findings must meet five conditions.

First, paragraph 503(a)(1) would require that each finding be in writing, unless immediate action is required of the United States and time does not permit the preparation of a written finding, in which case a written record of the President's decision would have to be contemporaneously made and reduced to writing as soon as possible but in no event more than 48 hours after the decision is made. This requirement is intended to prevent a President's subordinate from later claiming to have received oral authorization without further substantiation than the subordinate's undocumented assertion. It is also consistent with the President's current policy of requiring written findings.

Second, paragraph 503(a)(2) would restate the existing legal ban on retroactive findings. It would provide that a finding may not authorize or sanction covert actions, or any aspects of such activities, which have already occurred. This is also consistent with the President's current policy.

Third, the first clause of paragraph 503(a)(3) would require that each finding specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in the covert actions authorized by the finding. Specification of additional participating entities may be done in a subsequent amending document approved in the same manner as the original finding. This requirement is consistent with section 1.8(e) of Executive Order 12333 which states that no agency except the CIA in peacetime may conduct any special activity "unless the President determines that another agency is more likely to achieve a particular objective". It is intended that the finding identify all entities of the Government who are authorized to provide other than minimal, routine, and incidental support of the covert actions subject to the finding. For example, it is not intended that departments, agencies, or entities which provide routine, incidental and minimal administrative, personnel, or logistical support to the agency primarily responsible for the covert actions in question need be named in the finding itself. It should be emphasized that the term "significant" is intended to exclude from identification in a finding only de minimus participation, such as permitting use of secure communications systems, refueling or servicing aircraft, maintenance of equipment, obtaining overflight clearances or landing rights, which support is routinely provided among agencies for other purposes. However, where such support is not routinely provided, the department, agency, or entity providing such support must be identified in the finding itself. In arriving at this determination, the number of employees at a particular department, agency, or entity who are to be involved in the covert action concerned is not a determining factor; rather, it is the nature of such involvement as it relates to the conduct of the covert action. Moreover, it is intended that the intelligence com-

mittees should pursue in detail the involvement of each department, agency, or entity with respect to each finding to ensure that the spirit, as well as the letter, of this provision are satisfied. Where an "entity" is a subordinate component of an "agency" or "department", or where an "agency" is a subordinate component of a "department", the highest level organization shall be named in the finding.

The proviso at the end of paragraph 503(a)(3) imposes a further requirement that any employee, contractor, or contract agent of the United States Government who is directed to participate in any way in a covert action must be subject either to the policies and regulations of the Central Intelligence Agency, or to the policies and procedures of the parent agency with whom he or she is affiliated. It is the primary intent of this provision to ensure that any government employee or contractor who is utilized to carry out or support a covert action is bound by appropriate policies and regulations which ensure compliance with applicable law and with Executive policy. Where the parent agency of the employee or contractor concerned is responsible for the conduct of, or support to, a covert action, there should be agency regulations to govern their participation. Where the parent agency is assigned primary responsibility for conducting a covert action, there should be overall agency policies governing this type of activity. Where the parent agency is assigned a support role, there similarly should be agency regulations which govern the provision of support to other agencies. Indeed, such support may be governed by agency regulations having nothing to do with covert actions per se, so long as they ensure compliance by the employee or contractor with applicable law and Executive policy. Finally, there should be no circumstance where an employee or contractor of one department or agency is detailed to, or placed under the operational control of, another department or agency, and is uncertain whether the policies of his parent agency apply, or the policies of the gaining agency. This should be a matter of agreement between the two agencies in all cases, should be consistent with and pursuant to established regulations and procedures, and should be made clear to the employee or contractor concerned.

Fourth, paragraph 503(a)(4) would require that each finding specify whether it is contemplated that any third party, which is not an element of, contractor of, or contract agent of the United States Government, or is not otherwise subject to U.S. Government policies and regulations, will be used to fund or otherwise participate in any significant way in the covert action concerned, or will be used to undertake the covert action concerned on behalf of the United States. One purpose of this provision is to require the President to approve specifically the use of third countries or private parties outside normal U.S. Government controls to implement a covert action in any significant way. The finding itself need state only whether such use is contemplated, without actually identifying the third party (or parties) concerned. Additional information concerning the involvement of such third parties may be provided to the intelligence committees in accordance with subsection 503(b), discussed below, as required.

