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

JUNE 19 (legislative day, JUNE 11), 1991.—Ordered to be printed

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

REPORT

[To accompany S. 1325]

The Select Committee on Intelligence, having considered the original bill (S. 1325), authorizing appropriations for fiscal year 1991 for the intelligence activities of the U.S. Government, the Intelligence Community staff, the Central Intelligence Agency Retirement and Disability System, and for other purposes, reports favorably thereon and recommends that the bill do pass.

PURPOSE OF THE BILL

This bill would:

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

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

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

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

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

(6) Authorize the Secretary of Defense to withhold certain maps, charts, and geodetic data from public disclosure;

- (7) Provide the Director of the National Security Agency with enhanced personnel authorities to protect classified information;
- (8) Provide certain personnel authorities to enhance the intelligence functions of the Department of Energy; and
- (9) Improve the Congressional oversight of U.S. intelligence activities.

OVERALL SUMMARY OF COMMITTEE ACTION

[In millions of dollars]

	Intelligence activities	Fiscal year request	Committee recommendation
IC staff		\$28.88	\$28.88
CIARDS		164.6	164.6

BACKGROUND OF THE BILL: VETO OF S. 2834

The bill reported today by the Committee is, with the exception of one provision, virtually identical to S. 2834 (101st Congress) as reported by the Committee by the Committee of Conference (H. Rept. 101-928). S. 2834 passed both Houses of Congress by voice vote in the last days of the 101st Congress.

Although the Administration had advised that the President would sign S. 2834 (see Congressional Record, October 24, 1990, p. H13489), on November 30, 1990, the President issued a "Memorandum of Disapproval," stating that he had decided not to sign the bill, thus preventing it from becoming law.

The principal reason given by the President for his decision was his concern over a sentence in the definition of the term "covert action," contained in subsection 602(e) of S. 2834. This sentence provided that any request to a foreign government or private citizen to conduct a covert action on behalf of the United States was itself deemed to be a covert action, requiring a presidential finding and reporting to the Congress pursuant to the procedures set forth in the bill.

The President stated that he was "particularly concerned that the vagueness of this provision could seriously impair the effective conduct of our Nation's foreign relations. It is unclear exactly what sort of discussions with foreign governments would constitute reportable 'requests' under this provision, and the very possibility of a broad construction of this term could have a chilling effect on the ability of our diplomats to conduct highly sensitive discussions concerning projects that are vital to our national security. Furthermore, the mere existence of this provision could deter foreign governments from discussing certain topics with the United States at all."

Although the Chairmen of both Committees had made clear to the President in a letter dated November 29, 1990, that it was not the intent of this provision to change existing policy and require presidential findings and reports to Congress of preliminary contacts with foreign governments to determine the willingness and/or the feasibility of their conducting covert actions on behalf of the

United States, the Committee agreed to new language to resolve the concern of the President.

The President's Memorandum of Disapproval raised two additional points of concern. The first related to language in the Joint Explanatory Statement accompanying the Conference Report explaining a provision of the bill which states that when prior notice of covert actions had been withheld from the Congress, notice would be provided "in a timely fashion." Referring to the report language regarding the definition of "covert action," the Memorandum also stated that the President would "continue to work with the Congress to ensure that there is no change in our shared understanding of what constitutes a covert action, particularly with respect to the historic missions of the armed forces."

As a result of the discussions between the Committee and Administration representatives which followed the veto of S. 2834, additional modifications were made in the report language regarding these two points to resolve Administration concerns. These changes are reflected herein.

THE CLASSIFIED SUPPLEMENT TO THE COMMITTEE REPORT

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

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

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

SCOPE OF COMMITTEE REVIEW

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

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

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

Finally, the Committee also reviewed the Administration's budget request for Tactical Intelligence and Related Activities of

the Department of Defense. The Committee's recommendations regarding these programs, which fall under the jurisdiction of the Armed Services Committee, were provided separately to that Committee for consideration in the Defense Authorization bill.

INTELLIGENCE REQUIREMENTS IN A CHANGING WORLD

In its 1990 hearings on the budget, the Committee adopted an approach different from previous years. Rather than having individual program managers appear before the Committee to defend their respective budgets, the Committee first heard testimony from various officials relating to the dramatic changes rapidly taking place in the world order. Following this series of presentations, senior officials in the Intelligence Community described how U.S. intelligence was responding, or was planning to respond, to such developments, with emphasis upon any programmatic and budgetary shifts that may be necessary or desirable. While the Committee recognizes that such adjustments need to be made at a deliberate pace and continue over several years, the FY 1991 authorization bill does, in fact, reflect the beginning of a process to reorder priorities and objectives of U.S. intelligence activities.

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

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

In addition, the Committee believes that there are other intelligence requirements demanding attention in the future that have not received adequate resources given the intelligence community's long standing preoccupation with the Soviet threat. For example, intelligence support to low intensity conflict, counter-terrorism,

and counter-narcotics are areas where intelligence capabilities require improvement. In addition, better intelligence on political and economic developments will have to be assigned a higher priority in the years ahead. Perhaps our most serious deficiencies over the longer term lie in our ability to contend with the worldwide proliferation of sophisticated weaponry, to include nuclear, chemical, and biological weapons, and the long range missile systems to deliver them.

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

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

REORGANIZING DEPARTMENT OF DEFENSE INTELLIGENCE

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

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

While new requirements and the increasing cost of collection systems have driven a share of the increase in intelligence, the cost of maintaining large numbers of intelligence organizations internal to the Department of Defense has also contributed. Every echelon from the Office of the Secretary of Defense, to the Service Departments, to the CINCs and below have their own organic intelligence

arms. For each organization, we need separate buildings, separate administration, separate security, separate communications, and separate support services.

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

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

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

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

Both committees expect the Secretary of Defense and the Director of Central Intelligence to report on their efforts to comply with this language to the Committees. Both committees intend to initiate staff studies and to hold joint hearings to monitor the progress of these efforts and, if necessary, to draft legislation to achieve the objectives outlined in this report.

REVIEW OF GLOBAL PROLIFERATION DEVELOPMENTS

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

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

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

COUNTERINTELLIGENCE INITIATIVES

The Jacobs Panel

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

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

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

Based upon these recommendations, a new bill, S. 2726, was developed and introduced by Senators Boren and Cohen on June 13, 1990, and referred to the Committee. The Committee held two public hearings and one closed hearing on S. 2726 during the second session of the 101st Congress. There was however, insufficient time for a bill to be reported. Senators Boren and Cohen did, however, introduce a revised bill, S. 3251, at the end of the 101st Congress which incorporated many suggested revisions of the original bill. This legislation was reintroduced in the 102nd Congress as S. 394.

Counterintelligence oversight actions

In addition to the work of the Jacobs panel, the Committee has continued to review the overall capabilities, direction, and effectiveness of U.S. counterintelligence efforts. The rapid changes in Eastern Europe and U.S.-Soviet relations have required careful attention to new developments as well as long-standing problems. As a result of its oversight of U.S. counterintelligence policies and programs, the Committee is making a series of recommendations in this report and in the classified annex accompanying the Intelligence Authorization Act for FY91.

FBI resources and arms control inspection

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

tional resources for the FBI's FY 1991 counterintelligence program so as to meet the requirements for implementation of arms control inspection agreements, including the Threshold Test Ban Treaty and preparation for a possible START agreement.

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

The pending Threshold Test Ban Treaty will probably, if ratified, involve another site in the United States where the Soviets would have a long-term presence, as well as several other temporary access sites. Under a START agreement, the Soviets may have additional permanently staffed sites in the United States and considerably more temporary access to many other sites. The U.S. Government must prepare for the possibility that the Soviets will attempt to exploit these verification arrangements for clandestine intelligence purposes. In response to a request after a Committee briefing on arms control counterintelligence issues, the FBI has provided a classified estimate of its needs. The minimum requirements for the Test Ban Treaty are estimated to be substantial. The FBI's figures for START have a wider range, depending on the final agreement. The minimum for START is estimated to be much greater than the requirements for the Test Ban Treaty, while the maximum could be far more if Soviet inspectors are not subject to the same regulations as are imposed under the INF Treaty. Whenever START is implemented, the counterintelligence personnel shortfall in the FBI will be significant without additional positions. Thus far, however, the Administration has not proposed a budget amendment or other means to fund the FBI's requirements. With essentially static resources the FBI must respond to the great influx of Soviet visitors and emigres, as well as to arms control inspectors with official immunity.

