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REPORT
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INTELLIGENCE OVERSIGHT ACT OF 1988

JANUARY 27, 1988.—Ordered to be printed

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

REPORT

[To accompany S. 1721, as amended]

The Select Committee on Intelligence, having considered S. 1721, a bill to improve the congressional oversight of certain intelligence activities, and to strengthen the process by which such activities are approved within the executive branch, and for other purposes, reports favorably with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 1721, as reported, is to clarify the legal requirements for congressional oversight of intelligence activities, including special activities, and to specify the procedures for authorization of special activities within the executive branch, so as to ensure that such activities are conducted in the national interest.

AMENDMENT

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

That this Act may be cited as the "Intelligence Oversight Act of 1988".

SECTION 1. Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is hereby repealed.

SEC. 2. Section 501 of title V of the National Security Act of 1947 (50 U.S.C. 413) is amended by striking the language contained there in, and substituting the following new sections:

GENERAL PROVISIONS

SEC. 501. (a) The President shall ensure that the Select Committee on Intelligence of the Senate and the Permanent Select Committee of the House of Representatives (hereinafter in this title referred to as the "intelligence committees") are kept fully

and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activities, as required by this title; provided, however, that nothing contained in this title shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities: and provided further, however, That nothing contained herein shall be construed as a limitation on the power of the President to initiate such activities in a manner consistent with his powers conferred by the Constitution.

(b) The President shall ensure that any illegal intelligence activity is reported to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.

(c) The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of this title.

(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this title. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

(e) Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.

(f) As used in this section, the term "intelligence activities" includes, but is not limited to, "special activities as defined in subsection 503(e), below.

REPORTING INTELLIGENCE ACTIVITIES OTHER THAN SPECIAL ACTIVITIES

SEC. 502. To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall:

(a) keep the intelligence committees fully and currently informed of all intelligence activities, other than special activities, as defined in subsection 503(e), below, which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and significant failures; and

(b) furnish the intelligence committees any information or material concerning intelligence activities other than special activities which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

PRESIDENTIAL APPROVAL AND REPORTING OF SPECIAL ACTIVITIES

SEC. 503. (a) The President may authorize the conduct of "special activities," as defined herein below, by departments, agencies, or entities of the United States Government 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, which determination shall be set forth in a finding that shall meet each of the following conditions:

(1) Each finding shall be in writing unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision is made;

(2) A finding may not authorize or sanction special activities, or any aspect of such activities, which have already occurred;

(3) Each finding shall specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such activities: Provided, That any employee, contractor, or contract agent of a department, agency, or entity of the United States Government other than the Central Intelligence Agency directed to participate in any way in a special activity shall be subject either to the policies and regula-

tions of the Central Intelligence Agency, or to written policies or regulations adopted by such department, agency or entity, to govern such participation;

(4) Each finding shall specify whether it is contemplated that any third party which is not an element of, contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the special activity concerned, or be used to undertake the special activity concerned on behalf of the United States;

(5) A finding may not authorized any action intended to influence United States political processes, public opinion, policies or media; and

(6) A finding may not authorize any action that would violate any statute of the United States.

(b) To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods, or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a special activity shall:

(1) keep the intelligence committees fully and currently informed of all special activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures; and

(2) furnish to the intelligence committees any information or material concerning special activities which is in the possession, custody or control of any department, agency, or entity of the United States Government and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

(c)(1) Except as provided in subsection (2) through (4), below, the President shall ensure that any finding approved, or determination made, pursuant to subsection (a), above, shall be reported to the intelligence committees prior to the initiation of the activities authorized, and in no event later than 48 hours after such finding is signed or the determination is otherwise made by the President.

(c)(2) On rare occasions when time is of the essence, the President may direct that special activities be initiated prior to reporting such activities to the intelligence committees; provided, however, That in such circumstances, notice shall be provided the intelligence committees as soon as possible thereafter but in no event later than 48 hours after the finding authorizing such activities is signed or such determination is made, pursuant to subsection (a), above.

(c)(3) When the President determines it is essential to meet extraordinary circumstances affecting vital interests of the United States, the President may limit the reporting of findings or determinations pursuant to subsections (1) or (2) of this section, 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 such case, the President shall provide a statement of the reasons for limiting access to such findings or determinations in accordance with this subsection.

(c)(4) Notwithstanding the provisions of subsection (3) above, when the President determines it is essential to meet extraordinary circumstances affecting the most vital security interests of the United States and the risk of disclosure constitutes a grave risk to such vital interests, the President may limit the reporting of findings or determinations pursuant to subsections (1) or (2) of this section to the Speaker and Minority Leader of the House of Representatives, and the Majority and Minority Leaders of the Senate. In such cases, the President shall provide a statement of reasons explaining why notice to the intelligence committees is not being provided in accordance with subsection (c)(1), above. The President shall personally reconsider each week thereafter the reasons for continuing to limit such notice, and provide a statement to the members of Congress identified herein above on a weekly basis, confirming his decision, until such time as notice is, in fact, provided the intelligence committees.

(c)(5) In all cases reported pursuant to subsections (c)(1), (c)(2), and (c)(3), above, a copy of the finding, signed by the President, shall be provided to the chairmen of each intelligence committee. In all cases reported pursuant to subsection (c)(4), a copy of the finding, signed by the President, shall be shown to the members of Congress identified in such subsection at the time such finding is reported.

(d) The President shall ensure that the intelligence committees, or, if applicable, the members of Congress specified in subsection (c), above, are notified of any significant change in a previously-approved special activity, or any significant undertak-

ing pursuant to a previously-approved finding, in the same manner as findings are reported pursuant to subsection (c), above.

(e) As used in this section, the term "special activity" means:

(1) any operation of the Central Intelligence Agency conducted in foreign countries, other than activities intended solely for obtaining necessary intelligence; and

(2) to the extent not inconsistent with subsection (1), above, any activity conducted by any department, agency, or entity of the United States Government in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, but which does not include diplomatic or related support activities.

SEC. 3. Section 502 of title V of the National Security Act of 1947 (50 U.S.C. 414) is redesignated as section 504 of such Act, and is amended by deleting the number "501" in subsection (a)(2) of such section and substituting in lieu thereof "503"; and is further amended by adding the following new subsection (d):

"(d) No funds appropriated for, or otherwise available to, any department, agency, or entity of the United States Government, may be expended, or may be directed to be expended, for any special activity, as defined in subsection 503(e), above, unless and until a Presidential finding required by subsection 503(a), above, has been signed or otherwise issued in accordance with that subsection."

