TWO MODELS OF CONGRESSIONAL OVERSIGHT

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Let me begin by extending an apology from Sven Holmes, general counsel and staff director of the Senate Intelligence Committee, who was scheduled to be your speaker today. I appreciate your invitation to replace him on the program. Sven must remain in Washington because of urgent committee work on the verification and inspection issues in the INF Treaty. Arms control verification is an area where a good many people feel that the existence of a strong, assertive intelligence committee, insisting upon verification and inspection rights, and insisting upon information about U.S. deliberations with the Soviets on that subject prior to Senate ratification of the Treaty, has been a real asset to the security of the country. However, if you want a strong intelligence committee in this capacity, you have to expect it in other capacities as well.

That brings me to the subject of this panel—the policy implications of the Iran-Contra Affair and their relationship to intelligence oversight in a democracy.

There were significant implications of the Iran-Contra Affair that may not have been fully appreciated during the congressional hearings. One of the real disappointments in 1987 to many of us who have been watching and participating in the process of intelligence oversight since the mid-1970's was the failure of the Iran-Contra committees—in both houses, and in a bipartisan way—to come to grips with important policy issues. Instead, they treated the Iran-Contra investigation as essentially a prosecutorial exercise, to determine "who hit whom, when," rather than as a forum to educate the public, and to educate themselves about the implications of Iran-Contra for the policy process. These issues involved the role of the National Security Council, the system for covert action, and the relationships between Congress and the executive branch. The chairman of the Intelligence Committee, Senator David L. Boren, appended his additional views to the Iran-Contra Report:

> [T]he committees should have conducted their inquiry

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> with greater focus upon the broader policy questions and constructive lessons to be learned and with less time focused upon the kind of examination more appropriate to criminal prosecutions in a courtroom. Congressional committees by their nature are structured to conduct policy inquiries rather than criminal prosecutions.[1]

Some of you are familiar with the reports of the Church committee in 1975-76. For all of the damage undoubtedly done in the process of laying out the information to clear the air with respect to allegations of misconduct in the atmosphere of mistrust following Watergate and the Vietnam War, those reports provided a solid foundation for understanding the intelligence community. Book I of that report, in particular, still stands today as the best single explanation in print of the way our intelligence system has worked and evolved over the years. Many of us wish the Iran-Contra committees had followed that example and tried to examine the frame of reference, institutionally and historically, within which the events under investigation occurred. The Tower Board tried to do so, but it had too little time to do its job.[2] The Tower Board's recommendations, while sparce, began to capture what would have been a much deeper understanding of the problems if the Iran-Contra committees had built on the board's foundation, rather than focusing on a prosecutorial approach.

One thing the Tower Board did not have during its deliberations was Lt. Col. North's subsequent testimony about an "off the shelf" capability for using a private enterprise to conduct the covert actions of the United States. In my view, that was the single most important revelation in the 1987 hearings. I wish it had been available to the Tower Board, so they could have had a more complete appreciation of the problems confronting our system when that capability is developed, not just for one operation for a limited purpose but for multiple purposes. What we saw was evidence of a search for means to escape the Constitution, to escape the intelligence professionals, and to provide in the hands of policymakers a tool that they could use at their whim, rather than through a careful deliberative process—both of intelligence tradecraft and of national policymaking.

That was the most troublesome policy implication of Iran-Contra—the fact that we had policymakers at the very top of our Government

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1. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. Rep. No. 216, 100th Cong., 1st Sess. 657 (1987) (hereinafter REPORT). The Vice Chairman of the Intelligence Committee, Senator William S. Cohen, and his colleague from Maine, Senator George J. Mitchell, also make this point in their book on the work of the Iran-Contra committees. W. COHEN, G. MITCHELL, MEN OF ZEAL (1988).

2. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD (Feb. 26, 1987).

prepared to institute that type of government policy instrument. It was not covert action; I do not know what the word for it is, but it was not covert action. I hesitate to say it was some kind of foreign policy junta, but there were members of the Senate who justifiably talked at the public hearings in those terms.

Another policy lesson of Iran-Contra was the harm done by the exclusion from policymaking of the established institutions of Government, and particularly the principal members of the Cabinet, the Secretary of State and the Secretary of Defense. The failure to use the expertise of the Defense Department, the State Department, and significant elements of the intelligence community, fundamentally impaired the ability to conduct sensitive operations effectively. In response to this lesson, the President issued a National Security Decision Directive which specified the required participation in the review of covert action proposals. Mr. Rostow of the National Security Council (NSC) staff has explained how that works. Unfortunately, there was a similar directive in effect when the Iran-Contra decisions were made, and some of the principals did not know it even existed. When key decisionmakers do not know of a Presidential directive setting forth the procedures for review of covert action proposals, something is fundamentally wrong.

