Dear Bill

Dear Mr. Chairman, Members of the Committee:

I am pleased to appear before you today to discuss the constitutional issues implicated by S. 1721, a bill relating to the system of congressional oversight of intelligence activities. The Department of Justice believes that this legislation, in its present form, would unconstitutionally intrude upon the President's authority to conduct the foreign relations of the United States. In my statement, I will discuss briefly the constitutional problems with S. 1721. It will be left to others in the Administration to address concerns of a nonconstitutional nature.

S. 1721, of course, would repeal the Hughes-Ryan Amendment, which requires Presidential approval of covert actions by the CIA. In its place, S. 1721 would institute a new presidential approval requirement, which would become Section 503 of the National Security Act of 1947. Proposed Section 503 would require that the President authorize all "special activities," or covert actions, conducted by any department, agency, or entity of the United States government. The Presidential approval would take the form of a "finding," which would be reduced to writing within forty-eight hours of the time that a decision regarding covert actions is made.

Proposed Section 503 would be broader than the Hughes-Ryan Amendment in that it would apply not just to covert actions conducted by the CIA, but also to covert actions conducted by

other agencies or entities of the United States. This change does not in and of itself raise a serious constitutional problem. To the extent that Congress constitutionally may impose requirements of Presidential approval and notification to Congress on covert actions conducted by the CIA, it also may impose such requirements on covert actions conducted by other agencies and entities. The Department of Justice believes, however, that the requirement of notification to Congress set forth in S. 1721 is unconstitutional. Increasing the scope of the requirement therefore exacerbates the constitutional problem.

S. 1721 would do much more than extend the Presidential approval requirement to agencies other than the CIA. It also would require that the findings be in writing. In circumstances where time does not permit the preparation of a written finding prior to Presidential approval, S. 1721 would require that a written finding be prepared "as soon as possible." In no event would S. 1721 permit the preparation of a written finding more than forty-eight hours after a Presidential decision had been made. The Department of Justice believes that this proposed change is completely unnecessary. In a letter to Chairman Boren dated August 7, 1987, the President pledged that "[e]xcept in cases of extreme emergency," all national security findings will be in writing. Moreover, the President stated that if an oral directive is necessary, a finding will be "reduced to writing and signed by the President as soon as possible, but in no event more than two working days thereafter." It is evident, therefore, that the President already has recognized the need to commit

findings to writing, and he has adopted procedures virtually identical to those set forth in the bill in order to ensure that findings are put into written form as soon as possible.

The primary constitutional problem with S. 1721, however, arises not from the requirement that a finding be in writing, but instead from the requirement that a finding, under all circumstances, be reported to the congressional intelligence committees within a fixed period of time after it is signed. The current statutory scheme, of course, recognizes that there may be some circumstances in which Congress is not given prior notice of a finding. In such situations, the President is required only to inform the intelligence committees in "a timely fashion" of the covert action. The proposed amendment to the National Security Act of 1947 would eliminate the flexibility that the current Act provides by requiring that notice always be given within 48 hours of the time that a finding is signed.

This Administration, like prior Administrations, is anxious to work with Congress in devising arrangements to satisfy the legitimate interests in legislative oversight. For that reason, President Reagan has provided prior notice of covert operations in virtually every case. Moreover, the President repeatedly has reaffirmed his commitment to the current statutory scheme of prior notification. In the letter to Senator Boren to which I earlier referred, the President stated that "[i]n all but the most exceptional circumstances, timely notification to Congress under Section 501(b) of the National Security Act will not be delayed beyond two working days of the initiation of a special

activity." Despite this pledge of cooperation from the President, however, the Department believes that there is a point beyond which the Constitution will not permit congressional interference with the President's ability to initiate, direct, and control the sensitive national security activities at issue here. S. 1721 clearly transcends this point by purporting to oblige the President, under all circumstances, to notify Congress of a covert action within a fixed period of time.