SEC. 4. Section 503 of title V of the National Security Act of 1947 (50 U.S.C. 415) is redesignated as section 505 of such Act.

COMMITTEE ACTION

On December 16, 1987, the Select Committee on Intelligence, a quorum being present, approved the bill with an amendment and ordered that it be favorably reported on January 27, 1988, subject to any motion to reconsider that might be made at a meeting scheduled for that date. The Committee approved the bill and ordered it favorably reported by a vote of 13–2.

The purpose of the amendment adopted by the Select Committee is to clarify the legislative intent and ensure that the bill conforms wherever possible to existing law and current Executive branch policy. The amendment also responds to practical concerns expressed by the Administration and the intelligence community. The Committee consulted with Executive branch officials before and during the mark-up on December 16, 1987, and received assurances that the amendment resolved every issue other than the requirement to notify appropriate Members of Congress within 48 hours of presidential approval of special activities.

The clause in section 501(a) requiring "prior consultations" is deleted and in its place the phrase "including any significant anticipated intelligence activities" is inserted. This conforms the provision to current law which ordinarily requires prior notice of "significant intelligence activities" to the intelligence committees.

The amendment makes several changes to maintain the existing general statutory oversight framework which provides that the intelligence committees receive information to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters. In subsection 501(b) the requirement for reporting "significant intelligence failures" is moved to sections 502 and 503(b) so as to remain subject to the "due regard" clause. In section 502 this clause is moved to the beginning of the section to make clear that it applies to both reporting requirements contained in the section. The wording of the clause is also revised to remain consistent with the intent of cur-

rent law. In subsection 503(b) the "due regard" clause is added so that it applies to the general requirements in that subsection for reporting information on special activities.

The amendment refines the provisions of subsection 503(a) for presidential authorization of special activities. The word "only" is inserted to make clear that the President may authorize special activities only when he makes the requisite determinations. The word "significant" is added to paragraph (a)(3) to exclude from the finding requirement specification of agencies that provide routine, incidental, and minimal support to a special activity. The amendment deletes as inappropriate the language in paragraph (a)(3) which required that policies or regulations for participation in special activities by agencies other than the CIA be adopted "in consultation with the Director of Central Intelligence." Paragraph (a)(4) is revised to require that each finding specify "whether" it is contemplated that any uncontrolled third party will be used to fund or otherwise participate in any "significant" way in the special activity concerned. This requires less detailed information in the finding and excludes routine, minimal, and incidental support for a special activity. Paragraph (a)(4) is expanded to apply when an uncontrolled third party is to be used to undertake the special activity concerned on behalf of the United States. Paragraph (a)(5) inserts the prohibition against special activities for the purpose of influencing domestic political processes, public opinion, policies or media, which was previously contained in the definition of "special activities." No change in current law is entailed by this stylistic revision. Paragraph (a)(6) is modified to eliminate ambiguity and conform to existing law by providing that a finding may not authorize any action that would "violate" any statute of the United States.

The general requirements in subsection 503(b) for providing information on special activities to the intelligence committees are revised to add the "due regard" clause and reference to "significant failures" (as discussed above), to delete the obligation of the President which is adequately covered by subsection 501(a), and to conform the language to current law by covering departments, agencies, and entities "involved in" a special activity.

The specific requirements in subsection 503(c) for notice of Presidential findings are modified to make clear in paragraph (c)(1) that the normal rule is notice to the intelligence committees prior to initiation of a special activity and in no event later than 48 hours after presidential approval, and in paragraph (c)(2) that where prior notice cannot be given due to exigent circumstances, notice must be given within 48 hours of presidential approval. Paragraph (c)(3) retains the current option of the President to notify eight congressional and committee leaders, and paragraph (c)(4) gives the President an additional option to notify the four congressional leaders under certain conditions. Paragraph (c)(5) makes clear that Congress will always receive a copy of the finding signed by the President, whatever the circumstances of the approval and reporting.

The requirement in subsection 503(d) for notice of significant changes in a special activity is modified to make the procedures conform to the approval and reporting requirements for the original finding, and to ensure that significant undertakings pursuant

to previously-approved findings (which do not require changes in the findings themselves) are reported.

The definition of "special activities" in subsection 503(e) is changed to reflect the two elements of existing law—the Hughes-Ryan Amendment (22 U.S.C. 2422) which applies to the CIA, and Executive Order 12333 which applies to all government agencies—so as not to disturb the body of legal interpretation under current legal requirements.

History of the Bill

The Intelligence Oversight Act of 1988 is the culmination of a lengthy and comprehensive review and analysis by the Intelligence Committee of possible changes in the intelligence oversight statutes. 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 temparary 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.

I. 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 initiated 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 Adviser to the President, the Deputy Director of Central Intelligence and his predecessor, the CIA General Counsel and his prede-

cessor, 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 S. 1721.

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.

II. 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 withholding 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.

III. LETTER TO THE NATIONAL SECURITY ADVISER

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 Adviser, Frank Carlucci, setting forth detailed proposals for improved covert action approval and reporting procedures. These later became essential features of S. 1721. 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 Adviser Carlucci recommended that covert action approval and reporting procedures ought to incorporate the following points, which are key provisions of S. 1721:

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 or 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 within 48 hours, the Majority and Minority Leaders of the Senate and the Speaker and Minority Leader of the House, and the Chairmen and Vice Chairmen 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.

IV. NSDD 286

The Committee's dialogue with the Administration, through National Security Adviser 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 are contained in S. 1721.

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

S. 1721 requires that findings be in writing and cannot be made retroactive. S. 1721 provides that findings may not violate existing statutes. Similar requirements are contained in the NSDD.

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

S. 1721 requires that the Intelligence Committees be informed when a special activity involves another U.S. government agency or a third party who is not under the supervision of a U.S. government agency. The NSDD requires that these issues be addressed in a statement accompanying the finding.

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 were approved, he professed ignorance of that NSDD. S. 1721 would ensure that the requirements put in place by the Presidential directive cannot 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 requires 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 be to ensure that the delay will be kept to the absolute minimum length of time, the procedure contemplates that notice may be withheld indefinitely so long as NSC planning group members agree.

Thus, the NSDD appears to conflict with the current oversight statute which, in subsection 501(b) of the National Security Act, requires notification "in a timely fashion" and does not permit such indefinite delay. The differences of opinion between the Executive branch and Members of Congress over the meaning of term "timely" have demonstrated the necessity for legislation to clarify the legislative intent.

