

CONGRESSIONAL NOTIFICATION

HEARING
BEFORE THE
SELECT COMMITTEE ON INTELLIGENCE
OF THE
UNITED STATES SENATE
ONE HUNDRED FOURTH CONGRESS
SECOND SESSION
ON
CONGRESSIONAL NOTIFICATION
—
THURSDAY, SEPTEMBER 5, 1996
—

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[Established by S. Res. 400, 94th Cong., 2d Sess.]

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CONGRESSIONAL NOTIFICATION

THURSDAY, SEPTEMBER 5, 1996

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Select Committee met, pursuant to notice, at 9:34 o'clock a.m., in room SH-216, Hart Senate Office Building, the Honorable Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Shelby, Kerrey of Nebraska and Bryan.

Also Present: Charles Battaglia, Staff Director; Chris Straub, Minority Staff Director; Suzanne Spaulding, Chief Counsel; and Kathleen McGhee, Chief Clerk.

Chairman SPECTER. The Senate Select Committee on Intelligence will proceed. Vice Chairman Kerrey will be joining us momentarily, and he has asked that we proceed.

The Director of Central Intelligence has a tight schedule and we will try to proceed to complete his testimony as early as possible. The schedules are never easy here, but they are complicated this morning by the fact that two votes have been set for 10:00 o'clock. They were not set until past 6:00 o'clock yesterday afternoon, so whenever we schedule these sessions we have to be flexible for whatever the Senate schedule may be. And there are other hearings going on this morning. The Judiciary Committee is having a hearing and other Members will be joining us when their schedules permit.

Today's hearings will focus on a number of critical questions. The first line of inquiry will be whether there was compliance with the National Security Act on notification to Congress generally and the Intelligence Committee specifically on the sale of Iranian arms to Bosnia. The act requires notice on covert action and on intelligence activities.

In April of 1994, as disclosed on previous hearings, including an open hearing, Croatian President Tudjman asked what the United States policy was on the sale of arms to Bosnia. And Ambassador Galbraith and Ambassador Redman received instructions from Washington to tell President Tudjman that there were no instructions. Ambassador Galbraith then told Deputy Secretary of State Strobe Talbott that that would be perceived as a green light, and the arms were then shipped to Bosnia through Croatia.

The CIA and the Department of Defense were not informed about those matters. Ambassador Galbraith was advised by Deputy Secretary Talbott to report it, if and when he heard from one of two State Department officials, which request was never made, so that

Ambassador Galbraith did not report that through State Department channels.

National Security Counselor Anthony Lake told Ambassador Redman not to file a report. We have a fairly detailed statement of that not only from testimony taken by the Committee but also from a memorandum which Ambassador Galbraith prepared contemporaneously with that event.

The requirements on reporting intelligence are set forth in the National Security Act, Section 501, which says, quote, "The President shall ensure that the Intelligence Committees are kept fully and currently informed of the intelligence activities of the United States." And Section 502 specifically imposes that requirement on all departments, including the State Department, obviously, and all agencies, obviously again including the CIA.

Senate Resolution 400 provides that intelligence activities includes, quote, "covert or clandestine activities affecting the relations of the United States with any foreign government, political group, party, military force, movement or other association."

The definition of covert activities is contained in the National Security Act, 503(e), as, quote, "an activity or activities of the United States government to influence political, economic or military conditions abroad where it is intended that the role of the United States government will not be apparent or acknowledged publicly." And there are certain activities exempted from the definition, including quote, "traditional diplomatic or military activities," close quote.

It's important to note that the diplomatic exception on covert activities is not applicable on the obligation of the Administration to report on intelligence activities.

There is a real question as to whether this sequence of events involves traditional diplomatic activities in light of the facts that the diplomats were encouraging the violation of a UN arms embargo. Their message was contrary to the publicly acknowledged U.S. policy. The exchange was purposefully not reported back to Washington in traditional diplomatic communications, and it was kept secret from key U.S. officials, such as the secretary of Defense, the Chairman of the Joint Chiefs, and both of those told us that specifically—both of those men told us that specifically—and the Director of Central Intelligence, as did the then-director, Director Woolsey, tell us about that.

We are also going to cover, at least in the questioning of Director Deutch, a subject which he and I discussed informally yesterday, and that is on the issue of reorganization of the Intelligence Community, what the impact was of warnings which were given in advance on a potential terrorist attack on Khobar Towers in Dhahran, which in fact occurred on June 25, claiming the lives of 19 U.S. airmen and wounding hundreds of our military personnel there.

We have a series of intelligence warnings, and the question is whether they were adequate to put the Department of Defense on notice as to what might happen. And looking forward, the question as to whether a revision of the U.S. intelligence community would enable us to do a better job in protecting U.S. personnel around the

world with a specific focus on what happened at Khobar Towers on June 25.

I visited Dhahran on Sunday, August 25, and talked to military personnel there, also U.S. intelligence officials there, and then visited in Jeddah the following day—I was in Dhahran on Sunday, August 25, and in Jeddah on August 26, talking to Crown Prince Abdullah and the Minister of Defense Sultan.

This line of inquiry is very important at this time because the Senate will be considering the Intelligence Authorization Bill, which has recommendations for reform of the U.S. Intelligence Community. And there is a real issue here about what ought to be done. The Senate bill has substantially incorporated the recommendations of the commission headed by former Secretary of Defense Aspin, and on his untimely death, the chairmanship taken over by secretary—former Secretary of Defense Brown. And the thrust of the Aspin-Brown Commission was to give substantially more authority to the Director of Central Intelligence and that is the thrust of the Senate Intelligence Committee recommendations.

There has been substantial disagreement by the Department of Defense and the Department of State, and it's turned out to be a fierce turf battle. But this Committee is interested in knowing what might have been prevented at Dhahran, not so much as an assessment of responsibility or blame in the past, but what can be done in the future to prevent a recurrence.

There were a whole series of warnings given—warnings on December 5 of 1995, and January of 1996, along with an extensive OSI, Office of Special Investigations, report of the Department of Defense; a State Department warning on June 13, 1996. Much of that is classified and the question is to how much ought to be revealed and when. There was a June 17, report by the Defense Intelligence Agency which finally was substantially declassified and contained the note that, quote, "A pattern appears to be developing that warrants improved security efforts," close quote, which certainly ought to have put the Department of Defense on alert.

There were some individuals whom I sought to interview in Dhahran, who were not there, having been reassigned. And yesterday, my staff tried to interview them and was told that the Secretary of the Air Force had stated that they could not be interviewed by the Intelligence Committee; something that I will be taking up in substantial detail. But these are questions which really need to be answered now if we are to be able to proceed and legislate on the matters which are pending before the Senate.

We had hoped to have the information by the Downing Commission. When the Secretary of Defense, Secretary Perry was before the Intelligence Committee on July 23, he declined to answer very pertinent questions, such as, specifically, what did the military request by way of moving the fence, and what was the Saudi's response? Said that was for the Downing Commission. A little hard, candidly, for me to understand why this Committee is not entitled to those answers now. The Secretary of Defense also declined to answer questions about whether that should have been bucked up the chain of command with General Peay having testified earlier before the Armed Services Committee that he didn't know about that. Secretary Perry again deferred to the Downing task force.

This Committee had asked the Downing task force to testify on September 11, and was told that the report was not finished when we made that request in August, and wouldn't be done until a date for testimony before the Armed Services Committee, which is scheduled for September 17. When Secretary Perry was questioned before this Committee back on July 23, and we were pressing him for answers on these questions, he said that the Downing Commission would be prepared to testify in a matter of, quote, "not weeks, but days," is probably the answer to when General Downing is in the area as we speak. And now it's not a matter of days, but more than six weeks have elapsed, and we do not have those answers.

That is a general outline as to where we intend to go today. And we are pleased to have with us the very distinguished Director of Central Intelligence, who I think has made quite a difference tackling very, very difficult problems in the Central Intelligence Agency—after the Ames incident, coming in and making very material changes. And I think a great deal has been accomplished in the somewhat more than a year since John Deutch has been the director there. We welcome you here, Mr. Director, and look forward to your testimony.

STATEMENT OF JOHN DEUTCH, DIRECTOR OF CENTRAL INTELLIGENCE

Director DEUTCH. Thank you very much, Mr. Chairman.

I am very pleased to have this opportunity to speak with you about Congressional notification. It's a subject which is tremendously important. At my confirmation hearing, I made it clear that I place the greatest importance in meeting the Director of Central Intelligence obligation to keep Congress fully and thoroughly informed. I believe I have done so. I believe our agency has done so.

What I would like to do is to spend no more than a couple of minutes reviewing what these obligations are, with less detail than you have in terms of their definition, but what we've done to assure the kind of notification of Congress that we understand is necessary for a responsible and effective management of our intelligence activities.

The first, as you noted, Mr. Chairman is covert action—the requirement to notify Congress on activity or activities of the United States which are intended to influence political, economic or military conditions abroad, where it is intended that the U.S. government will not be apparent or acknowledged publicly, but, of course as you noted sir, does not include traditional, diplomatic or military activity.

We have done so scrupulously in every case since I have become Director, have made those notifications to the appropriate Committees of Congress.

The second has to do with intelligence activities—keeping the Oversight Committees fully and currently informed of all intelligence activities, as you so correctly pointed out, of any agency in the United States government. The Committee stressed to me the importance of keeping Congress informed of intelligence activities in my hearings in front of this Committee stemming from concerns of activities of the CIA in Guatemala in the mid '80s, and indicated

the Committee's view of deficiencies in Congressional notification procedures.

Immediately upon becoming Director, I put into place new procedures and regulations for Congressional notification. These procedures define in writing what is expected of everybody and the Directorate of Operations and other offices of the Central Intelligence Agency on reporting to Congress. There's a systematic method for reporting up periodically, usually weekly, on a weekly basis from every office to the Office of Congressional Affairs which at the CIA is responsible for compiling these notifications and reporting them to this Committee and the Oversight Committee in the House.

Since May of 1995 there have been over 300 formal notifications of intelligence activities of significance to this Committee. On June 30, 1995 in my capacity as leader of the Intelligence Community, I sent a letter to all elements of the Intelligence Community explaining our responsibilities on reporting intelligence activities and asking them to establish procedures to inform us of all intelligence activities so that we convey it to you.

Third, Mr. Chairman, let me make a remark about providing substantive intelligence to this Committee and to Congress. As you've noted, the Director of Central Intelligence is required to provide intelligence to the President, Executive branch heads, senior military commanders, and where appropriate, to the Senate and the House. In addition, we are to furnish any intelligence information that's requested by the Intelligence Committee. Thus, Congress is an important statutory consumer of intelligence and receives finished intelligence product like other parts of the government. We comply fully with any Congressional requests for information.

Let me give you some examples. We provide the National Intelligence Daily and hundreds of other publications to this Committee and other interested Committees of Congress. We have delivered more than 1,000 staff member and Committee briefings and appearances since May 1, 1995. We are even going into a new era, where we have installed Intelink, an electronic communication system, both here and at the House Committee so that staff has easy access to—electronic access to our publications and services.

Let me sum up, Mr. Chairman. First, I personally take the obligation to keep Congress informed extremely seriously. Secondly, I believe we are doing that job and we've made significant strides to improve our performance at keeping Congress completely and thoroughly informed. And third, it is my judgment that this process is working extremely well.

Let me close my remarks here, Mr. Chairman. I'd be happy to answer as best I can any of the questions that you may have, sir.

Chairman SPECTER. Thank you very much, Director Deutch.

The issue of notification to the Intelligence Committees has been a very troublesome one in the past on Iran-Contra as to the duties to keep the Congress currently and fully informed. And the Committee has conducted an extensive inquiry into the events surrounding the sale of Iranian arms to Bosnia at a time when there was an embargo, when there was a United Nations position on it, at a time when the Congress of the United States debated that

subject very extensively as to whether the arms embargo should be lifted, whether the United States should take unilateral action.

And while it was reported extensively in the press that arms shipments were going to the Bosnians, there was never any official notification from the Executive branch, and it was not known at that time that those were Iranian arms. And had we known that they were Iranian arms and that it was the de facto position of the Administration to let arms go through, a very different policy might have been formulated and to provide arms from someone other than Iran to avoid Iran getting any further foothold in Bosnia.

And we have, the Committee has prepared a very exhaustive summary, which we submit, in accordance with practice and law, to the Executive branch for classification review and for declassification. That was submitted on August 8, almost a month ago, and we still have not gotten a declassification on that, which is very troublesome, because we had hoped to have that report in the public domain so that these hearings could have a greater significance on the specific factual matters. And I sought in my opening statement to summarize briefly what those underlying facts were.

This is an important matter because this is something which is subject to legislation on our Intelligence Authorization Bill which will be on the Senate Floor in the course of the next several days, certainly before the end of the month when will we conclude our work for the year. And if we do not have that report declassified, there are procedures where the Congress can give notice to the President, and the Congress, through our own activities, can declassify it and take independent action. We hope it does not come to that, but if that is our only recourse, that is what we should do.

Director Deutch, I would start with a very, very broad question which goes to the picture in its totality and the appropriate kind of notification that Congress ought to have. And my question to you, in a context where the Congress is actively debating unilaterally changing the arms embargo and supplying arms to Bosnia, should the Congress have been notified by the Executive branch as to what was happening with this green light, perceived green light, to Croatian President Tudjman having been given, and Iranian arms being shipped into Bosnia?