As used in this paragraph, the term "significant" is intended to encompass all but routine, minimal support to U.S. Government activities, which are incidental to the conduct and successful completion of the covert action in question. For example, where a third country routinely provides overflight clearances or landing rights to U.S. aircraft for a variety of purposes, its providing such clearances or landing rights for an aircraft involved in a covert action would not be considered "significant", in the context of the requirement for acknowledgment in a finding.

Fifth, paragraph 503(a)(5) would maintain current Executive Order restrictions that preclude a finding from authorizing any action intended to influence domestic political processes, public opinion, policies or media. This prohibition is taken from the definition of "special activities" contained in section 3.4(h) of Executive Order 12333, and has been longstanding policy within the Government. While it is recognized that activities intended to have their impact abroad may be reported in the U.S. media, it is intended that no covert action may have as its purpose influencing political activity, policy, or media within the United States by instituting or influencing events which are undertaken either inside or outside the United States.

Sixth, paragraph 503(a)(6) would establish that a finding may not authorize any action that violates the Constitution of the United States or any statute of the United States. This is similar to section 2.8 of Executive Order 12333, which states that nothing in that Order "shall be construed to authorize any activity in violation of the Constitution or statutes of the United States." Current CIA policy is to avoid violation of any federal statutes which apply to covert actions, directly or which apply to government agencies in general. However, CIA possesses statutory authorities to carry out its authorized functions that are unavailable to other government agencies. This provision is not intended to require that covert actions authorized in presidential findings need comply with statutory limitations which, by their own terms, apply only to another U.S. Government program or activity. For example, a statutory restriction on the overt Defense Department arms transfer program would not apply to covert CIA arms transfers authorized in a finding, even if the CIA obtained the arms from the Department of Defense under the Economy Act. Similarly, statutes which may prohibit conduct by private parties may not be applicable to the CIA or other government agencies because of the absence of the mens rea necessary to the offense. For example, the Justice Department takes this view with respect to the Neutrality Act. In short, there may be covert actions undertaken by the CIA which do not violate U.S. statutes because the statutes themselves do not apply to the CIA. However, any such case deserves intense scrutiny by the Executive branch, and by the intelligence committees, in their respective reviews of covert actions. It is intended that the intelligence committees will establish procedures to obtain any analysis of the impact, if any, of existing statutes on each covert action as part of their routine oversight functions.

*(b) General reporting provisions relating to covert actions*

Subsection 503(b) establishes the general requirements to govern reporting of covert actions to the intelligence committees. Its structure parallels the structure set forth in section 502 for the reporting of intelligence activities, other than covert actions. The reporting requirements are imposed upon the DCI, and the head of any department, agency, and entity of the Government involved in a covert action.

*Fully and currently informed*

The first reporting obligation, set forth in subsection 503(b)(1), is to keep the intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures. This provision maintains the obligations imposed by current law, although the phrase "including significant failures" has been extracted from the general requirement in subsection 501(a)(3) of current law, and applied specifically to covert actions. This parallels the addition of this same phrase to section 502, for the same reasons as explained above.

In carrying out this obligation, it is not intended that where multiple agencies or entities are involved in a particular covert action, or where multiple levels of bureaucracy are involved in approving a particular covert action, duplicative reports need be made to the committees by every element of the Government so involved. It is intended, however, that the DCI and the heads of departments, agencies and entities involved in such activities each be obligated to ensure that the committees are kept fully and currently informed. But duplicative reports of the same involvement are not required. Where lines of authority and command exist between such officials, the official of highest authority may represent subordinate agencies or entities to the committees. In this respect, there is no change from practice under current law.

The requirement to keep the intelligence committees fully and currently informed is subject to the preambular clause regarding the protection of certain classified information, which is identical to the preambular clause in section 502, and which bears the same meaning, as explained above.

It is also to be noted that there is no specific requirement in subsection (b)(1) to apply the formulation "significant anticipated intelligence activity" to covert actions as under current law. This becomes redundant in view of the reporting requirements of covert actions set forth in subsection, 503(c) and 503(d), below.

*Furnishing pertinent information*

Subsection 503(b)(2) would continue to impose a second obligation upon the officials designated in the introductory clause to furnish the intelligence committees any information of material concerning covert actions which is in their possession, custody or control, and which is requested by either of the intelligence committees in order

to carry out its authorized responsibilities. This requirement is imposed under current law.