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

tends to consider the adequacy of the Administration's commitment to providing FBI resources for this purpose.

Office of Foreign Missions Controls

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

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

The Committee believes that counterintelligence-related controls administered by the Office of Foreign Missions should not be modified without an assessment of the impact from the FBI and other appropriate elements of the intelligence community. In view of the possibility that such issues may arise in the coming year, the Committee requests that the intelligence community submit to the President and to the Committee, at the time of the 1991 Leahy-Huddleston report, a detailed analysis of the intelligence activities of foreign countries in the U.S. harmful to national interests. The President's report should explain any changes in OFM policies or in the countries covered by the report, with specific reference to the intelligence community's analysis.

Economic espionage

During the Committee's closed hearing in 1990 on U.S. counterintelligence programs, the FBI Director and senior State Department, Defense Department, and CIA officials discussed the possibility of an emerging economic espionage threat, including the collection of U.S. proprietary and unclassified information by foreign powers. In the course of refocusing the national counterintelligence

strategy for the 1990s, more attention is being given to the economic espionage issue. There is evidence that foreign intelligence services, including services that are not "traditional" adversaries, have conducted clandestine operations in the United States to obtain information to be used for their national economic advantage.

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

Overseas construction security

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

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

Since the Inspector General uncovered noncompliance, the State Department has made a concerted effort to comply with the construction security certification requirements. In response to the Committee's inquiries, the Department has advised that it takes the law to mean, and it follows the principle that, no construction security certification can be completed without input from the DCI.

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

Report on port security at Hampton Roads

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

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

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

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

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

The Secretaries of Defense and Transportation shall report to the Committee the results of this review no later than June 1, 1991.

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

Security at U.S. test range facilities

In May, 1990, the Committee received a report prepared by the Defense Intelligence Agency (DIA) regarding the effectiveness of security measures at several key U.S. test range facilities. The Committee had requested the Defense Department to prepare this

report after confirming serious security deficiencies at the Kwajalein Atoll Test Range in 1989.

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

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

Because of its continuing interest in this important matter, the Committee requested the Secretary of Defense to prepare a further report identifying the funds being set aside in the FY 1992 Defense Authorization bill to remedy the deficiencies identified in the DIA report, and describing the organizational and procedural changes being implemented to rectify the management and acquisition problems identified by the DIA report.

DEPARTMENT OF DEFENSE DAMAGE ASSESSMENTS

Last year, the Committee directed the Department of Defense to establish a mechanism under the auspices of the Chairman, Joint Chiefs of Staff for the conduct of comprehensive, detailed, joint damage assessments of cases where U.S. classified information has been compromised. Members of the damage assessment analytical teams were to include both operators and intelligence analysts (cryptologic and all-source). The Department of Defense is in the process of establishing a senior OSD oversight group, and a working group within the JCS, headed by DIA, to conduct such assessments. The Department has assured the Committee that this working group will have access to all relevant classified, compartmented, and special access information, consistent with the requirements of legal proceedings. The Committee commends the Department of Defense for its efforts to date, and looks forward to receiving a report from the Department on the final codification of its structure and procedures.

INTELLIGENCE OVERSIGHT

Title VI of the bill contains the provisions governing the congressional oversight of intelligence activities. They would substantially replace the provisions of the Intelligence Oversight Act of 1980.

The text of title VI is, with the exception of one provision, the same as that of title VI of S. 2834, passed by both Houses of Congress during the 2nd session of the 101st Congress. As explained above, on the basis of his objection to a particular sentence in title VI of S. 2834, the President declined to sign the bill into law.

The text of title VI has subsequently been revised to satisfy the President's concerns.

Most of the provisions of title VI originally passed by the Senate on March 15, 1988 by a vote of 71-19 as part of S. 1721, a bill introduced in the 100th Congress in the aftermath of the Iran-Contra affair. The same provisions were later substantially incorporated in the Intelligence Authorization bill for FY 1990 (S. 1324, 101st Congress) which passed the Senate by voice vote in 1989. For various reasons, neither S. 1721 nor the oversight provisions of the Intelligence Authorization Act for FY 1990 ever passed the House of Representatives. Thus, the October, 1990 vote of the two Houses on the conference committee report on S. 2834 marked the first time both Houses had approved the oversight provisions.

(For a detailed explanation of the history, background, and objectives of this legislation, see pp. 13-27 of the Senate report to accompany S. 2834, the Intelligence Authorization Act for Fiscal Year 1991 (S. Rept. 101-358, 101st Congress, 2nd Session)).

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

Title I—Intelligence Activities

SECTION 101

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

SECTION 102

Section 102 makes clear that details of the amounts authorized to be appropriated for intelligence activities and personnel ceilings covered under this title for fiscal year 1991 are contained in a Classified Schedule of Authorizations which is incorporated as part of the bill.

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

Subsection (b) provides that the Schedule of Authorizations shall be made available to the Appropriations Committees of the Congress and to the President, and requires the President to make appropriate distribution of the Classified Schedule, or portions thereof, within the Executive Branch.

SECTION 103

Section 103 authorizes the Director of Central Intelligence (DCI) in fiscal year 1991 to expand the personnel ceilings applicable to the components of the Intelligence Community under Sections 102 and 202 by an amount not to exceed two percent of the total of the ceilings applicable under these sections. The Director may exercise this authority only when necessary to the performance of important intelligence functions or to the maintenance of a stable personnel force, and any exercise of this authority must be reported to the two intelligence committees of the Congress. "The authority conveyed by section 103 is not intended to permit the wholesale raising of personnel strength in each or any intelligence component. Rather, the section provides the Director of Central Intelligence with flexibility to adjust personnel levels temporarily for

contingencies and for coverages caused by an imbalance between hiring of new employees and attrition of current employees from retirement, resignation, and so forth. The Committee does not expect the Director of Central Intelligence to allow heads of intelligence components to plan to exceed personnel levels set in the Schedule of Authorizations except for the satisfaction of clearly identified hiring needs which are consistent with the authorization of personnel strengths in the bill. In no case is this authority to be used to provide for positions denied by this Act."

Title II—Intelligence Community Staff

SECTION 201

Section 201 authorizes appropriations in the amount of \$27,900,00 for the staffing and administration of the Intelligence Community Staff for fiscal year 1991. This includes \$6,580,000 for the Security Evaluation Office. "In the conference report on the FY 1990 Intelligence Authorization Act (see pages 21-11, H. Rept. 101-367, 101st Congress, 1st Session), the conferees expressed concern that for various reasons the SEO had failed to make the contribution expected of it by the committees as the focal point for bringing to bear the unique capabilities of the Intelligence Community on the problems of embassy security. The conference report set forth in detail what the conferees believed the organizational relationships and functions of the SEO should be to achieve the role envisioned for it.

The Committee continues to support the language on SEO in the conference report on the FY 1990 Intelligence Authorization Act."

SECTION 202

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

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

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

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

SECTION 203

Section 203 provides that the DCI shall utilize existing statutory authority to manage the activities and to pay the personnel of the Intelligence Community Staff. This language reaffirms the statutory authority of the DCI and clarifies the legal status of the Intelligence Community Staff. In the case of detailed personnel, it is understood that the authority of the DCI to discharge personnel ex-

tends only to discharge from service at the Intelligence Community Staff and not from federal employment or military service.

Title III—Central Intelligence Agency Retirement and Disability System and Related Provisions

SECTION 301

Section 301 authorizes fiscal year 1991 appropriations in the amount of \$164,600,000 for the Central Intelligence Agency Retirement and Disability Fund for fiscal year 1991. The Central Intelligence Agency Retirement Act of 1964 for Certain Employees (Public Law 88-643) authorized the establishment of CIARDS for a limited number of Agency employees and authorized the establishment and maintenance of a fund from which benefits would be paid to qualified beneficiaries.

The requested CIARDS funds will finance:

- Interest on the unfunded liability;
- The cost of annuities attributable to credit allowed for military service;
- Normal cost benefits not met by employees and employer contributions; and
- The increase in unfunded liability resulting from liberalized benefits and Federal pay raises.

