U.S. Department of Justice

Office of Legal Counsel

December 17, 1986

Office of the
Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act

This memorandum responds to your request that this Office review the legality of the President's decision to postpone notifying Congress of a recent series of actions that he took with respect to Iran. As we understand the facts, the President has, for the past several months, been pursuing a multifaceted secret diplomatic effort aimed at bringing about better relations between the United States and Iran (partly because of the general strategic importance of that country and partly to help end the Iran-Iraq war on terms favorable to our interests in the region); at obtaining intelligence about political conditions within Iran; and at encouraging Iranian steps that might facilitate the release of American hostages being held in Lebanon. It is our understanding that the President, in an effort to achieve these goals, instructed his staff to make secret contacts with elements of the Iranian government who favored closer relations with the United States; that limited quantities of defensive arms were provided to Iran; that these arms shipments were intended to increase the political influence of the Iranian elements who shared our interest in closer relations between the two countries and to demonstrate our good faith; and that there was hope that the limited arms shipments would encourage the Iranians to provide our government with useful intelligence about Iran and to assist our efforts to free the Americans being held captive in Lebanon.

On these facts, we conclude that the President was within his authority in maintaining the secrecy of this sensitive diplomatic initiative from Congress until such time as he believed that disclosure to Congress would not interfere with the success of the operation.

As we indicated in our memorandum of November 14, 1986, section 501 of the National Security Act permits the President to

withhold prior notification of covert operations from Congress, subject to the requirements that he inform congressional committees of the operations "in a timely fashion," and that he give a statement of reasons for not having provided prior notice. We now conclude that the vague phrase "in a timely fashion" should be construed to leave the President wide discretion to choose a reasonable moment for notifying Congress. This discretion, which is rooted at least as firmly in the President's constitutional authority and duties as in the terms of any statute, must be especially broad in the case of a delicate and ongoing operation whose chances for success could be diminished as much by disclosure while it was being conducted as by disclosure prior to its being undertaken. Thus, the statutory allowance for withholding prior notification supports an interpretation of the "timely fashion" language, consistent with the President's constitutional independence and authority in the field of foreign relations, to withhold information about a secret diplomatic undertaking until such a project has progressed to a point where its disclosure will not threaten its success.[1]

I. The President's Inherent Constitutional Powers Authorize a Wide Range of Unilateral Covert Actions in the Field of Foreign Affairs

A. The President Possesses Inherent and Plenary Constitutional Authority in the Field of International Relations

"The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, sec. 1. This is the principal textual source for the President's wide and

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[1] The vagueness of the phrase "in a timely fashion," together with the relatively amorphous nature of the President's inherent authority in the field of foreign relations, necessarily leaves room for some dispute about the strength of the President's legal position in withholding information about the Iranian project from Congress over a period of several months. The remainder of this memorandum outlines the legal support for the President's position, and does not attempt to provide a comprehensive analysis of all the arguments and authorities on both sides of the question. This caveat, which does not alter the conclusion stated in the accompanying text, reflects the urgent time pressures under which this memorandum was prepared.

inherent discretion to act for the nation in foreign affairs.[2] The clause has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. The President's executive power includes, at a minimum, all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.

Before the Constitution was ratified, Alexander Hamilton explained in The Federalist why the President's executive power would include the conduct of foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate."[3] This fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" explains why the Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American

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[2] The Constitution also makes the President Commander in Chief of the armed forces (Art. II, sec. 2); gives him power to make treaties and appoint ambassadors, subject to the advice and consent of the Senate (Art. II, sec. 2), and to receive ambassadors and other public ministers (Art. II, sec. 3); the Constitution also requires that the President "take Care that the Laws be faithfully executed" (Art. II, sec. 3). These specific grants of authority supplement, and to some extent clarify, the discretion given to the President by the Executive Power Clause.

[3] The Federalist No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961). This number of the The Federalist was devoted primarily to explaining why the power of making treaties is partly legislative and partly executive in nature, so that it made sense to require the cooperation of the President and the Senate in that special case.

citizens.[4] As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of

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[4] Congress's power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," art. I, sec. 8, cl. 11, like the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," art. I, sec. 8, cl 10, and the power "[t]o regulate Commerce with foreign Nations," art. I, sec. 8, cl. 3, reflects the fact that the United States is, because of its geographical position, necessarily a nation in which a significant number of citizens will engage in international commerce. A declaration of war immediately alters the legal climate for Americans engaged in foreign trade and is therefore properly treated as a legislative act necessarily binding on an important section of the private citizenry. Similarly, Congress's broad power over the establishment and maintenance of the armed forces, art. I, sec. 8, cls. 12-16, reflects their obviously important domestic effects. In accord with Hamilton's distinction, however, the actual command of the armed forces is given to the President in his role as Commander in Chief. Treaties (in whose making the Senate participates under art. II, sec. 2) have binding legal effect within our borders, and are most notable for the significantly small role that Congress plays.

the "executive Power."[5]

The presumptively exclusive authority of the President in foreign affairs was asserted at the outset by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain impartial in the war between France and Great

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[5] As one would expect in a situation dealing with implied constitutional powers, argument and authority can be mustered for the proposition that Congress was intended to have a significant share of the foreign policy powers not specifically delegated by the Constitution. Perhaps the most oft-cited authority for this position is James Madison's "Helvidius Letters" (reprinted in part in E. Corwin, The President's Control of Foreign Relations 16-27 (1917)), where he cautioned against construing the President's executive power so broadly as to reduce Congress's power to declare war to a mere formality. Madison's argument was directed principally at countering some overstatements made by Alexander Hamilton in his "Pacificus Letters" (reprinted in part in E. Corwin, supra, at 8-15); Madison's argument is not properly interpreted to imply that Congress has as great a role to play in setting policy in foreign affairs as in domestic matters. Even Jefferson, who was generally disinclined to acknowledge implied powers in the federal government or in the President, wrote: "The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly. . . ." 5 Writings of Thomas Jefferson 161 (Ford ed. 1895). While we agree that Congress has some powers to curb a President who persistently pursued a foreign policy that Congress felt was seriously undermining the national interest, especially in cases where Congress's constitutional authority to declare war was implicated, well-settled historical practice and legal precedents have confirmed the President's dominant role in formulating, as well as in carrying out, the nation's foreign policy.