The requirement to furnish pertinent information requested by the intelligence committees concerning covert actions is subject to the preambular clause regarding the protection of certain classified information, which is identical to the preambular clause in section 502, and which bears the same meaning, as explained above. It also has the same intent as the second preambular clause in subsection 501(a) of current law. Moreover, as discussed above, with respect to section 502, the absence to the first preambular clause in the current subsection 501(a) does not affect the ability of the Executive branch to object to the production of information based upon the assertion of the constitutional claim of Executive privilege, to the extent that such privilege exists in law.

*(c) Notice of findings*

Subsection 503(c)(1) sets forth the requirement that in ordinary circumstances the intelligence committees will be advised of all findings or determinations made pursuant to subsection 503(a), prior to the initiation of the covert action in question. The President is made responsible for ensuring that this is done.

Moreover, it should be emphasized that no actions whatsoever may be taken to implement a covert action prior to the time the finding is signed or the oral determination, pursuant to subsection 503(a)(1), is made. This is not intended, however, to preclude necessary planning for such activities, including gathering intelligence and other information to determine whether such activities are feasible.

The subsection does recognize certain exceptions to this general requirement of notice to the intelligence committees, as set forth in subsections (2) and (3), explained below.

*Notice after the initiation of a covert action*

Subsection 503(c)(2) permits the President, on rare occasions, to initiate a covert action without first reporting it to the two intelligence committees. However, the subsection makes clear that in any case where prior notice of a covert action is not provided the committees, the President will ensure that the committees are provided such notice in a timely fashion and shall provide a statement of the reasons for not giving prior notice. While the Committee anticipates that it will ordinarily receive notice of all covert actions before they are implemented, it recognizes there could be exigent circumstances where the President needs to act immediately to protect United States interests and there is simply no time to provide prior notice to the two intelligence committees. In permitting such flexibility, however, the Committee does not intend to authorize by statute the withholding of notice beyond a few days of the President's decision to act.

Moreover, in re-enacting the phrase "in a timely fashion", which is the formulation contained in existing law (section 501(b) of the National Security Act of 1947), the Committee wishes to emphasize and make absolutely clear that such action should not in any way be taken to imply agreement with or acquiescence in the Memoran-

dum to the Attorney General, dated December 17, 1986, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, entitled "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act" (reprinted in Hearings before the Select Committee on Intelligence, "Oversight Legislation", S.HRG. 100-623, pp. 126-152) insofar as such memorandum interprets the "timely fashion" phrase as it exists in current law. As far as the Committee is concerned, the explanation of the Committee's intent set forth herein constitutes the sole and only authoritative basis for interpretation of the phrase "in a timely fashion" as it appears in this bill.

*Notice to eight Members of Congress*

Subsection 503(c)(3) permits the President, when he determines it essential to meet extraordinary circumstances affecting vital interests of the United States, to provide the notice required under either subsection (c)(1) or (c)(2) 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 other words, the President could utilize this option either in giving prior notice of a covert action, or in giving notice after initiation. In such case, the President must provide a statement of the reasons for limiting such notice at the time it is made. This alternative is available to the President under current law.

*Copies of findings*

Subsection (c)(4) requires that when notice of covert actions is provided the intelligence committees under subsections (c)(1), (c)(2), or (c)(3) (by notification of the chairmen and ranking minority members), that a copy of the finding, signed by the President, will be provided to the chairman of each intelligence committee. When the finding is orally approved pursuant to subsection 501(a), and is reported orally to the Congress pursuant to subsection 503(c), this means that a copy of the finding must nonetheless be provided to the chairmen of the intelligence committees once it is reduced to writing.

(D) NOTICE OF SIGNIFICANT CHANGES

Subsection 503(d) sets forth the requirements to keep the Congress advised of significant changes to covert actions which have been previously authorized and reported. It provides that all such reports be made in the same manner as the original finding was reported in accordance with subsection 503(c), permitting the President the same options as discussed above with respect to such subsection.

As with the reporting of findings in general, the President is made personally responsible for ensuring that significant changes are reported. It is contemplated that the President would carry out this responsibility by promulgating policies applicable to the Executive branch which would implement the statutory requirements in the bill.