The benefits structure of CIARDS is essentially the same as for the Civil Service Retirement System with only minor exceptions. These exceptions are : (a) annuities are based upon a straight two percent of high three-year average salary for each year of service, not exceeding 35; (b) under stipulated conditions a participant may retire with the consent of the Director, or at this direction be retired, at age 50 with 20 years service, or a participant with 25 years of service may be retired by the Director regardless of age; and (c) retirement is mandatory at age 65 for personnel receiving compensation at the rate of GS-18 or above, and at age 60 for personnel receiving compensation at a rate less than GS-18; except that the Director may, in the public interest, extend service up to five years.

Annuities to beneficiaries are provided exclusively from the CIARDS fund maintained through: (a) contributions, currently at the rate of seven percent, deducted from basic salaries of participants designated by the Director; (b) matching Agency contributions from the appropriation from which salaries are paid, based on the actual rate of contributions received from participants; (c) transfers from the Civil Service Retirement and Disability Fund representing employee and matching employer contributions for service of Agency employees prior to the date of their participation in CIARDS, and contributions for service of integrated Agency employees included in CIARDS following termination of integrated status; (d) income on investments in U.S. Government securities; and (e) beginning in 1977, direct appropriations consistent with the provisions of Public Law 94-552.

SECTION 302—CIA FORMER SPOUSE QUALIFYING TIME

Section 302 amends the Central Intelligence Agency Retirement Act of 1964 for Certain Employees to make clear that the five years of marriage spent outside the United States required to qualify for

former spouse benefits must occur during the periods of the participant's service with the Central Intelligence Agency.

Under the current CIARDS provisions, the "ten years of marriage during periods of service the participants . . . at least five years of which were spent outside the United States . . ." does not specify that any of this service must be with the CIA. The Foreign Service Retirement and Disability System (FSRDS) has comparable former spouse provisions but requires that five years of the marriage/service period must have occurred while the participant was a member of the Foreign Service.

SECTION 303—ELIMINATION OF 15-YEAR CAREER REVIEW FOR CIA EMPLOYEES

Section 303 amends the Central Intelligence Agency Retirement Act of 1964 for Certain Employees to eliminate the statutory provisions requiring a 15-year career review and a re-election option for CIARDS and FERS Special Category participants to remain under CIARDS or in FERS Special Category status for the duration of their Agency service.

The 15-year review and re-election option was established in the original CIA Retirement Act of 1964 for Certain Employees. Experience under Agency policy since 1976 has confirmed that there is no longer a need for either. Continuing the 15-year review will entail an administrative burden on the Agency for what is an essence only a pro forma exercise, while eliminating it will provide participants who accept the offer of designation under the system with the assurance that such an election will not be subject to subsequent change by the Agency.

SECTION 304—SURVIVOR ANNUITIES UNDER CIARDS FOR CERTAIN POST-RETIREMENT SPOUSES

Section 304 amends the Central Intelligence Agency Retirement Act of 1964 for Certain Employees to permit a retiree under CIARDS who failed to elect a survivor benefit for a prior spouse to elect a survivor benefit upon remarriage. Under existing law, such an election for current spouse can only be made if a previous election was made for a spouse to whom the participant was married at the time of retirement.

SECTION 305—REDUCTION OF REMARRIAGE AGE

Section 305 amends the CIA Retirement Act of 1964 for Certain Employees to lower, from 60 to 55, the age before which an entitlement to retirement benefits, in the case of former spouses, and survivor benefits, in the case of surviving spouses and former spouses, shall terminate based upon the remarriage of the former spouse or surviving spouse. The amendment will conform these provisions of CIARDS to similar provisions applicable to the Civil Service Retirement System, the Foreign Service Retirement System, and the Federal Employee Retirement System.

The provision affecting surviving spouses will apply to any remarriage that occur on or after July 27, 1989, the effective date of Executive Order 12684 which, for technical reasons, was ineffective in carrying out its intended purpose of reducing the remarriage age

to 55. The provision affecting former spouses will apply to any remarriage that occurs after the date of enactment.

SECTION 306—SELECTION BETWEEN CIARDS ANNUITY AND OTHER SURVIVOR ANNUITIES

Section 306 amends the Central Intelligence Agency Retirement Act of 1964 for Certain Employees to require a surviving spouse, who marries a retiree and becomes entitled to a CIARDS survivor annuity, to choose between such annuity and any other survivor annuity to which he or she may be entitled. CIARDS does not currently address the situation where a surviving spouse remarries after 60 (or the new 55), thus continuing to receive survivor benefits, and then again becomes a surviving spouse with survivor benefit entitlements payable by the federal government based on this second marriage. Under current law, if the surviving spouse married a CIARDS participant the second time, the surviving spouse would be eligible to receive two survivor annuities.

SECTION 307—RESTORATION OF FORMER SPOUSE BENEFITS AFTER DISSOLUTION OF REMARRIAGE

Section 307 contains several provisions which provide for the restoration of benefits to certain former CIA spouses whose benefits were terminated because of remarriage before the age of 55, and whose remarriage is later dissolved by death, annulment, or divorce. Former CIA spouses who were divorced after November 15, 1982 are already entitled to the restoration of benefits under these circumstances. But in providing benefits for former spouses divorced prior to November 15, 1982, Congress did not provide for such restoration. To correct this inconsistency and provide greater consistency with other federal retirement programs with similar provisions, the Committee believes such adjustment is desirable.

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

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

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

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

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

*Title IV—General Provisions***SECTION 401—INCREASE IN EMPLOYEE BENEFIT AND COMPENSATION
AUTHORIZED BY LAW**

Section 401 provides that appropriations authorized by the bill for salary, pay, retirement, and other benefits for Federal employees may be increased by such additional or supplemental amounts as may be necessary for increase in such compensation or benefits authorized by law.

SECTION 402—RESTRICTION ON CONDUCT OF INTELLIGENCE ACTIVITIES

Section 402 provides that the authorization of appropriations by the bill shall not be deemed to constitute authority for the conduct of any intelligence activity which is not otherwise authorized by the Constitution or laws of the United States.

**SECTION 403—TREATMENT OF CERTAIN ALIEN EMPLOYEES IN HONG
KONG**

Section 403 authorizes the Director of Central Intelligence to apply any unused portion of the annual allocation provided by Section 7 of the CIA Act of 1949 (permitting the DCI to authorize entry into the United States for permanent residence up to 100 aliens annually), for fiscal years 1991 through 1996, to permit the entry into the United States of employees of the Foreign Broadcast Information Service in Hong Kong, and their dependents, prior to 1997.

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

By applying the unused portion of such annual allocation for fiscal years 1991 through 1996, section 403 permits the Director to provide immediate assurance to FBIS employees in Hong Kong that they will be able to immigrate to the United States, should they choose to do so, when Hong Kong reverts to PRC control in 1997.

SECTION 404—EXCEPTED POSITIONS FROM THE COMPETITIVE SERVICE

Section 404 amends the Department of Energy Reorganization Act to provide that all positions within the Department which are determined by the Secretary to be devoted to intelligence and intelligence-related activities are excepted from the competitive service.

The Department of Energy has embarked during the past year on a program to consolidate and upgrade its intelligence functions, an initiative strongly supported by the Committee. It has become clear in the process of this development, however, that the Depart-

ment has difficulty filling intelligence and intelligence-related positions in a timely manner and in competing with other agencies in the Intelligence Community for qualified personnel. Many of these agencies already are exempted from the requirements of the competitive service.

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

SECTION 405—INTELLIGENCE COMMUNITY CONTRACTING

Section 405 provides that the Director of Central Intelligence shall direct by appropriate means that elements within the Intelligence Community, whenever compatible with the national security interests of the United States, and consistent with operational and security concerns related to the conduct of intelligence activities, should, where fiscally sound, award contracts that would maximize the procurement of products produced in the United States.

Title V—Department of Defense Intelligence Provisions

SECTION 501—REIMBURSEMENT RATE FOR CERTAIN AIRLIFT SERVICES

Section 501 would permit the Secretary of Defense to authorize a component of DOD to charge the CIA the same rate for military airlift services as would be charged another component of DOD if the Secretary determines that such services are provided for activities related to national security objectives.