V. IRAN-CONTRA COMMITTEE

All these issues were fully considered at great length by the Intelligence Committee 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 serves 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 are 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 rare 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 constitutes 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 recommend legislation that requires that the Finding 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 Findings, 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 Intelligence 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 identities 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 that have been followed by the Intelligence Committee in developing this legislation:

(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 Adviser 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 is 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, pp. 383-384.

V. 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 contains similar covert action finding and notice requirements and would establish a statutory Inspector General for the CIA and impose a mandatory jail term for false statements to Congress. Senator John Glenn testified on behalf of S. 1458 which would authorize the General Accounting Office to audit CIA programs and activities. Senator Wyche Fowler testified on behalf of S. 1852 which would establish 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 S. 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 several 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 fo 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 was the culmination 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 policymakers and intelligence officials who were not involved in the Iran-Contra events. In fact, few issues have received such detailed consideration

by so many people over so great a period of time prior to final mark-up.

GENERAL STATEMENT

I. BACKGROUND

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 dats 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 CIAS 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 vital US 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 on 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 the 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).

S. 1721 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 defini-

tion of "special activities," including the ban on operations to influence domestic US politics 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. 31-34.

It has become clear as a result of the Iran-Contra affair, however, that the Executive branch does not agree with the intent of the sponsor of the oversight law. Instead, the Justice Department has asserted the right to withhold prior notice from even the group of eight leaders on the grounds of protecting secrecy. In addition, the Department has 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. No. 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 S. 1721.

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 on-going 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.

S. 1721 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 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.

II. OBJECTIVES OF THE BILLS

S. 1721 draws on this background and the intensive deliberations surrounding 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 over the last year between the Committee and the Executive branch on measures to implement the lessons learned from the Iran-Contra inquiries.

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 uncertain meaning of the requirement to report "in a timely fashion," 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 detailed provisions for special activities, 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 special activities 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 expressely 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 bill maintains existing law, including the core Hughes-Ryan 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 activities "fully and currently informed" of intelligence activities other than special activities, including "any significant anticipated intelligence activity" or "significant intelligence failure," except to make the President responsible for ensureing 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 retains the definition of "special activities" in the existing statute (Hughes-Ryan) and Executive order. The requirements to keep the intelligence committees "fully and currently informed" of intelligence activities, including special activities and significant failures, and to provide information upon request are still 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 this bill is to use the lessions 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.

III. CONSTITUTIONALITY OF PRIOR NOTICE PROVISIONS

The Administration has voiced particular constitutional objection to section 503(c) of S. 1721, which, in essence, requires the President to ensure that prior notice of all special activities is provided the Congress, unless he determines that he must initiate such actions before such notice can be provided, in which case, notice must be provided within 48 hours of such determination.

In testimony before the Committee on December 11, 1987, Assistant Attorney General Charles J. Cooper stated:

> There may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this presidential authority is protected by the Constitution, and that by purporting to oblige the President, *under any and all circumstances,* to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this constitutional prerogative of the President * * *. A President is not free to communicate information to Congress if to do so

would impair his ability to execute his own constitutional duties. Under some circumstances, communicating findings to Congress within 48 hours could well frustrate the President's ability to discharge those duties.

The Committee does not share the view that a statutory requirement to communicate findings to the Congress, in the manner prescribed by S. 1721, would frustrate the President's ability to discharge his constitutional duties. Indeed, refusal to communicate such information to the Congress effectively precludes it from discharging its own duties under the Constitution.

The Constitution expressly confers powers and reponsibilities on both the Executive and Legislative branches in the area of national security. With repsect to the Executive, this authority flows from his responsibility as Commander-in-chief and from the power to make treaties and appoint ambassadors. The authority of the Executive to conduct intelligence activities, including special activities, has been implied as a necessary extension of these responsibilities. With respect to the Legislative branch, the Constitution gives Congress the power to declare war, to raise and support armed forces, to regulate foreign commerce, and, in the Senate, to consent to treaties and the appointment of ambassadors. Moreover, it gives the Congress the sole power to enact laws binding upon the Executive and to appropriate money for its activities, including intelligence activities and special activities. A necessary corollary to these powers and responsibilities is the ability of Congress to require information from the Executive. This is especially so where special activities are concerned, since they are carried out in secret, and the Executive branch is the sole repository of knowledge.

Although the Constitution gives both branches powers in the area of national security, it is largely silent in terms of how these powers interact with each other. The Committee accepts the view that where the Constitution gives the President independent and exclusive authority to act—for example, the power to "receive ambassadors and other public ministers"—Congress cannot deny him funds or prohibit him by statute from carrying out such activities. On the other hand, where the Constitution does not provide the Executive with independent and exclusive authority, Congress may regulate its actions either by enacting statutes which prohibit or restrict such activities, or by refusing to appropriate funds, or by restricting or conditioning the use of appropriated funds, for such activities.

In the view of the Committee, special activities do not represent an area of independent or exclusive presidential power under the Constitution. By definition, special activities are activities of the United States undertaken in foreign countries to achieve U.S. foreign policy objectives, and are not publicly acknowledged. As such, they are extraordinary and sensitive instruments of U.S. foreign policy. While the Executive may have sole responsibility for carrying out special activities, the Legislative branch must appropriate money for them. If they are financed by funds which have not been appropriated by the Congress, or for purposes not approved by the Congress, a fundamental part of the checks and balances incorporated in the Constitution will have been undermined. Moreover,

special activities, by their very nature, often have particular relevance to the exercise of congressional powers as specifically enumerated by the Constitution—

For example, it is given to Congress to make the fundamental determination whether the U.S. will be at peace or at war with particular countries. Special activities may involve the United States in conducting or supporting armed hostilities against other countries; or they might lead to retaliatory measures against the U.S. or its allies;

The Congress is charged by the Constitution "to raise and support armies" and "to provide and maintain a Navy." Special activities on occasion may impact adversely upon U.S. military readiness, both in terms of manpower and equipment;

Finally, and fundamentally, the Constitution invests Congress with "all legislative powers", including the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof * * *" This responsibility necessarily entails monitoring the activities of the Executive both in terms of its compliance with existing law, and to identify areas where new laws may be needed. Special activities on occasion raise such concerns. They may have the effect of undermining laws which have already been enacted; or they may suggest the need for additional legislative restriction.

In short, Congress has a legitimate and undisputable need for information concerning special activities in order to carry out its responsibilities under the Constitution. Where such information is withheld by the Executive, the system of checks and balances envisioned by Constitution is rendered inoperative.