Britain.[6] Similarly, the First Congress itself acknowledged the breadth of the executive power in foreign affairs when it established what is now the Department of State. In creating this executive department, Congress directed the department's head (i.e. the person now called the Secretary of State) to carry out certain specific tasks when entrusted to him by the President, as well as "such other matters respecting foreign affairs, as the President of the United States shall assign to the said department."[7] Just as the first President and the first Congress recognized that the executive function contained all the residual power to conduct foreign policy that was not otherwise delegated by the Constitution, subsequent historical practice has generally confirmed the President's primacy in formulating and

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[6] Proclamation of the President, April 22, 1793, reprinted in 1 Messages and Papers of the Presidents 156-157 (J. Richardson ed. 1896). President Washington also warned that his Administration would pursue criminal prosecutions for violations of his neutrality proclamation. Although such prosecutions were upheld at the time, a rule that would prohibit such prosecutions was recognized by the Supreme Court relatively soon thereafter. Compare Henfield's Case, 11 F. Cas. 1099, 1102 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.), with United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). It is worth emphasizing that Presidents have sometimes encountered constitutional obstacles when attempting to pursue foreign policy goals through actions in the domestic arena, but have rarely been interfered with in taking diplomatic steps, or even military actions short of war, outside our borders. The present significance of President Washington's proclamation has less to do with the particular actions he might have taken in the domestic sphere than with his claim that foreign affairs are generally within the constitutional domain assigned to the Executive. This claim is consistent with the Constitution and has now been reinforced by long historical practice.

[7] Act of July 27, 1789, 1 Stat. 28-29. See also Act of Jan. 30, 1799, 1 Stat. 613 (similar provision currently codified at 18 U.S.C. 953), which made it a crime for any person to attempt to influence the conduct of foreign nations with respect to a controversy with the United States.

carrying out American foreign policy.[8]

The Supreme Court, too, has recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the Constitution itself and that congressional efforts to act in this area must be evaluated in the light of the President's constitutional ascendancy:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations--a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be

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[8] The fact that Presidents have often asked Congress to give them specific statutory authority to take action in foreign affairs may reflect a practical spirit of courtesy and compromise rather than any concession of an absence of inherent constitutional authority to proceed. For example, President Franklin Roosevelt requested that Congress repeal a provision of the Emergency Price Control Act that he felt was interfering with the war effort; he warned, however, that if Congress failed to act, he would proceed on the authority of his own office to take whatever measures were necessary to ensure the winning of the war. 88 Cong. Rec. 7044 (1942).

As one would expect, of course, Congress has not always accepted the most far-reaching assertions of presidential authority. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Constitution did not authorize President to take possession of and operate privately owned steel mills that had ceased producing strategically important materials during labor dispute); id. at 635 (Jackson, J., concurring) ("[The Constitution] enjoins upon [the government's] branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful

results.[9]

Based on this analysis, the Supreme Court rejected the argument that Congress had improperly delegated a legislative function to the President when it authorized him to impose an embargo on arms going to an area of South America in which a war was taking place. The Court's holding hinged on the essential insight that the embargo statute's principal effect was merely to remove any question about the President's power to pursue his foreign policy objectives by enforcing the embargo within the borders of

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[9] 299 U.S. at 319-320 (emphasis added). See also Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948) (President "posseses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); id. at 109-112 (refusing to read literally a statute that seemed to require judicial review of a presidential decision taken pursuant to his discretion to make foreign policy); id. at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."), quoted with approval in United States v. Nixon, 418 U.S. 683, 710 (1974).

In Perez v. Brownell, 356 U.S. 44, 57 (1958) (citations omitted), the Court stated, "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation." The Perez Court, however, was reviewing the constitutionality of a statute in whose drafting the Executive Branch had played a role equivalent to one of Congress's own committees. 356 U.S. at 56. Furthermore, the statute at issue in Perez provided that an American national who voted in a political election of a foreign state would thereby lose his American nationality. If the President lacks the inherent constitutional authority to deprive an American of his nationality, then the Perez Court's language about congressional "regulation of foreign affairs" may refer only to "regulation of domestic affairs that affect foreign affairs." In any case, Perez should not be read to imply that Congress has broad legislative powers that can be used to diminish the President's inherent Article II discretion.

this country.[10] As the Court emphatically stated, the President's authority to act in the field of international relations is plenary, exclusive, and subject to no legal limitations save those derived from applicable provisions of the Constitution itself.[11] As the Court noted with obvious approval, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history:

> "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution

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[10] See 299 U.S. at 327 (effect of various embargo acts was to confide to the President "an authority which was cognate to the conduct by him of the foreign relations of the government")(quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 422 (1935) (emphasis added)). This implies that while the President may in some cases need enabling legislation in order to advance his foreign policy by controlling the activities of American citizens on American soil, he needs no such legislation for operations and negotiations outside our borders.

[11] Because the presidential action at issue in Curtiss-Wright was authorized by statute, the Court's statements as to the President's inherent powers could be, and have been, characterized as dicta. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring). We believe, however, that the Curtiss-Wright Court's broad view of the President's inherent powers was essential to its conclusion that Congress had not unconstitutionally delegated legislative authority to the President. Furthermore, the Supreme Court has since reaffirmed its strong commitment to the principle requiring the "utmost deference" to presidential responsibilities in the military and diplomatic areas. United States v. Nixon, 418 U.S. 683, 710 (1974).

> and unity of design, and their success frequently depends on secrecy and dipatch."

299 U.S. at 319 (emphasis added) (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). It follows inexorably from the Curtiss-Wright analysis that congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and that statutes infringing the President's inherent Article II authority would be unconstitutional.[12]

B. Secret Diplomatic and Intelligence Missions Are at the Core of the President's Inherent Foreign Affairs Authority

The President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court has repeatedly so held in modern times. For example:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over

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[12] See e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (citations omitted):

> The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

See also Worthy v. Herter, 270 F.2d 905, 910-912 (D.C. Cir. 1959) (statute giving President authority to refuse to allow Americans to travel to foreign "trouble spots" simply reinforces the President's inherent constitutional authority to impose the same travel restrictions).

> internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (emphasis in original). The Court has also, and more recently, emphasized that this core presidential function is by no means limited to matters directly involving treaties. In United States v. Nixon, 418 U.S. 683 (1974), the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 710 (emphasis added).[13]

Such statements by the Supreme Court reflect an understanding of the President's function that is firmly rooted in the nature of his office as it was understood at the time the Constitution was adopted. John Jay, for example, offered a concise statement in The Federalist:

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[13] See also id. at 706 ("a claim of need to protect military, diplomatic, or sensitive national security secrets" would present a strong case for denying judicial power to make in camera inspections of confidential material); id. at 712 n.19 (recognizing "the President's interest in preserving state secrets").

Note also that the Curtiss-Wright Court expressly endorsed President Washington's refusal to provide the House of Representatives with information about treaty negotiations after the negotiations had been concluded. 299 U.S. at 320-321. A fortiori, such information could be withheld during the negotiations.