In this testimony, I will not attempt to discuss all of the authorities and precedents relevant to our conclusion that an absolute requirement that Congress be notified within a fixed period of time is unconstitutional. Nevertheless, I do believe that it is important to discuss briefly some of the sources that support our conclusion. First, of course, there is the text of the Constitution itself. Article II, section 1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." This clause has long been held to confer on the President a plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to the limits 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.

Alexander Hamilton, in The Federalist, recognized that the Constitution vests in the President the power to conduct foreign relations. He said that "[t]he essence of the legislative authority is to enact laws, or in other words to prescribe rules

for the regulation of society." The executive magistrate, Hamilton argued, should be concerned instead with the "execution of the laws and the employment of the common strength . . . for the common defense." This fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" is important. It shows that the Framers intended to give Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens. 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 "executive Power."

The first President of the United States, of course, asserted his authority to conduct foreign affairs. President Washington, without consulting Congress, issued the famous Proclamation of Neutrality, which provided that the United States would remain neutral in the war between France and Great Britain. Alexander Hamilton, writing under the pseudonym "Pacificus," again argued persuasively that the direction of foreign policy is an inherently "executive" function. It is clear, moreover, that Washington and his successors recognized that this power carries with it the authority to withhold information from Congress when that information relates to the conduct undertaken pursuant to President's prerogative in foreign affairs.

In 1792, the House of Representatives, called upon the Executive branch to produce "persons, papers and records"

relating to a military campaign that General St. Clair had led against Indians in the Northwest. President Washington summoned his Cabinet to discuss the congressional request because he believed that insofar as it might "become a precedent, it should be rightly conducted." The President pointed out that "there might be papers of so secret a nature, as they ought not to be given up." After considering the matter for a couple of days, the Cabinet reached the same conclusion. A Cabinet report stated that the Executive branch should "communicate such papers as the public good would permit," but that it should "refuse those, the disclosure of which would injure the public."

The advice given to President Washington by his Cabinet was followed by President Tyler about 50 years later. The House of Representatives called upon Tyler's Secretary of War to provide reports dealing with the affairs of the Cherokee Indians and on frauds allegedly practiced upon them. President Tyler decided to withhold the bulk of the reports because he believed that their publication would not be in the public interest. He recognized that the reports related to a legitimate subject of congressional concern. Nevertheless, in a message dated January 31, 1843, President Tyler stated that "[i]t cannot be that the only test is whether the information relates to a legitimate subject of deliberation." Tyler asserted that "[t]he injunction of the Constitution that the President 'shall take care that the laws be faithfully executed' necessarily confers an authority" to undertake "confidential" inquiries.

President Tyler made another decision to withhold confidential information from Congress, which was affirmed by his successor, James K. Polk. In 1846, the House of Representatives asked for an accounting of $5460 that had expended by President Tyler during the negotiation of a treaty with Great Britain. President Polk responded that "the experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity." According to President Polk, President Tyler had "solemnly determined" that the circumstances surrounding the expenditure of these funds should remain a secret. Therefore, President Polk refused to "revise the acts of his predecessor."

There have been many other situations in which a President has refused to accede to a Congressional request for information that he deems confidential. These range from President Hoover's refusal to provide the Senate Foreign Relations Committee with letters leading up to the London Treaty to President Eisenhower's refusal to turn over personnel information during Congressional investigations into the loyalty-security program. Moreover, on numerous occasions in our history, Congress itself has recognized that its power to get information from the Executive branch is not absolute, particularly when it relates to a matter within the ambit of the President's foreign affairs powers.

James Madison, while a member of the House of Representatives, defended Washington's decision to withhold from

House information relating to the negotiation of the Jay Treaty. Madison asserted that he "the Executive had a right . . . to withhold information, when . . . [he] conceived that, in relation to his own department, papers could not be safely communicated." Indeed, historically most congressional requests for Executive branch information have been qualified to exclude information that the President deems it inappropriate to disclose. Thus, for example, when calling upon President Jefferson to provide information relating to the Burr conspiracy, the House requested all such information "except such as [the President] may deem in the public welfare to require not to be disclosed." Likewise, when in 1825 Congress was investigating charges against naval officers in the Pacific, it requested only that information that President Monroe believed could be delivered in a manner "compatible with the public interest."