Director DEUTCH. Mr. Chairman, let me make two or three remarks.

The first is I want to stress that the Intelligence Community at the time, contemporaneously, reported on the transfer of the arms through Croatia—of Iranian arms through Croatia to Bosnia. So there was always accurate and timely reporting, beginning on the 27th of April 1994, of the transfer of arms. So I want to make it absolutely clear there was accurate and timely reporting contemporaneously of the Iranian arms shipment.

Secondly, I want to mention to you that our agency has reviewed the document that you are—your Committee report for declassification, we have submitted those to an interagency group, and I will get back to them to urge the timely and prompt declassification as much as possible for approval.

Chairman SPECTER. Thank you. We'd really appreciate that, Director Deutch.

Director DEUTCH. Third, to your central question, the issue about whether the communication between Ambassador Galbraith and Tudjman should have been communicated, let me say to you that this is a judgment that the Director of Central Intelligence is not responsible for making. This is clearly a judgment that has to be made by the Secretary of State and others in this, in our government.

And since I have also been stringently instructed by this Committee—correctly so—not to get into policy matters, I think it would be inappropriate for the Director of Central Intelligence to pass judgment on whether a policy matter should have been communicated to Congress or not. I am here to explain what our policy is and what we're responsible for with respect to intelligence matters. I might also say that hindsight is a very important part of this problem. What we know now is always better than what has happened in the real course of events. But my answer to your question about should Congress have been notified at the time about the diplomatic activity that took place is a matter that should be directed to the Secretary of State and it is not in my competence, and it would be improper for me to address here.

Chairman SPECTER. Well, Director Deutch, had you been notified of what was going on, would you have told the Vice Chairman, Senator Kerrey, and me about it?

Director DEUTCH. Well, let me go back and say to you that then-Director Woolsey, when he had information that was of concern to him about whether there was a potential violation of covert action, he certainly went to the appropriate people in the Administration to examine that matter. I certainly, absolutely would have felt, feel compelled to inform you, as was done at the time, of the transfers of the arms. It is not the responsibility of the Director of Central Intelligence to notify or even to be always knowledgeable of all the diplomatic activities that are taking place.

Chairman SPECTER. Well, had you known of this perceived green light to Croatia President Tudjman, had you been director of CIA then, which of course you were not, and had you known of that, would you have told the Vice Chairman and me?

Director DEUTCH. Sir, it's a hypothetical question. I don't know what I would have done at the time. I do know that at the time the Director of Central Intelligence told the correct people in the Administration of his concern to clarify an uncertainty about whether it was a violation—whether it was covert action or not, and it was determined not to have been. So the Director of Central Intelligence, in my judgment, followed the responsibilities that he had at that time.

Chairman SPECTER. Well, he did not know about the secret activities. He was not told, as the Secretary of Defense, Secretary Perry was not told, as he reported to this Committee. And the chairman of the joint chiefs of staff, General Shalikashvili was not told, as he reported to this Committee. So when CIA Director Woolsey was not informed, he obviously was not in the position to report to this Committee. I don't think it is a hypothetical question. It's a very real question, not hypothetical at all. It happened. The only factor in play is that you were not the Director at that time. But

you are the Director now, and you have been fastidious in reporting to this Committee.

But on the face of the statute on notification—and this is totally separate from the question of covert action—on the issue of notification, the statute is very explicit, quote, “The President shall ensure that the Intelligence Committees are kept fully and currently informed of the intelligence activities of the United States,” close quote. And the act specifically imposes that requirement of all departments, which would obviously include State. And Senate Resolution 400 provides that intelligence activities include covert or clandestine activities affecting the relations of the United States with any foreign government.

Now put aside covert, because that’s an issue of controversy. And my own view is that reasonable men and women could come to different conclusions on it. I have a view as to whether or not it’s covert, but put that aside for the moment. So you have intelligence activities defined as, quote, “clandestine activities”—certainly it was secret—“affecting the relations of the United States with any foreign government.” Certainly it affected our relations with Croatia and Bosnia at a minimum, and realistically with our allies in the UN when we were abrogating the embargo.

Now is there any way—and you and I talked about this yesterday—because we had a lot of notice. I gave you my memorandum on it. So you go back and check the statute yourself.

Director DEUTCH. You told me not to tell anybody that.

Chairman SPECTER. No secrets. All out in the open. Lots of time to prepare and analyze. Is there any way that you can read that, Director Deutch, where you have clandestine, secret, and that affects the relations of the United States with at least Bosnia and Croatia—any way you could read that as not being a requirement to tell the Intelligence Committees?

Director DEUTCH. Mr. Chairman, I am not a lawyer. Happily, I am not a lawyer. But I have thought about this to the best of my ability and I want to tell you that there is an essential difference here between us in our interpretation of this matter. That is, did what went on between Ambassador Galbraith and President Tudjman, was that an intelligence activity, or was that a secret diplomatic transaction or activity? In my judgment it was a secret diplomatic exchange, which happens a million times a day and it’s not an intelligence activity. The fact that it was secret does not in my mind make it an intelligence activity. The fact that it was conducted by an officer—not in the intelligence part of the Department of State—but by a foreign service officer as an ambassador, under instructions, to the head of state or another country is, in my mind, a diplomatic activity. It was secret. I do not regard it as an intelligence activity. And that, I think, is the only difference between us on this issue.

I do not think that I was responsible or that any DCI would be responsible for reporting the fact of that diplomatic exchange. It was a secret diplomatic exchange.

Chairman SPECTER. Well, perhaps the most compelling part of your answer was the part where you said, happily, you weren’t a lawyer. I’m going to come back to that in some detail. But Vice

Chairman Kerrey cannot be with us after the vote, so I'm going to yield to him at this time.

Vice Chairman KERREY. Thank you very much, Mr. Chairman.

First of all, welcome, Director Deutch. I believe that every Member that's here and all Members of this Committee share the view that we need to have more complete notification of Congress of the actions and policy changes of the executive branch. I think that notification is increasingly critical as we try to make judgments about how to write laws and, indeed, what kind of statements we might be making on the floor of the Senate that could have an impact upon the Executive branch's capacity to carry out their policy. If we don't legislate in the full light of all the facts available on a particular issue, we run the risk of writing bad law.

Now, there are some that would say that that risk is always present. But it increases when we are denied very specific information that might be critical to the decision. And I believe, given the Administration's lack of information to Congress in '94 regarding Iranian arms shipments to Bosnia, it is fortunate, in the end, that we passed good law on the arms embargo and sanctions in the former Yugoslavia. But we shouldn't have to rely just on luck. And when it comes to information about what the government is doing, we shouldn't have to rely on rumors or news reports either. And some have come before this Committee and said, well, you should have known. There was an article in the Washington Times, and some have implied that that's as good as notification. I know, because you've responded to that, to my question, would you like us to call you before the committee every time we read something in the Washington Times, the New York Times, the Washington Post, and your answer has been, no, you would not like that to happen, and, thus, we don't view that as notification, nor do you.

We on this Committee, however, I believe, need to ask the question, does this mean that we need an additional statute that requires additional notification. I've come down on the negative side of that question, at least at the moment. I come to this conclusion when I try to draft a meaningful new notification requirement. In other words, it's easier to say that I want more notification than it is to actually write a law that produces it, because once I do that and ask Congress to be informed of all changes in foreign policy, leaving aside questions of scale, there are going to be instances, such as the Iran-Bosnia arms case in which an Administration witness has stated, U.S. policy didn't change. Yet, many of us believe it did, which leads to the question, do we need to be informed of all substantive intelligence, and if so, should we—then we're going to have to prepare, on this side of Pennsylvania Avenue, we have to prepare for a tidal wave of information rolling up the hill.

And today, we're already, this Committee is inundated with notifications from the Intelligence Community. And again there's already a definition problem regarding substantive.

Anyway, Mr. Director, I'd rather leave the law alone in the area. I'd rather let the Executive branch continue to conduct the foreign policy, defense policy, intelligence operations that it's responsible for, trust the current law and the enlightened self-interest of the Administration to keep Congress informed, and allow us with respect, as we are doing in this particular instance, to say, I think

we ran the risk that we didn't need to run in not bringing some level of notification above what we had when we were making very, very important decisions about sanctions in 1994.

When we urged generous notification for Congress to our, to the Director, this morning, we are, it should be obvious and it needs to be stated for the public, we are preaching to the choir, because you, Director Deutch, have been informing this Congress very fully. You have been erring, if anything, on the side of notification and you'd been holding us, as I think is correct for you to do, responsible to understand and act and keep secret the large amount of information that you're giving us. You put the burden on us, and I think that's appropriate. And I look forward to having a chance to ask you some additional questions.

And I'm going to reach a bit beyond, which is typical, I suspect, of all of us, the purpose of this hearing and use—use the hearing to ask you your own views of our current strategy in regards to Iraq. The judgment made, I believe correctly by President Bush, was to pull up short and not go into Baghdad with DESERT STORM. We did pull up short. The belief then was, that sanctions would work in bringing down the regime. Sanctions have not worked to bring down the regime. Indeed, it's likely that sometime in relatively short order, Iraq is once again going to be allowed by the United Nations to sell oil. I don't know when that's going to happen. There's a lot of pressure to get that done.

Presuming that the objective of getting rid of Saddam Hussein is a good objective, both, in my judgment because of the national security concerns in the region and because by all measurements, he is, at least as measured by the way that he treats his own people, as bad as Stalin and Hitler. It is in our—if that is still the objective, do you believe that we at some point, perhaps after the election, when things calm down a bit—it's difficult to talk about these things in an open environment—do you think that it's going to be worthwhile for us to re-examine the means that we have selected to achieve the objective that we've declared?

Director DEUTCH. I believe that the most recent action by Saddam Hussein in the region which, as you know, as the most recent intelligence indicates, his troops of his motorized and tanks units are withdrawing from Erbil and the northern Iraqi—Kurdish internal frontier, has reminded us once again—and when I say us, I don't only mean the U.S. government, I mean the states in the region, and our allies elsewhere in the world—that we are going to have to deal, in a political way, with the future of Iraq in making sure that the people of Iraq get a democratic government.

So my answer to your question is, I think that in the fullness of time, we will see a great deal of greater discussion about ways of moving Iraq towards democracy. This most recent example of Saddam Hussein's aggression just indicates the importance of doing so.

Vice Chairman KERREY. Well, I hope that—I mean, presuming that you're in the next Administration, I hope the Administration views this, and I hope the Congress consistently keeps the pressure on to use this particular situation as an example of why notification is so important. There'll be a considerable amount of disagreement, indeed, as I said earlier, the overthrow of Saddam Hussein, that really is not even our stated policy at the moment. I mean,

this is one where a considerable amount of discussion and notification is going to have to occur, even though it may not be required by law in order to make certain that—you know, whatever we do from this moment forward, enjoys the support of Congress, presuming that it's successful.

Can you give me your—again, sort of digressing here off the purpose of this hearing—give me your own views of what you think is going to happen in Bosnia on the 14th of September, in the election?

Director DEUTCH. Not only are you asking me to digress, I'm not fully prepared. I think this election is going to take place, and I think I'm not going to be able to—the likely candidates are all candidates who are going to be very much oriented towards their own ethnic constituencies. But the election will take place more or less without incident. I have a fairly good feeling about that election taking place on time.

Vice Chairman KERREY. You know, I would just, for the record, I would just—for whatever it's worth, I believe that if it was worthwhile canceling the election local elections, it was probably worthwhile canceling the national election, given the nature and at least what I'm reading in the newspaper about the nature of the campaign itself and the influence of Karadzic, you know, in these elections, it seems to me that a pretty good case could be made—

Director DEUTCH. Senator, I think that, actually, the issues are slightly different between the two elections. And what I would like to do is to come back to the more thoughtful and up-to-date response here.

I must say, that for the last 10 days or so, or even a little bit longer, my attention has been riveted on Iraq and not on Bosnia. So, let me get a more thorough answer for you.

Vice Chairman KERREY. Thank you.

Chairman SPECTER. Thank you. We have just a very few minutes left on the vote, so we're going to proceed to do that now, and we'll return, and it'll be Senator Shelby's turn to question.

Director DEUTCH. Yes, sir.

[A recess was taken from 10:15 o'clock a.m. until 10:35 o'clock a.m.].

Chairman SPECTER. The Committee will resume and Senator Shelby will do the questioning.

Senator SHELBY. Thank you, Mr. Chairman.

Dr. Deutch you said you weren't a lawyer and that's what I tell people too. I tell them I wasn't much of one, you know. Small businessman. I know your background and it's all right. But you're pretty good with words. I believe it was your phrase a few minutes ago, you said, and correct me if I misinterpret what you said, a secret diplomatic exchange was not an intelligence activity. In other words, that was your interpretation.

But that's not always so is it? You know, a secret diplomatic exchange could be the utmost of an intelligence matter. Depends on what it is and someone's interpretation of it.

Director DEUTCH. It certain—

Senator SHELBY. I'm not just being a semanticist.

Director DEUTCH. No it certainly would be if it was between—

Senator SHELBY. Between anybody. If it was very important to a nation.

