REMARKS OF MICHAEL J. O'NEIL*

I have been deeply involved in an exercise just recently that I think is the most appropriate subject for my remarks this morning, and that is the most recent congressional expression, at least on the House side, of what congressional oversight ought to be, particularly in the area of covert action.

Just by way of short diversion, and to refute the point that was made earlier about the disadvantage of trying to work out a cooperative relationship in the oversight process, the original Boland amendment, the first Boland amendment, was an amendment to an amendment offered by then-Congressman Tom Harkin that would have cut off any covert assistance to the Contras. Mr. Boland, in an attempt to save that program—about which he had misgivings, but was not in a position to disagree with at the time—offered his amendment. It incorporated, in what I would never claim was the most precise drafting of classified report language, what the two Intelligence Committees had agreed upon earlier that year. That language reflected an understanding that they had with the Administration that this effort, which had grown rapidly from an effort to send small interdiction teams to prevent the flow of arms from Nicaragua to insurgents in El Salvador to a much larger effort, should be limited to interdiction. Although they had some skeptical thoughts, it was agreed to by the Administration. It was an effort to preserve a program with which Congress then agreed. Certainly things went awry thereafter; everyone knows that. But there was an effort, then and later, to make that oversight process work.

Congressional oversight of intelligence is unique in our legal experience. It is a very cooperative, behind-doors, in some sense "chummy," informal process. Some of the "secret law" that is the result of this process would by no means stand the kinds of tests that we, in the aftermath of affairs like Iran-Contra, would want to see in legal expression and particularly in the actions of Congress. But Congress is in a funny position. Let me lead in with that.

Much of the discussion that we heard yesterday about congressional

---

* Mr. O'Neil has a Juris Doctorate from the Georgetown University Law Center. He served as an attorney for the Federal Communications Commission and as the administrative and legislative assistant to the Honorable Edward P. Boland. Presently Mr. O'Neil is the Chief Counsel of the House Permanent Select Committee on Intelligence, and has served in that capacity since 1977.

review of secret intelligence activities could have led a listener to conclude that constitutionally, practically, and institutionally, Congress cannot conduct oversight of sensitive intelligence activities. I disagree with that proposition strongly on all three grounds. In any event, I think the reality is one we should understand and accept—that we do have congressional oversight, that it works for many purposes for both branches, and that it is here to stay. It seems to me, in much of our discussion about congressional oversight, and particularly about oversight of covert action operations, we have not made a consistent reference to the history of this oversight process. I would like to go through that quickly because I think it will give you a background for House action on HR 3822, which is the House counterpart of the forty-eight hour Senate-passed bill.

It started in 1974 with the passage of the Hughes-Ryan amendment. The Amendment required that in each operation the Central Intelligence Agency oversees, other than those operations solely for the collection of intelligence, there had to be a finding by the President that the operation was important to national security, and the President had to report it in a timely fashion to the appropriate committees of Congress. Congress was concerned, as we all know, about some of the activities that had come to light at that time involving secret intelligence activities, one example being our activities in Chile.

Shortly after the passage of this Amendment, which was never intended to be a permanent structure for congressional oversight of these kinds of activities, came the establishment of both the Church and the Pike committees. Among their recommendations was the establishment of permanent intelligence oversight committees in both the House and Senate.

The next significant event was President Carter's request in 1977 that the House create an intelligence committee in the wake of the Senate's creation of a permanent oversight committee. The House had not done so. There had been, I would say, a bitter taste left in the mouth of most members after the fiasco that resulted from the manner in which the Pike committee ended its investigatory life. A draft of its report had been leaked prior to formal approval by the committee and the House rejected the printing of the final report.

I think the President of the United States urged Congress to go forward with the process of instituting regular intelligence oversight because he saw a net advantage to the executive branch, which stemmed from effective conduct of these kinds of secret foreign policy initiatives, in regularized oversight by a small and select group of members of Congress. There was another reason. The language in Hughes-Ryan requiring reports to appropriate committees had, by the time of the creation of the

Intelligence Committees, resulted in a requirement to report to six committees of the House and Senate, which with the addition of the two Intelligence Committees became eight.

These and other developments influenced Congress to enact the 1980 Intelligence Oversight Act. On the one hand, you had the recommendations from the Church and Pike committees for a rather comprehensive charter for intelligence activities, which, as we learned yesterday, resulted in little legislation, certainly nothing comprehensive. One part of this proposal was for a comprehensive new oversight statute setting forth responsibilities of the executive branch and of the Congress in the conduct of intelligence oversight.