It is because special activities may have such serious consequences for the United States, and bear so directly upon Congress' own responsibilities, that the Committee believes Congress must, without exception, be made aware of them. In all cases except those where time is of the essence, notice of special activities should be given prior to undertaking such action in order to provide Congress with an opportunity to exercise its responsibilities under the Constitution. When immediate action is required and there is no time to advise Congress prior to initiating such actions, such notice must be provided as soon as possible thereafter, again to maximize Congress' opportunity to play an effective role with respect to the execution of such activity. This is the policy underlying the requirement contained in S. 1721 that in no case may notice of a special activity be withheld from the Congress for longer than 48-hours after the activity is approved.

Notice of covert action findings to the Congress within forty-eight hours, with proper security safeguards, is necessary to make the constitutional system of checks and balances work effectively. Covert actions pose a serious challenge because they by-pass many of the constitutional processes intended to ensure the responsible exercise of governmental powers. Normally, foreign policy initiatives must withstand the test of public and congressional debate, under scrutiny from the press, from interested groups, and from a

wide range of experts inside and outside of government. The result of this debate may be legislation or budgetary actions by the Congress to reverse or redirect U.S. policy or to reinforce the President's action through the development of a consensus in support of his policy. Covert actions, however, avoid these constitutional checks because secrecy is needed to achieve their objectives. Notice to select congressional committees, or to appropriate congressional leaders, helps to compensate for the absence of the constitutional mechanisms that ordinarily allow broad participation in the formulation of national policy.

The Constitution provides for the shared exercise of governmental powers in order to prevent arbitrary or ill-considered actions that harm the national interest. Covert action with inadequate constitutional checks increases the risks of misjudgment. While at times the Executive branch may undertake secret diplomatic negotiations without consulting the Congress, those negotiations have to take into account the prospect of public and congressional debate over the outcome. Even if a President uses the armed forces to intervene abroad, he must anticipate having to defend his action publicly. By contrast, in making the decision to employ covert action, a President and a small inner circle of advisers may not be inhibited by these usual constitutional constraints. The dangers of miscalculation increase accordingly.

A constitutional mechanism is necessary to ensure that decisions to undertake covert actions are not left solely to a handful of single-minded executive officials. This can be accomplished by requiring notice of such decisions to select committees of the Congress, or to key leaders when extraordinary precautions are needed to protect secrecy. If a President decides to implement foreign policy objectives covertly, he would thereby be obliged to advise a limited number of experienced elected officials within the Congress who share responsibilities in the foreign policy area but who may have different perspectives than the President. By choosing covert action he may be freed from the normal constitutional constraints of anticipated public discussion and wider congressional knowledge; but if so the President would still have the benefit of a broader range of opinion from carefully chosen representatives of the House of Representatives and the Senate.

A proper assessment of this procedure in terms of constitutional principle calls for an understanding of the historical evolution of covert action in the American system of government. Although various forms of covert action date back to the beginnings of the nation, covert action did not become a significant and continuing instrument of national policy until World War II. From the 1940s until the mid-1970s, however, the Congress allowed covert action to be conducted by the Executive branch essentially outside the framework of constitutional checks and balances. When Congress finally reconsidered its role in this aspect of national policymaking, the initial impulse through the Hughes-Ryan Amendment of 1974 was to require timely notice of CIA covert actions to all appropriate congressional committees—as many as eight for several years in the later 1970s. It became clear, however, that this requirement was unduly burdensome, even though the Executive branch complies in all cases except two involving the Iranian hostage crisis in

1980. Shortly thereafter, the statutory requirement was changed to provide for reporting only to the two intelligence committees, with procedures for notice to the committees or a group of eight congressional leaders prior to implementation in all but the most exceptional cases.

Recent experience has vindicated the constitutional validity of this basic mechanism. Since 1980, the intelligence committees or the group of eight leaders have been given prior notice in every case—including highly sensitive operations where lives were at risk—except for the operations associated with the Iran-Contra affair. In that situation, where the Executive branch interpreted the law to mean that it could withhold notification to the Congress indefinitely, the result was a foreign policy disaster. Relying on a few advisers who convinced him to withhold information from the committees and congressional leaders for nearly a year, the President misjudged the risks and consequences of covert action. Moreover, in that atmosphere his subordinates were able to act without the President's authorization to conduct operations in definance of the clear intent of statutory restrictions governing assistance to the Nicaraguan contras. The lesson is that Congress now has a constitutional obligation to eliminate the ambiguities in the reporting requirements so that future Presidents cannot so readily avoid the checks and balances necessary in our constitutional system to ensure that governmental powers are exercised in the national interest.

The Iran-Contra affair brought to light another constitutional dimension of the covert action notice issue. The January 1986 presidential finding which authorized the covert sale of arms to Iran was issued with full knowledge by the President and his advisers that Congress had by law restricted overt arms sales to Iran. By authorizing the CIA to transfer arms covertly under the general authority of the National Security Act of 1947, the Iran finding evaded those statutory restrictions. Such use of covert action to avoid legal limitations on comparable overt action undermines the ability of Congress to exercise its legislative powers under Article I of the Constitution. That problem can be resolved by making clear in the National Security Act that the decision to pursue a covert alternative must be reported immediately to the intelligence committees or key congressional leaders. Permitting exceptions to that requirement would allow the Executive branch to thwart the will of Congress and weaken its law-making capabilities under Article I.

Perhaps the most carefully considered federal appellate court opinions in recent years on the constitutional issues raised by intelligence oversight were written by the Court of Appeals for the District of Columbia Circuit in *United States* v. *American Tel. & Tel. Co.*, 551 F.2d 384 (1976) and 567 F.2d 121 (1977). The case involved a House committee's request for telephone company documents on FBI electronic surveillance which the executive claimed to be privileged on the basis of national security. The Court of Appeals refused to defer "to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers." 551 F.2d at 392. The Court urged negotiation of a settlement, and when no agreement

was reached, the Court reemphasized the need for an accommodation of interests:

> Given our perception that it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi, which positively promotes the functioning of our system. The Constitution contemplates such accomodation.—567 F. 2d at 1228-133.

In following this judicial guidance, S. 1721, as reported by the Committee, seeks to accommodate the constitutional interests of both branches and "positively promote the functioning" of the constitutional system. The Executive branch interest in secrecy is met by giving the President the ability to limit notice to four leaders of the House and Senate in the most extreme cases where extraordinary secrecy is vital to the success of an operation. At the same time, the bill establishes the unqualified principle of notice to Congress which is essential to the effective functioning of the constitutional system of checks and balances. And it makes clear that Congress will not permit the erosion of its law-making powers under Article I by unilateral Executive branch recourse to covert action that evades statutory restrictions.