Director DEUTCH. It is of extreme importance. What I'm trying to say, Senator, is that if it is a secret diplomatic exchange undertaken by our government purposefully so that it is not the responsibility or not reported as, nor should it be reported as an intelligence act.

Senator SHELBY. You've been a candid man and I've known you quite a while, but, when you're dealing with a change of our entire policy that Senator Specter has talked about before, a change of our policy dealing with the arms embargo to Bosnia, what is our change? I mean, no one knew it like—we were saying one thing and doing another. We were saying to the world and to our allies that we wanted to enforce the embargo. Is that right, basically? Yes or no? That was the policy—the official policy of the administration was to embargo arms into Bosnia. That was my understanding of what was going on. Is that right?

Director DEUTCH. Senator, the business of describing our policy and whether it was a change or not is not my—

Senator SHELBY. You didn't answer my question.

Director DEUTCH. Well sir, I want to say—

Senator SHELBY. OK.

Director DEUTCH. I want to be very careful about it.

Senator SHELBY. I know that. You have to be.

Director DEUTCH. Because I've heard in this room, before—

Senator SHELBY. I know.

Director DEUTCH. It is not my job to talk about what our policy is.

Senator SHELBY. And I know you don't make policy, not directly, anyway.

Director DEUTCH. And I do not want to be the person who you listen to and rely on as a characterization of what our policy was or how it changed.

Senator SHELBY. But, Dr. Deutch, as Director of the Central Intelligence Agency, if we have a substantive change of policy—and I'd submit this was a change of policy—was it known to the world? Obviously not. Was it covert? It was obviously secret. Was it brought about diplomatically, as we've interpreted, by a nod and wink, by looking the other way or whatever? But nevertheless, it's still a substantive change of policy. Shouldn't—under the law that Senator Specter quoted earlier and you're very familiar with—shouldn't the Central Intelligence Agency inform this Committee, the Select Committee on Intelligence in the Senate and the House of this?

Director DEUTCH. Senator—

Senator SHELBY. This might be hindsight, but shouldn't they have done that?

Director DEUTCH. Senator, there are two parts of this. Should the Congress have been informed about the transaction, the diplomatic activity? People can differ on that. That's outside of my purview. Should the Central Intelligence—

Senator SHELBY. How could they differ on it?

Director DEUTCH. Let me finish my sentence and I'll come back.

Senator SHELBY. OK.

Director DEUTCH. The second question is should the Central Intelligence Agency have been responsible for reporting it. Absolutely not. Now, you see, my point is, if you want to say to me, somebody—like the Secretary of State—should have come up here and informed somebody on this. That's—I understand that point of view. Take it up with the Secretary—

Senator SHELBY. Are you saying that's the Secretary of State's job, and not your job?

Director DEUTCH. This is a policy—yes, sir. My job is to keep you fully and currently informed on intelligence activities.

Senator SHELBY. And you don't consider this an intelligence activity?

Director DEUTCH. That's right.

Senator SHELBY. Because your interpretation and your phase was, again, this was a secret diplomatic exchange, not an intelligence activity?

Director DEUTCH. That's correct, Senator.

Senator SHELBY. But you would have to concede, wouldn't you, Dr. Deutch, that that's subject to interpretation?

Director DEUTCH. Yes—

Senator SHELBY. Your interpretation is that it was not an intelligence activity. It was not something that you had—

Director DEUTCH. That's correct, sir.

Senator SHELBY [continuing]. An obligation as Director of the Central Intelligence Agency to inform this Committee.

Director DEUTCH. That's exactly right, sir.

Senator SHELBY. But a lot of us feel quite the opposite. That this was an intelligence activity, I mean, of the highest order. It was a change of—a substantive change of policy conducted with arms going to Bosnia. And our government, sir, saying we—basically, when the Ambassador, Ambassador Galbraith called, no instructions. What is that except and nod and wink? Isn't that intelligence?

Director DEUTCH. Sir, the fact of the transfer.

Senator SHELBY. Okay.

Director DEUTCH. The fact of the transfer, I want to tell you, was contemporaneously reported absolutely. Okay, so the fact that the transfer took place was absolutely reported. Officers of the Central Intelligence Agency did not know about the policy, the diplomatic exchange, could not have reported it. Now you say to me, shouldn't it be the responsibility of the Director of Central Intelligence to report secret diplomatic exchanges of great importance. The answer to that is I don't believe so, because we can't conceivably be responsible for knowing all the activities that take place everyday throughout the world by the Department of State.

Senator SHELBY. Dr. Deutch.

Director DEUTCH. Yes, sir.

Senator SHELBY. You did know—your agency did know that there had been a change in our policy, although it was a basically a secret change in our policy. In other words, it was not made known to the world, and your agency knew that.

Director DEUTCH. No, what the Agency knew—and the Director did—what the Agency knew and the Director behaved, in my mind, entirely appropriately—they knew that there was this transaction

going on. They were concerned about whether it was a covert action and the Director—the chief of station and the Director behaved entirely appropriately in going to the relevant individuals—the Secretary of State, the National Security Adviser—and saying I'm concerned about this, what is going on? That is what Director Woolsey did and he did it appropriately. That is absolutely his responsibility. He was focused on the right point.

Senator SHELBY. Dr. Deutch, would you consider this in the context of a change in our policy by a nod and a wink, or looking the other way, a substantive change? In other words, to let the arms go through? We knew they were going through. We knew that the Croats were—that they were coming through Croatia and where they were coming from to Bosnia, did we not? You knew it, or the Agency knew it.

Director DEUTCH. Well, first—you've got to be a little careful about what I knew.

Senator SHELBY. Absolutely, the Agency knew.

Director DEUTCH. Yes, and we reported it. I mean, we did not keep back—

Senator SHELBY. Absolutely, but you didn't report it to this Oversight Committee?

Director DEUTCH. Oh, you know, the fact of the transfers were absolutely reported. The fact that the transfers were taking place, the first day they were reported was on the 27th, I believe, or the—

Chairman SPECTER. But the reports didn't say they were Iranian arms, did they?

Senator SHELBY. They didn't say Iranian arms. I yield to Senator Specter for a minute. If you want to go ahead.

Chairman SPECTER. No, I just wanted to interject that one focal point, because that's a critical distinction.

Director DEUTCH. Yes, sir.

Senator SHELBY. Yes, very critical.

Director DEUTCH. I'm sorry, what was the—I'm sorry, I missed it, sir.

Chairman SPECTER. You say that they reported arms shipment, but they did not—he did not report to the Intelligence Committee that they were Iranian arms shipments.

Senator SHELBY. A big difference.

Director DEUTCH. I don't—well, may I go back and check for the record? I don't think that's correct. I think we reported they were Iranian shipments. There was a great deal of reporting in May about Iranian arms shipments. I mean, we don't mean to make this—disagree on facts here. The NID, I believe—I think it was the National Intelligence Daily, but we can easily get the facts here—there was contemporaneous reporting about transfer which had happened before in 1992. The question which is being posed to me is what about the reporting on the diplomatic exchange between Ambassador Galbraith and Tudjman. That is where we're having a problem.

Chairman SPECTER. Well, if you would yield.

Senator SHELBY. I certainly will yield to the Chairman; go ahead.

Director DEUTCH. I certainly, absolutely believe and state categorically we should have immediately reported the fact of the transfer of the arms, and I believe we did so.

Chairman SPECTER. Well, all right. It is plain that you reported the transfer of arms. You go back and check whether you reported that they were Iranian arms. But there is no question you did not report—CIA did not report because it didn't know—that this transfer of arms was being undertaken because of a perceived green light which President Tadjman got from the State Department.

Director DEUTCH. We did not report that. That is correct.

Chairman SPECTER. Okay.

Director DEUTCH. We did, I believe, and I'll go back and check on the Iranian part. Yes, sir? Yes, Senator?

Chairman SPECTER. You have some more time. Senator Shelby.

Senator SHELBY. Why didn't you report that? That we had given a green light to Mr. Tadjman?

Director DEUTCH. There were four—there were two reasons for that. The first is that we didn't know, okay, at the time. And the second is, I state again—

Senator SHELBY. When did you know? You said you didn't know at the time. When did you know?

Director DEUTCH. When did the Director of Central Intelligence know?

Senator SHELBY. Yes.

Director DEUTCH. I can't answer that question.

Senator SHELBY. That's what I mean. When did the Director.

Director DEUTCH. I apologize. I can't—

Senator SHELBY. The then-Director.

Director DEUTCH. The then-Director? I cannot answer for him. I believe that on May 5th, he saw the Secretary of State and there was a conversation in which there is, I believe, a difference of recollection between what was said at that. But I think that he did immediately do the right thing. He went and he said there's something here I don't understand, and he came forward with it to the right, appropriate people in the Executive branch.

Senator SHELBY. Dr. Deutch, you know, as I said earlier, I believe you're a candid man, and I've worked with you some. You were not over there at that time, I don't recall. I don't believe you were there.

Director DEUTCH. That's correct. I was not, sir.

Senator SHELBY. But isn't it important to the relationship between this Committee, Select Committee on Intelligence in the Senate, doing oversight of the CIA and others, that the CIA, whoever's over there, be open and candid with us? That's why this Committee was set up, is it not? Among other things.

Director DEUTCH. I wish, Senator, that you had been here when I started with my opening statement.

Senator SHELBY. Okay.

Director DEUTCH. I want to tell you, I believe that absolutely. I've said that absolutely since the day of my confirmation hearing, keeping this Committee informed has been a big deal, is a big deal and is important.

Now, what I'm saying to you here is that the Committee has also said be clear about not getting involved in policy matters, which is

also important for the integrity of the Intelligence Community. We are not the people who are responsible for even very important diplomatic exchanges. That's somebody else. That's the Secretary of State.

I will tell you that the Committee—the CIA's reporting on the transfer of the arms, which is what they knew about, was punctual and timely, and accurate and complete, and I'm going to go back and check whether the first report included Iranian arms or not, but I believe it did. I do not think, sir, even when there is an important change of policy, that you want to say that it is the Director of Central Intelligence Agency's responsibility to report on changes in policy that he did not direct, he did not execute, he did not control.

Senator SHELBY. But if he knew?

Director DEUTCH. So somebody may have—

Senator SHELBY. Don't you believe it's important, Dr. Deutch, that this Congress, having debated and voted on this arms embargo, not once but many times, this Congress, very concerned about the presence of, influence of, then and now, of the Iranians in Bosnia in a basically a Muslim country there, knowing the demeanor and the goals, at least stated goals of some of the Iranians, that that was an intelligence matter, rather than a diplomatic exchange? Dealing with Iranian arms shipments. Senator Specter, the Chairman, emphasized that, and that's what we're talking about. If it had been British arms, I still say we should know. But Iranian arms? That is an intelligence matter.

And I'd hope you wouldn't be telling us that a so-called secret diplomatic exchange couldn't be an intelligence activity. In other words, gosh, you know, over at the CIA if you were to be privy to some secret, some interception of a diplomatic exchange that was of the utmost intelligence to this country, you'd still say that was a diplomatic exchange? Are you saying—

Director DEUTCH. Sir, if it had been carried out—if it had been carried out, to the best of our knowledge, under the correct authority of the Secretary of State, it is his responsibility to do diplomacy, not ours. But if I would have been concerned about it, I would have gone to the Secretary of State or I would go to the National Security Adviser, and in extremis I would go to the President and say, here's something I know about a legitimate diplomatic activity of the Department of State—

Senator SHELBY. And this Committee ought to be informed?

Director DEUTCH. Congress ought to be informed appropriately.

Senator SHELBY. Uh huh.

Director DEUTCH. I'll tell you, I'm concerned about it. I may be so concerned about it that I will walk if you don't do something about it. But I will tell you, I don't believe it's an intelligence matter and I don't believe you want the Director of Central Intelligence reporting on important, critical diplomatic matters of this country. That is for the Secretary of State to do somewhere else. We are not the ones who should be looked at as the watchdogs of even the most critical kind of secret diplomatic transactions. That's what we have the Secretary of State for. We are and we should be held to the highest standards of reporting on intelligence matters, and we want to do that.

Senator SHELBY. But have you met those standards here? Not you, but has the—

Director DEUTCH. I believe, I believe largely so. Maybe not perfectly, but largely so. I don't think that that's what worrying you, either. I think what's worrying you is why didn't Congress learn about this diplomatic exchange. That's what I believe. It's not—

Senator SHELBY. Because of the Iranian influence here, and because of a change of—

Director DEUTCH. Because of, yes, I understand the importance.

Senator SHELBY. That was an intelligence matter. I could argue with you all day, but I believe you're—and I know you're a smart man, but that's very—it goes to the intelligence.

Mr. Chairman, thank you.

Chairman SPECTER. Thank you, Senator Shelby.

Senator BRYAN. We're proceeding in order of arrival.

Senator BRYAN. Thank you very much, Mr. Chairman. I arrived a little late so perhaps we have gone over some of this, Mr. Secretary. Let me try to put this into some context as I understand it.

The diplomatic exchanges that occurred, as I understand, were in April of 1994, am I correct?

Director DEUTCH. Yes.

Senator BRYAN. And in April of 1994, you did not hold your present position?

Director DEUTCH. Yes.

Senator BRYAN. You were Deputy Secretary of Defense.

Director DEUTCH. Yes.