Two types of significant changes are expressly mentioned in the subsection. The first pertains to significant changes in a previously-approved finding. This would occur when the President authorizes a change in the scope of a previously-approved finding to authorize additional activities to occur. The second type of change specified in this subsection pertains to significant undertakings pursuant to a previously-approved finding. This would occur when the President authorizes a significant activity under a previously-approved finding without changing the scope of the finding concerned.

*(e) Definition of "Covert Action"*

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

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

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

In attempting to reconcile the current definitions, the bill opts for a broad general definition—i.e., the approach employed by the Hughes-Ryan drafters—but with the addition of explicit enumerated exceptions to that general definition, the approach employed in a limited way by the drafters of Executive Order 12333.

In accordance with this overall approach, the core definition of covert action should be interpreted broadly. That is why, for instance, the requirement, found in the definition of "special activities" under Executive Order 12333, that the activities be "in sup-

port of national foreign policy objectives abroad" has not been retrained here. The foreign policy interests of the United States are so broad that any covert operation abroad is likely to be in support of some foreign policy objective. The definition also removes the possibility of ambiguity presented by previous Administration arguments that sought to distinguish the foreign policy of the United States from the defense policy of the United States. Furthermore, this phrase is not so much a definitional element, as a limitation of covert action, and one which is reflected in the presidental determination required by section 503(a). Thus, the definition encompasses activities to influence conditions—be they political, economic, or military—overseas and focuses on the objective features of the activity, rather than on a formal relationship to foreign policy purposes, as constitute covert action.

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

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

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

Thus, the basic definition of a covert action retains the same level of general comprehensiveness as is now applied to determine whether activities constitute covert action operations, subject, however, to certain exceptions that are explained further below. The definition is intended to apply uniformly and equally to all elements of the U.S. Government.

Subsection (e)(1) is the first exception to the general definition of covert action. It lists first "activities the primary purpose of which

is to acquire intelligence." This represents a change from the language of the Hughes-Ryan Amendment, which excluded activity only if its sole purpose was the collection of necessary intelligence. The primary purpose test nonetheless reflects actual practice since 1974. It appears that neither the Central Intelligence Agency nor the Congress have actually applied the sole-purpose test since the enactment of the Hughes-Ryan Amendment. What has applied is a rule of reason that treats as intelligence collection activities such as intelligence liaison relationships that produce intelligence indirectly or have other incidental results. By requiring a primary purpose test, however, the bill does not seek to create an avenue for designing operations to avoid the covert action requirements or to change the high threshold traditionally distinguishing covert action from intelligence collection operations.

Subsection (e)(1) also excludes from the definition of covert action operations "traditional counterintelligence activities." The bill uses the word "traditional" several times throughout the new definition. It is intended to be understood in the sense of being usual, accepted customary practice—practice that is acknowledged and understood to fall within accepted parameters. This does not mean that every possible variation of counterintelligence operation or technique must have an exact precedent to be included within the exception. However, it does require that "traditional" counterintelligence hew to the purpose of, in the words of the Executive Order, gathering information or conducting activities "to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons or international terrorist activities." Such activities generally include double agent operations and operations to frustrate intelligence collection activities by hostile foreign powers, such as exposure of their agents.

Traditional counterintelligence, however, does not include the use of a counterintelligence operation or counterintelligence assets for purposes other than those that are described as counterintelligence above. For instance, efforts to deceive or influence a hostile foreign power where such actions could have a significant effect on the perceptions, policies or actions of such foreign power beyond the ordinary objectives of counterintelligence operations are not considered to be traditional counterintelligence activities.

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

Operational security involves a variety of techniques, including the camouflage and concealment of equipment; concealing or disguising operational movements, intentions or capabilities; communications security activities; and physical security activities. Thus, the use of U.S. resources, such as communications systems or equipment, for operational security purposes falls within the ambit of the exception.

Military operational security activities are a subset of this category. It is not intended that such activities as concealing military maneuvers by using cover and deception or the use of radio messages in peacetime to confuse or mislead potential adversaries as to military tactics or capabilities should be considered as covert actions.

However, should the efforts of any department and agency to affect the perceptions of potential adversaries go beyond the limited purpose of providing protection to U.S. information, capabilities, intentions, operational activities, or plans, and, instead, be deliberately undertaken primarily for the purpose of influencing or changing the perceptions of foreign governments in order to accomplish national foreign policy or defense objectives of the United States abroad vis-a-vis such governments, such efforts assume a character different from merely "traditional activities to improve or maintain the operational security of United States Government program," and thus do not fall within the ambit of this exception.