Under the Economy Act, the Department of Defense has the authority to provide both services and goods to the Central Intelligence Agency in support of its activities. While the Act requires that the Department of Defense be reimbursed for the actual costs incurred, neither the Act nor its legislative history includes a definition of the term, "actual costs." Historically, the Department of Defense has not charged the CIA for indirect costs associated with military airlift services and the Air Force has charged the CIA the same "DOD rate" it would charge other Defense Department components. However, in light of a recent interpretation by the DOD General Counsel of an earlier Comptroller General opinion, the Department of Defense no longer believes that it has the authority to exempt the CIA from paying reimbursement for certain indirect costs involving personnel expenses associated with the airlift.

SECTION 502—PUBLIC AVAILABILITY OF MAPS, ETC., PRODUCED BY THE DEFENSE MAPPING AGENCY

Section 502 amends Chapter 167 of title 10, United States Code, by creating a new section 2796, providing for the public sale of unclassified maps and charts at scales of 1:500,000 and smaller produced by the Defense Mapping Agency, and authorizing withholding from public disclosure unclassified maps, charts and related geodetic data (MC&G) meeting specific criteria.

The Department of Defense requirements for mapping, charting and geodetic products and services are many and varied. Paper

maps and charts are needed for use by ground, sea and air forces to plan and execute military missions and to ensure safety of navigation on the seas and in the air. Computer readable or digital forms of MC&G products are becoming more widely needed in operational weapons systems, training and flight simulators, command and control systems, and in sea and air navigation systems. The Defense Mapping Agency satisfies these requirements in different ways. It may produce a product entirely from United States source material or it may acquire source material or even an entire product from a foreign government.

DMA discharges DOD's responsibility to provide certain MC&G products to the general public (10 U.S.C. 2791-94) through an extensive public sales program and by participation in the Government Printing Office's Library Depository Program. This section is not intended to diminish or restrict these activities. To the contrary, by providing clear statutory authority to withhold certain products, public availability of medium and small scale maps and charts, to include new efforts such as the "digital chart of the world" (A \$10,000,000 cooperative international effort by DMA to place maps and charts of the world at scales of 1:500,000 and smaller on compact disc-read only memory (CD-ROM) media), is assured and encouraged. Section 502 will also insure that future digital products and databases are made available to the public to the greatest extent practicable consistent with international obligations and defense purposes.

Unclassified products exempted from disclosure by this section need protection because: a foreign government may have provided information or a product with the understanding it was to be used solely for military or governmental purposes; or, certain products if analyzed could reveal how and from what source DMA may have acquired essential information to produce the products; or in certain circumstances, release of a product could reveal military operational or contingency planning. Classification of these products is not an acceptable or practical alternative because in many cases it would limit the availability and utility of the product and unnecessarily increase costs for storage and handling.

Section 502, which is intended to be "(b)(3) exemption" under the Freedom of Information Act (5 U.S.C. 552(B)(3)), properly balances the public's right to governmental information against the need to protect certain military information by specifically identifying the types of information which may be withheld, while providing authority to sell certain maps and charts to the public.

The Committee notes that DMA's concerns regarding public access to the materials at issue reflect familiar "national security" claims for the protection of intelligence sources, foreign relations, and military planning—yet, for the sake of convenience in using such materials, the agency prefers to avoid the requirement contained in the classification process provided under the President's executive order for "national security information."

As a rule, the Committee believes that it is generally unnecessary and inappropriate for an agency to have authority to deny public access to unclassified records on national security grounds. Although such statutory authority exists with respect to certain records of the CIA, See 50 U.S.C. Sec. 403(d)(3) and 403g, and the

National Security Agency, See 50 U.S.C. Sec. 402, this is chiefly because these provisions were enacted before Congress provided a general exemption from public disclosure for properly-classified "national security information" under Exemption 1 of the Freedom of Information Act, 5 U.S.C. Sec. 552(b)(1).

By requiring that information must be "properly classified" in order to qualify for Exemption 1 withholding, Congress sought to ensure that the "national security" need for protection would be certified and met pursuant to standards and procedures established by the President in an executive order on national security information. In addition to providing grounds for Exemption 1 denial of public access, classification pursuant to this executive order triggers certain information remains unclassified and is protected from public access only by a statute which qualifies it for withholding under Exemption 3 of the FOIA.

In this instance, the Committee has agreed that the enactment of withholding authority is justified for a narrowly defined category of DMA information. The Committee has reached this conclusion because (1) maps and charts produced by DMA are apparently subject to the FOIA; (2) there is a legitimate need to withhold some of these maps and charts from public disclosure; (3) it is demonstrably more efficient in this case to provide protection for the information outside of the classification system; (4) it is possible to distinguish through legislation between the categories of information that should be withheld and the categories of information that should be disclosed; and (5) legitimate public access to DMA materials will not be adversely affected in any way and the legislation includes specific language requiring the publication of categories of information that clearly belongs in the public domain. In the absence of any of these factors, this legislation would not be advisable.

Finally, it is the Committee's intent that the authorities provided to the Secretary of Defense in this section may be delegated to officials of rank no lower than Assistant Secretary of Defense.

SECTION 503—POST-EMPLOYMENT ASSISTANCE FOR CERTAIN NSA EMPLOYEES

Section 503 would amend the National Security Agency Act of 1959 (50 U.S.C. 402 note) to provide certain discretionary authority to the Director, NSA to utilize appropriated funds to provide assistance to former NSA employees for up to five years after leaving NSA employment where the Director determines such assistance is essential to avoid circumstances that might lead to the unlawful disclosure of classified information to which such employee or employees had had access. Annual reports are required to the Appropriations and Intelligence Committees of each House on the uses made of this authority.

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

In providing such authority, the Committee does not anticipate that it will often be needed. Clearly, it is intended to address

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

SECTION 504—COVER SUPPORT FOR CERTAIN FOREIGN INTELLIGENCE
ACTIVITIES

Section 504 adds a new subchapter II (sections 431-437) to chapter 21 to title 10 of the U.S. Code, permitting the Secretary of Defense to authorize the conduct of commercial activities necessary to provide security for intelligence collection activities undertaken abroad by elements of the Department of Defense. It is similar to statutory authorities previously granted the Federal Bureau of Investigation. (See section 203(b) of P.L. 98-411.)

The purpose of the new subchapter is to provide an exemption from certain federal statutes which deal with the administration and management of federal agencies, the requirements of which would be inconsistent with establishing and maintaining a bona fide private commercial activity to protect foreign intelligence collection activities. It would excuse compliance with such statutes where compliance would compromise the commercial activity concerned as an agency or instrumentality of the U.S. Government.

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

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

close and continuing scrutiny both within DOD and the Executive branch and by the two intelligence committees. To further guard against abuse of the new authority, and to ensure adequate congressional review, the provision contains a clause which states that no commercial activity may be initiated pursuant to this subchapter after December 31, 1995. This is intended to permit the continuation of commercial activities initiated prior to such date, but will require new legislative authority to approve new commercial activities after such date.

SECTION 431

Section 431 provides that the Secretary of Defense may authorize the conduct of those commercial activities as may be necessary to provide security for authorized intelligence collection activities abroad undertaken by elements of the Department of Defense subject to the provisions of this subchapter. The authority to authorize new commercial activities pursuant to this subchapter expires on December 31, 1995, although previously authorized activities may continue pending further action by the Congress.

It should be emphasized that the legislation authorizes the Department of Defense to engage in commercial activities only to provide cover for foreign intelligence collection activities. Thus, for example, the Department of defense may not engage in the commercial activities authorized by the legislation to provide cover for covert action or for non-intelligence Department of Defense activities.

Section 431(b) requires that the new commercial activities shall be carried out only after coordination with the Director of Central Intelligence. It is the Committee's intent that the DCI should provide both guidance and support for all such activities, and that the DCI be in a position to disapprove such activities should they conflict with other U.S. intelligence or policy objectives or if the DCI does not consider them operationally sound. Similarly, this section requires that all such activities that might take place within the United States be coordinated with, and, where appropriate, be supported by, the Director of the Federal Bureau of Investigation. Again, it is the Committee's intent that the FBI Director provide both guidance and support for all such activities, and be in a position to disapprove such activities within the United States if they should conflict with other FBI operational activities or if the FBI Director does not consider them operationally sound. The Committee also emphasizes that the Director of Central Intelligence and the Director of the Federal Bureau of Investigation are required to provide appropriate support to the Department of Defense in carrying out activities pursuant to this subchapter. Finally, in approving this subchapter, the Committee does not intend to terminate, supplant, or alter any support that DOD may now be receiving from the CIA, FBI, or other department or agency of the Executive branch in support of its intelligence collection activities.