Senator BRYAN. And as I understand it, it's your position that this colloquy and the policy that was being implemented—the non-response, if you will—that that is essentially diplomatic in nature?

Director DEUTCH. Yes.

Senator BRYAN. And that is not your responsibility or was not the responsibility of the intelligence agencies to communicate that to the Congress?

Director DEUTCH. Yes.

Senator BRYAN. You agree that it should be communicated to the Congress in a timely and appropriate fashion, but by the agency that's responsible, if I understand your testimony?

Director DEUTCH. I would say that even today I don't want to make that judgment. If you ask me that as an individual, as a person, my answer to that would be yes, but the DCI is not the person who should make the judgment about the reporting of those kinds of activities.

Senator BRYAN. But let me be clear, you do agree that Congress should be notified. At least as I understood your position, you did not believe it was the appropriate role for the DCI to make that notification, but that Congress should have been notified.

Director DEUTCH. Yes.

Senator BRYAN. And based upon your earlier characterization that this is diplomatic in nature, I take it that your position would be that that should come through the State Department channels?

Director DEUTCH. Yes.

Senator BRYAN. I don't think that's terribly difficult to comprehend myself. Now, what position would the DCI take if, indeed,

there was information that was of such a critical nature that you felt that it should be communicated and that had not been communicated? How would you, at that point—

Director DEUTCH. Outside of my area of responsibility.

Senator BRYAN. Yes.

Director DEUTCH. I just described it to Senator Shelby. I would go to the Secretary of State. I would go to the Assistant to the President for National Security. And if need be, I'd go to the President and say I am concerned about this. Something has to be done. And if it weren't done, I would walk.

Senator BRYAN. I also understood in your colloquy with Senator Shelby that you raised a question in terms of the role of the CIA, perhaps policy, maybe even legal, is not to report on another agency of government, in this case the State Department.

Director DEUTCH. If it's legitimate—if it's undertaking legitimate business. I mean, I could imagine if they're not undertaking legitimate business, then I think I would give a different answer, but if they're undertaking the legitimate business of the government, the answer is yes.

Senator BRYAN. And in this case, you believe that the discussions that occurred with the State Department and with President Tudjman were legitimate diplomatic activities?

Director DEUTCH. Yes.

Senator BRYAN. Let me say, could you indicate at this point whether or not you would agree with the nature of the conversations that occurred, and the decisions that were made at that time. Do you have an opinion, as the DCI, as to whether that was correct?

Director DEUTCH. Senator, I want to pass on that. Can I pass on that? Is that all right?

Senator BRYAN. All right. Okay. All right. And you're going to get us information, just your recollection is that the Committee was notified of the Iranian arms transfer, but you want to be sure that that is in fact the case?

Director DEUTCH. No, I think there's no question that there was broad distribution in May. The question's about what was said in the very first report, of whether it was Iranian or not. But there's no question there was a tremendous amount of reporting about the fact of the transfers at that period of time. That I remember very clearly as a consumer myself.

Senator BRYAN. Can you share with us any information publicly in terms of our present situation in Iraq? I know that's beyond the scope of what we're talking about. But what can you tell—

Director DEUTCH. I addressed that earlier, sir, in response to a question by Senator Kerrey. We are seeing the withdrawal of the mechanized and armor units from the Kurdish territories in Northern Iraq, back to their garrisons fairly systematically. We find that most of the units are returning. And the—there is compliance with the change in the no-fly zone. So for the time being, it looks like the Iraqi military has stood down.

Senator BRYAN. Are the French and British participating in the expanded no-fly zone?

Director DEUTCH. I'm not current on what the French and British are doing in the no-fly zone. I just haven't focused on that this

morning. I know there's some discussion of French participation, but I'm not cognizant of it, sir.

Senator BRYAN. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Bryan. Director Deutch, I know you have other commitments.

Director DEUTCH. I'll stay.

Chairman SPECTER. And, well, we appreciate your staying. We were interrupted by the vote, and there are some other questions that we'd like to ask.

You responded to Senator Bryan that Congress should have been notified about the perceived green light. And I can under—did I understand you correctly on that?

Director DEUTCH. Yes. I mean, that is a statement that I should have made very clear is not, as a Director of Central Intelligence, but I understand the point of view which says it's an important policy issue, that it's—Congress ought to be informed by the appropriate authorities. It's their judgment to make.

Chairman SPECTER. Well, I can understand the collegiality of the Cabinet, and the positions that you've taken. And I'm not going to pursue the plain language which my lawyer's interpretation says constitutes an intelligence activity. We have a number of lawyers coming after you, and we can take that up.

And I have a strong sense, having worked with you for a long time, that had you been DCI and had you known about the perceived green light, that you would have told at least the Chairman and the Vice Chairman of the Committee. But having said that I can see why you're reluctant to go further than you did in your testimony in response to my questions or Senator Bryan's questions.

Director DEUTCH. Mr. Chairman, can I ask—Mr. Chairman, I—

Chairman SPECTER. Some of our Members have come and gone and I just want to yield to them if they wanted to be present. Do you want to say something at this point? Proceed.

Director DEUTCH. It's all right, sir. I'll pass.

Chairman SPECTER. You're sure?

Director DEUTCH. Yes, sir.

Chairman SPECTER. Go ahead. No?

Some of the most important testimony is solicited under just that kind of an exchange.

Director DEUTCH. I'm glad I said no. [General laughter.]

Chairman SPECTER. Due to the limitations of time, let me proceed without going further on the definition of Intelligence Committee or covert action, or the diplomatic exception, to ask your view, Director Deutch, about our overall thrust on reforming the Intelligence Community, trying to give more power to the Director of Central Intelligence, in a context where the Defense Department has 85 percent of the budget, makes the appointments, trying very hard to get the question of concurrence so that the Director could—Director of Central Intelligence would concur with the Secretary of Defense on appointments which are very key—NSA, for example, where we had so many problems last year and have ongoing problems—and where the general view is that the Director of Central Intelligence is the key operating officer to coordinate all the activities, and on the reprogramming and on the budget.

And I know that your original position was to have more authority in your office institutionally, and that that had been an Administration position and there was considerable objection. I characterized it as a fierce turf war, with objections coming from the Department of Defense and the Department of State.

But as we look to the future, and try to figure out ways to give better intelligence to the United States, and so many lives, and as we have had terrorist activities of enormous proportion, and our work is focusing now, as said earlier, on the June 25, incident in Dhahran. And I was just there and saw how close Building 131, Khobar Towers, was to that fence. And how tragic it was, and how anybody who would have seen that would have, I think, instinctively and conclusively have said something more needs to be done.

And we know the difficulty of dealing with the Saudis. And that is a very, very sore spot even today as we move forward with the investigation to try to find out who was responsible for the bombing.

Isn't there some way that we can structure our Intelligence Community to do a better job where all of these reports come in where you have a December 5, high-level warning about the likelihood of an incident which did occur, and you have the January 1996, OSI report, and you have the 13 June State Department report, and the 17 June DIA report? Isn't there a better way? We've got a haystack. Some people say it's a needle. It doesn't look that way to me with all of these reports, and with these towers, and our thousands of service people there, and the closeness of that fence.

Isn't there a way to restructure our Intelligence Community to give more power to somebody? Maybe it's not the DCI, but he's the logical candidate. Or maybe it's the FBI, the way the FBI is moving overseas. I knew that would bring a little frown to your face. But isn't it important that some institution, some individual, have greater consolidated authority—that you can't expect the Secretary of Defense to know everything—to do a better job at protecting our service people?

Director DEUTCH. Mr. Chairman, you've asked a lot of important questions. I am not prepared to address them all.

Let me begin by making a remark about intelligence reform, and stress that I had a great deal of regard for the bipartisan Aspin-Brown report, and generally found myself very much in favor of the recommendations made throughout that report, by Les Aspin and Harold Brown and their colleagues. We had a long and full debate about how much of these—how many of these recommendations should be put into place this year. And there were some modest, but I think important, steps in both your bill and in the Defense Authorization Bill towards improving the way this country conducts its intelligence operations.

I would note two of them which are of particular—three of them which are of particular importance. One is the personnel reform. The second has to do with the ability of law enforcement to task intelligence when it has to do with matters like counterterrorism and counter-narcotics. The third is with the establishment of the National Imagery and Mapping Agency, with authority still with the Director of Central Intelligence.

These are important steps that have been taken. Yes, I believe more needs to be done. But I would not advocate—I do not think it is timely, that more gets done now. And I think it's important that that legislation—both the Defense Authorization Bill and the Intelligence Authorization Bill—be passed because I do not think it helps this country carry out its intelligence activities at a time when it's desperately needed. And I will say that it will strengthen what we do in counterterrorism and counternarcotics as well.

Is there more that needs to be done? Yes, I think there's more that needs to be done, and I hope that in the fullness of time, that we get more reform on these matters.

Chairman SPECTER. Well, the problem—

Director DEUTCH. Along the lines of the Aspin-Brown Commission, yes, sir.

Chairman SPECTER. The problem, Director Deutch, with the fullness of time, is that there are risks daily. And while we were debating the Aspin-Brown report, the June 25 terrorist attack occurred.

Now, if the authority is to be lodged in the Defense Department, then we have to expect the Pentagon and the Secretary of Defense to carry out those duties. And there are a lot of warnings. If the structure is in place now, which is the best one we can find, then more should have been done. If you can't expect the Secretary of Defense to do more or to respond to these warnings, like the 17 June DIA report, which goes to the Pentagon, but he doesn't read, that there is too much of a burden there, then let's restructure it.

But I don't think we can wait. I don't think we can wait weeks. When the Secretary appears before this Committee on July 23, and says, you'll have the Downing Report in a matter of days and not weeks, and weeks have passed and the Congress is going to go out of session, and we're now considering the Aspin-Brown report, we're considering the whole matter, and it is not before us, and our Committee is denied information from Air Force officers at the scene, time is more than of the essence.

You talk about time is of the essence. We lawyers talk about time is of the essence in a real estate transaction. We're talking about lives are of the essence in getting this moved forward.

Well, I'm going to leave it there because you and I talked for an hour and a half yesterday morning, and we've talked a lot here today, but we need to do something more and we need to do it now.

Before taking up a couple of other subjects, let me yield to Senator Bryan, who didn't have very much time.

Senator BRYAN. I appreciate that. Mr. Secretary, let me—you and the Chairman have had an interesting colloquy about the nature of reform. Implicit in Senator Specter's questions were a series of events that were reported on those that were at least in the field command. I happen to also serve on the Armed Services Committee, as you know. It is my sense the tragedy that occurred in Saudi Arabia with respect to our troops was not a question of an intelligence failure—that is, all of the information was available and was provided. But somehow through the chain of command, the individuals, the field commanders, and some of their exchanges with respect to their counterparts in either the Saudi armed forces or the Saudi diplomatic levels—that somehow those reports with re-

spect to extending the perimeter of the fences and all of that had not been reported up in a timely fashion through the chain of command.

I'd like to get your assessment essentially on whether you feel that there was any intelligence failure in terms of notifying the military commanders in the field?

Director DEUTCH. We certainly do not believe that there was an intelligence failure. Having said that, I want to make it clear that nobody has suggested, nor is it, I think, reasonable to expect that we had precise tactical information about time and circumstances of the attack.

With respect to your other questions, let me say that I know that Secretary Perry is seized of this problem. Having been a close associate with him for a long time and having been his deputy for over a year, I want to tell you that I have a total confidence in his ability to get to the bottom of this matter.

Senator BRYAN. As do I. As do I.

The point that I sought to make there is the context of our intelligence hearing today that, having looked at the information that was available, it seems to me that you provided that information to those who needed to have that information. What was done with that information after it was provided and what additional follow-through by the field commanders, I can tell you that this Senator was greatly distressed in our Armed Services Committee hearing that we held, to find out that I'm talking about the general officers that were involved in this—the Central Command commanding general and others—that there was, in fact, a request that had been made at some level to move that fence, the perimeter fence that was ultimately the cause of the explosion devices being placed in such proximity that we lost all of those personnel.

Essentially that conversation had occurred as we were told, but it was a very murky thing. And at the point of our hearing before the Armed Services Committee, it was unclear to us as to whether or not that information had been sent up to the chain of command, to the Pentagon. That was the concern that I had. But the information in terms of the various things that Senator Specter has raised, the various intelligence data that has been alluded to here, was provided to those individuals and whether they took the appropriate follow-through action, at least in my mind, I have a substantial question.

And you may or may not care to comment.

Director DEUTCH. No. I think I understand the problem you pose, sir.

Senator BRYAN. Mr. Chairman, those are all the points that I wanted to make.

Chairman SPECTER. Thank you, Senator Bryan.

Just a couple more questions on matters which have been raised by other Senators, which are collateral, but very timely.

With respect to Iraq, Director Deutch, I have supported the military action taken because of Saddam Hussein's record—that if you let him go beyond a defined line, he may go anywhere. He's a short distance from Kuwait. He's not too far from Saudi Arabia. In the course of the past month, I had occasion to be—as I said earlier—in the Gulf states and Oman, where there's enormous concern both

from Iran and Iraq. And questions raised about containing Saddam Hussein. If Saddam Hussein goes, maybe Iran will go on the warpath—that there's sort of a balance between the two of them.