Such a statute had a significant advantage for the executive branch. It would lead to the diminution, from eight to two, in the number of committees that would oversee intelligence activities, and an understanding and a requirement that intelligence committee security procedures would be appropriate to the sensitive matter that they would be receiving and reviewing. For the Congress, on the other side, there would be a requirement that there be prior notification of significant anticipated intelligence activities, the principal subset of which was covert actions. Thus, you would have a promise of secrecy on the part of the Congress, and a promise of full disclosure on the part of the executive branch.

The statute that was enacted, although it had a requirement for prior notification, also had a provision which indicated that there might not always be prior notification. This was an issue on which there was much debate and discussion, and a process in which the executive branch and the Congress worked on every word in the reports, statute, and congressional debate. It resulted in a thoroughly debated, and I think reasonably well understood, decision to leave the conditions ambiguous under which Congress would not be told. However, Congress insisted that the only thing that would make this kind of a compact work would be an assurance of comity from both sides, and particularly from the Executive who, after all, controls the secret information at issue here. They wanted assurance that the President, who might make a decision to withhold information, would not do so in order to take advantage of Congress. He would withhold only on a very reasonable basis where he would be essentially at risk, because he would have to explain afterward why he thought it was appropriate to withhold the information and how extraordinary the circumstances had been. He would also have informed the Congress only after a reasonable delay. That was thought to be reasonably soon, although the timely-notice requirement has been since interpreted quite differently.

The eight years of oversight that followed the enactment of this statute, I think, showed that it could work. There was prior notice of all covert actions until the Iran-Contra Affair. There were some bumps in that process—Nicaragua and the debate about Contra aid being the most significant one. But it seems to have worked.

Now comes the Iran-Contra Affair. You can argue about the constitutional implications of requiring prior notice and whether or not it is reasonable for Congress to insist on consultation. But the approach of many in Congress who are interested in this legislation has been, and still is, to reassert the compact agreed to in 1980 which they think was broken. What they would like to see is a return to what they thought they enacted in 1980. And you can certainly argue that forty-eight hours is an arbitrarily chosen time period. You can say it ought to be seventy-two hours, or a week, or that a specific time limitation is not the appropriate way to express the concept we are talking about here. Perhaps it ought to be "as soon as possible."

There are all sorts of possible approaches to that issue, but I think Congress has not seen much from the executive branch in terms of a willingness to discuss how best to reassert the understandings that led to the compact of 1980. In fact, I think that many in Congress have seen the Iran-Contra Affair not simply in terms of this notification issue, but as an across-the-board assault on many of the underlying assumptions and specific requirements of the 1980 Act. Let me read, if I may, just a few excerpts from some remarks that my chairman, Louis Stokes of Ohio, made when he introduced the predecessor to the bill that was approved by the House Intelligence Committee.

> When the executive branch treats congressional oversight as an irritant to be avoided or overcome, the result is quite often a policy or program failure. Occasionally, such failures are of such magnitude as to directly affect the national interest.
>
> . . . .
>
> That bond of mutual respect and trust between the intelligence committees and the CIA, which Eddie Boland, Ken Robinson, Senator Inouye, Senator Bayh, Senator Goldwater and others strove so hard and so successfully to establish has been broken. It has been replaced of late by a demonstration of arrogance that permits high-ranking governmental officials to look for ways to avoid the law rather than to execute it, and to reason that a statute designed to ensure prior notice authorized no notice at all for ten months.[1]

On a subsequent occasion he said:

1. 133 CONG. REC. H-566 (daily ed. Feb. 4, 1987).

> Congress has heard testimony from a former National Security Advisor and an Assistant Secretary of State, admitting that they deliberately misled or misinformed congressional committees. . . .
>
> A CIA official has asserted in effect that his superiors did not tell the truth when testifying before Congressional committees. . . .
>
> We have learned that DEA was directly involved in a covert attempt to free our hostages, a covert action for which there was no finding and which was not reported to the requisite committees, etc., etc.[2]

He went on to say:

> Mr. Chairman, against this backdrop, dare we risk any confusion about what is essentially the charter of the intelligence oversight process, the Oversight Act of 1980? We should leave no room for doubt or dissembling. The legislative intent should be clear: prior notice of covert actions, prior notice to the eight-person leadership group for matters of rare and extraordinary sensitivity, and a short delay of such notice in extraordinary circumstances when the President must act before he can provide notice.
>
> That was what Congress meant in 1980. That is what we should restate today.[3]