Subsection (c) of section 431 contains definitions of terms used in the subchapter. Paragraph (1) defines the term "commercial activities" as meaning activities conducted in a manner consistent with prevailing commercial practice and includes the acquisition, use,

sale, storage and disposal of goods and services; entering into employment contracts, leases, and other agreements for real and personal property; depositing funds into and withdrawing funds from domestic and foreign commercial businesses or financial institutions; acquiring licenses, registrations, permits, and insurance; and establishing corporations, partnerships, and other legal entities.

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

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

Subsection (b) requires the Secretary to assign an organization within the Department of Defense to audit the activities conducted under the new authority and provides that the disposition of non-appropriated funds used or generated by such activities shall be audited at least annually by the appropriate auditing element of the Department of Defense, and that the results of such audits be promptly forwarded to the intelligence committees.

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

Subsection (a) provides that except where permitted by subsection (b), which follows, the commercial activities conducted pursuant to this subchapter shall be carried out in accordance with applicable federal law. For example, nothing in this chapter authorizes conduct that would violate any provision of federal criminal law contained in title 18, United States Code, or of any provision of title V of the National Security Act of 1947 which deals with, among other things, fully reporting all intelligence activities to Congress.

Subsection (b) provides that where the Secretary of Defense determines, in connection with the authorization of a commercial activity pursuant to section 431, that compliance with certain federal laws and regulations pertaining to the management and administration of federal agencies would create an unacceptable risk of compromise of authorized intelligence activities, the Secretary may waive compliance with such laws and regulations, to the extent necessary to prevent such compromise. Such determinations and waivers must be made in writing and must specify the particular laws and regulations for which compliance is waived.

The authority of the Secretary of Defense under this subsection may be delegated only to the Deputy Secretary of Defense, an Under Secretary of Defense, an Assistant Secretary of Defense, or to the Secretary of a Military Department.

Subsection (c) sets forth by general category the types of federal laws and regulations which pertain to the management and administration of federal agencies. This list is intended as inclusive.

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

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

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

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

Subsection (b) provides that such activities may be undertaken in the United States only as necessary to support intelligence activities abroad. This provision makes clear that such activities in the United States shall not be used to support intelligence collection activities within the United States itself. While the Committee recognizes that Department of Defense intelligence elements do, in fact, collect foreign intelligence within the United States, the Committee does not intend that this authority be used to support such operations unless they are a continuation of a collection activity that had been initiated abroad. In particular, the Committee does not intend that such authority be utilized within the United States to obtain information from United States citizens or permanent resident aliens without their being aware such information is being provided the U.S. Government.

Subsection (c) provides that commercial activity may not be undertaken within the United States for the purpose of providing goods or services to the Department of Defense, except as may be

necessary to provide security for the activities subject to this subchapter.

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

Section 436 provides that the Secretary of Defense shall issue implementing regulations which shall be consistent with this subchapter and satisfy certain requirements.

First, they must specify all elements of the Department of Defense who are authorized to engage in commercial activities pursuant to this subchapter.

Second, the regulations must require the personal approval of the Secretary or Deputy Secretary of Defense for all sensitive activities to be authorized pursuant to this subchapter. While it is intended that the Secretary be left with discretion to determine which activities should require his personal approval, the Committee intends that these include those activities specified in current Defense Department directives requiring referral of intelligence collection plans to the Office of the Secretary of Defense in certain circumstances. The Committee also agrees that an example of a "sensitive" activity would be the first time an operational activity utilizing the authority of this subchapter is to be conducted in a country that is itself the target of such collection. Another dimension of sensitivity is size. The regulations required by this subchapter should specify a level of anticipated commercial activity and a number of employees to be involved in such activity, above which the Secretary or Deputy Secretary's personal approval would be required.

Third, the regulations must specify all officials who are authorized to grant waivers of laws and regulations pursuant to subsection 433(b), or to approve the establishment or conduct of commercial activities pursuant to this subchapter.

Fourth, the regulations must designate a single office within the Defense Intelligence Agency to be responsible for the management and supervision of all activities authorized by this subchapter. It is the Committee's intent that the implementation of all activities authorized by this subchapter should be carried out by a single office which performs this function as a service of common concern for appropriate DOD components. This function logically belongs under the Defense Intelligence Agency whose Director has responsibility for coordinating and supporting all DOD human intelligence activities. The Committee views the centralization of this responsibility as desirable since: (1) the need for this authority is limited; (2) the implementation of this authority requires special skills and expertise which should not be duplicated in all DOD components that might avail themselves of this authority; and (3) centralizing the implementation responsibility will provide for better and more expeditious accountability and oversight by both DOD and the intelligence committees.

Fifth, the Secretary's regulations must provide for prior legal review of all commercial activities authorized pursuant to this chapter. The determinations required under this chapter cannot be adequately made without review by counsel. Such review should be conducted at least at the level of the DIA General Counsel and should, when appropriate, include participation by the Department of Justice.

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

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

Subsection (a) requires that the regulations mandated by section 436, and any changes thereto, be provided to the intelligence committees not less than 30 days prior to becoming effective.

Subsection (b) requires the Secretary to ensure that the intelligence committees are kept fully and currently informed of actions taken pursuant to this subchapter, including any significant anticipated activity to be authorized pursuant thereto. This provision makes clear that activities authorized pursuant to this subchapter are intelligence activities within the purview of 50 U.S.C. 413(a). In addition, subsection (b) directs the Secretary to promptly notify the appropriate committees of Congress whenever a corporation, partnership, or other legal entity is established pursuant to the authority contained in this subchapter. For purposes of this subsection, and pursuant to Senate Resolution 400 of the 94th Congress, Rule XXV of the Rules of the Senate, and Rule XLVIII of the House of Representatives, the appropriate committees are the Select Committee on Intelligence and the Committee on Armed Services of the Senate, and the Permanent Select Committee on Intelligence of the House of Representatives.

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

Subsection (c) requires an annual report, as of January 15 of each year, describing all commercial activities authorized pursuant to this subchapter that were undertaken during the previous fiscal year, including any exercise of the authorities specified in section 433 exempting commercial activities from the requirements of federal law and regulations. The report also must include a description of any expenditure of appropriated or non-appropriated funds made pursuant to this subchapter and a description of any actions

taken to implement recommendations or correct deficiencies identified in the audits required by section 432.

Subsection (b) of Section 503 states the effective date of the commercial cover provisions as the later of the end of the 90-day period beginning on the date of enactment of the Intelligence Authorization Act for Fiscal Year 1991 or the effective date of regulations prescribed by new section 436 of title 10.

Title VI—Oversight of Intelligence Activities

Section 601 of the bill repeals the Hughes-Ryan Amendment of 1974 so as to consolidate intelligence oversight provisions at a single place in the law and expand the requirement for Presidential approval of covert action to all entities of the United States Government (to parallel Executive Order 12333).

Current statutory provisions for intelligence oversight include the general requirements to inform the House and Senate Intelligence Committees in Title V of the National Security Act of 1947, as amended in 1980, and the requirement of Presidential approval for CIA covert action in Section 662 of the Foreign Assistance Act of 1961, as amended in 1974 (22 U.S.C. 2422—the Hughes-Ryan Amendment). The differences in language and scope between these provisions, which appear at different places in the statutes, have been a source of unnecessary confusion and disagreement between the branches. Therefore, Section 601 of the bill would repeal the Hughes-Ryan Amendment in order to substitute a new Presidential approval requirement as an integral part of a more coherent and comprehensive statutory oversight framework for covert action and other intelligence activities to be set forth at one place in the law. The superseding Presidential approval requirement is contained in the proposed new sections 503 and 504(d) of the National Security Act of 1947, discussed below.

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

Section 602 of the bill would replace the existing Section 501 of the National Security Act of 1947 with three new sections that prescribe, respectively, general provisions for oversight of all intelligence activities, reporting of intelligence activities other than covert actions, and Presidential approval and reporting of covert actions.