But a big part in many of the reactions, including mine, to supporting the military action was the apprehension as to what Saddam Hussein was going to do next. To the extent you can in this open hearing, I think the public would be interested to know what our assessment is as to where Saddam Hussein is likely to go if he is not contained.

Director DEUTCH. Mr. Chairman, I don't think I can be very helpful in public session. Let me just say that I completely concur with the comment you've made that Saddam Hussein, as this recent action illustrates, remains a tremendously dangerous, undemocratic, and highly unstabilizing force in the region. And he can, at any time, strike out in ways that are very disadvantageous and harmful to the international community. And we are going to continue to make every effort to anticipate his actions and collect information on his capabilities and intentions. But I can't really in public session reflect on this much more in greater detail.

Chairman SPECTER. Well, it may be desirable to have you give some thought to how much can be said publicly, because the wisdom of what we have done, I think, turns in large measure about what we expect next, as opposed to the specific issue with the Kurds where strong arguments can be made that we oughtn't take sides, and that we are unleashing a genie from a bottle, perhaps. But in terms of our national interests from projections as to what he may do, it may be an entirely different matter which perhaps can be refined and stated publicly.

Director DEUTCH. Yes, sir.

Chairman SPECTER. A final question—and this was raised by Senator Kerrey and is an important one as to Bosnia, and we've had Intelligence Committee hearings on it, and we have the September 14 elections coming. We've had the cancellation of some elections. This is a very important matter implicating how long our troops are going to be there. What can you tell us about the status of matters in Bosnia which would give assurances that elections on September 14, just a week from Saturday, will be held in a climate which will reasonably guarantee honest elections without excessive fraud?

Director DEUTCH. Mr. Chairman, you know that there is an OSCE individual over there who's responsible for making that judgment on the fairness of the elections. We do believe that these elections are going to take place with a moderate degree of mobility and freedom of movement, which is important to the success of the national elections. And as I mentioned earlier, my own, I think, my own preliminary judgment—and again, I have not focused on this for the past week because of Iraq—would be to say that these elections would take place without a tremendous amount of violent activity, and that we will have in place the expected governments to deal with the matters in Bosnia.

It's important that that happens. If it doesn't happen, it will be unlikely that the necessary economic and political steps are taken to finally bring that country back to some kind of peace.

Chairman SPECTER. Well, we thank you, Mr. Director, unless Senator Bryan has anything further. We appreciate the work you're doing as Director. We appreciate the candor that you approach this committee and 99.44 percent of the time, just a little bit on that one section of the National Security Act as to what is intelligence activity. And we very much appreciate the kind of notification which you have given. And were all Directors to be like you, we wouldn't need a statute at all.

Director DEUTCH. Thank you very much, Mr. Chairman. Thank you, sir.

Chairman SPECTER. Thank you very much.

Now, we have two additional panels. Two distinguished experts in this field, Lloyd Cutler and Morton Halperin. And then we'll have a third panel—Acting Legal Adviser Michael Matheson of the Department of State and Deputy General Counsel Whit Peters of the Department of Defense.

But now, we'll turn to Mr. Cutler and Mr. Halperin. In these two gentlemen we have two real experts on the issues before the Committee today and on Congressional-Executive relations.

Lloyd Cutler has had an extraordinary record of service to his country, having been counsel to both President Clinton and President Carter; having served on many special missions—ratification of the Salt II Treaty, representative to the Maritime Resource and Boundary negotiations with Canada, the Commission on Strategic Forces and a long line on his resume.

Mr. Halperin is now Senior Fellow to the Council on Foreign Relations and served as Special Assistant to the President and Senior Director for Democracy to the National Security Council, and has worked in the Department of Defense and has written extensively. And to give their entire resumes would take the balance of the day.

So at this time we will turn to Mr. Cutler. I see, Mr. Cutler, that you were awarded the Yale honorary degree as Doctor of Laws in 1983, having gotten your LLB in 1939. And I had thought that the LLB could be changed to a doctorate by paying \$25 for a new certificate. And my first question: When you got your doctorate of laws was there an exception made?

Mr. CUTLER. Well, it never seemed to me it was worth the \$25, by the time they changed those rules. And the LLD, as you know, Senator Specter—you undoubtedly have many yourself—is an honorary degree.

Chairman SPECTER. Well, I first met Lloyd Cutler when he came to speak to the student body when I was at Yale, some time ago, and he's had a very distinguished record. So we're pleased to welcome you here, Mr. Cutler.

Mr. CUTLER. Thank you very much, sir.

STATEMENT OF LLOYD CUTLER, FORMER COUNSEL TO PRESIDENTS CARTER AND CLINTON

Mr. CUTLER. I understand that this panel is addressing itself not to the factual issues that you were discussing with Director Deutch, but to the broader question of whether the existing arrangements under which the Executive branch informs the Legislative branch of foreign policy and national security decisions are

adequate, or whether additional formal or informal improvements in that process are desirable.

As you know so well, Mr. Chairman, the American constitutional system is not based on an absolute separation of powers between the branches. It's based instead on the principle of checks and balances. None of the three branches has absolute authority, even in its own field. Each requires the consent or cooperation of at least one of the other branches to take important actions. And that's true, of course, of legislation, appropriations, nominations, treaties and the like.

And in foreign policy, national security policy, as in domestic matters, neither branch—Congress or the Executive branch—can get very far for very long without the cooperation of the other.

Up to now, Congress has tried to legislate methods of cooperation and notification in some fields, but not in others. You've legislated over Presidential veto the War Powers Resolution, providing that you have the right to be consulted and to approve the Executive's use of armed forces in combat situations. And you've legislated the right to be informed of, but not necessarily to approve, covert actions. You also have somewhat similar legislation relating to arms sales.

But you have not legislated a broad right to be consulted or approved in advance as to any other foreign policy, national security initiatives or modifications of pre-existing policies. And I think that's a wise decision of Congress up to the present time.

You're now looking at whether further legislation would be appropriate. It seems to me—and I've thought about this some—that legislation establishing such a right to be informed of foreign policy shifts, modifications, initiatives, et cetera, would be extremely difficult to draft and to conform to. If it was drafted to cover the alleged yellow light or green light to Croatia, the language would have to be extremely broad and would apply to virtually every modification of existing foreign policy or its application to a given set of facts. As we all know, there is no manual we can pick up, or law, or regulation that says the foreign policy of the United States in the following million-in-one circumstance is so-and-so. So any such law would have to depend on a case-by-case basis as to what the Administration of the day thought the foreign policy should be. And many, many cases would be cases where a new foreign policy, or a modification or something like that would have to be worked out because a new set of facts arose for which no specific foreign policy response had yet been devised.

You'd also have to give the President running room to take actions or make communications that for various foreign policy and national security reasons should be kept confidential for an extended period of time.

In my view, drafting such a law and making it work in practice would seem to be virtually an impossible task. And I think the same would be true of a narrower amendment which tries to expand the definition of covert action to include foreign policy decisions or non-decisions, such as this alleged yellow or green light to Croatia.

It seems to me that rather than seeking to enact new legislation, Congress and the Executive ought to find better ways of consulting

informally on a confidential basis. I was very much involved in the Iranian hostage crisis in President Carter's day, and I believe that Secretary Vance and other high Administration officials met regularly with, and frequently with Congressional leaders, the Committees and broad groups of Senators and Congressmen who were interested, to keep them up to date on all aspects of the situation, other than details as to the identity of particular middlemen and negotiators who wanted to keep their identity a secret.

And I imagine that similar arrangements must now exist with respect to Bosnia and other foreign policy national security hot spots, such as Iraq.

In my judgment, informal discussions along these lines are far superior to statutory fixes. Secretary of Defense Cheney made a remark about the War Powers Resolution just before the Gulf War which I think is very pertinent to the issue you're now trying to resolve. And he said this. When the stakes have to do with the leadership of the free world, we cannot afford to be paralyzed by an intramural stalemate. The decision to act finally belongs to the President. He is the one who bears the responsibility for sending young men and women to risk death. If the operation fails, it will be his fault. I have never heard one of my former colleagues—as you know, he was a Congressman—stand up after a failed operation to say, I share the blame for that one. I advised him to go forward.

In my view, those remarks apply even more aptly to new foreign policy initiatives and modifications of existing foreign policies than to the use of armed force or covert actions. Even in foreign policy it's true, as I said earlier, the President cannot get very far without the express or implied approval of Congress. You have myriad ways in which to check policies that you disapprove. But the President ought not to be forced simply to lie dead in the water until Congress has been informed of, and has approved and followed the legislative legal process for every foreign policy decision that he wants to make.

I think a much better course is to follow the proposals made by Warren Christopher between his engagements as Deputy Secretary of State under President Carter and as Secretary of State under President Clinton. And as you know, he proposed some sort of informal compact between the Executive and the Legislature for working out methods of discussing problems like the one you're considering now—keeping Congress fully informed and at the same time giving the President the running room he needs.

And of course, I'd be pleased to answer any questions.

Chairman SPECTER. Thank you very much, Mr. Cutler. We will have some questions for you, but first we'll turn to Mr. Halperin.

STATEMENT OF MORTON HALPERIN, FORMER DOD AND NSC OFFICIAL, SENIOR FELLOW, COUNCIL ON FOREIGN RELATIONS

Mr. HALPERIN. Mr. Chairman, thank you very much. It's a great pleasure to testify again before this Committee, as I have on many occasions in the past.

As you will see, Mr. Chairman, although Mr. Cutler and I have not consulted, we have very similar views and come out in basically

the same place, and indeed, consistent, as he said, with Secretary Christopher's article which he wrote shortly after he left serving in the Carter administration.

I need to begin with three caveats. First of all, I want to make clear that I speak for myself and not for the Council on Foreign Relations. Second, in light of your previous comments, I need to make it clear that I am not, in fact, a lawyer. And third, I need to make it clear though that although I did serve in the Clinton administration and was in the administration at the time these events took place, I was not involved in them, I was not privy to any information relating to them, and what I have to say today is not in any way based on classified information. And of course, I do not in any way represent the administration.

Chairman SPECTER. Mr. Halperin, when you were not informed of what was going on, you had a lot of company.

Mr. HALPERIN. I gather.

I approach these issues in part from a constitutional perspective having represented the American Civil Liberties Union before the Congress for many years, and I believe that there are important constitutional principles that are at stake in what took place in the set of events that this committee is concerned with.

As a foreign policy analyst, I think we need more than ever now a bipartisan and bicameral approach to foreign policy. And that must be based on a mutual respect between the branches and an acceptance, particularly by the executive branch, of the appropriateness of an active and full congressional role in foreign policy.

And I think it is unfortunate that Congress has been driven to enacting legal requirements. But it has been driven to that, I think the historical record will show, because of the tendency in the executive branch, under Republican as well as Democratic presidents, to ignore anything else—that Congress's pleas in the past for active consultation, for accepting congressional policy guidance, have in most cases, been ignored.

Not knowing all of the facts, I hesitate to comment on the question of whether there was a covert operation or an intelligence activity requiring a finding and notice to the committee. But on reflection I think that issue is too important and too central to what you're about to duck it. So let me say that my view is that there was not a covert action within the meaning of the law; that the action here was standard diplomatic activity, not contemplated by the definition of the Congress as it drafted that statute. And I should say that on behalf of the American Civil Liberties Union I was deeply involved in the whole set of legislation beginning with Senate Resolution 400, which created this committee.

And I think it would be a great mistake to amend the law covering covert action to cover this kind of activities. And I say that, I think, for three reasons.

First, if covert actions occur often, which would be the case if this was considered a covert action, then they will not receive within the executive branch the kind of careful attention that I think they deserve and now receive and which Mr. Deutch described to you in his testimony.

Second, I believe that covert action should be rare events—that we should only conduct them when the vital interests of the nation

are at stake and when they are consistent with the public policies of the United States. If we broaden the definition too much, then we run the risk of having this be a routine activity, which again, I think will lead to many more activities taking place than I believe should.

And finally I think that the history is that whenever the Congress enacts legislation, the executive branch is tempted either to reinterpret the action so that it's not covered by the legislation, or to alter the action that it contemplates in order to avoid having to find that it is covered by the legislation. And this leads to bad law, and it leads to bad policy.

I have to say also that I don't think this was an intelligence activity within the meaning of the law for the same reasons, and as I think, Mr. Deutch has well described—that if a diplomatic activity is to be interpreted as an intelligence activity, then you're covering everything, and you're making Director of Central Intelligence either a spy in the State Department or a handmaiden of the Secretary in reporting things that I think it is the obligation of the Secretary to report.

Because, having said that, having said that it is not a covert action or an intelligence activity, I believe that beyond a doubt, Congress should have been notified of exactly what the executive branch was doing. If we are to have a bipartisan and bicameral foreign policy, Congress must be fully informed about what the executive branch is doing. If it is being asked to share the responsibility, it must know what is going on.

And I think the rule should be a simple one. If members of the executive branch know that members of Congress would want to know something, then they should be told. And I doubt whether anybody in the executive branch had any doubt that Congress would have wanted to know what actions were taken, and that those were relevant to the decisions that were being made in the Congress about these issues, about lift and strike, about the activities of Iran and Bosnia and so on.