The Committee emphasizes that the requirement for notice does not preclude the President from initiating such actions as he believes are necessary to fulfill his constitutional responsibilities. Nor does the Committee insist that its approval be required before such activities may be undertaken. The President would be free to carry out any special activity he determined was necessary, even in the face of unanimous disapproval from the Committee. In short, the Committee does not seek a veto, only an effective voice in the process.

In particular, the Committee rejects the notion that the risk of disclosure justifies the Executive branch's withholding such notice entirely from the Congress where sensitive cases are concerned. There is no support for this assertion to be found in the Constitution, nor is this supported by past practice. The intelligence committees recognize the peculiar sensitivity of special activities for the nation's security. Such activities heretofore reported to these committees have been disclosed to the public, and stringent security procedures insure against such disclosures in the future. Moreover, the bill itself gives the President the option of limiting notice of special activites in extraordinary circumstances to four congressional leaders who have been selected by Congress as a whole: the majority and minority leaders of the Senate, and the Speaker and minority leader of the House of Representatives. In short, the Committee is willing, in cases of extraordinary sensitivity, to minimize the numbers of people who must know, provided Congress is not altogether removed from the process.

To the extent the Committee may, after notice has been given, wish to regulate such activities through the authorization of funds, or by enacting particular legislation, it is only carrying out its responsibilities under the Constitution. The President cannot contend

that the exercise of such authority by the Congress in this area is any more an intrusion upon his constitutional responsibilities than similar actions by the Congress in any other area of shared constitutional responsibility.

In conclusion, each branch of the Government is entitled to assert its own views of the Constitution as they bear upon proposed leglislation. With respect to special activities, the Administration has asserted its view that in certain circumstances, the President, to satisfy his responsibilities under the Constitution must retain the option to keep Congress in the dark, even though such a decision, in effect, prevents Congress from exercising its own constitutional responsibilities. Indeed, it contends that current law gives the President this option. The Committee rejects this assertion in the only manner available to it—by recommending a change to the law which makes notice mandatory, regardless of the circumstances. Should such a requirement become law, the President could no longer contend that a decision to keep Congress in the dark can be taken with Congress' own explicit acquiescence.

SECTION-BY-SECTION ANALYSIS

SECTION 1. REPEAL OF HUGHES-RYAN AMENDMENT

Section 1 of the bill repeals the Hughes-Ryan Amendment of 1974 so as to consolidate intelligence oversight provisions at a single place in the law and expand the requirement for presidential approval of covert action to all entities of the U.S. Government (to parallel Executive Order 12333).

Current statutory provisions for intelligence oversight include the general requirements to inform the House and Senate Intelligence Committees in Title V of the National Security Act of 1947, as amended in 1980, and the requirement of the 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 1 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 (or "special activities") and other intelligence activities to be set forth at one place in the law. The superseding presidential approval requirement is contained in the proposed new sections 503 and 504(d) of the National Security Act of 1947, discussed below.

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

action (or "special activities") by any U.S. Government entity gives statutory force to a policy that has previously been a matter of Executive discretion.

SECTION 2. OVERSIGHT OF INTELLIGENCE ACTIVITIES

Section 2 of the bill would replace the existing section 502 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 special activities, and presidential approval and reporting of special activities.

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 intelligence activities and reaffirms 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 requring 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 committee 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) 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 special activities 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 proviso 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 within 48 hours of presidential authorization in paragraphs 503(c)(2)–(4).

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

(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 Order 12333 or successor orders. The current provision requires the reporting of illegal activity "in a timely fashion." This language is deleted because of its ambiguity. 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)–(f) Other general provisions

Subsections (c) through (e) 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 establish procedures to carry out 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) repeats the current subsection 501(e) which makes clear that providing information to the intelligence committees does not constitute unauthorized disclosure of classified information or information relating to intelligence sources and methods under this Act.

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

SECTION 502. REPORTING INTELLIGENCE ACTIVITIES OTHER THAN SPECIAL ACTIVITIES

The new section 502 is intended to maintain the same reporting requirements imposed by current law insofar intelligence activities other than special activities are concerned. This distinction between special activities 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 information, 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 special activities as defined in subsection 503(e), which are the responsibility of, are engaged in by, or are

carried out for or on behalf of, any such department, agency, or entity of the United States engaged in intelligence activities, including any significant anticipated intelligence activity and significant 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 special activities to eight congressional leaders in clause (B) of paragraph 501(a)(1) of current law, because it was primarily intended to apply to special activities, to be governed by section 503, discussed below.

In carrying out these obligations, it is not intended that 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 subordinate 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 officals designated in the introductory clause to furnish the intelligence committees any information or material concerning intelligence activities (other than special activities) 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. The 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 experience indicates that legislation qualifying its term 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 adquately met by this 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 SPECIAL ACTIVITIES

Special activities (or covert actions) raise fundamentally different policy issues from other U.S. intelligence activities because they are an instrument of foreign power. 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. The Committee does not accept the view that such special activities are an exclusive presidential function. Congress clearly has the constitutional power to refuse to appropriate funds to carry out special activities and may impose conditions on the use of any funds appropriated for such purposes.

Under curent law, however, the Congessional mandate is ambiguous, confusing and incomplete. There is no express recognition in statute of the President's authority to conduct special activities; the requirement for presidential approval of special activities 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 special activities that may violate other applicable statutes. The statutory requirements for informing the intelligence committees of special activities 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 express statutory authority for the President to authorize the conduct of special activities 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 3 of the bill, discussed later, which prohibits expenditure of funds available to the U.S. Government to initiate any special activity 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 defintion 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 determine 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 would have to meet five statutory 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 special activities, 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 special activities 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 special activities 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 special activity 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 communcations 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 special activity concerned is not a determining factor; rather, it is the nature of such involvement as it relates to the conduct of the special activity. Moreover, it is intended that the intelligence committees 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 special activity 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 special activity 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 special activity, there should be agency regulations to govern their participation. Where the parent agency is assigned primary responsibility for conducting a special activity, 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 special activities 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, 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 special activity concerned, or will be used to undertake the special activity 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 special activity 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 would 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 special activity 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 special activity 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 special activity 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 would violate 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 special activities, either 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 special activities 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 special activities undertaken by the CIA which do not violate U.S. statutes because the statutes themselves do not apply to the CIA. Nonetheless, the effect of undertaking such an activity would, if disclosed, undermine the public policies set forth in such statutes. In theory, there may be rare circumstances where this result is justified. However, any such case deserves intense scrutiny but the Executive branch, and by the intelligence committees, in their respective reviews of special activities. It is intended that the intelligence committees will establish procedures to obtain any analysis of the impact, if any, of existing statutes on each proposed special activity as part of their routine oversight functions.