SECTION 501—GENERAL PROVISIONS

The new section 501 of Title V of the National Security Act of 1947 would specify the general responsibilities of the President and the Congress for oversight of intelligence activities and reaffirm the basic principles in current law for keeping the House and Senate Intelligence Committees fully and currently informed of intelligence activities, including any significant anticipated intelligence activity, without requiring approval by the Committees.

(a) Presidential duty to ensure Congress informed

Subsection (a)(1) would place a statutory obligation upon the President to ensure that the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (referred to in the bill as the "intelligence committees") are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity, as required by this title. Current law imposes such duties on the DCI and agency heads, but not on the President himself. Over-all responsibility should be vested in the President because of the importance and sensitivity of secret intelligence activities that may affect vital national interests, and because the President, who exercises authority over all departments, agencies and entities in the Executive branch, may have unique knowledge of such activities. It is contemplated that the President would carry out this statutory responsibility by promulgating policies applicable to the Executive branch which would implement the statutory requirements contained in the bill. Such policies and any changes therein should be reported to the intelligence committees.

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

Subsection (a)(2) would also retain the qualification in current law that nothing contained in the prior notice requirements shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities. The parallel provision of existing law is clause (A) of paragraph 501(a)(1).

(b) Illegal activities

Subsection (b) would require the President to ensure that any illegal intelligence activity is reported to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity. Under current law, paragraph 501(a)(3) imposes this duty on the Director of Central Intelligence and agency heads, subject to certain qualifications. The purpose of this revised provision is to place an unqualified statutory obligation on the President to ensure reporting of such matters to the committees. It is contemplated the President would

carry out this statutory responsibility by promulgating policies applicable to the Executive branch which would implement the statutory requirements in the bill. The definition of illegal activity remains unchanged, but the responsibility to ensure the reporting of such activity is shifted to the President.

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

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

(c)-(f) Other general provisions

Subsections (c), (d) and (e) would retain provisions of existing law. Subsection (c) is identical to the current subsection 501(c) that authorizes the President and the intelligence committees to establish procedures to carry out their oversight obligations. With the exception of a minor technical change having no substantive effect, subsection (d) is the same as the current subsection 501(d) that requires the House and Senate to establish procedures to protect the secrecy of information furnished under this title and to ensure that each House and its appropriate committees are advised promptly of relevant information. Subsection (e) is identical to subsection 501(e) of the National Security Act of 1947. The Committee believes it is important to emphasize, as this provision does, that for the purpose of the preambular clause contained in sections 502 and 503(b) of the bill, disclosure of information by an intelligence agency to the intelligence committees cannot itself be an "unauthorized disclosure." This provision is not intended, however, to negate the effect of the preambular clause in sections 502 and 503(b).

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

**SECTION 502.—REPORTING INTELLIGENCE ACTIVITIES OTHER THAN
COVERT ACTIONS**

The new section 502 is intended to impose the same reporting requirements imposed by current law insofar as intelligence activi-

ties other than covert actions are concerned. This distinction between covert actions and other intelligence activities is discussed more fully with respect to section 503, below.

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

Fully and currently informed

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

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

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

Furnishing pertinent information

Subsection 502(b) would impose a second obligation upon the officials designated in the introductory clause to furnish the intelligence committees any information or material concerning intelligence activities (other than covert actions) which is within their custody or control, and which is requested by either of the intelli-

gence committees in order to carry out its authorized responsibilities. This provision maintains existing law, and is subject to the preambular clause regarding the protection of sources and methods, discussed below.

Protection of sensitive sources and methods

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

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

SECTION 503.—PRESIDENTIAL APPROVAL AND REPORTING OF COVERT ACTIONS

Covert actions raise fundamentally different policy issues from other U.S. intelligence activities because they are an instrument of foreign policy. Indeed, constitutional authorities draw a distinction between Congressional power to restrict the gathering of information, which may impair the President's ability to use diplomatic, military, and intelligence organizations as his "eyes and ears," and

Congressional power to regulate covert action that goes beyond information gathering. Congress has the constitutional power to refuse to appropriate funds to carry out covert actions and may impose conditions on the use of any funds appropriated for such purposes.

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

(a) Presidential findings

Subsection (a) provides that the President may not authorize the conduct of covert actions by departments, agencies or entities of the United States, including the Executive Office of the President, unless he determines such activities are necessary to support identifiable foreign policy objectives of the United States and are important to the national security of the United States. This determination must be set forth in a "finding" that meets certain conditions. The importance of this requirement is underscored by Section 803 of the bill, discussed later, which prohibits expenditure of funds available to the U.S. Government to initiate any covert action unless and until such a presidential finding has been signed or otherwise approved in accordance with section 503.

The current presidential approval provision in the Hughes-Ryan Amendment (22 U.S.C. 2422) requires a finding by the President "that each such operation is important to the national security of the United States." The proposed new subsection 503(a) would require the President to make an additional determination that the activities "are necessary to support identifiable foreign policy objectives of the United States." This conforms the statute to the Executive branch definition of "special activities" in section 3.4(h) of Executive Order 12333 which refers to "activities conducted in support of national foreign policy objectives abroad." The President should determine not only that the operation is important to national security, but also that it is necessary to support identifiable U.S. foreign policy objectives. The requirement that the foreign policy objectives in question must be "identifiable" is intended to prevent an overly general or speculative statement of objectives, to ensure that the foreign policy interests to be served by a covert action are well-thought out prior to approval and not contrived after the fact. Covert actions should be instruments of foreign policy, not a substitute for foreign policy.

It is intended that the intelligence committees will establish procedures to obtain an analysis of this issue with respect to each finding as part of their routine oversight functions.

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

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

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

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

the spirit, as well as the letter, of this provision are satisfied. Where an "entity" is a subordinate component of an "agency" or "department", or where an "agency" is a subordinate component of a "department", the highest level organization shall be named in the finding.

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

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

As used in this paragraph, the term "significant" is intended to encompass all but routine, minimal support to U.S. Government activities, which are incidental to the conduct and successful com-

pletion of the covert action in question. For example, where a third country routinely provides overflight clearances or landing rights to U.S. aircraft for a variety of purposes, its providing such clearances or landing rights for an aircraft involved in a covert action would not be considered "significant", in the context of the requirement for acknowledgment in a finding.

Fifth, paragraph 503(a)(5) would establish that a finding may not authorize any action that violates the Constitution of the United States. This is similar to section 2.8 of Executive Order 12333, which states that nothing in that Order "shall be construed to authorize any activity in violation of the Constitution or statutes of the United States." Current CIA policy is to avoid violation of any federal statutes which apply to covert actions, directly or which apply to government agencies in general. However, CIA possesses statutory authorities to carry out its authorized functions that are unavailable to other government agencies. This provision is not intended to require that covert actions authorized in presidential findings need comply with statutory limitations which, by their own terms, apply only to another U.S. Government program or activity. For example, a statutory restriction on the overt Defense Department arms transfer program would not apply to covert CIA arms transfers authorized in a finding, even if the CIA obtained the arms from the Department of Defense under the Economy Act. Similarly, statutes which may prohibit conduct by private parties may not be applicable to the CIA or other government agencies because of the absence of the mens rea necessary to the offense. For example, the Justice Department takes this view with respect to the Neutrality Act. In short, there may be covert actions undertaken by the CIA which do not violate U.S. statutes because the statutes themselves do not apply to the CIA. However, any such case deserves intense scrutiny by the Executive branch, and by the intelligence committees, in their respective reviews of covert actions. It is intended that the intelligence committees will establish procedures to obtain any analysis of the impact, if any of existing statutes on each covert action as part of their routine oversight functions.

(b) General reporting provisions relating to covert actions

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

Fully and currently informed

The first reporting obligation, set forth in subsection 503(b)(1), is to keep the intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures. This provision maintains the obligations imposed by current law, although the phrase "including significant failures" has been

extracted from the general requirement in subsection 501(a)(3) of current law, and applied specifically to covert actions. This parallels the addition of this same phrase to section 502, for the same reasons as explained above.

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

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

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

Furnishing pertinent information

Subsection 503(b)(2) would continue to impose a second obligation upon the officials designated in the introductory clause to furnish the intelligence committees any information or material concerning covert actions which is in their possession, custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities. This requirement is imposed under current law.