Now, there are two ways to proceed. One is to try to broaden the law, which covers war powers, covert actions, arm transfers, and executive agreements, to try to cover every contingency when Congress should be informed. And I agree very much with Mr. Cutler that this effort is doomed to failure. First, it is not possible to conceive and articulate all the circumstances in which Congress should be informed. Second, presidents always will find a loophole if the task is seen as a legal one. If you ask the lawyers, can we interpret the legislation so as not to cover this, the answer will always be yes. And in extremis, I think it will lead to changes in what the executive branch plans to do so as not to have to consult, and I think that's a very bad effect.

Therefore, I would urge the Congress and urge this committee to abandon any legal effort to cover everything. I think you ought very much to leave the covert action law in place, which I think has worked very well. Rather, I think you need to seek a political accommodation with the executive branch, and I think this requires three things.

First, an agreement needs to be reached between the bipartisan leadership of the Congress and each new president that Congress

will be informed and consulted whenever there is a policy or an action which Congress should want to know about. I do not think we should get hung up on the question of whether this was a new policy or not. Whether or not it was, quote, "a new policy," it was a change in what we were doing, which Congress would have wanted to know about and should have known about.

Second, I think Congress needs to designate a small leadership committee of both parties and ranking members of key committees which the administration is asked to consult with unless the matter clearly falls within the jurisdiction of only one committee, and you may need to have an even smaller group to be consulted on very sensitive matters, as we have with covert operations.

But I think at the same time, Congress needs to need pull back from the effort in micromanagement and the legislating of restrictions that deny needed flexibility. And I think a first step in this direction, which should accompany this agreement with the president, is to repeal the so-called clock in the War Powers Resolution. I realize that's beyond the jurisdiction of this committee but I think it is a critical step in establishing the kind of relationship of trust and consultation that needs to be done.

Finally, I think, Mr. Chairman that this committee and the Congress should insert greater control over the control of classified information. And I think you should do that by taking two steps. One is to legislative a standard and the other is to exercise the authority, which as you noted Mr. Chairman this committee has, to disclose classified information that the Executive Branch asserts is classified. That authority has never been used and I think if you don't get the kind of declassification you've asked for in this report, that you ought to use it. I think it is important for Congress to establish the precedent that it can decide that information should be closed.

The covert action legislation, Mr. Chairman, let me say in conclusion, was meant to create a means for the Congress and the president to work together and share responsibility in a critical area. I think it has worked very well, and I urge you to not to tamper with it to seek a solution to a problem that was raised by the episode that the committee is exploring. I think there is an alternative and a better way to deal with that kind of issue which I hope will contribute to restoring the kind of bipartisan foreign policy that we need if we have to function effectively in the post-Cold War world.

I would, of course, be delighted to respond to questions.

Chairman SPECTER. Well, thank you very much, Mr. Halperin.

Your conclusion is the same as mine on the passing of the information about the perceived green light and what was happening with the negotiations which were not shared with the Congress, nor were they shared with the State Department, with the CIA, or with the Department of Defense. But how you get there is a very, very tough matter.

I'm intrigued by the standard which you articulate: if Congress wants to know then Congress should be told. That's easy to say, but a little hard to apply because it would probably be the case that Congress would want to know about everything. Somebody in Congress would want to know about everything. And these definitions are difficult. And you have, in an erudite way, articulated

what happens when the Executive Branch consults lawyers who tell them that they can do it. Or if they feel conclusively they can't, to modify the matter slightly so that they can then accomplish it with the same purpose, by finding the loophole, as you say.

And we had a bitter experience with Iran-Contra. And I believe we've had a serious breach with Iran-Bosnia. The matter has worked out, so it hasn't been quite as vexing to the American people, hasn't been picked up by the press. But the Iranian foothold there has potential for the future as to what will happen, and the principles are very important.

Let me talk just a little bit about the statutory provisions with you two men. Director Deutch did testify, as you heard, that the Congress should have been informed. He doesn't want to be the one to have to tell on the State Department, but the Congress should have been informed. And we'll take this up with the lawyers for State and Defense in a few minutes.

But Section 2680 of 22 U.S. Code provides, quote, "The Department of State shall keep the Committee on Foreign Relations of the State and the Committee on Foreign Affairs of the House of Representatives fully and currently informed with respect to all activities and responsibilities within the jurisdiction of these Committees," close quote. Should State have told those Committees, Mr. Cutler?

Mr. CUTLER. I know so little about the actual facts, and I gather the facts are contested to some extent among the various players within the Administration.

Chairman SPECTER. Well, There's no contest on these facts, that President Tudjman of Croatia wanted to know what U.S. policy was on arms coming into Bosnia. And Ambassador Galbraith asked Washington for instructions, and he said give them a no-instructions answer. And he and Ambassador Redman gave that response to President Tudjman. And Ambassador Galbraith told Deputy Secretary of State Talbott that that would be taken as a perceived green light—nothing yellow about it—perceived green light, and they went ahead and did it. And then both Redman and Galbraith were instructed not to make a report on it. And those are the facts which are admitted to by all parties.

There is a dispute between Mr. Talbott and Mr. Woolsey as to whether Mr. Talbott told Mr. Woolsey, but that's the only area of dispute.

Mr. CUTLER. Well, I haven't read much of that. I was in the Administration in April at that time. I was not involved in any of these matters at all. But I think what is involved in most of these cases is a concern on the part of the Executive—and I refer to Republican Executives as well as Democratic Executives—that in one way or another, what is reported to the Congress may leak out in a way that would either destroy the utility of the operation or be very damaging to the United States as perceived by the Administration.

Let me recount one illustration of that that may not be generally known, and that was the rescue mission to rescue the hostages in Iran in 1980. The question I had to resolve at President Carter's request was whether that was covered by the War Powers Resolu-

tion and whether there was a duty to inform Congress—consult Congress, I think are the words of the statute.

It would be hard to think of a way of consulting Congress without consulting the Speaker of the House. The Speaker of the House at that time was a very lovable man, a very much respected speaker, but he had an incorrigible habit of telling whoever came into the room, whether on his staff, a fellow Congressman, or somebody else, what he had just learned. Had we consulted Congress in advance of the rescue mission, the news in the days of modern communications might have gotten out and the surprise element that was so essential for a successful mission would have been lost.

We came to the conclusion that we could construe the War Powers Resolution—which as you know, every President, including the Republican Presidents, have maintained is unconstitutional—that we could construe the War Powers Resolution so that it did not apply to rescue missions where surprise was of the absolute essence. And no one in Congress challenged that conclusion. But the concern was a very real concern. I don't wish to raise any implications about the Intelligence Committees. I don't know of a case myself in which any Member of an Intelligence Committee violated a confidence, but there have been inquiries about that, there have been newspaper reports of things communicated to the Intelligence Committees under these various statutes, and that is the concern that drives all Administrations.

Chairman SPECTER. Well, both—

Mr. CUTLER. I'd rather not comment on this particular case and whether there should have been a report to Congress, but I have no doubt that one of the real concerns was if there was a report to Congress, it would have become public, and the fact that we were shutting our eyes, casting a yellow light, or whatever you want to call it, to the Iranian arms shipments—

Chairman SPECTER. Where do you get this yellow light? There's never been a talk about a yellow light. You refer to it constantly. It's perceived green light.

Mr. CUTLER. Well, all I know is what I've read in the newspapers, and I think of it as a yellow light.

Chairman SPECTER. Did you see anything about a yellow light. You say some—

Mr. CUTLER. I don't want to get into a dispute of whether it was a yellow or green light, but I didn't hear the words green light till I got here today.

Chairman SPECTER. Both of you have referred to the War Powers Act. This is a matter of currency because the Congress was not consulted about the military action taken in Iraq. The statute provides, quote, "The President, in every possible instance, shall consult with Congress before introducing United States armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States armed forces are no longer engaged in hostilities or have been removed from such situations," close quote. And the leadership, at least of the Senate, was not informed until after the hostilities had been undertaken.

Mr. CUTLER. I think, Senator, if you will look at the record of the reports made under the statute, it has frequently happened that a report was made after, usually very soon after, but frequently after the actual action because of the element of surprise.

Chairman SPECTER. There's a separate section on reporting, but that has nothing to do with consultation in advance.

Mr. HALPERIN. Senator—

Chairman SPECTER. The statute is perfectly—is plain on the face.

Mr. HALPERIN. Senator.

Chairman SPECTER. Mr. Halperin.

Mr. HALPERIN. It's my understanding, and I think you'll be told this by the lawyers who will follow us, that there is a Congressional authorization on the books relating to military action against Iraq, and so that, I think, as a legal matter, it is not covered. But my view is that looking at it as a legal matter is the wrong way to do it; that when the president is going to use military force, the question should not be turned to the lawyers and say, "Is there a legal way not to have to consult the Congress?" The question should be for the President to turn to his cabinet officers and say "Don't we have an understanding with the Congress that requires us to talk to them before we do this?"

Chairman SPECTER. Well, I have to disagree with you because what you're really saying is let's not pay any attention to the statute. And the statute is very emphatic. And the statute was drafted in a time of high controversy on two critical Constitutional provisions—the President's authority as commander-in-chief, and the sole authority in the Congress to declare war. And you're going to have to—

Mr. HALPERIN. No, that's—

Chairman SPECTER. Excuse me. Excuse me.

We're going to hear from the lawyers, but it's pretty hard for me to see how you can say that it's not an Intelligence activity when it's clandestine and it involves relations with other countries. Or how you can say that the President doesn't have an obligation to consult with the Congress on the basis of some other resolution which was entered into at some other time. And you can talk in the generalizations, but these matters are carefully crafted and these statutes are enacted by the Congress with the concurrence of the President or, as the War Powers Act, over his veto. And that's our law. And we're trying to define them. And I'm not prepared to chair the Senate Intelligence Committee and stand by and have the plain language of the statutes ignored.

Let's just talk about the statute for just a minute. The statute says that Intelligence activities include clandestine activities affecting the relations of the United States with any foreign government.

I'd be interested in your view, Mr. Cutler. You don't have to know a whole lot about the facts to know that it was clandestine or secret, and that it affected our relations with Croatia and Bosnia.

Mr. CUTLER. Well, once again, I have not studied this question, but I will be glad to give you my initial reaction. And that is, there is an exception in the statute for normal diplomatic communications; that this was, at most, a diplomatic communication; that it did not relate to an intelligence activity. I would concede you could

have diplomatic communications that do relate to an intelligence activity. For example, a communication by our government to another government, would it cooperate in a covert action, or would it furnish some intelligence assets? That would be, I think, clearly covered by the statute. But if I understand the facts here, and again, I don't know the facts, all that happened is the question was asked, would there be a United States objection if the arms were trans-shipped through—from Iran through Croatia, and the answer was, we take no position.

Chairman SPECTER. Mr. Cutler, I can appreciate the fact that you haven't been able to get involved in the facts. But the legal provisions which apply here do not have the diplomatic exception to notification of intelligence activities. The diplomatic exception applies to covert action. But let's take it up with respect to covert action, which is a separate question. My reading of the statute is that on its face, it's conclusive that you have to provide information which is secret, which affects relations of the United States with other foreign governments. That's all notification of intelligence activities.

But with respect to an exception to covert action, it excepts, quote, "traditional diplomatic or military activities." And is that a realistic exception in the context here where the State Department was encouraging a violation of a U.N. arms embargo. Their message was contrary to publicly acknowledged U.S. policy. Their exchange was purposefully not reported back to Washington, in traditional diplomatic communications. And the incident matter was kept secret from key U.S. officials such as the Secretary of Defense, the Chairman of the Joint Chiefs, and the Director of Central Intelligence.

So, what do you think, Mr. Halperin?

Mr. HALPERIN. Well, I am tempted to say only half facetiously, Mr. Chairman, that the criteria you lay out sounds to me like exactly traditional diplomatic activity.

I don't think the statute intended to cover that. I know that there isn't a specific exception for diplomatic activity in the intelligence provision, but I think it was understood by everybody that was drafting it. Because if it is not understood by that, then what you're saying is that every time there is a very private diplomatic communication, which the Secretary of Defense is not told about, which is not reported back in a regular diplomatic channel, and which violates a publicly stated policy of the United States, that somehow that becomes an intelligence activity. I think those things are often inappropriate. I think that Congress should always be told about them. But I do not think anybody drafting that statute believed that they were intelligence activities.

I think one of two things has to happen for it to be an intelligence activity. Either it has to be about intelligence matters—that is, if a diplomat is having a conversation with a foreign government about participating in covert action or even clandestine collection, then I think it's an intelligence activity; or if the communication is through intelligence channels—that is, if the head of our station in Croatia had delivered that message—then I think it would have been covered.

But where the subject matter is neither intelligence nor is it delivered in intelligence channels, then I think to include it as an intelligence activity or a covert operation, because of the kind of things which you mentioned, which are far from extraordinary, would be to involve the Director of Central Intelligence into reporting to the Congress on a whole range of policy matters that I think ought not to be within his jurisdiction. But I repeat, I think the Congress should have been told.

Chairman SPECTER. Well, you've repeated that, but you don't get Congress told unless you have it explicitly required, and even then you don't.

If the intelligence agents out there had been involved or brought into it by the State Department, would that have made it a covert activity?

Mr. HALPERIN. Absolutely. Absolutely.