I do not think we are likely to have that happen again soon. The reason is not just the NSC process itself, but because of the checks and balances that have been brought in from outside the NSC process, primarily through congressional oversight.

A third policy implication, the one that perhaps received the most attention, was the way the NSC staff took on an operational role. The development of the NSC staff and the NSC mechanism as the principal instrument of Presidential policymaking for national defense, foreign policy, and intelligence is something the Congress had never come to grips with (at least since Senator Henry Jackson's hearings in the early 1960's). Certainly the Iran-Contra committees did not. The Tower Board attempted to, but with limited success. The issue is not mainly one of rogue NSC staffers, but rather a question of the relationship of the NSC staff and the National Security Advisor to the policy process. Iran-Contra taught us a great deal about how a National Security Advisor, who goes off track, can do great damage to his President and to the ability of the country, for almost a year, to be able to do constructive business.

The remedies proposed by the Tower Board and the system set forth in its report have been substantially implemented. That system emphasizes a strong National Security Advisor. There is no lesson drawn by the Tower Board, and certainly none drawn by the Congress, that the power of the National Security Advisor should be reduced or limited—

even though one or two National Security Advisors and some of their staff went wrong. Instead, the outcome has been to strengthen the NSC system with the focusing of authority and responsibility on the National Security Advisor. Everyone should recognize that this is what happened with Mr. Carlucci and General Powell in the position.

The Tower Board recommended against Senate confirmation of the National Security Advisor. At the same time, however, the board commented that a number of people whom they talked to felt that consultation between the Congress, the National Security Advisor, and the NSC staff is a good thing. In this connection, perhaps the most significant institutional change in executive-legislative relations over the past year and a half is the development of that consultative relationship between the Senate Intelligence Committee and the NSC. Sometimes only the National Security Advisor and his staff can see and explain the President's reasons for doing things in areas where foreign policy, military, and intelligence considerations overlap. The Director of Central Intelligence cannot, the Secretary of State cannot, the Secretary of Defense cannot, because the President synthesizes the advice from all three. When it comes to explaining why a policy is a good idea from the President's point of view, it occasionally turns out that the best person to do so is the National Security Advisor.

The National Security Advisor and his staff do not come up and testify before the committee. Most of the communications continue through the CIA and intelligence community channels. But there has developed an ability of the chairman, vice chairman and members of the committee to be able to reach an understanding with the NSC—sometimes with direct communications—on issues of importance to the President and the committee. I believe this is one of the most constructive results of the Iran-Contra Affair. A new Administration would be well advised to maintain this relationship, because only if there is an understanding between the President, the Senate Intelligence Committee and its House counterpart will the process of intelligence oversight work effectively. The reports and studies on Iran-Contra have not examined this most significant institutional aspect of the policymaking process.

All this is introduction to the theme of my remarks. In looking at congressional oversight of intelligence activities, I see two competing models. One is a model of oversight as restriction, oversight as constraint. If you adopt that model from the congressional perspective, you are trying to impose restrictions and prevent bad things from being done. And if you adopt that model from the executive branch perspective, you are constantly resisting and trying to prevent Congress from finding

things out. That is not the model of oversight, from either a congressional or an executive branch point of view, that I believe is most appropriate and most worthy of attention.

There is another model that is described by Senator Boren in his separate views in the Iran-Contra committee report, where he said, "We must now concentrate on confidence-building measures which will help bring us together."[3] The term I like to use as a political scientist is "collaborative mechanisms." What kind of collaborative mechanisms can we institutionalize so that the oversight process from the congressional viewpoint becomes not an attempt to restrict, but an effort to understand and a responsibility to share in some of the burdens of decision—so that from the executive branch viewpoint oversight becomes an opportunity, a way to cement and solidify the support that is necessary for the long-term success of our intelligence community and foreign policy?

The efforts to enact new oversight legislation in the wake of the Iran-Contra Affair can be looked at in light of these two models of oversight. Such legislation could contribute to polarization, with some in the Congress saying that the bill is needed to put greater restrictions on the President, and then, of course, the response from the executive branch that such restrictions must be resisted. Or, new oversight legislation could be seen as a decision by the Congress that it must share responsibility, and as an opportunity for the President to solidify the long-term legitimacy of covert action.