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

(c) Notice of findings

Subsection 503(c)(1) sets forth the requirements that in ordinary circumstances the intelligence committees will be advised of all findings or determinations made pursuant to subsection 503(a), as soon as possible after approval and prior to the initiation of the

covert action in question. The President is made responsible for ensuring that this is done.

The Committee notes that the primary purpose of prior notice is to permit the intelligence committees, on behalf of Congress, to offer advice to the President. This purpose would be thwarted if the President waits until immediately prior to the initiation of the covert action to provide notice. It is important to remember that discussion with and advice from the intelligence committees must, in the case of covert actions, substitute for the public and congressional debate which normally precedes major foreign policy actions of the U.S. Government.

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

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

Notice to eight members of Congress

Subsection 503(c)(2) permits the President, when he determines it essential to meet extraordinary circumstances affecting vital interests of the United States, to provide the notice required under either subsection (c)(1) or (c)(3) to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate and such other Member or Members of the joint congressional leadership as may be included by the President. This latter clause is not included in existing law, but is added to permit the President to provide notice to additional members of the joint congressional leadership if he chooses to do so. The President may utilize this option either in giving prior notice of a covert action, or in giving notice after initiation. In such case, the President must provide a statement of the reasons for limiting such notice at the time it is made. This alternative is available to the President under current law.

Where prior notice has not been provided

Subsection 503(c)(3) provides that where a finding has not been reported to the intelligence committees pursuant to paragraph (1) or to the congressional leaders specified in paragraph (2), the President shall fully inform the intelligence committees in a timely fashion, and shall provide a statement of the reasons for not giving prior notice. This subsection incorporates without substantive change the requirement found in existing law (section 501(b) of the National Security Act of 1947) that the President fully inform the intelligence committees "in a timely fashion" of covert actions for which prior notice was not given.

The Executive branch has asserted that the President's constitutional authorities and/or existing law (section 501(b) of the National Security Act of 1947) permit the President to withhold notice

from the Committees for as long as he deems necessary. Such arguments were made most strongly in a Memorandum to the Attorney General, dated December 17, 1986, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, entitled "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act" (reprinted in Hearings before the Select Committee on Intelligence, "Oversight Legislation," S.HRG. 100-623, pp. 126-152), which concluded that the President had "virtually unfettered discretion to choose the right moment for making the required notification."

Both intelligence committees expressed strong disagreement with this legal opinion when it came to light, believing it to be clearly inconsistent with the understandings which underlay the 1980 Act.

In 1989, this Committee asked the newly-installed Bush Administration to reject the Cooper memorandum and to provide explicit assurances with respect to how the President intended to comply with the requirement for "timely notice," contained in section 501(b). A similar request was made by the House Permanent Select Committee on Intelligence in 1990.

President Bush responded to these requests with similar letters to both Committees. The text of the letter to the Chairman of the House Committee is reprinted here in full:

DEAR MR. CHAIRMAN: I am aware of your concerns regarding the provision of notice to Congress of covert action and the December 17, 1986 opinion of the Office of Legal Counsel of the Department of Justice, with which you strongly disagree primarily because of the statement that "a number of factors combine to support the conclusion that the 'timely notice' language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification."

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

I am sending a similar letter to Congressman Hyde.

Sincerely,

GEORGE BUSH.

In re-enacting the phrase "in a timely fashion," which is the formulation contained in existing law, the Committee wishes to emphasize and make absolutely clear that such action should not in any way be taken to imply agreement or acquiescence in the Cooper memorandum insofar as such memorandum interprets the "timely fashion" phrase as it exists in current law.

At the same time, however, it is the intent of the Committee that this provision be interpreted in a manner consistent with whatever authority the Constitution may provide. If the Constitution in fact

provides the President authority to withhold notice of covert actions for longer periods, then the Committee's interpretation cannot be legally binding upon the President. In his letter to the Committees, reprinted above, the President asserts that the Constitution, in his view, does provide such authority.

The Committee has never accepted this assertion, but recognizes that this is a question that neither the Committee nor the Congress itself can resolve. Congress cannot diminish by statute powers that are granted by the Constitution. Nor can either the Legislative or Executive branch authoritatively interpret the Constitution, which is the exclusive province of the Judicial branch.

Congress is, however, free to interpret the meaning of statutes which it enacts. While the Committee recognizes that it cannot foreclose by statute the possibility that the President may assert a constitutional basis for withholding notice of covert actions for periods longer than "a few days," we believe that the President's stated intention to act under the "timely notice" requirement of existing law to make a notification "within a few days" is the appropriate manner to proceed under this provision, and is consistent with what the Committee believes is its meaning and intent.

Copies of findings

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

(d) Notice of significant changes

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

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

Two types of significant changes are expressly mentioned in the subsection. The first pertains to significant changes in a previously-approved finding. This would occur when the President authorizes a change in the scope of a previously-approved finding to authorize additional activities to occur. The second type of change specified in this subsection pertains to significant undertakings pursuant to a previously-approved finding. This would occur when the Presi-

dent authorizes a significant activity under a previously-approved finding without changing the scope of the finding concerned.

(e) Definition of "Covert Action"

Subsection 503(e) contains a new definition of "covert action." It is intended to supersede the current references to CIA "operations" abroad under the Hughes-Ryan Amendment and "special activities" as defined by Executive Order 12333. The new definition is intended to reflect current practice as it has developed under the Hughes-Ryan Amendment and the Executive Order definition of "special activities." It is not intended that the new definition exclude activities which were heretofore understood to be covert actions, nor to include activities not heretofore understood to be covert actions. In other words, the new definition is meant to clarify the understanding of those activities that require presidential findings and reporting to Congress; not to relax or go beyond previous understandings.

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

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

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

In accordance with this overall approach, the core definition of covert action should be interpreted broadly. That is why, for instance, the requirement, found in the definition of "special activities" under Executive Order 12333, that the activities be "in support of national foreign policy objectives abroad" has not been re-

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

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

The definition also provides that covert actions may be undertaken by elements of the U.S. Government or by third parties “acting on their behalf and under their control.” These third parties may be foreign governments as well as private individuals. The Committee considers third parties to be acting on behalf and under control of an element of the United States Government when they are receiving direction and assistance from U.S. personnel directly involved in carrying out the covert action in question, or when they are receiving significant financial support or other significant forms of tangible materiel support from an element of the United States Government for use in carrying out the covert action.

The definition also provides that covert action must be an activity where the “role of the United States Government is not intended to be apparent or acknowledged publicly.” Activities which may be undertaken in secret but where the role of the United States will be disclosed or acknowledged once such activities take place are not covert actions. On the other hand, covert actions may involve activities which are visible or public, but the role of the United States in carrying out such activities is itself not apparent or acknowledged. The essential element of a covert action is that the role of the United States in the activity is not apparent and not intended to be acknowledged at the time it is undertaken. The U.S., in other words, seeks a form of plausible denial to the outside world. (This deniability would not, of course, apply to those within the United States Government who have a need to know about such activities, including the intelligence oversight committees.)

Since the definition of “covert action” applies only to activities in which the role of the United States Government is not intended

to be apparent or acknowledged publicly, the definition does not apply to acknowledged United States Government activities which may mislead a potential adversary as to the true nature of United States military capabilities, intentions, or operations. Likewise, the definition does not include acknowledged United States Government activities intended to influence public opinion or governmental attitudes in foreign countries. In both cases, the activity is not a "covert action" because the United States Government acknowledges the activity as being an activity of the United States Government. Concealment or misrepresentation of the true nature of an acknowledged United States activity does not make it a "covert action," even if the concealment or misrepresentation is intended to influence political, economic, or military conditions abroad. Similarly, acknowledged United States activities intended to influence public opinion or governmental attitudes in foreign countries are not "covert actions," even if the specific objectives of the activities are concealed. The definition of "covert action" does not apply unless the fact of United States Government involvement in the activity is itself not intended to be acknowledged.

Thus, the core definition of "covert action" retains the same basic criteria heretofore applied to determine whether activities constitute covert action operations, subject to certain exceptions explained below. The definition is intended to apply uniformly and equally to all elements of the U.S. Government.