(b) General reporting provisions relating to special activities

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

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 special activities 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 paragraph 501(a)(3) of current law, and applied specifically to special activities. 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 special activity, or where multiple levels of bureaucracy are involved in approving a particular special activity, 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 special activities as under current law. This becomes redundant in view of the detailed reporting requirements for special activities set forth in subsection 503(c), 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 or material concerning special activities 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 maintains the obligations imposed by current law.

The requirement to furnish pertinent information requested by the intelligence activities concerning special activities 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 Exeuctive 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) sets forth additional detailed requirements for reporting special activities to the Congress. This subsection, in effect, both replaces and supplements requirements of current law.

Prior Notice

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 special activity in question, but in no event later than 48 hours after such findings is signed, or determination made. 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 special activity prior to the time the finding is signed or the oral determination, pursuant to paragraph 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) through (4), explained below.

Notice After the Initiation of a Special Activity

Subsection 503(c)(2) provides the only exception to the requirement for prior notice to the Congress, established in subsection 503(c)(1), explained above. It permits the President on rare occasions when time is of the essence, to initiate a special activity without first reporting it to the two intelligence committees, but, in such circumstances, the subsection requires that notice be provided within 48 hours after the finding authorizing the activity is signed, or the determination is made, pursuant to subsection 503(a).

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) of the chairman and ranking minoirty 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 special activity, or in giving notice after initiation, or in giving notice of significant changes to an ongoing special activity, but within the 48 hour limit established by subsection (c)(2). 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.

Notice to Four Congressional Leaders

Subsection 503(c)(4) provides the President with an additional option of limiting the notice required by subsection (c)(1) or (c)(2) to the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. He may invoke this alternative when he determines that limiting notice in this manner is essential to meet extraordinary circumstances affecting the most vital security interests of the United States and the risk of disclosure constitutes a grave risk to such vital interests. It is intended that this provision be invoked only where the

President has reason to believe that disclosure would have such dire consequences for the security of the United States that notice to Congress must be temporarily limited to the two leaders of each House. As with subsection (c)(3), this form of alternative notice may be utilized either in providing prior notice before the initiation of such activities, or in providing notice after initiation but before the expiration of 48 hours from the time the finding is signed or the oral determination, pursuant to subsection 503(a), is made.

When the President invokes this option, he is required to provide to the four leaders, at the time they are notified, a statement of the reasons explaining why notice to the intelligence committees (to include notice to the chairmen and ranking minority members) is not otherwise being provided in accordance with subsection (c)(1). This subsection also requires the President, once having invoked this alternative, personally to reconsider on a weekly basis the reasons for continuing to withhold notice from the intelligence committees consistent with this subsection. If he determines that such notice should continue to be withheld, the President must provide a statement on a weekly basis to the four leaders to whom notice was given, confirming his decision, until such time as the intelligence committees are notified of the special activity in question.

Copies of Findings

Subsection (c)(5) requires that when notice of special activities 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.

This subsection also provides that where the President temporarily limits notice to the four congressional leaders pursuant to subsection (c)(4), that a copy of the finding be shown to the four leaders at the time they are notified. If such finding has not been reduced to writing at the time the notice is given, it is intended that a copy of the finding, signed by the President, be shown to them as soon as possible thereafter. Further, it is contemplated that once notice is provided the intelligence committees, a copy of the finding, signed by the President, be provided the chairman of each intelligence committee.

s(d) Notice of significant changes

Subsection 503(d) sets forth the requirements to keep the Congress advised of significant changes to special activities 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 "special activity"

Subsection 503(e) contains the definition of the term "special activity", as used in the bill. It is intended, as written, to reflect and incorporate existing law and mutually-agreed upon practice.

Under current law, i.e. the Hughes-Ryan Amendment (22 U.S.C. 2422), the CIA is prohibited from expending any appropriated funds for "operations in foreign countries, other than activities intended solely for obtaining necessary intelligence", unless pursuant to a presidential finding.

This provision, and, in particular, the phrase "operations in foreign countries", was never intended by Congress to require a Presidential finding for all CIA's overseas activities other than collection. It has been recognized both by the Executive branch and the intelligence committees that certain CIA activities abroad, such as certain counterintelligence activities, routine assistance to the Department of State in performing certain diplomatic or overt initiatives, and certain routine assistance to the Department of Defense or other agencies under the Economy Act, are not "operations in foreign countries", requiring presidential findings.

In attempting to define what activities were included within the ambit of Hughes-Ryan, the Executive branch with the acquiescence of the intelligence committees, has relied in part upon the definition of "special activities" contained in section 3.4(h) of Executive order 12333, which applies to both CIA and other departments and agencies of the Government. The Executive order defined "special activities" (in pertinent part) as any activity "in support of national foreign policy objectives abroad which is planned and executed so that th role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity * * * but which does not include diplomatic activities or the collection and production of intelligence or related support activities." To the extent that the Executive order definition excluded activities from the requirement of a presidential finding that were not within the intended scope of Hughes-Ryan, it was cited as justification for not applying the Hughes-Ryan language to CIA under the types of circumstances mentioned above.

The CIA and the intelligence committees recognize that a provision in an Executive order cannot legally override the require-

ments of a statute, and that, indeed, there are CIA activities abroad which would not meet the standards of the Executive order definition but which would meet the requirements of Hughes-Ryan (e.g., covert CIA support of the operations of other U.S. agencies which are apparent or publicly acknowledged once carried out). Nevertheless, the CIA and the intelligence committees regard the definition of "special activities" in Executive Order 12333 as a useful guide for the interpretation of the Hughes-Ryan language requiring presidential findings for CIA "operations". Indeed, the intelligence committees regard it as bringing any CIA covert action conducted within the United States in support of objectives abroad within the ambit of a requirement for a finding, when, in fact, the Hughes-Ryan Amendment did not impose a requirement for a presidential finding in such circumstances. In an effort to reflect and incorporate this current policy and practice, the definition of "special activity" in subsection 503(e) contains two parts. Paragraph (1) contains the language previously contained in the Hughes-Ryan Amendment with respect to the CIA. Paragraph (2) contains the pertinent language from the definition of "special activities" in Executive order 12333.