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.
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> . . . So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.[14]

Jay's reference to treaties "of whatever nature" and his explicit discussion of intelligence operations make it clear that he was speaking, not of treaty negotiation in the narrow sense, but of the whole process of diplomacy and intelligence-gathering. The President's recent Iran project fits comfortably within the terms of Jay's discussion.

[14] The Federalist No. 64, at 392-393 (J. Jay) (C. Rossiter ed. 1961) (emphasis in original). Jay went on to note that "should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them." Id. at 393. Jay did not, however, suggest that the President would be obliged to seek such advice and consent for actions other than those specifically enumerated in the Constitution.

C. The President Has Inherent Authority to Take Steps to Protect the Lives of Americans Abroad

Perhaps the most important reason for giving the federal government the attributes of sovereignty in the international arena was to protect the interests and welfare of American citizens from the various threats that may be posed by foreign powers. This obvious and common sense proposition was confirmed and relied on by the Supreme Court when it held that every citizen of the United States has a constitutional right, based on the Privileges or Immunities Clause of the Fourteenth Amendment, "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."[15] Accordingly, the Supreme Court has repeatedly intimated that the President has inherent authority to protect Americans and their property abroad by whatever means, short of war, he may find necessary.

An early judicial recognition of the President's authority to take decisive action to protect Americans abroad came during a mid-nineteenth century revolution in Nicaragua. On the orders of the President, the commander of a naval gunship bombarded a town where a revolutionary government had engaged in violence against American citizens and their property. In a later civil action against the naval commander for damages resulting from the bombardment, Justice Nelson of the Supreme Court held that the action could not be maintained:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof . . . .
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> Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the

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[15] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

> duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not infrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.

Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186) (emphasis added).

Later, the full Court confirmed this analysis in an opinion holding that the President has inherent authority to provide bodyguards, clothed with federal immunity from state law, to protect judicial officers, even when they are travelling within the United States in the performance of their duties. In re Neagle, 135 U.S. 1 (1890). Rather than base its decision on a narrow analysis of the status of federal judges, the Court held that the presidential duty to "take Care that the Laws be faithfully executed"[16] includes "any obligation fairly and properly inferrible [sic] from" the Constitution.[17] The Court specifically stated that these were not limited to the express terms of statutes and treaties, but included "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[18] As the Court pointed out, Congress itself had approved this position when it ratified the conduct of the government in using military threats and diplomatic pressure to secure the release of an American who had been taken prisoner in Europe. Noting that Congress had voted a medal for the naval officer who had threatened to use force to obtain the American's release, the Court asked, "Upon what act of Congress then existing can any one lay his finger in

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[16] U.S. Const., art. II, sec. 3.

[17] In re Neagle, 135 U.S. at 59.

[18] Id. at 64 (emphasis added).

support of the action of our government in this matter?"[19] If military force may be used on the President's own discretion to protect American lives and property abroad, surely the less drastic means employed by President Reagan during the Iran project were within his constitutional authority.

II. Any Statute Infringing upon the President's Inherent Authority to Conduct Foreign Policy Would be Unconstitutional and Void.

Congress has traditionally exercised broad implied powers in overseeing the activities of Executive Branch agencies, including "probes into departments of the Federal Government to expose corruption, inefficiency or waste." Watkins v. United States, 354 U.S. 178, 187 (1957); see also McGrain v. Daugherty, 273 U.S. 135, 161-164 (1927). This power of oversight is grounded on Congress's need for information to carry out its legislative function. Because the executive departments are subject to statutory regulation and to practical restrictions imposed through appropriations levels, Congress can usually demonstrate that it has a legitimate and proper need for the information necessary to make future regulatory and appropriations decisions in an informed manner. McGrain, 273 U.S. at 178.

As the Supreme Court has observed, however, the congressional power of oversight "is not unlimited." Watkins, 354 U.S. at 187.[20] It can be exercised only in aid of a legitimate legislative function traceable to one of Congress's enumerated powers. See McGrain, 273 U.S. at 173-174. The power of oversight cannot constitutionally be exercised in a manner that would usurp the functions of either the Judicial or Executive Branches. Thus, the Supreme Court has held that by investigating the affairs of a business arrangement in which one of the government's debtors was interested, "the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature

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[19] Id. The fact that such a statute may have existed, see Expatriation Act of July 27, 1868, ch. 249, sec. 3, 15 Stat. 223, 224 (current version at 22 U.S.C. 1732) (authorizing the President to use such means, short of war, as may be necessary to obtain the release of Americans unjustly held prisoner by foreign governments), does not diminish the force of the Supreme Court's statement that no such statute would be needed to support such an exercise of executive power.

[20] It is worth observing that Congress's oversight powers are no more explicit in the Constitution than are the President's powers in foreign affairs. See McGrain, 273 U.S. at 161.

clearly judicial." Kilbourn v. Thompson, 103 U.S. 168, 192 (1881). The same principle applies to congressional inquiries that would trench on the President's exclusive functions. "Lacking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive." Barenblatt v. United States, 360 U.S. 109, 112 (1959) (emphasis added).[21]

It is undoubtedly true that the Constitution does not contemplate "a complete division of authority between the three branches." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). Nevertheless, there are certain quintessential executive functions that Congress may not exercise in the guise of its "oversight power." Congress, for example, may not give its own agents the power to make binding rules "necessary to or advisable for the administration and enforcement of a major statute." Buckley v. Valeo, 424 U.S. 1, 281 (1976) (White, J., concurring in part). Nor may Congress unilaterally alter the rights and duties created by a prior statutory authorization. INS v. Chadha, 462 U.S. 919, 951 (1983). In general, the management and control of affairs committed to the Executive Branch, even those given to the Executive by Congress itself, must remain firmly in the control of the President. Myers v. United States, 272 U.S. 52, 135 (1926). A fortiori, the conduct of affairs committed exclusively to the President by the Constitution must be carefully insulated from improper congressional interference in the guise of "oversight" activities.

This principle has three immediately relevant corrolaries. First, decisions and actions by the President and his immediate staff in the conduct of foreign policy are not subject to direct review by Congress. "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[22] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803).

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[21] On its facts, Barenblatt did not involve an inter-branch dispute. The Court upheld a contempt citation issued by a House Committee against a witness who refused to answer questions about his ties with the Communist Party.

[22] Obviously, Congress may investigate and consider the President's past actions when performing one of its own assigned functions (for example, while giving advice and consent to treaties or appointments, deciding whether to issue a declaration of war, or during the impeachment process).