Congressional recognition of the President's right to withhold information has continued into the twentieth century. Senator O'Mahoney of Wyoming, who was one of the greatest proponents of congressional access to Executive branch information, did nothing more than state the traditional understanding when he remarked "[i]t is generally agreed that the President has the constitutional right, in matters of foreign relations, to decline to give out information when he believes that such information would impair national security." Senator Humphrey made the same point when he told the Senate that "there is no bill we can write whereby we can compel the president of the United States to deliver information, if he feels such is contrary to his duty under the Constitution of the United States."

The federal judiciary, like its two coequal branches, also has recognized the President's important powers in the area of foreign affairs. In Curtiss-Wright, the Supreme 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 Court emphatically declared that this discretion derives from the Constitution itself, stating that "the President [is] 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." Curtiss-Wright thus confirms the President's inherent Article II authority to engage in a wide range of extra-territorial foreign policy initiatives, including intelligence activities -- an authority that derives from the Constitution, not from the passage of specific authorizing legislation.

More recently, the Supreme Court again has emphasized that the President has broad powers in the area of foreign affairs. Moreover, the Court's reasoning indicates that this power will sometimes justify withholding information from the other branches of the government. In United States v. Nixon, the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of former President Nixon's claim of an absolute executive privilege. While rejecting his sweeping and undifferentiated claim of privilege as it applied to communications involving domestic affairs, the Court repeatedly stressed that military or

diplomatic secrets are in a different category. The Court's opinion stated that such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities."

Despite this wide-ranging authority, which has been recognized by all three branches of our government, Presidents have been careful to consult regularly with Congress to seek support and counsel in matters of foreign affairs. Nevertheless, it is important to remember that this cooperation has been voluntary on the part of the President.

There certainly is no provision of the Constitution that authorizes Congress to assume the role that it has provided for itself in S. 1721. This is not to deny that Congress has a legitimate role to play in the formulation of American foreign policy, but only to recognize that Congress is a legislative and not an administrative body. Congress' implied authority to oversee the activities of executive branch agencies is grounded on its need for information to consider and enact needful and appropriate legislation. Congress in the performance of this legislative function does not require detailed knowledge of virtually all intelligence activities within a fixed period after the time that the President signs an order authorizing its initiation.

S. 1721 appears to be designed to involve Congress in the routine administration of covert intelligence activities. To be sure, the bill does not provide for anything more than trans-

mittal of a presidential finding to Congress within 48 hours of its execution. But there could be no other explanation for the requirement of virtually contemporaneous transmittal unless Congress expects to take some action, or at least to reserve to itself the right to take some action, with regard to the subject of the finding. This attempt by the Congress to micro-manage the conduct of intelligence activities is highly impractical, for 535 members of Congress can hardly be expected to act with the secrecy and dispatch required in the intelligence field. In short, we are doubtful that Congress has a legitimate interest in having every single finding transmitted to it within 48 hours of the time that it is signed.

Even if it can be assumed that Congress has a legitimate interest, it does not follow that the President invariably should communicate findings to Congress within 48 hours of the time that they are signed. As President Tyler recognized in 1843, "[i]t cannot be that the only test is whether the information relates to a legitimate subject of [congressional] deliberation." A President should not communicate any information to Congress if to do so would interfere with his ability to execute his own constitutional duties. Under some circumstances, communicating findings to Congress within 48 hours might frustrate the President's ability to conduct foreign affairs. For example, it was absolutely necessary that the Carter Administration withhold from Congress information relating to Canada's involvement in the smuggling of six American hostages out of Iran. According to Admiral Stansfield Turner, who was Director of the CIA at the

time, Canada made withholding notification a condition of their participation.