Paragraph (1) applies to CIA operations in foreign countries, other than activities intended solely for obtaining necessary intelligence. It applies only to the CIA and does not apply to any other department, agency, or entity of the Government.

Paragraph (2) applies to all departments, agencies, or entities of the U.S. Government, including, to the extent not inconsistent with paragraph (1), the CIA. For operations of any department, agency or entity of the U.S. Government, special activities are any activity conducted in support of national foreign policy objectives abroad which is planned and executed so that the role of the U.S. Government is not apparent or acknowledged publicly, and functions in support of such activity, but which does not include diplomatic activities or the collection and production of intelligence or related support activities. This part of the definition covers all covert activities undertaken by the United States to support its foreign policy objectives towards other countries regardless of the department, agency, or element of the U.S. Government used to carry out such activities. While it applies to those activities conducted in support of national foreign policy objectives abroad, the term encompasses those activities conducted by the U.S. Government within the territory of the United States so long as they are intended to support U.S. objectives abroad. (Note that section 503(a)(5) maintains the prohibition from the current Executive order definition of "special activities" against any action intended to influence domestic political processes, public opinion policies or media.)

Paragraph (2) applies to the CIA to the extent not inconsistent with paragraph (1). This means that CIA may cite the definition in subsection (2), taken from the existing Executive Order 12333, to exclude certain of its activities from the requirement for a Presidential finding provided that such activities do not fall within the intended ambit of subsection (1). In effect, this means that where CIA has not legally been barred in the past from undertaking certain activities in foreign countries without a presidential finding (i.e. certain counterintelligence activities, routine assistance to the

Department of State in performing certain diplomatic or overt initiatives, and certain routine assistance to the Department of Defense or other agencies under the Economy Act), it is not so barred under this definition. It does mean, however, that to the extent CIA activities within the United States or abroad have been barred under previous law from being undertaken without a presidential finding, even though they are not expressly covered by the Executive order definition (e.g., covert support to other U.S. agencies abroad whose activities would be apparent or publicly acknowledged upon execution), they will continue to be included under subsection (1) of the definition.

In short, the two-part definition of "special activity" contained in subsection 503(e) is intended to maintain current law with respect to both CIA and the Executive branch as a whole, as mutually interpreted and agreed upon by the Executive branch and the intelligence committees.

SECTION 3. LIMITATION ON USE OF FUNDS FOR SPECIAL ACTIVITIES

Section 3 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 subsection 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 special activities.

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 1 of the bill. The Hughes-Ryan amendment restricts the use of funds appropriated to CIA to carry out actions outside the United States "other than the 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 special activities 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 special activity 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 special activity, as explained in the analysis of subsection 503(c)(1), above.

SECTION 4. REDESIGNATION OF SECTION 503 OF NATIONAL SECURITY ACT OF 1947

Section 4 redesignates section 503 of the National Security Act of 1947 as section 505, to conform to the changes made by the bill.

COST ESTIMATE

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee estimates that enactment of this legislation will not result in any additional cost to the government, either in this fiscal year or in the future.

EVALUATION OF REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds no additional regulatory impact will be incurred in implementing the provisions of this legislation, apart from that which may exist under existing law.

CHANGES IN EXISTING LAW

In accordance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the proposed legislation would entail the following changes in existing law: Existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman:

(A) TEXT OF STATUTES PROPOSED TO BE REPEALED

Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422). Limitation on Intelligence Activities.—No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947.

(B) AMENDMENTS TO EXISTING LAW

TITLE V OF THE NATIONAL SECURITY ACT OF 1947 (50 U.S.C. 413) (ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES)

TITLE V—ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES

CONGRESSIONAL OVERSIGHT

[SEC. 501. (a) To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and informa-

tion relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall—

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

[(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

[(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

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

[(c) The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b).

[(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protection from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under this section. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

[(e) Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees

would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.]

GENERAL PROVISIONS

SEC. 501. (a) The President shall ensure that the Select Committee on Intelligence of the Senate and the Permanent Select Committee of the House of Representatives (hereinafter in this title referred to as the "intelligence committees") are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activities, as required by this title; provided, however, that nothing contained in this title shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities: and provided further, however, That nothing contained herein shall be construed as a limitation on the power of the President to intiate such activities in a manner consistent with his powers conferred by the Constitution.

(b) The President shall ensure that any illegal intelligence activity is reported to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.

(c) The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of this title.

(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure of all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this title. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

(e) Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.

(f) As used in this section, the term "intelligence activities" includes, but is not limited to, "special activities" as defined in subsection 503(e), below.

REPORTING INTELLIGENCE ACTIVITIES OTHER THAN SPECIAL ACTIVITIES

SEC. 502. To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall:

(a) keep the intelligence committees fully and currently informed of all intelligence activities, other than special activities, as defined in subsection 503(e), below, which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and significant failures; and

(b) furnish the intelligence committees any information or material concerning intelligence activities other than special activities which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

PRESIDENTIAL APPROVAL AND REPORTING OF SPECIAL ACTIVITIES

SEC. 503. (a) The President may authorize the conduct of "special activities," as defined herein below by departments, agencies, or entities of the United States Government 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, which determination shall be set forth in a finding that shall meet each of the following conditions:

(1) Each finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision is made;

(2) A finding may not authorize or sanction special activities, or any aspect of such activities; which have already occurred;

(3) Each finding shall specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such activities: Provided, That any employee, contractor, or contract agent of a department, agency, or entity of the United States Government other than the Central Intelligence Agency directed to participate in any way in a special activity shall be subject either to the policies and regulations of the Central Intellience Agency, or to written policies or regulations adopted by such department, agency or entity, to govern such participation;

(4) Each finding shall specify whether it is contemplated that any third party which is not an element of, contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the special activity concerned, or be used to undertake the special activity concerned on behalf of the United States;

(5) A finding may not authorize any action intended to influence United States political processes, public opinion, policies or media; and

(6) A finding may not authorize any action that would violate any statute of the United States.

(b) To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods, or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a special activity shall:

(1) keep the intelligence committees fully and currently informed of all special activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures; and

(2) furnish to the intelligence committees any information or material concerning special activities which is in the possession, custody or control of any department, agency, or entity of the United States Government and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

(c)(1) Except as provided in subsections (2) through (4), below, the President shall ensure that any finding approved, or determination made, pursuant to subsection (a), above, shall be reported to the intelligence committees prior to the initiation of the activities authorized, and in no event later than 48 hours after such finding is signed or the determination is otherwise made by the President.