Second, while Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs. Just as an individual cannot be required to waive his constitutional rights as a condition of accepting public employment or benefits, so the President cannot be compelled to give up the authority of his office as a condition of receiving the funds necessary to carry out the duties of his office.[23] To leave the President thus at the mercy of the Congress would violate the principle of the separation of powers in the most fundamental manner. The Federalist indicates that one great "inconveniency" of republican government is the tendency of the legislature to invade the prerogatives of the other branches, and that one of the main concerns of the Framers was to give the other branches the "necessary constitutional means and personal motives to resist [such] encroachments."[24] In an effort to address this problem the Constitution provides that the President's personal compensation cannot be altered during his term of office,[25] and it must be acknowledged that the President's constitutional independence is even more precious and

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[23] The doctrine of unconstitutional conditions has pervasive application throughout the law. For a good general statement of the doctrine, see Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 594 (1926):

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

[24] The Federalist No. 51, at 321-322 (J. Madison) (C. Rossiter ed. 1961).

[25] U.S. Const., art. II, sec. 1, cl. 7; The Federalist No. 51, at 321 (J. Madison) (C. Rossiter ed. 1961); id. No. 73, at 441-442 (A. Hamilton).

vulnerable than his personal independence.[26]

Third, any statute that touches on the President's inherent authority in foreign policy must be interpreted to leave the President as much discretion as the language of the statute will allow. This accords with the well-established judicial presumption in favor of construing statutes so as to avoid constitutional questions whenever possible.[27] Because the President's constitutional authority in international relations is by its very nature virtually as broad as the national interest and as indefinable as the exigencies of unpredictable events, almost any congressional attempt to curtail his discretion raises questions of constitutional dimension. Those questions can, and must, be kept to a minimum in the only way possible: by resolving all statutory ambiguities in accord with the presumption that recognizes the President's constitutional independence in international affairs.

III. Statutory Requirements that the President Report to Congress about his Activities Must Be Construed Consistently with the President's Constitutional Authority to Conduct Foreign Policy.

In 1980, the National Security Act of 1947 was amended to provide for congressional oversight of "significant anticipated intelligence activities." This section now provides (section

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[26] See 41 Op. A.G. 230, 233 (1955):

> It is recognized that the Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy.

[27] "[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' a court should adopt that construction." Califano v. Yamasaki, 442 U.S. 682, 693 (1979) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

501(a) of the National Security Act, 50 U.S.C. 413(a)) (emphasis added):

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --
>
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

For situations in which the President fails to give prior notice under section 501(a), section 501(b), 50 U.S.C. 413(b), (emphasis added) provides:

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

reasons for not giving prior notice.[28]

The delicate connection between the "timely notice" requirement of section 501(b) and the President's inherent constitutional authority, acknowledged in section 501(a), is dramatically confirmed by a colloquy between Senators Javits and Huddleston, both of whom were on the committee that drafted this provision. Senator Javits asked: "If information has been withheld from both the select committee and the leadership group (as section 501(b) envisages), can it be withheld on any grounds other than 'independent constitutional authority' and, if so, on what grounds?" Senator Huddleston answered: "Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operation [sic], but would not be able to claim the identical authority to withhold timely notice under section 501(b). A claim of constitutional authority is the sole grounds that may be asserted for withholding prior notice of a covert operation." 126 Cong. Rec. 17693 (1980)

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[28] Section 501 of the National Security Act does not contemplate that prior notice of "intelligence activities" will be given in all instances. Subsection (b) of section 501 makes specific provision for situations in which "prior notice was not given under subsection (a)." Because subsection (a) includes situations in which the President provides notice to the full intelligence committees under subsection (a)(1)(A) and situations in which he provides prior notice restricted to designated members of Congress, including the chairmen and ranking members of the House and Senate intelligence committees under subsection (a)(1)(B), it seems clear that subsection (b) contemplates situations in which no prior notice has been given under either of these provisions.

(emphasis added).[29] If, as Senator Huddleston contended, section

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[29] A similar colloquy took place on the floor of the House between Rep. Boland, Chairman of the House Select Committee on Intelligence, and Rep. Hamilton:

> Rep. Hamilton: As I understand that subsection, it allows the President to withhold prior notice entirely: that is, he does not inform anyone in that circumstance. He only has to report in a timely fashion.
> Is that a correct view of subsection (b)?
>
> Rep. Boland: In response to the gentleman, let me say that the President must always give at least timely notice.

126 Cong. Rec. 28,392 (1980). Thus, Rep. Boland clearly, if reluctantly, confirmed Rep. Hamilton's interpretation. During the floor debates, several Senators also acknowledged that the proposed legislation did not require that Congress be notified of all intelligence activities prior to their inception. According to Senator Nunn, the bill contemplated that "in certain instances the requirements of secrecy preclude any prior consultation with Congress." 126 Cong. Rec. 13,127 (1980)(statement of Sen. Nunn). See also id. at 13,125 (statement of Sen. Huddleston)("Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operations . . . ."); id. at 13,103 (statement of Sen. Bayh).

In the course of the floor debates, some Senators stated that the situations in which prior notice was not required would be very rare. See, e.g., 126 Cong. Rec. 26,276 (1980) (remarks of Sen. Inouye). Such statements are of little relevance to determining the scope of the prior notice requirement. First, the executive branch has always agreed that instances of deferred reporting will be rare and has consistently given prior notice. Second, section 501 at the very least permits the President to defer notice when he is acting pursuant to his independent constitutional authority; the scope of this authority is determined, not by legislators' view of the Constitution, but by the Constitution itself. Third, the draftsmen of section 501 decided that because the scope of the President's constitutional "authorities and duties" was in serious dispute, the legislation would not attempt to resolve the issues separating the parties to the dispute. See 126 Cong. Rec. 13,123 (1980) (statement of Sen. Javits). The ambiguities of subsection (b) reflect Congress' inability to override the executive branch's view of the President's constitutional authority. That dispute cannot now be settled, contrary to the Executive's position, by reference to the statements of individual Congressmen who had a narrow view of the President's constitutional role.

501(b) is to be interpreted to require the President to act on his inherent authority in withholding notice of covert operations until after the fact,[30] then any further statutory limitations on the President's discretion should be narrowly construed in order to respect the President's constitutional independence. The requirement that such after-the-fact notification be made "in a timely fashion" appears to be such an additional limitation.

The entire analysis in this memorandum supports the proposition that the phrase "in a timely fashion" must be construed to mean "as soon as the President judges that disclosure to congressional committees will not interfere with the success of the operation." To interpret it in any other way--for example, by requiring notification within some arbitrary period of time unrelated to the exigencies of a particular operation--would seriously infringe upon the President's ability to conduct operations that cannot be completed within whatever period of time was read into the statutory provision.[31] Furthermore, several putatively discrete intelligence "operations" may be so interrelated that they should realistically be treated as a single undertaking whose success

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[30] Senator Huddleston's interpretation is not necessarily correct. As we indicated in our memorandum of November 14, 1986, the President may be able to withhold prior notice even without invoking his independent constitutional authority.