Subsection (e)(1) is the first exception to the general definition of covert action. It lists first "activities the primary purpose of which is to acquire intelligence." This represents a change from the language of the Hughes-Ryan Amendment, which excluded activity only if its sole purpose was the collection of necessary intelligence. The primary purpose test nonetheless reflects actual practice since 1974. It appears that neither the Central Intelligence Agency nor the Congress have actually applied the sole-purpose test since the enactment of the Hughes-Ryan Amendment. What has applied is a rule of reason that treats as intelligence collection activities such as intelligence liaison relationships that produce intelligence indirectly or have other incidental results. By requiring a primary purpose test, however, the bill does not seek to create an avenue for designing operations to avoid the covert action requirements or to change the high threshold traditionally distinguishing covert action from intelligence collection operations.

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

operations to frustrate intelligence collection activities by hostile foreign powers, such as exposure of their agents.

In addition, the ordinary objectives of traditional counterintelligence activities might include influencing the intelligence gathered by foreign powers regarding specific United States military capabilities, intentions, or operations. The fact that such activities may have a substantial influence on the military plans and programs of certain foreign powers does not make them "covert action." However, there is a line beyond which such activities could, at least in theory, be undertaken to effect major changes in the foreign policies of such foreign powers or to provoke responses by such foreign powers that would have significant political consequences. If such activities were to be undertaken for such purposes, they would exceed the ordinary objectives of traditional counterintelligence activities and would constitute "covert action." None of the counterintelligence activities which the Department of Defense has reported to the Committee constitute covert action within the meaning of the definition.

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

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

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

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

Subsection (e)(2) exempts "traditional diplomatic activities" from the definition of covert action. It includes the use of diplomatic channels or personnel to pass messages and conduct negotiations between the United States and other governments of foreign entities. Traditional diplomatic activities, in this context, include activities long understood and accepted to be diplomatic in nature, in-

cluding the use of private citizens as intermediaries. They do not include activities that cannot reasonably be considered to be diplomatic in character, despite characterizations by some administration officials, such as the covert sales of arms to Iran. Such an operation went well beyond the traditional and accepted definition of diplomacy because of the means employed (e.g., financial transactions).

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

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

Traditional military activities encompass almost every use of uniformed military forces, including actions taken in time of declared war or where hostilities with other countries are imminent or ongoing. In addition to conventional warfare, the term also includes military contingency operations to rescue U.S. hostages held captive in foreign countries, to accomplish other counterterrorist objectives, such as assisting in the extraterritorial apprehension of a known terrorist, to support counternarcotics operations in other countries, or to achieve other limited military objectives, where the United States intends to acknowledge its sponsorship at the time the military contingency operation takes place.

The possibility exists, however, that military elements who are not identifiable to the United States could be used to carry out an operation to achieve a military or political objective abroad where there is no intent to acknowledge the involvement or sponsorship of the United States. Indeed, such operation need not be in support of U.S. military forces. The Committee does not view this potential use of military forces as a "traditional military activity" under subsection (e)(2).

It is the Committee's intent that "traditional military activities" include activities by military personnel under the direction and control of a United States military commander (whether or not the U.S. sponsorship of such activities is apparent or later to be acknowledged) preceding hostilities which are anticipated (meaning approval has been given by the National Command Authorities for the activities and for operational planning for hostilities) involving U.S. military forces, or where such hostilities are ongoing, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly. In this regard, the Committee intends to draw a line between activities that are and are not under the direction and control of the military commander. Activities that are not under the direction and control of a military commander should not be considered as "traditional military activities."

The Committee also recognizes that even in the absence of anticipated or ongoing hostilities involving U.S. military forces there could potentially be requirements to conduct activities abroad which are not acknowledged by the United States to support the planning and execution of a military operation should it become necessary. Whether or not other forms of support for the planning and execution of military operations could constitute "covert actions" will depend, in most cases, upon whether they constitute "routine support" to a military operation, as explained below.

The Committee considers as "routine support" unilateral U.S. activities to provide or arrange for logistical or other support for U.S. military forces in the event of a military operation that is to be publicly acknowledged. Examples include caching communications equipment or weapons, the lease or purchase from unwitting sources of residential or commercial property to support an aspect of an operation, or obtaining currency or documentation for possible operational uses, if the operation as a whole is to be publicly acknowledged.

The Committee would regard as "other-than-routine" support activities undertaken in another country which involve other than unilateral activities. Examples of such activity include clandestine attempts to recruit or train foreign nationals with access to the target country to support U.S. forces in the event of a military operation; clandestine efforts to influence foreign nationals of the target country concerned to take certain actions in the event of a U.S. military operation; clandestine efforts to influence and effect public opinion in the country concerned where U.S. sponsorship of such efforts is concealed; and clandestine efforts to influence foreign officials in third countries to take certain actions without the knowledge or approval of their government in the event of a U.S. military operation.

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

Routine support to such activities that would not rise to the level of a covert action would include the loan of equipment or certain kinds of training (for example, training in the use of loaned equipment, or the provision of intelligence), to a law enforcement agency

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

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

(f) Prohibition on use of covert actions

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

SECTION 603—LIMITATION ON USE OF FUNDS FOR COVERT ACTIONS

Section 603 of the bill redesignates section 502 of the National Security Act of 1947, which concerns the funding of intelligence activities, as section 504 of the Act. It also makes a technical amendment to conform section 502(a)(2) of the existing statute to the numbering used in this bill. Finally, it adds a new subsection (d) which deals with the use of funds for covert actions.

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

Section 504(d) would similarly provide that appropriated funds could not be expended to implement covert actions until the President had signed, or otherwise approved, a finding authorizing such activities, in accordance with subsection 503(a) but it would expand this limitation to cover the funds appropriated for any department, agency, or entity of the Government, not solely CIA. It would cover any appropriated funds, whether or not appropriated for the covert action contemplated. It would also cover non-appropriated funds

which are available to such departments, agencies, or entities from any source, over which such department, agency or entity exercises control. These might include funds provided by third parties, funds which are in the possession or custody of third parties but over which the U.S. has authority to direct disbursements, and funds produced as a result of intelligence activities (i.e., proprietaries). The limitation contained in section 504(d) would also apply regardless of whether the department, agency, or entity concerned actually came into possession of the funds, so long as it had the ability to direct the expenditure of such funds by the possessing agency or third party. This bar on expenditures would not preclude the payment of salaries or other expenses necessary for the planning of a covert action, as explained in the analysis of subsection 503(c)(1), above.

Section 504(e) requires that, except for funds generated in FBI undercover operations and in Department of Defense counterintelligence operations, non-appropriated funds spent for intelligence or intelligence-related activities may be used by an intelligence agency only if the use is pursuant to procedures jointly agreed upon by the intelligence committees and appropriations committees, and the Director of Central Intelligence and the Secretary of Defense, as appropriate. The purpose of section 504(e) is to ensure control over non-appropriated funds similar to those that have applied under existing section 502 of the National Security Act of 1947 to the use of appropriated funds for intelligence or intelligence-related activities, including covert actions. The procedures referred to, which have been in effect since 1988, deal with the categories of uses of non-appropriated funds identified to the committees by the relevant intelligence agencies and require reporting to the committees concerning such funds.

**SECTION 604—REDESIGNATION OF SECTION 503 OF NATIONAL SECURITY
ACT OF 1947**

Section 604 redesignates Section 503 of the National Security Act of 1947 as section 505, to conform to the changes made by the bill, and amends this section to require that the intelligence committees be notified of the proposed covert transfer of items on the munitions list worth more than \$1 million, as is required by current law, and also of the anticipated transfer of such items aggregating more than \$1 million in any fiscal year. Thus, if the Executive branch has agreed to covertly transfer 12 items, all of which are worth \$100,000, during any fiscal year to a foreign recipient, it should report prior to the first transfer of a single such item that it anticipates transferring an aggregate of items which in total will be worth more than \$1 million. The obligation to report an anticipated transfer would occur when the Executive branch determines that it will make such a transfer or series of transfers, whether or not it draws this conclusion during the fiscal year in which the transfers in excess of \$1 million are made, and even if the decision occurs in a prior fiscal year. If no expectation exists that items worth more than \$1 million will be transferred, no obligation to report is imposed by this section.

COMMITTEE ACTION

On June 19, 1991, the Select Committee on Intelligence approved the bill and ordered it favorably reported.

EVALUATION OF REGULATORY IMPACT

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

CHANGES IN EXISTING LAW

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

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