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

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

Subsection (e)(2) also refers to "routine support" to traditional diplomatic activities. Routine, in this sense, means ordinary support. What is contemplated by this phrase is relatively minor, often administrative activities that are an adjunct to a diplomatic activity. An example would be the use of intelligence communications facilities or personnel to pass diplomatic messages, or providing a safe house for a meeting between U.S. officials and foreign officials. What is not included would be activities of intelligence elements that in themselves represent separate efforts to covertly influence events overseas as well as provide support to diplomatic activities. In oter words, routine support cannot become a "backdoor" instrument of covert action.

Subsection (e)(2) also exempts "traditional military activities" and "routine support" to such activities.

Traditional military activities encompass almost every use of uniformed military forces, including actions taken in time of declared war or where hostilities with other countries are imminent or ongoing. The term also includes military contingency operations to achieve limited military or political objectives, as well as military operations to rescue U.S. hostages held captive in foreign countries, to accomplish other counterterrorist objectives (i.e. the extraterritorial apprehension of a known terrorist), or military actions in support of counternarcotics operations in other countries. None of these cases, where the sponsorship of the United States would be apparent or acknowledged at the time the military operation takes place, would constitute covert actions within subsection (e) requiring a presidential finding.

The possibility exists, however, that military elements not identifiable to the United States could be used to carry out an operation abroad without ever being acknowledged by the United States. The Committee does not view such potential use of military forces as a "traditional military activity" under subsection (e)(2).

A more difficult issue arises with regard to support for traditional military activities. Clearly where such support is apparent or acknowledged by the United States at the time such support is rendered or when the operation takes place, it would not be considered a "covert action" in itself. It is also clear that activities undertaken to collect intelligence to support traditional military operations are themselves not covert actions, under subsection e(1), and do not require presidential findings. (Such collection activities could, however, depending upon the circumstances, be considered "significant anticipated intelligence activities" to be reported to the committees under section 502(a), above.)

On the other hand, there may be activities undertaken by U.S. agencies, including non-DoD agencies, in furtherance of the planning and eventual execution of a military operation that are not acknowledged publicly by the United States, even if the operation should take place. Moreover, at the time such activities are undertaken, it is often uncertain whether the military operation being supported will, in fact, ever take place. In this regard, subsection (e)(2) of the definition excludes from the definition of covert action "routine" support to a military operation by both DoD and non-DoD agencies even though the operation being supported never takes place and, thus, such support never becomes apparent and is never acknowledged by the United States. Conversely, the definition of covert action would encompass unacknowledged "other-than-routine support" to such operations whether or not the operation ever occurs or is acknowledged.

Although the determination as to whether support is "routine" or not "routine" will inevitably involve a subjective element, the Committee believes that certain guidance is possible. For example, the Committee would regard as "routine support" such measures as providing false documentation, foreign currency, special communications equipment, maps, photographs, etc., to persons to be involved in a military operation that is to be publicly acknowledged. The Committee would also regard as "routine" support other unilateral actions that might be undertaken by elements of the U.S. Government within the target country itself, such as the caching of

communications equipment or weapons, the leasing or purchase from unwitting sources of residential or commercial property to support an aspect of the operation, or the procurement and storage of vehicles and other equipment from unwitting sources to be used in such operations, if the operation as a whole is to be publicly acknowledged.

On the other hand, the Committee would regard as "other-than-routine" support (requiring a finding and reporting to the committee) such activities as clandestinely recruiting and/or training of foreign nationals with access to the target country actively to participate in and support a U.S. military contingency operaiton; clandestine efforts to influence foreign nationals of the target country concerned to take certain actions in the event a U.S. military contingency operation is executed; clandestine efforts to influence and effect public opinion in the country concerned where U.S. sponsorship of such efforts is concealed; and clandestine efforts to influence foreign officials in third countries to take certain actions in the event a U.S. military contingency operation is executed. (Traditional diplomatic activities would be excluded by other parts of this section.)

In other words, the Committee believes that when support to a possible military contingency operation involves other than unilateral efforts by U.S. agencies in support of such operation, to include covert U.S. attempts to recruit, influence, or train foreign nationals, either within or oustside the target country, to provide witting support to such operation, should it occur, such support is not "routine." In such circumstances, the risks to the United States and the U.S. element involved have, by definition, grown to a point where a substantial policy issue is posed, and because such actions begin to constitute efforts in and of themselves to covertly influence events overseas (as well as provide support to military operations).