[31] On the floor of the Senate, the bill's sponsor indicated that his personal view of the President's constitutional powers was very narrow, and that he wanted the relevant congressional committees notified "as soon as possible." He acknowledged, however, that the executive branch took a different view, and that he expected "that these matters will be worked out in a practical way." 126 Cong. Rec. 13096 (1980) (remarks of Sen. Huddleston). These statements show that the legislation was not thought to preclude the President from acting on his own view of his own constitutional powers. In guarding against such improper interference, the President's own interpretation of his constitutional powers "is due great respect" from the other branches. See United States v. Nixon, 418 U.S. 683, 703 (1974).

might be jeopardized by disclosure prior to its completion.[32]

Thus, a number of factors combine to support the conclusion that the "timely fashion" language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification. The word

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[32] In his prepared testimony on S. 2284, President Carter's CIA Director, Stansfield Turner, stated (National Intelligence Act of 1980: Hearings before the Senate Select Committee on Intelligence, 96th Cong. 2d Sess. 17 (1980)) (emphasis added):

> Prior reporting would reduce the President's flexibility to deal with situations involving grave danger to personal safety, or which dictate special requirements for speed and secrecy. On the other hand, activities which would have long term consequences, or which would be carried out over an extended period of time should generally be shared with the Congress at their inception, and I would have no objection to making this point in the legislative history.

Turner's testimony cannot properly be interpreted to imply that all "long term," as opposed to "short term," projects require prior notice. First, Turner drew a distinction between projects involving great personal danger or requiring speed and secrecy and projects of long duration or with long term consequences. He did not address projects that are both long term and that involve danger to personal safety, such as the recent Iranian initiative. The inadvisability of prior reporting applies as forcefully to such a project as to "short term" projects that involve personal safety. Second, Turner was careful not to say that long term projects must always be reported at their inception: he said only that they will generally be so reported. In a colloquy with Senator Bayh concerning the word "generally," Turner stressed that "one has to be a little cautious" in making such a statement because "it will be quoted back from these hearings for years to come." Hearings, supra, at 32. Turner never stated that the Executive would or should give prior notice of all long term projects. Third, a distinction between long and short term projects would virtually force the President to prefer military to diplomatic initiatives in situations like the one at issue in this memorandum, which could not have been Congress' intent.

In any event, S. 2284 was not enacted, and the full Congress never had its attention directed to Turner's statements. Those statements are therefore not a significant aid in interpreting section 501(b). As we have shown, both the text of the statute and the colloquies on the floor of the House and Senate indicate that Congress did not require prior notice when the President was acting pursuant to his independent constitutional authority. In permitting "timely notice" in section 501(b), Congress made no distinction between long and short term projects, and no such distinction should be read into the statute.

"timely" is inherently vague;[33] in any statute, it would ordinarily be read to give the party charged with abiding by a timeliness requirement the latitude to interpret it in a reasonable manner. Congress apparently thought that the notification requirement was meant to limit the President's exercise of his inherent authority, while at the same time Congress acknowledged the existence and validity of that authority. Because the President is in the best position to determine what the most reasonable moment for notification is, and because any statutory effort to curtail the President's judgment would raise the most serious constitutional questions, the "timely fashion" language should be read, in its natural sense, as a concession to the President's superior knowledge and constitutional right to make any decision that is not manifestly and indisputably unreasonable.[34] This conclusion is reinforced by the nature of intelligence operations, which are often exceptionally delicate undertakings that may have to extend over considerable periods of time. The statute's recognition of the President's authority to withhold prior notification would be meaningless if he could not withhold notification at least until

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[33] The statute uses a more precise phrase in section 501(a), where it requires that certain committees be kept "fully and currently informed" of activities not covered by section 501(b). This phrase was interpreted by the Senate Committee to mean that "[a]rrangements for notice are to be made forthwith, without delay." S. Rep. No. 730, 96th Cong., 2d Sess. 9 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4192, 4199. No such interpretation was placed on the "timely fashion" language of section 501(b). See id. at 12, reprinted in U.S. Code Cong. & Admin. News, at 4202-4203.

[34] The legislative history of section 501(a) specifically indicated that "[n]othing in this subsection is intended to expand or to contract or to define whatever may be the applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative branches." S. Rep. No. 730, 96th Cong., 2d Sess. 6 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4192, 4196. Furthermore, the Senate Committee acknowledged that it was "uncertain" about the distribution of powers between the President and Congress in the national security and foreign policy area. See id. at 9, reprinted in 1980 U.S. Code Cong. & Admin. News, at 4199.

after the undertaking as a whole was completed or terminated.[35]

Conclusion

Section 501(b) of the National Security Act of 1947 must be interpreted in the light of section 501 as a whole and in light of the President's broad and independent constitutional authority

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[35] Section 502 of the National Security Act, 50 U.S.C. 414, generally limits the use of funds appropriated for intelligence activities to cases in which Congress has been given prior notice of the nature of the activities. Section 502(a)(2) allows expenditures when "in the case of funds from the Reserve for Contingencies of the Central Intelligence Agency and consistent with the provisions of section [501] concerning any significant anticipated intelligence activity, the Director of Central Intelligence has notified the appropriate congressional committees of the intent to make such funds available for such activity." This provision should be interpreted to allow the President to use funds from the Reserve for Contigencies in order to carry out operations for which he withholds notice in accord with section 501(b). Section 502(a)(2)'s specific reference to section 501 should be taken to give the President implicit authorization to withhold notification of the expenditure of funds just as he withholds notification of the operation itself: to read it otherwise would mean that section 502 had effectively, though impliedly, repealed section 501's acknowledgement of the President's independent constitutional authority.

It should be noted, however, that section 502(a)(2) is clumsily drafted; if read literally, it could be taken to suggest that Congress must always be notified in advance when funds appropriated for intelligence activities are to be used for covert operations. The Conference Committee commented on the language in question by noting that it did not expect situations to arise in which there would have to be prior notice under section 502 as to the funding of an activity that did not itself have to be reported under section 501; the Committee also indicated that if such a situation were to arise, it should be resolved in a spirit of "comity and mutual understanding." H.R. Conf. Rep. No. 373, 99th Cong., 1st Sess. 19 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 952, 961-962. Accord S. Rep. 79, 99th Cong., 1st Sess. 5 (1985). Similarly, the House Committee Report indicated that "the same event . . . can be treated in the same way under new Section 502(a) and Section 501. H.R. Rep. No. 106 (Part 1) 8 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 952, 954. This supports the reasoning outlined above.

to conduct foreign policy. The requirement that the President inform certain congressional committees "in a timely fashion" of a foreign intelligence operation as to which those committees were not given prior notice should be read to leave the President with discretion to postpone informing the committees until he determines that the success of the operation will not be jeopardized thereby. Because the recent contacts with elements of the Iranian government could reasonably have been thought to require the utmost secrecy, the President was justified in withholding section 501(b) notification during the ongoing effort to cultivate those individuals and seek their aid in promoting the interests of the United States.