And I think, also, if the Intelligence Community learned—and I don't know whether the Committee has looked into this—the Intelligence Committee learned that the Croatian government believed that it had a green light from the United States, that is, I think, intelligence information which should have been reported to this Committee.

Chairman SPECTER. Well, Ambassador Galbraith said that Croatia thought they had a green light, and there is an obligation on the State Department to report intelligence activities. And as you say, that would be an intelligence activity.

Mr. HALPERIN. No. I think that would be intelligence information, Senator, in my view, not intelligence activity. I think the Intelligence Community has an obligation to report intelligence information to the Committee. And if it learned, not from an American, but from a Croatian source, that Croatia believed it had a green light, I think it had an obligation to report that as well. That's where I think—

Chairman SPECTER. So you're distinguishing between intelligence information and intelligence activities.

Mr. HALPERIN. I think—

Chairman SPECTER. The split hairs are being resplit.

Mr. HALPERIN. No. I think the statute clearly does. It has three categories in the statute: Intelligence information, which I think the Congress is entitled to, clearly, under the statute; intelligence activities which need to be reported, as you've described it; and covert operations. I think they're all three are covered, and I think they're three different things.

Chairman SPECTER. I don't think they are, Mr. Halperin. The requirements are on intelligence activities and covert action. But where you have the exception for traditional diplomatic activities, and you have a statute drafted so that it's an exception for covert activities and not for intelligence activities, it would be pretty hard to have a drafting oversight of that magnitude with all the people who are looking at it.

But all that aside, Mr. Halperin, wouldn't you say that the State Department had an obligation to report it to at least the Committee on Foreign Relations in the Senate or the Committee on Foreign Affairs in the House under the provisions of the State Department responsibilities?

Mr. HALPERIN. Oh, I don't think—my view is, beyond question, the State Department should have reported it to those Committees and the Members of Congress dealing with this issue should have known about it.

Chairman SPECTER. Well, thank you very much gentlemen. We appreciate your testimony, and I think that beyond the statute, your suggestions are very important ones about the informal relations. Now all we have to do is to figure out that informal group to cover the situation where you have a Speaker of the House who likes to tell everybody everything, the one Mr. Cutler had to confront in the hostage situation.

Mr. CUTLER. I'm not sure that's true anymore.

Chairman SPECTER. Well, I know you didn't say it about this speaker.

Thank you very much.

Mr. HALPERIN. Thank you.

Mr. CUTLER. You're welcome.

Chairman SPECTER. We'll now move to our final panel, Acting Legal Adviser Michael Matheson of the Department of State and Deputy General Counsel Whit Peters of the Department of Defense.

Welcome. We very much appreciate your being with us. Mr. Matheson, would you care to make an opening statement?

STATEMENT OF MICHAEL MATHESON, ACTING LEGAL ADVISER, DEPARTMENT OF STATE

Mr. MATHESON. Thank you very much, Mr. Chairman. I would like to make a brief statement, and then I'd be happy to answer any questions that you might have.

First, I'd like to thank the Committee for the opportunity to provide our views on the issues which were described in your August 15 letter to Secretary Christopher, and particularly with respect to the suggestion about legislation which might be adopted to require notification to the Congress of significant changes in foreign policy that are contrary to or reflect a significant departure from publicly acknowledged U.S. policy.

First of all, I think the need for cooperation between the Executive and Legislative branches is very clear. The Constitution itself provides an important role for the Congress with respect to foreign affairs. What the Executive branch does in the foreign policy arena cannot be successful without Congressional involvement. This is particularly true in certain specific areas, such as the need for Congressional approval of appropriations for U.S. government programs overseas or to carry out agreements reached with foreign countries.

But it's also true in a more general sense. An Administration, in our view, operates at its peril if it fails to build the support in Congress for the policies that it seeks to pursue.

Now, in fact, we believe that there is already in place an ongoing consultative process between the branches with respect to foreign policy issues. The form of these consultations does vary. They include the provision of information and views by Administration witnesses at formal Congressional hearings and, as well, less formal briefings of members and staff on issues of concern.

There is ongoing consultation between the State Department and the other foreign affairs agencies on the one hand, and their Oversight Committees on the other hand. And this includes the extensive material that is provided each fiscal year in connection with the authorization and appropriation of funds for international operations. Furthermore, in areas of particular concern, the Congress frequently adopts legislation requiring the Administration to provide information in the form of reports. And on a less formal basis, we frequently provide additional information in order to address Congressional concerns about particular programs or activities.

Similarly, our Office of Legislative affairs works very hard in behalf of Secretary Christopher and the department's other principals to help insure that information is made available for members on fast-breaking events, or on issues in which particular Members are known to be especially concerned.

Now, is this system perfect? And the answer is no. It never has been, it probably never will be. But, the provision of information to the Congress is a very real priority for the department. Both in its own right as an element of good government and because the Executive Branch has an ongoing interest in working closely with Congress. Certainly, the senior policy officials of the department would carefully consider any procedural suggestions from the Committee as to how that process might be improved.

Now your August 15 letter, on the other hand, raises a more specific question. Whether our system of government and the conduct of foreign policy by the United States would be enhanced by the enactment of statutory requirements to report to Congress each time there is a change in foreign policy or a deviation from publicly acknowledged policy. With respect, we don't believe that this would be the case.

There is presently no statutory requirement for the Executive Branch to consult or report to Congress about policy formulation, generally, or changes in policy, either in the foreign affairs area or elsewhere. This is not an oversight or an accident. The Executive Branch, in our view, needs to have flexibility and discretion to develop and modify its policy, provided that in its actual operations it complies with appropriate statutory requirements. As I'm sure you would understand, this need has a constitutional dimension relating to the separation of powers and to the President's particular Constitutional responsibility both in the foreign affairs area and with respect to the command of the armed forces.

Further, on a very practical level it's difficult to see how the idea of the statutory requirement to notify significant changes of US foreign policy or departures from publicly acknowledged US foreign policy would work. There is, as I think Mr. Cutler eloquently stated, no codified, comprehensive statement of US foreign policy against which a lawyer, like myself, might try to judge proposed deviations. The conduct of diplomacy, in fact, is a very fluid process of give and take, where shades of gray are often the rule, and black and white the exception. In many areas policy may not shift by an explicit decision, but instead a new policy may emerge over time as a reflection of smaller steps that our diplomats may take to cope on a practical level with the many problems they face in their daily work.

Similarly, given the complexity and subtlety of the world in which our diplomats operate, it is a mistake, we believe, to conclude that it will always be clear that a particular idea may deviate from established policy.

Even if such—

Chairman SPECTER. Do you have much more, Mr. Matheson?

Mr. MATHESON. Perhaps another paragraph.

Chairman SPECTER. Excuse me?

Mr. MATHESON. Another paragraph.

Chairman SPECTER. Okay.

Mr. MATHESON. Even if such an idea could be reduced to a comprehensible and workable statutory form, we would be concerned that any such requirement could have a significant chilling effect on the work of our diplomats and policymakers. They would need to evaluate possible courses of action not only on the basis of their intrinsic merit, but also on whether they would fall within the technical terms of the new reporting statute.

The need for constant determinations of this sort, probably after careful legal review, could significantly impair the ability of the United States to operate forcefully in the international arena and to respond to rapidly changing developments.

That concludes my formal statement. Of course, I would be pleased to address any questions you might have.

Chairman SPECTER. Thank you very much for a very profound statement, Mr. Matheson.

Mr. Peters.

STATEMENT OF WHIT PETERS, DEPUTY GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. PETERS. Thank you, Mr. Chairman.

I would like to thank the Committee for providing us the opportunity to discuss the questions posed in your letter to Secretary Perry of August 15, 1996. As has been stated before, your August 15 letter raises the question of whether legislation or improved procedures are needed to inform Congress of significant changes in US foreign policy that are contrary to or reflect a significant departure from publicly acknowledged U.S. policy. We believe the answer is no.

Unquestionably, effective government requires cooperation and information sharing between the Executive and Legislative branches. With respect to Department of Defense activities, we believe that such cooperation and information sharing is robust and should not be the subject of additional legislation. By statute, for example, the department already reports to Congress on a wide range of its activities, often in advance of undertaking those activities. By example again, over 500 reports have been submitted by the Department of Defense in this fiscal year. In addition, we notify the Congress before expanding monies for peacekeeping, humanitarian, and various civic activities.

Given the broad scope of current statutory reporting requirements, we believe the legislation as proposed in your August 15 letter is both unnecessary and, for the reasons stated by Mr. Cutler, Mr. Halperin, and the State Department, we believe, unworkable.

Second, Mr. Chairman, in assessing the need for such an amendment, we would call your attention not only to the reporting requirements of Section 503 of the National Security Act, but also remind the Committee that we also at the Defense Department have additional statutory reporting requirements which have been honored under the War Powers Resolution. In short, the War Powers Resolution requires us to notify the Congress whenever troops are committed to imminent hostilities or a significant number of troops go into a foreign territory armed for combat. While there has been always a significant debate about the constitutionality of this provision, in fact the position of the Executive branch is to honor the provision in spirit and to make these reports.

Second, you also asked Secretary Perry a question whether Sections 501 and 502 of the National Security Act obligate the intelligence community to inform the Committees of significant substantive intelligence collected by US intelligence agencies. On this issue our views are consistent with those of the General Counsel of the CIA. In summary, Sections 501 and 502 require the President and the heads of intelligence agencies to keep the Intelligence Committees fully and currently informed of intelligence activities of the United States. The phrase intelligence activities is not defined in the National Security Act, but the standard interpretation of that phrase is to read it in parallel with Executive Order 12333 which defines intelligence activities to include collection of intelligence, covert actions, and support for those activities.

Strictly speaking, therefore, Sections 501 and 502 do not impose on the Executive branch an obligation to report significant substantive intelligence to the Intelligence Committees. As a matter of practice, however, the Intelligence Committees receive significant amounts of intelligence from all DOD intelligence agencies, including daily reports and contributions to all source digests. Moreover, in many cases reports on intelligence activities are themselves inseparable from reporting of substantive intelligence.

We believe, therefore, that highly significant reports relating to foreign developments are in fact being reported to Intelligence Committees today and have been for some time.

With those comments as an introduction, I would be pleased to answer any further questions.

Chairman SPECTER. Thank you very much, Mr. Peters.

Mr. Peters, in your capacity as a deputy general counsel to the Department of Defense, do you think that the Secretary of Defense, William Perry, the Chairman of the Joint Chiefs of Staff, General Shalikashvili, should have been informed about what went on, this perceived green light from President Tudjman

Mr. PETERS. Mr. Chairman, I do not have a position on that. I believe that the Secretary and the Chairman were fully informed of the intelligence matters dealing with the arms shipments and certainly were fully aware of the issues raised by those arms shipments.

Chairman SPECTER. Mr. Peters, they weren't. Secretary Perry and General Shalikashvili were not told about the perceived green light to President Tudjman.

Mr. PETERS. That's correct. Mr. Chairman.

Chairman SPECTER. They were not told about it. Do you think they should have been told about it?

Mr. PETERS. I don't have a position on that, Mister—I don't believe there was any statutory obligation to tell them, and I don't have a position with respect to whether it would have been helpful.

Chairman SPECTER. No statutory obligation for the State Department to tell the Defense Department something of that magnitude?

Mr. PETERS. I don't believe so, Mr. Specter.

Chairman SPECTER. Aside from a statute, do you have to have a statute so that the State Department ought to tell the Defense Department about something like that?

Mr. PETERS. I don't believe there is necessarily the need for a statute, but I'm—my statement simply was I don't believe there is a statutory obligation to make that statement. Certainly, lots of information is shared, and I'm not in a position to comment on the wisdom, or lack of wisdom of the sharing in this case.

Chairman SPECTER. Mr. Matheson, don't you think the State Department should have told the Defense Department something of that importance and magnitude?

Mr. MATHESON. Mr. Chairman, I know you've explored this with Deputy Secretary Talbott, and others. And I don't believe I could really add much with respect to the policy question in that regard. I know that this was an issue that was dealt with at the very highest levels of this government, it was considered to be very sensitive information, and I'm sure that they made a good faith judgment as to which senior officials needed to know about the diplomatic exchanges. I really don't believe that I could, as a lawyer, attempt to elaborate upon what Deputy Secretary Talbott had to say to you.

Chairman SPECTER. Okay, on to the legalisms, then.

Mr. Peters, you talk about the definition of intelligence activities, but you did not include Senate Resolution 400 which provides that intelligence activities include covert or clandestine activities affecting the relations of the United States with any foreign government. Do you accept that as a definition for intelligence activities?

Mr. PETERS. Not with respect to sections 501 and 502, Mr. Chairman. We believe that the appropriate reference there is to Executive Order 12333 which I believe does not include clandestine.

Chairman SPECTER. Well, if that provision was a statute, would there have been an obligation to report the perceived green light as being clandestine, which it obviously was secret, and it obviously effected the relations of the United States with Croatia and Bosnia. Would there have been an obligation to report that had that been a part of the statute?

Mr. PETERS. Mr. Chairman, I don't think I can add anything to what Dr. Deutch has already indicated with respect to his interpretation and the CIA's interpretation of that statute.

Chairman SPECTER. Well, why not? He's not a lawyer. He doesn't—you don't speak for the Central Intelligence Agency. You're here as counsel for the Department of Defense. You're a lawyer. Aren't you?