(c)(2) On rare occasions when time is of the essence, the President may direct that special activities be initiated prior to reporting such activities to the intelligence committees; provided, however, That in such circumstances, notice shall be provided the intelligence committees as soon as possible therefter but in no event later than 48 hours after the finding authorizing such activities is signed or such determination is made, pursuant to subsection (a), above.

(c)(3) When the President determines it is essential to meet extraordinary circumstances affecting vital interests of the United States, the President may limit the reporting of findings or determinations pursuant to subsections (1) or (2) of this section, 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 such case, the President shall provide a statement of the reasons for limiting access to such findings or determinations in accordance with this subsection.

(c)(4) Notwithstanding the provisions of subsection (3) above, when the President determines it is essential to meet extraordinary circumstances affecting the most vital security interests of the United States and the risk of disclosure constitutes a grave risk to such vital interests, the President may limit the reporting of findings or determinations pursuant to subsections (1) or (2) of this section to the Speaker and Minority Leader of the House of Representatives, and the Majority and Minority Leaders of the Senate. In such cases, the President shall provide a statement of reasons explaining why notice to the intelligence committees is not being provided in accordance with subsection (c)(1), above. The President shall personally reconsider each week thereafter the reasons for continuing to limit such notice, and provide a statement to the Members of Congress identified herein above on a weekly basis, confirming his decision,

until such time as notice is, in fact, provided the intelligence committees.

(c)(5) In all cases reported pursuant to subsections (c)(1), (c)(2), and (c)(3), above, a copy of the finding, signed by the President, shall be provided to the chairman of each intelligence committee. In all cases reported pursuant to subsection (c)(4), a copy of the finding, signed by the President, shall be shown to the Members of Congress identified in such subsection at the time such finding is reported.

(d) The President shall ensure that the intelligence committees, or, if applicable, the Members of Congress specified in subsection (c), above, are notified of any significant change in a previously-approved special activity, or any significant undertaking pursuant to a previously-approved finding, in the same manner as findings are reported pursuant to subsection (c), above.

(e) As used in this section, the term "special activity" means:

(1) any operation of the Central Intelligence Agency conducted in foreign countries, other than activities intended solely for obtaining necessary intelligence; and

(2) to the extent not inconsistent with subsection (1), above, any activity conducted by any department, agency, or entity of the United States Government in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, but which does not include diplomatic activities or the collection and production of intelligence or related support activities.

FUNDING OF INTELLIGENCE ACTIVITIES

SEC. [502] *504.* (a) Appropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity only if—

(1) those funds were specifically authorized by the Congress for use for such activities; or

(2) in the case of funds from the Reserve for Contingencies of the Central Intelligence Agency and consistent with the provisions of section 501 of this Act concerning any significant anticipated intelligence activity, the Director of Central Intelligence has notified the appropriate congressional committees of the intent to make such funds available for such activity; or

(3) in the case of funds specifically authorized by the Congress for a different activity—

(A) the activity to be funded is a higher priority intelligence or intelligence-related activity;

(B) the need for funds for such activity is based on unforeseen requirements; and

(C) the Director of Central Intelligence, the Secretary of Defense, or the Attorney's General, as appropriate, has notified the appropriate congressional committees of the intent to make such funds available for such activity;

(4) nothing in this subsection prohibits obligation or expenditure of funds available to an intelligence agency in accordance with sections 1535 and 1536 of title 31, United States Code.

(b) Funds available to an intelligence agency may not be made available for any intelligence or intelligence-related activity for which funds were denied by the Congress.

(c) As used in this section—

(1) the term "intelligence agency" means any department, agency, or entity of the United States involved in intelligence or intelligence-related activities;

(2) the term "appropriate congressional committees" means the Permanent Select Committee on Intelligence and the Committee on Appropriations of the House of Representatives and the Select Committee on Intelligence and the Committee on Appropriations of the Senate; and

(3) the term "specifically authorized by the Congress" means that—

(A) the activity and the amount of funds proposed to be used for that activity were identified in a formal budget request to the Congress, but funds shall be deemed to be specifically authorized for that activity only to the extent that the Congress both authorized the funds to be appropriated for that activity and appropriated the funds for that activity; or

(B) although the funds were not formally requested, the Congress both specifically authorized the appropriation of the funds for the activity and appropriated the funds for the activity.

(d) No funds appropriated for, or otherwise available to, any department, agency, or entity of the United States Government, may be expended, or may be directed to be expended, for any special activity, as defined in subsection 503(e), above, unless and until a Presidential finding required by subsection 503(a), above, has been signed or otherwise issued in accordance with that subsection.

NOTICE TO CONGRESS OF CERTAIN TRANSFERS OF DEFENSE ARTICLES AND DEFENSE SERVICES

SEC. [503] *505.* [50 U.S.C. 415] (a)(1) The transfer of a defense article or defense service exceeding $1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant anticipated intelligence activity for the purpose of section [501] *503* of this Act.

(2) Paragraph (1) does not apply if—

(A) the transfer is being made to a department, agency, or entity of the United States (so long as there will not be a subsequent retransfer of the defense articles or defense services outside the United States Government in conjunction with an intelligence or intelligence-related activity); or

(B) the transfer—

(i) is being made pursuant to authorities contained in part II of the Foreign Assistance Act of 1961, the Arms Export Control Act, title 10 of the United States Code (including a law enacted pursuant to section 7303(b)(1) of that title), or the Federal Property and Administrative Services Act of 1949, and

(ii) is not being made in conjunction with an intelligence or intelligence-related activity.

(3) An intelligence agency may not transfer any defense articles or defense services outside the agency in conjunction with any intelligence or intelligence-related activity for which funds were denied by the Congress

(b) As used in this section—

(1) the term "intelligence agency" means any department, agency, or other entity of the United States involved in intelligence or intelligence-related activities;

(2) the terms "defense articles" and "defense services" mean the items on the United States Munitions List pursuant to section 38 of the Arms Export Control Act (22 CFR part 121);

(3) the term "transfer" means—

(A) in the case of defense articles, the transfer of possession of those articles; and

(B) in the case of defense services, the provision of those services; and

(4) the term "value" means

(A) in the case of defense articles, the greater of—

(i) the original acquisition cost to the United States Government, plus the cost of improvements or other modifications made by or on behalf of the Government; or

(ii) the replacement cost; and

(B) in the case of defense services, the full cost to the Government of providing the services.

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