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE

WASHINGTON

Executive Registry
75-8594

September 8, 1975

662 Background

MEMORANDUM FOR: HENRY A. KISSINGER

FROM: PHILIP BUCHEN P.W.B.

SUBJECT: Requirements of Section 662(a), The Foreign Assistance Act of 1961, as Amended, Concerning Expenditures for Certain CIA Operations

1. The Statutory Provision

Section 662 of the Foreign Assistance Act of 1961, as Amended (22 U.S.C.A., Sec. 2422) reads in its entirety as follows:

(a) No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives.

(b) The provisions of subsection (a) of this section shall not apply during military operations initiated by the United States under a declaration of war approved by the Congress or an exercise of powers by the President under the War Powers Resolution.

The required finding by the President

(a) When it must be made

The statute makes a finding by the President a condition precedent to the expenditure of funds for an operation that is covered by the statute. Therefore, no funds should be expended until after the President has made his finding.

(b) What the finding should be

The President must find for each operation that it is "important to the national security of the United States."

(c) How the finding should be made

As a matter of good practice, it should be in writing, signed by the President and should be supported by documents which the President has reviewed and which give a description and scope of the proposed operation and give a basis for determining that the proposed operation is important to the national security of the United States.

(d) Dissemination of finding

There appears to be no requirement under Section 662 (a) that the President's written finding must be furnished to the appropriate Committees of the Congress; only that "a description and scope" of the operation covered by the finding be reported to such Committees. Before Section 662 was added to the Act in 1974, there was a more general provision about Presidential findings, namely Section 654 (22 U.S.C.A. Sec. 2414). It relates only to cases where the "President is required to make a report ... concerning any finding or determination" under the Act. Then the following provision appears in Subsection (c) in respect to such a Presidential finding.

> "[It] shall be published in the Federal Register as soon as practicable after it has been reduced to writing and signed by the President. In any case in which the President concludes that such publication would be harmful to the national

security of the United States, only a statement that a determination or finding has been made by the President, including the name and section of the Act under which it was made, shall be published."

This section was tailored to the situation where the finding itself was to be reported to Congress, and it does not cover the situation under Section 662 where the reporting requirements deal not with the finding itself or the basis on which it has been made, but with a description of the operation which follows from the finding.

Moreover, in the case of findings under the new Section 662 even a public disclosure that a finding was made under that section would itself be harmful to the national security and would vitiate the President's authority to have the CIA carry out covert operations. Public notice that a finding has been made in the context of known developments or events within a particular country would inevitably allow inferences as to the location and purpose of the planned covert operation, even though the published notice did not by itself disclose such information.

It is evident from the legislative history of Section 662 that it was a sui generis provision, that it was conceived and adopted without consideration of any other provisions in the Act, that its purpose was to provide information for only the jurisdictional committees concerned with CIA operations and the respective Senate and House Committees on Foreign Relations and on Foreign Affairs, and that even for the particular committees to be involved "the quality or the detail or the minutia" of the report would be up to the President (Congressional Record of October 2, 1974, p. S.18063-5; House Conference Report 93-1610 of December 17, 1974 on S. 3394 at pp. 42-3). In the Conference Report, it was stated:

[redacted] committee of conference agreed that strict measures should be taken to insure maximum security of the information submitted to the Congress pursuant to this provision."

Such measures would be in vain if the existence of a covert operation became known through a publication requirement of any kind as provided in Section 654.

Therefore, it is concluded that the purpose and effect of Section 654 conflicts with Section 662, with the intent of Congress when it enacted the latter section, and with the right and authority of the President in the protection of national security and the conduct of foreign affairs. Consequently, there exists no dissemination or publication requirement for a finding by the President under Section 662.

3. The required reports by the President to the appropriate Committees of the Congress

(a) When they must be made

Section 662 was added in 1974 to the Foreign Assistance Act. The attached memorandum from the CIA makes a convincing argument for interpreting the words "reports, in a timely fashion" to mean that the act of reporting is not a condition precedent to expenditure of funds. It deals with the ambiguity created by the works "unless and until" which precede the verb "finds" and the verb "reports" but which cannot apply to both verbs without rendering nugatory the next words "in timely fashion." It resolves this ambiguity by concluding that the words "in timely fashion" give to the reporting requirement a status different from the finding requirement so as to allow reports to be made after the start of expenditures. This is certainly a valid interpretation, and it allows for reasonable time to include all the appropriate committees as recipients of the required reports. For purposes of demonstrating good faith compliance with these reporting requirements, the report of each operation

should be made with due and deliberate speed. The Chairman of each Committee should be notified of a finding by the President as soon as secure communication to him is possible, along with information as to the nature and location of the operation sufficient to permit the Chairman to judge how quickly he may want the "description and scope" to be reported. This method should satisfy the "timely fashion" requirement for each intended recipient of such a report, without in any way conceding that the report must precede the initiation of expenditures.

(b) The recipients of the reports

The language in Section 662 which specifies the recipients of reports is: "appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives." The history of the legislation indicates that beyond the two committees expressly included, the other committees (or subcommittees) were at the time of enactment intended to be "the present Armed Services Committees and the present Subcommittees handling the oversight of matters of intelligence and the CIA," the latter being subcommittees of the respective Senate and House Appropriations Committees (Congressional Record of October 2, 1974, p.5, S.18064). Since then the Senate and House have each created Select Committees with authority which includes investigation of the extent of, and necessity for, covert intelligence activities in foreign countries. However, these are committees of limited duration which have not supplanted in oversight of intelligence matters the previously established and continuing committees serving this purpose. While the Select Committees may be entitled to the same information, this particular statute does not appear to require their inclusion as recipient of timely reports on each new operation covered by Section 662.

(c) Who is to report

Section 662 requires the President to report, but there is nothing to prevent him from delegating his authority and responsibility in that regard, as he has done, to the Director of CIA. It may be better practice in the future to have the President, when he makes a written finding, delegate in writing to the Director the authority and responsibility to make the required reports.