Mr. PETERS. I am a lawyer. But the specific questions you asked us to address was focused purely on sections 501 and 502 which is what we have talked to our intelligence agencies about and their interpretation of that. What I'm saying is that does not—the inter-

pretation of those sections, as we currently understand them does not include an obligation to report intelligence information except as may be incidental to the reporting of intelligence activities.

Mr. MATHESON. Could I add a few points on that subject, sir?

Chairman SPECTER. Sure.

Mr. MATHESON. I think the first is a technical point which you've already alluded to. S. Res. 400 is a—in effect an internal Senate resolution which divides up the jurisdiction of Committees.

Chairman SPECTER. No doubt about it. We can put it in the statute, though, if that will clarify the situation.

Mr. MATHESON. Well, that leads to point number two, whether that would be a sensible thing to do. If you literally apply the language—

Chairman SPECTER. Before coming to whether it's the sensible thing to do—let us decide that—give me a legal interpretation that if it were a part of the statute, wouldn't that have obligated the reporting on it because it was clearly clandestine or secret and it clearly affected relations between the United States and Bosnia and Croatia.

Mr. MATHESON. If you apply the language in S. Res. 400 literally, then it would cover, for example, the use of information relating to a foreign country. And that literally would include virtually all of our diplomatic activities. So, if the question is whether that would apply, if it were part of the statute, we would be faced with a real dilemma because that clearly could not have been the intent of Congress. We would probably therefore have to try to determine what more limited purpose the Congress had in enacting this, on its face, open-ended language.

Chairman SPECTER. Mr. Matheson, do you think Congress should have been informed about this perceived green light?

Mr. MATHESON. That again is another question which I know that you've taken up in your earlier hearings with Deputy Secretary Talbott. My recollection from looking at the transcripts is that he basically replied that at the time a judgment was made that this were merely implementation of existing policy, that in light of the information which committees had, that he didn't—

Chairman SPECTER. I know what he said. My question was, what do you think?

Mr. MATHESON. Well, obviously, I'm not going to second-guess the judgment of the policymaker that was made at the time, given those facts and circumstances.

Chairman SPECTER. Well, I ask you that in the context of your saying that if you had Senate Resolution 400, it would present a real practical problem from a matter of legal interpretation. And that's why I say something as clear-cut as the green light to President Tudjman ought not to pose that kind of a far-flung interpretation, which would be impractical. That's why I ask that question of you after your statement you have to be realistic or practical.

Mr. MATHESON. I think those are two somewhat different questions. The first question is what the scope of activities would be that Congress intended to include, and I was saying that I didn't think Congress could possibly have intended to include all diplomatic activity, which is the literal import of this language.

But you've raised, obviously, a very important question, not a legal question, but an important policy question in the matter of relations between the Administration and the Committees as to whether this was an event that you should have been informed about. I think the answer you got from Deputy Secretary Talbott was the judgment that they made at the time was that it was not a significant change that had to be reported or should have been reported. But I think he also acknowledged that he understood you had a strong view on that, that that view would be registered within the Administration and taken account of in future conduct.

Chairman SPECTER. Well, sometimes the legal interpretations, as we lawyers know, do move into practicalities and do move into policy as they impact on statutory intent. The ridiculous is not intended. Sometimes people think that's what Congress is doing, but the legal interpretation does take into account practicalities and policies.

Let me ask you this, Mr. Matheson. I cited earlier the provisions of Section 2680, requiring the State Department of keep the Committees fully and currently informed with respect to, it says, all activities and responsibilities within the jurisdiction of these Committees. Now, that's obviously a broad statement. You could interpret that to mean the world. But wouldn't you at least say that that statutory requirement would include a perceived green light to President Tudjman and the policy of sending Iranian arms to Bosnia.

Mr. MATHESON. Well, I would say this. That the scope of that statute, unlike the scope of the intelligence statute, does, obviously, cover the conduct of diplomatic activities. Then the question is what does that, as you say, very general mandate mean with respect to a specific diplomatic conversation. Is that one of the things that needs specifically to be communicated? And again, I have to say that Deputy Secretary Talbot gave you what he believed the judgment was. At the time, they didn't think so. He understands now that you have a strong view of the matter. That's to be taken into account. But again, the statute that you read requires a judgment by a policy maker at the time whether a specific event or conversation was of significant importance or a significant change that it ought to have been reported under this statute is part of keeping the Committees fully informed.

Chairman SPECTER. Mr. Matheson, Secretary Talbott was not asked about that provision.

Mr. MATHESON. That's correct. But I think his response was essentially the same one he would give, because he was being asked, was this a matter which should have been reported to the Committees as part of the process of keeping them fully informed, which is essentially the same standard as this statute you cited.

Chairman SPECTER. Mr. Matheson just a question or two on the opinion of the acting legal adviser, James Thessin, on November 4, 1994 where he draws an extraordinary line on the use of language of whether there was a suggestion, an encouragement or an asking, on delineating whether there's a covert action. And isn't this opinion just about what Mr. Halperin was describing as a highly sophisticated legal interpretation which really seeks to accomplish what would be a covert action if you passed, and that really being

the intent to put it up to the line, or the middle of the line, if you put it in the form of a suggestion or an encouragement?

Mr. MATHESON. First of all, I'm not sure whether I should be commenting on that memo in open session. I don't know whether it's been declassified.

But if I may address the issue itself as opposed to the specific memo.

Chairman SPECTER. How are you going to do that?

Mr. MATHESON. I can address the question of what would cross the line into covert action in general terms without saying what Jim Thessin did or didn't say in that case.

Chairman SPECTER. Okay.

Mr. MATHESON. But I think you have seen not only the Thessin memo, but the Cummings memo, and I think to give us our due, we did try to give our best advice in both cases, and we didn't say anything you want to do is fine.

Chairman SPECTER. Which other memo were you referring to?

Mr. MATHESON. I was referring to the memo which you discussed with Mr. Holbrooke, in which advice was given on hypothetical situations about what would and wouldn't constitute covert action.

And I think you'll see that in both cases we gave our best honest judgment as to where that line would be, and in some cases the line was a gray one. But we did not simply say you can do whatever you want to do and we'll figure out a way to do it. We said there are clear limitations here. Some of these actions would clearly be covert action, some would not. In other cases, they may not be technically, but you may still wish to, as a matter of good prudent policy, report to the Committees.

Now, with respect to your specific question, you were asking about the distinction between our requesting another government or entity to conduct a covert action, on the one hand, or on the other hand, taking a much more affirmative role, such as directing or financing or in some fashion being very heavily involved.

Chairman SPECTER. No, no, no, no, no, not that.

Mr. MATHESON. Okay.

Chairman SPECTER. There are three words here.

Mr. MATHESON. Right.

Chairman SPECTER. Asking, suggesting, and encouraging. And you say that you were not figuring out a way for your client to do something which crossed the line, but is there really that kind of a substantive difference between asking or suggesting or encouraging as a realistic matter? Aren't you really selecting a form of words which allows your client to really do something which you think is wrong if it's asking, but it is on the right side of the line if it is just suggesting or encouraging?

Mr. MATHESON. Well, I hesitate to try and parse those three particular words.

Chairman SPECTER. Well, those are the words that are used.

Mr. MATHESON. I understand.

Chairman SPECTER. Those are the words.

Mr. MATHESON. And it is difficult also to make a real judgment in the absence of a specific fact situation. What I will say is that if we are simply making a diplomatic communication to a foreign government that asks or encourages them to take a covert action,

I think legally that is not a covert action by the United States. There are other forms of involvement, however, in a covert action by another entity that would. If we finance, if we direct, if we're actively involved in carrying it out on our behalf, that would be a covert action, and that's the advice we're given. We were not unclear about that.

Chairman SPECTER. I've just been informed that a report was filed, Mr. Peters, 30 minutes ago. I had intended to ask if one wasn't due on that within 48 hours, but I just am told that one was filed, maybe a little after the 48 hours, but not

Mr. MATHESON. Could I explain what that report was in terms of the statutory scheme?

Chairman SPECTER. The War Powers Act?

Mr. MATHESON. Yes.

Chairman SPECTER. Sure.

Mr. MATHESON. This and the prior Republican Administration have both been proceeding on the same basis.

Chairman SPECTER. Will you wait just one minute.

Mr. MATHESON. Of course.

Chairman SPECTER. Oh, I got the wrong writing here. No War Powers report has been received.

Mr. MATHESON. Well, if you haven't received your report, you shortly will. But at any rate, what I was saying was that under this Administration and the previous Republican Administration, we've been operating under the same basis with respect to military activities vis-a-vis Iraq since 1991. And that is that all of these activities are governed by and authorized by the joint resolution which was adopted in January of '91, which acknowledged that it was the authorization referred to in the War Powers Resolution for the commencement and continuation of armed activities against Iraq, and which itself had a requirement for reporting every 60 days with respect to various factors including our military involvement.

So since that date, both Administrations have reported within the 60-day cycle, and sometimes a little in advance, with respect to all relevant military activities. And that is what we are about to do if we haven't laterally done it at this moment.

Chairman SPECTER. I've just had a request to come to the Floor on pending legislation. So let me bring this to a conclusion.

Mr. Matheson, are you saying that Congress will receive a report as required within 48 hours after hostile action was taken?

Mr. MATHESON. It's a report required by the terms of the 1991 joint resolution.

Chairman SPECTER. So it's not under the War Powers Act?

Mr. MATHESON. It is not literally under the War Powers Act. It is under that act which was adopted—

Chairman SPECTER. Which requires a report after 48 hours?

Mr. MATHESON. No, the '91 requires a report every 60 days. In this particular case—

Chairman SPECTER. Requires a report what?

Mr. MATHESON. Every 60 days.

Chairman SPECTER. So this is the 60-day report. It isn't 48 hours after—

Mr. MATHESON. Well—

Chairman SPECTER [continuing]. Military action?

Mr. MATHESON [continuing]. It's personally my hope that you will receive it within 48 hours. But at any rate, we have accelerated it a bit to make sure that the Congress receives prompt reporting.

Chairman SPECTER. Well, I ask you this question because it's important as to the corollary question of shouldn't Congress have been notified prior to the commencement of the hostile activity?

Mr. MATHESON. The legal answer to your question, which both this Administration and the prior one have adopted, is that the requirements which govern in light of the authorization given under the War Powers Act in 1991 is the 60-day reporting cycle. That doesn't mean that that's the only thing we're going to do, and in fact, we obviously have done more and we're trying to do more, but that is the legal structure.

Chairman SPECTER. You say the requirement for notification—for consultation with Congress in advance of hostile action is abrogated because of the other provisions which you cite.

Mr. MATHESON. In effect, we are still in the introduction and hostilities that was authorized by Congress in 1991.

Chairman SPECTER. Well, I have to disagree with you, Mr. Matheson. But if you seek that legal technicality to avoid consultation with Congress, I'd be inclined to ask you, don't you think it would have been a good idea if the Executive branch had consulted Congress in advance of hostile activity?

Mr. MATHESON. I honestly don't think it was the purpose to avoid consultation. I think you're pointing to a difference of a few hours as to whether it occurred before or after the strikes.

Chairman SPECTER. No, there was no—well, consultation requires consultation before the strike. It's very important as to whether it's before the strike or the Congressional leadership is notified after the strike.

Mr. MATHESON. I understand. I believe there were general consultations before, but probably not of the specific character that would otherwise have been required absent this statute in 91.

Chairman SPECTER. Well, what do you mean by general consultations?

Mr. MATHESON. Consultations about the situation in Iraq, the developing threat, the possible options.

Chairman SPECTER. Well, the Senate Majority Leader was not notified about the military action which was taken. He announced that to a group of Senators yesterday.

Mr. MATHESON. I understand.

Chairman SPECTER. So I don't know what you're talking about.

Mr. MATHESON. I'm not trying to say that this specific notification that would ordinarily have been given under the War Powers Resolution but for this change in the law was given in this case. I'm just trying to point out that there has not been an attempt to avoid keeping the Congress fully informed on developments in Iraq.

Chairman SPECTER. Well, when you talk about intent to avoid fully notifying Congress, you're either in some very fuzzy ground or something that I disagree with you on. I think before missiles are launched, that there's a requirement that Congress be consulted. That's under the War Powers Act. And I don't think that there

ought to be some extended effort to find a way around that; that it's just a telephone call; it's just a—Congress doesn't have to concur. All the Congress has to do is be consulted with, which is a matter of notification. And in the context where we're trying to work these things out without having elaborate statutes that require lawyers to pore countless hours over it to figure out ways to avoid or march right up to the line without crossing it or defending it in these hearings, it would be a pretty good idea if the Executive branch would call up the Legislative branch and say this is what we're doing. Let's consult. And if the Legislative branch says don't do it, the Executive doesn't have to pay any attention to that at all.

Mr. MATHESON. Mr. Chairman, I'll now do what Deputy Secretary Talbott did in a different context, which is to say I have heard your message and I will make sure that it is communicated back in the department.

Chairman SPECTER. Okay. Maybe we can come to agreement next time.

Thank you very much, gentlemen.

Mr. MATHESON. Thank you.

[Thereupon, at 12:30 p.m., the hearing was concluded.]



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