This is not to suggest that the President should routinely withhold information from Congress. But Congress should not place an absolute notification requirement on the President that might interfere with his ability to conduct foreign affairs. In this regard, it might be useful to recall the debates in the Senate on the Mutual Security Act of 1957. Senator O'Mahoney of Wyoming, whom I quoted earlier, proposed an amendment to the act that would require the Secretary of State to keep the foreign relations and appropriations committees of both the House and the Senate "fully informed with respect to all activities of the Department of State or any agency thereof . . . ." The amendment was attacked as both an unconstitutional infringement of the President's executive power and as an ill-advised attempt by Congress to administer the foreign policy of the United States. Senator J. William Fulbright, who members of the Committee will recall as an ardent and eloquent advocate of an active congressional role in foreign policy formulation, charged that the purpose of the bill was "to assume the responsibility which is in the executive." Senator Humphrey joined Senator Fulbright in opposing the amendment, noting that "day to day type of reporting . . . would impair the administration of foreign policy." The Senate, with the remarks of Senators Fulbright and Humphrey in mind, defeated the O'Mahoney Amendment. This Committee, and this Congress can profit from its example. S. 1721 arrogates to Congress an authority for which it is neither

institutionally suited nor constitutionally entitled, and I strongly urge its rejection.

There are two other provisions of S. 1721 which raise problems of a constitutional nature. Proposed Section 502 would require that intelligence agencies disclose to Congress whatever information concerning intelligence activities, other than "special activities," that Congress deems necessary to fulfill its responsibilities. Proposed Section 503 has a similar provision concerning information relating to covert actions. Neither of the provisions enumerates any situations in which the Executive branch may decline to provide the requested documents. The Department of Justice believes that this blanket statutory requirement of disclosure may conflict with the President's right to withhold confidential documents in instances where such action is necessary to the performance of the Executive's constitutional responsibilities.

First, many of the documents retained by intelligence agencies may constitute "state secrets." In both the Curtiss-Wright and Nixon cases, the Supreme Court recognized the authority of the Executive branch to protect "state secrets." Indeed, in commenting on President Washington's refusal to comply with a congressional request for documents relating to relations with foreign countries, the Curtiss-Wright Court stated that it was "a refusal the wisdom of which was recognized by the House itself and has never since been doubted." While the provisions of the bill requiring disclosure of information permit the executive branch to provide such information "with due regard for

the protection of classified information relating to sensitive intelligence sources and methods," the category of state secrets is not subsumed by intelligence sources and methods. For instance, a confidential communication from a foreign head of state concerning the policy of his government with respect to a particular foreign policy problem would reveal intelligence sources or methods but might well be a state secret.

Other documents retained by intelligence agencies, although not "state secrets," may constitute interagency communications. We believe that the Executive branch may also legitimately refuse to provide these documents to Congress. The Supreme Court in the Nixon case recognized that there is a "valid need for protection of communications between high government officials and those who advise and assist them." While this decision was rendered in the context of Presidential communications, the same principles would apply with respect to communications containing the policy deliberations of other executive officials. The need to protect deliberative communications derives from the need for candor and objectivity in the policymaking decisions of the government. See United States v. Nixon, supra, at 705-706. This need exists not only at the Presidential level, but also at other levels in the government.

Of course, the Executive branch will attempt to cooperate with Congress in fulfillment of its legitimate responsibilities. Frequently, this cooperation may take the form of providing information to Congress. We cannot agree, however, that a blanket requirement of disclosure in all cases in which Congress

sees fit to request disclosure is appropriate. As I have mentioned, often the information requested will be protected because it is a "state secret" or because it involves an intra-branch communication that was part of the deliberative process. The President must retain the discretion to withhold such information when its disclosure would impair his ability to fulfill his own constitutional responsibilities.

In sum, then, S.9 1721 raises two serious constitutional problems. First, the requirement that the President, under all circumstances, report to Congress within 48 hours of the time that a finding is signed authorizing covert action unconstitutionally interferes with the President's foreign affairs powers. Second, two other provisions of the bill purport to interfere with the President's authority to protect documents that contain "state secrets" or confidential executive branch deliberations. These provisions attempt by legislation to alter the Constitution's allocation of powers among the institutions of our government. This simply cannot be done by legislation, regardless of whether the Executive branch concurs in the reallocation of power.