(d) Form and content of reports

The reports have to provide "a description and scope" of each operation. According to the legislative history, and as has been accepted in practice, the reports may be oral. Also, in the process of the Congressional debates the words "detailed description of the nature and scope" were deliberately changed to allow latitude on the part of the President. (See Congressional Record of October 2, 1974 at S.18063-4).

(e) Record of reports

Apart from whatever record each recipient committee may make of each report, it will be good practice for the Director of CIA to provide a full record for the President of the time, nature and scope of each preliminary approach and ultimate report made pursuant to Section 662.

cc: William Colby
Jim Lynn

ABC

JBS

THE WHITE HOUSE

WASHINGTON

March 27, 1987

MEMORANDUM FOR WILLIAM B. LYTTON, III

FROM: PETER D. KEISLER PDK

SUBJECT: Legal Analysis Team

This memorandum summarizes the principal questions of law that are implicated, at least potentially, by the activities that surrounded the recent shipments of arms to Iran and the provision of support to the Nicaraguan Contras.

1. Arms Shipments

According to the Report of the President's Special Review Board, officials of the United States government participated in the sale and shipment of defense articles to the country of Iran. That participation took a variety of forms. It included the conveying to the government of Israel of consent to the transfer of defense articles from Israel to Iran along with a pledge to replenish the articles transferred, the provision of operational support for the shipment of defense articles from Israel to Iran, and the selling of defense articles by the United States to Iran.

(a) The Arms Export Control Act, the Foreign Assistance Act, and the Export Administration Act.

(i) The Arms Export Control Act (22 U.S.C. § 2751 et seq.) and the Foreign Assistance Act of 1961 (22 U.S.C. § 2311 et seq.) authorize the furnishing of defense articles by the United States to foreign countries, subject to certain restrictions.

The restrictions established by the Arms Export Control Act include the following:

- Recipient countries must agree that they will maintain the security of the articles with which they are provided and will not transfer them to third countries without first obtaining the President's consent (22 U.S.C. § 2753(a));

- A report of the proposed sale of major defense equipment valued at $14 million or more must be submitted to Congress (22 U.S.C. § 2776);

- The President must "terminate all sales under this chapter to any government which aids or abets, by granting sanctuary from prosecution to, any individual

or group which has committed an act of international terrorism." The President may avoid this prohibition is he finds that "the national security requires otherwise," and, if he makes such a finding, it must be reported to Congress.

- o As of August 26, 1986, no arms may be exported to countries that the Secretary of State has certified as supporting terrorism. The President may waive this prohibition if he determines that the export is important to the national interest, and if he makes such a determination, it must be reported to Congress.

In addition, section 38(b)(2) of the Arms Export Control Act prohibits the export of the covered defense articles without a license issued under the International Traffic in Arms Regulations (ITAR), 22 C.F.R. 121-130. This prohibition does not apply to transactions conducted for official purposes by the United States government.

The threshold question is whether any of the shipments to Iran were carried out under the authority of the Arms Export Control Act, or under an alternative source of authority, whether statutory or constitutional. If any of the activities engaged in by officials of the United States government were taken pursuant to authority provided by the Arms Export Control Act, the additional legal issue raised is whether the authority was exercised in compliance with the technical requirements and restrictions established by that Act with respect to such exports. A further legal issue is whether the "official purposes" exception to section 38(b)(2) is applicable to each of the shipments conducted, and, if not, whether the activities of private citizens in connection with these shipments were in compliance with the terms of this Act and the accompanying regulations.

(ii) A separate legal issue is raised whenever a country which has been provided with defense articles under either the Arms Export Control Act or the Foreign Assistance Act seeks to transfer those articles to a third country. Both Acts forbid such transactions absent the consent of the President (22 U.S.C. § 2314(a); 22 U.S.C. § 2753(a)(2)). There are a variety of additional restrictions imposed. The President may not consent to such transfers unless the United States would itself make the transfer (22 U.S.C. § 2314(e); 22 U.S.C. § 2753(a)); the third-country-recipient must commit in writing not to transfer the defense articles received without the President's consent, unless they have been demilitarized (22 U.S.C. § 2314(e); 22 U.S.C. § 2753(a)); and the President must report the transfer to Congress (22 U.S.C. § 2753(a)).

If the defense articles shipped by Israel to Iran had been provided to Israel under the authority of either of these Acts, then the issue arises of whether the consent of the

United States was required for any of the shipments at issue, and whether the consent which was provided was given pursuant to the authority conferred by these Acts, authority conferred by other statutes, or authority conferred by the Constitution. If consent was required under these Acts, the additional legal issue raised is whether the consent was given in compliance with the technical requirements and restrictions established by these Acts for the giving of such consent.

(iii) The Export Administration Act of 1979 governs certain exports of items which have the potential for military application but which have not been placed on the United States Munitions List. Section 6(j) of this Act (50 U.S.C. App. 2405(j)) requires that congressional committees be notified at least thirty days prior to the approval of any license for the export, to any country which the Secretary of State has determined has repeatedly provided support for acts of international terrorism, of any goods or technology worth more than $7 million which would make a significant contribution to its military potential. No license is required for shipments by the United States government.

The issue that arises is whether any of the transactions involved were subject to this Act, and, if any were, whether there was compliance with the requirements it establishes.

(b) The National Security Act.

(i) The National Security Act of 1947 provides that, in addition to those duties specifically described in the statute, the National Security Council may "perform[] such other functions as the President may direct." 50 U.S.C. § 402. That Act further authorizes the Central Intelligence Agency "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." 50 U.S.C. § 403.

The National Security Act may therefore provide a framework separate from that created by the arms export statutes that authorizes, under certain circumstances, involvement by the United States in the shipment of arms. The scope of the authority it confers, and the question of whether that authority has been implicitly circumscribed by provisions of the arms export statutes, would be appropriate subjects for legal analysis.

(ii) The National Security Act imposes certain reporting requirements which may have been applicable to the activities undertaken. Under Section 501(a), all agencies of the United States government are required to keep the intelligence committees, or their chairmen and ranking members if notification must be limited, "fully and currently informed" when they plan to engage in "significant anticipated intelligence activities."

This requirement is one of prior notification, and is imposed "to the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the government." 50 U.S.C. § 413(a). The Hughes-Ryan Amendment subjects all CIA activities which require a Hughes-Ryan finding to the reporting requirement of Section 501.

When prior notification is not given under Section 501(a), Section 501(b) requires the President to "fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence."

> The legal questions presented are whether the activities involving arms shipments to Iran were activities for which prior notification was required under Section 501(a), and whether the report ultimately provided was "timely" within the meaning of section 501(b). If the report given was statutorily insufficient, the issue raised is whether the reporting requirements are constitutional.