A question that we have asked this morning is, why should Congress be involved at all? If the Constitution is an invitation to struggle over control of foreign policy, one possible reason is that the President wants the Congress involved. He knows, as do we, that secret and diplomatic or intelligence initiatives are unlike many other major policy issues or initiatives in the foreign policy or national security arena. This is because they are taken in secret and they cannot be gauged for public support, as we do with major arms sales, for instance. Congress can help a President gauge what public reaction might be. Additionally, there has been a skepticism about covert action since the days of Hughes-Ryan, as evidenced by the Church committee report. The Church committee considered recommending the abolition of all covert actions, but decided in balance that there were going to be opportunities or circumstances when covert action should be employed. Thus, the issue for Congress in the area of covert action is whether it should limit or even prohibit such

2. *H.R. Doc. No. 1013, 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to the Congress, Hearings of Subcomm. on Legislation, House Permanent Select Comm. on Intelligence*, 100th Cong., 1st Sess. 163 (1987).

3. *Id.* at 164.

action; and as it considers this on a regular basis, how best can such action be evaluated?

Prior notice also provides an opportunity to examine initiatives which have the potential for involving us in foreign wars. That is not an idle suggestion; it has happened from time to time. Covert actions also provide potential embarrassment to the United States. In addition, they may involve great costs or the use of appropriated funds.

Covert action is secret policy. Is that policy consistent with the foreign policy as the rest of the Congress, as the rest of the American people, understand it?

Finally, covert action involves the use of contingency funds—funds which Congress appropriates and makes available to the President for practically any use in the secret intelligence arena. Congress does not ordinarily provide funds with so few strings.

In short, Congress asserts a broad right to know what the secret affairs of the U.S. government are at any appropriate time. What can Congress do if we do get this prior notice—even if it is the small group of eight? Well, they can provide advice to the President. How valuable is that? Are they going to, as Bruce Fein has suggested, have done the right amount of homework? Perhaps not. I doubt that most of the members of Congress are going to be able to give the President advice that somebody in the Administration has not already suggested, but it is going to be coming from people who are not beholden to him. And he will get a different sense of the reaction of the public to these things, views that he may not get from a small circle of advisors who are imbued with a need for secrecy, and not for consultation.

Congressional consultation can be a boon to the process. We can avoid the kind of imprecise policy limitations which Congress may feel forced to impose after the fact when it disagrees with the President. With the availability of contingency funds, the President is usually in the position of being able to launch a secret initiative. Should Congress disagree at that point, it is at a significant disadvantage in many cases. People will have been told, "This is the policy of the United States. We want you to help us and to cooperate with us." Congress is now faced with the responsibility, after the fact, of deciding whether it is reasonable or even effective to try to reverse that policy: to require the President, in effect, to go back and say, "No, that isn't the policy of the United States."

Congress does not want to cut off the covert action option. It does not want to prevent the President from having that option. But because it is skeptical, and because it makes these contingency funds available, it will insist on knowing about covert actions in advance. It does not want to be disadvantaged by this uneasy compromise—and that is exactly

what it is—by its broad grants of authority to the President in using funds, and otherwise employing his agents overseas. It is a half step, just as the forty-eight hour requirement is a half step. It may not be perfect, but it is a reaffirmation by the Congress that this prior notification process is one that it will insist on if covert action is to continue as a policy option.

Congress wants that oversight. I think it wants better oversight. That is why the suggestion that comes out of the Iran-Contra Minority Report for a joint committee on intelligence will probably not be accepted. Proponents say a joint committee will be more bipartisan, smaller in membership, and in every way a more secure instrument by which Congress could exercise oversight over intelligence.

However, joint committees are not creations that are well accepted in the Congress. One of the reasons is that inherent in the surrogate concept of having a committee represent an entire body, 435 members for instance, is the trust of their colleagues for members who serve on the Intelligence Committee. This is butressed because members of the Intelligence Committee are indeed selected with care and, as senior members of their House, regularly involved in the business of that body. That will not be true in a joint committee that may be controlled every odd year by the other body, by another party than the one that controls the other House. What will happen inevitably is other committees of the Congress will become more interested in intelligence oversight. An example is the Committee on Foreign Affairs in the House which has reawakened to an interest in intelligence matters in several bills that are pending before that committee. There is an effort to get into areas which they think may have been improperly handled by the Intelligence Committee or where they see a glitch in the Arms Export Control and Foreign Assistance Acts, etc.

What I am saying is that the present committee structure is one that will be given even more responsibility, and on which the two Houses will rely more in the future, not less. Unless there is a meeting of the minds on this concept of what timely notice can be and should be, a more satisfactory concept than there has been of late, these bills that require at least forty-eight hours notice in every case are going to advance. There will be a confrontation. Perhaps the President will veto this bill. That will not solve the problem, and it certainly will not daunt what I see to be this progression toward more congressional oversight.