Subsection (e) (3) exempts "traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities." Traditional law enforcement activities include activities such as those of the FBI to apprehend, or otherwise cooperate with foreign law enforcement authorities in the apprehension of those who have violated U.S. laws or the laws of other nations. It includes Drug Enforcement Agency and State Department assistance provided at the request, or with the consent, of other countries in the destruction or interdiction of narcotics supplies or products within such countries. In each case, it is necessary to distinguish activities which are to be acknowledged by the United States from those which are not and which otherwise meet the test of a covert action. In other words, the fact that an operation is conducted by a law enforcement agency does not alone determine whether the operation is a traditional law enforcement activity. Covert activity by a law enforcement agency in a foreign country, without the consent of that country, to disrupt a criminal enterprise by means not sanctioned by law, would not be a traditional law enforcement activity.

Routine support to such activities that would not rise to the level of a covert action would include the loan of equipment or certain kinds of training (for example, training in the use of loaned equip-

ment, or the provision of intelligence), to a law enforcement agency by an intelligence agency. As in the case of routine support to traditional diplomatic activities, what is not included in the concept of routine support to traditional law enforcement activities would be activities of intelligence elements that in themselves represent separate efforts to covertly influence events overseas as well as provide support to law enforcement activities. Routine support cannot become a backdoor instrument of covert action.

Subsection (e)(4) provides a limited exception for activities not covered by subsections (e)(1), (2), or (3). The exception permits "routine support" to the "overt activities" of "other United States Government agencies abroad." An example of such support might involve the loan of equipment by an intelligence agency to another U.S. Government element to assist it in the conduct of its authorized activities. Routine support has the same general meaning and limitations as that term is used above.

*Section 703. Limitation on Use of Funds for Covert Actions.*—Section 703 of the bill redesignates section 502 of the National Security Act of 1947, which concerns the funding of intelligence activities, as section 504 of the Act. It also makes a technical amendment to conform section 502(a)(2) of the existing statute to the numbering used in this bill. Finally, it adds a new subsection (d) which deals with the use of funds for covert actions.

This provision is intended to carry forward and expand the limitation currently contained in 22 U.S.C. 2422 (the Hughes-Ryan Amendment), which would be repealed by Section 701 of the bill. The Hughes-Ryan Amendment restricts the use of funds appropriated to CIA to carry out actions outside the United States for "other than collection of necessary intelligence", unless and until the President had determined that such actions were important to the national security.

Section 504(d) would similarly provide that appropriated funds could not be expended to implement covert actions until the President had signed, or otherwise approved, a finding authorizing such activities, in accordance with subsection 503(a) but it would expand this limitation to cover the funds appropriated for any department, agency, or entity of the Government, not solely CIA. It would cover any appropriated funds, whether or not appropriated for the covert action contemplated. It would also cover non-appropriated funds which are available to such departments, agencies, or entities from any source, over which such department, agency, or entity exercises control. These might include funds provided by third parties, funds which are in the possession or custody of third parties but over which the U.S. has authority to direct disbursements, and funds produced as a result of intelligence activities (i.e., proprietaries). The limitation contained in section 504(d) would also apply regardless of whether the department, agency, or entity concerned actually came into possession of the funds, so long as it had the ability to direct the expenditure of such funds by the possessing agency or third party. This bar on expenditures would not preclude the payment of salaries or other expenses necessary for the planning of a covert action, as explained in the analysis of subsection 503(c)(1), above.

*Section 704. Redesignation of Section 503 of National Security Act of 1947.*—Section 704 redesignates Section 503 of the National Security Act of 1947 as section 505, to conform to the changes made by the bill.

## Title VIII—General Provisions

*Section 801* authorizes the increase of appropriations authorized by the Act for salary, pay, retirement, and other benefits for federal employees as necessary for increase in such benefits authorized by law.

### COMMITTEE ACTION

On June 28, 1990, the Select Committee approved the bill and ordered it favorably reported.

### EVALUATION OF REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds no regulatory impact will be incurred in implementing the provisions of this legislation.

### CHANGES IN EXISTING LAW

In the opinion of the Committee, it is necessary to dispense with the requirements of section 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

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