(c) Hughes-Ryan. Section 662 of the Foreign Assistance Act, commonly known as the Hughes-Ryan Amendment (22 U.S.C. § 2472), forbids the expenditure of appropriated funds by or on behalf of the Central Intelligence Agency for any operation (other than pure intelligence gathering) in a foreign country unless and until the President finds that the operation is important to the national security of the United States. Section 654 of the National Security Act provides that in any case in which the President is required to report to Congress (or any committee or member thereof) concerning a finding or determination made by him under the Act, that finding or determination must be reduced to writing and signed by him. The Report of the President's Special Review Board determined that the President had signed two Covert Action Findings, one on January 6, 1986 and one on January 17, 1986.

> The legal questions raised concern the sufficiency of any unwritten findings made prior to January 1987, the validity of the actions taken during that period in light of the sufficiency or lack thereof of earlier findings, and the liability of the officials involved in the event a proper finding was not made.

2. Diversion of Funds.

The President's Special Review Board concluded that substantial amounts of money transferred in the course of the arms transactions with Iran remain unaccounted for. The possibility of diversion raises several legal issues, but resolution of those issues is likely to depend upon facts currently unavailable. In particular, analyzing the nature of any diversion that may have occurred will require a determination of whose money might have

been diverted. Did the money belong to the government of Iran, or Israel, or the United States? Or did it belong to private individuals?

The question of whether the diversion, if there was one, was illegal will depend upon the answers to those and other inquiries. The following statutes may be implicated:

- o 18 U.S.C. § 641 (embezzlement)
- o 18 U.S.C. § 663 (solicitation of gifts)
- o 31 U.S.C § 1341 (anti-deficiency act)
- o 31 U.S.C. § 3302 (custodians of money; requires government official receiving "money for the government" from any source to deposit it in the Treasury)
- o 18 U.S.C. § 371 (conspiracy to defraud the United States)

3. Assistance to the Contras

The President's Special Review Board found strong reason to believe that funds received through the shipment of arms to Iran were diverted by the NSC to support the Nicaraguan Contras. It is alleged that members of the NSC staff were engaged in a wide variety of activities in support of the Contras, including the seeking of contributions from foreign countries and private citizens, the arranging of the transmittal of such contributions in the form of military aid, the organization and direction of a private supply network, and participation in lobbying and election campaigns on behalf of Contra aid.

At the time these activities were said to have taken place, one of the many variants of the Boland Amendment was in effect. It forbade any government agency involved in intelligence to expend funds "for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual." Certain exceptions were made with respect to the provision of transportation and communications equipment, humanitarian assistance, and intelligence. If DOD, NSA, NSC or CIA funds were expended to assist the Nicaraguan Contras, then such expenditures may have been in violation of the Boland Amendment. If the Boland Amendment does prohibit the activities that were engaged in, the question of the constitutional authority for such prohibitions is implicated as well.

There are other laws that could conceivably have been violated:

- o 18 U.S.C. § 1913 (anti-lobbying act)

- o 18 U.S.C. § 607 (solicitation of campaign contributions in government buildings)

- o 2 U.S.C. § 431 et seq. (federal election campaign act)

- o 18 U.S.C. § 956 (conspiracy to injure property within a foreign country)

- o 18 U.S.C. § 960 (provision of money for any military enterprise against the "territory or dominion" of any foreign state)

4. Post-Disclosure Activities

There have been various allegations of "cover-up" activities following the disclosure of the arms shipment to Iran in November of 1986. It has been suggested that congressional testimony was falsified, that dishonest public statements were made, and that records were altered or destroyed. If these allegations are true, questions will be raised concerning the legal action that might be taken in response.

5. Conspiracy to Defraud the United States

The general conspiracy statute, 18 U.S.C. § 371, establishes a criminal offense of "conspiracy to defraud the United States." As previously noted, this statute could provide a basis for a prosecution relating to the diversion of government funds for private purposes. Conceivably, however, it could also be the basis for a much broader sort of prosecution.

The concept of "fraud" has been held to apply to instances of public corruption, in which citizens are held to have been "defrauded" of their right to the honest and faithful service of their government officials. The theoretical limits to this form of offense are not readily apparent, and it is not certain that the underlying dishonesty must involve a violation of criminal law. Through a conspiracy charge, a prosecutor can tie defendants to acts they did not themselves directly commit, and through a charge of conspiracy to defraud the United States, the definitions of the conspiratorial acts might themselves be made quite broad. Some analysis of the scope of this law would be useful.

6. Military Regulations

Some of the participants in these activities were and are members of the military, and they may have been operating under special legal restrictions as a result. The question raised is whether, independent of any other potential legal violations, these men committed violations of provisions of the Uniform Code of Military Justice.

7. Presidential Records Act

The Presidential Records Act, 44 U.S.C. § 2101 et seq., imposes a legal obligation on the Office of the President to develop and maintain a system of records on official activities. The extent of the obligation to create records is unclear, and the line which divides "official records" from "personal records" is difficult to draw. Since the Reagan Administration is the first Administration subject to this Act, many of the legal issues raised are ones of first impression. These issues include: (a) what sorts of records the government is legally obligated to create; (b) what sorts of records, once created, cannot be destroyed; and (c) who has legal control over records that occupy the gray area between "official" and "personal."

8. Access to White House Records

Several present and former government officials have requested, or will request, access to government records relating to their activities or the activities of others. Some of these individuals may be possible targets of a criminal investigation; others will be asked to testify before a grand jury or the Select Congressional Committees. We need to define with precision the government's responsibilities in responding to requests of this sort.

9. Testimony by White House Officials

With the rarest of exceptions, White House officials in this and prior Administrations have followed a long-standing policy of declining requests for appearances and testimony before congressional committees. Because of the seriousness of the situation, the President waived whatever privilege he may have had in the matter and permitted Donald Regan, who was then his Chief of Staff, to testify on Capitol Hill. The Select Congressional Committees are likely to request or subpoena testimony from various present and former White House officials, and it will be necessary for us to determine whether there are any circumstances that might arise in the course of these hearings in which an assertion of privilege would be warranted with respect to testimony.

10. The Legal Analysis Team

Now that the Independent Counsel has accepted a parallel appointment within the Department of Justice, the criminal investigation which he is pursuing has become an investigation by the Executive Branch. This requires that some attention be paid to the relationship of the work of the Legal Analysis Team to this government investigation. It is quite common, of course, for two entities within the Executive Branch to work separately and simultaneously on the same matter, but it is not common for that matter to be a criminal investigation and for one of the entities to be the White House. We need to determine for ourselves the

purpose and effect of our work, and the uses to which it may conceivably be put.

Priorities

Our emphasis should be on those issues which bear directly upon the Presidency. These are items 1, 3, 7-10.