Senator Boren and Senator Cohen, as chairman and vice chairman of the Senate Intelligence Committee, have done everything they could to have new oversight legislation viewed from the latter point of view. Senator Cohen introduced the Intelligence Oversight Act of 1988 to implement Iran-Contra committee recommendations. On every one of the issues that arose in consideration of the bill and passage by a vote of 71-19 in the Senate, there were intensive negotiations with the intelligence community and the executive branch so that each provision—except the forty-eight hour notice requirement—accommodated the concerns of the intelligence community and the NSC. Even at the final mark-up session of the committee, the committee insisted that the executive branch be represented and that an official speaking on behalf of the executive branch come before the committee on the record and certify that all the differences had been resolved between the executive branch and the committee, except for the forty-eight hour notice provision. And then, Chairman Boren persuaded his colleagues not to vote on the bill immediately. This was in December of 1987, just before the holiday recess. At

3. REPORT, *supra* note 1, at 658.

his insistence, the final vote was postponed until after the recess when the members returned in late January so as to give the executive branch an opportunity to scrutinize the bill. If they found something else wrong with it, they could come in and try to fix the problem.

There was always a willingness to make changes in language to meet executive branch concerns, except on the one crucial issue of principle. For example, the early bill language called for the identification in Presidential findings of third parties who would assist in carrying out a covert action. This requirement was carefully revised in consultation with the intelligence community. As reported by the committee and passed by the Senate, the bill only applied to third parties who do not have a contractual relationship with the U.S. Government. CIA sources have such a relationship, and the legislative history was clear that the bill did not apply to such persons. In addition, the bill was changed from requiring identification of third parties to specifying only whether third parties will be used. The oversight committees may seek further information under a separate provision that does not guarantee the committees an absolute right to information, but rather gives them access "to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." If the executive branch believed it would not be consistent with such protection to provide the information, a dialogue would ensue. That dialogue is at the heart of the oversight process: the committee explains why it thinks it needs the information, and the executive branch explains why it is so sensitive, with the outcome depending on the nature of the particular case. The outcome is not dictated by absolute statutory language. This is an example of an area where differences on the bill were worked out.[4]

The Senate Intelligence Committee consulted widely in the legislative process, not only with the executive branch, but also with outsiders as well, a number of whom are in this room today. Their input significantly enhanced the quality of the legislation.

On the one outstanding issue—notice of covert action findings within forty-eight hours—Chairman Boren took a final initiative to recognize the President's legitimate need in the most exceptional cases to keep to a minimum the number of people who know about a planned covert action. Senator Boren proposed that in the extraordinary case where the President needs that constitutional and legal room to impose the strictest "need to know" limits, he only has to call in the majority

4. *Intelligence Oversight Act of 1988: Report to Accompany S. Rep. No. 1721, as amended by S. Rep. No. 276*, 100th Cong., 2nd Sess. 31-34 (1988).

and minority leaders in the Senate and the Speaker and minority leader in the House. There is no requirement to tell thirty members, or even the chairmen and vice chairmen of the committees, or any staff at all. What is left is simply a requirement to ensure that there is more than one person involved in the decision who has experience, training and background in American politics, not just single-minded national security proponents with exclusively military, diplomatic, or intelligence backgrounds.

The President, and the Vice President if he is consulted, may be the only senior members of the executive branch who have the lifeblood of politics running through their veins. They are the most likely to understand what would have the support of the American people, and, I suggest, what would be the response of foreign leaders, who are also politicians. By consulting congressional leaders elected by their colleages, the President is getting input from others who bring that unique expertise to the decision to exercise the President's most sensitive authorities. The bill does not force him to consult in advance if time is of the essence, and nobody in the executive branch has said that notice within forty-eight hours is impractical. Committee members asked whether forty-eight hours was too short a time period to implement notice, but executive branch witnesses said it was not.

Some may wonder why legislators would want to share responsibility for covert action policies when they have no authority to prevent their initiation. It is clear under current law, as well as the new legislation, that the members notified of covert actions can only give their advice; they can do nothing to block implementation (until the next budget bill). If they make public their concerns, they face the prospect of an Ethics Committee investigation and penalties for violation of congressional rules. Chairman Boren and Vice Chairman Cohen have an additional agreement with the Senate leaders that any member or staff caught leaking will be removed from the committee. Why, then, do members want this burden? From the 1940's until the 1970's, there was a pervasive inclination not to know, and thus to be able to sit back and second guess after the fact.

It is obvious today, however, that members have made a commitment to their consultative role, and it has evolved over more than a decade to where they have come to know of a great many different, highly sensitive activities that have not become public. They know that they and the executive branch have been able to maintain secrecy, and they also know that their advice has made a difference on occasion. Their experience has been that the process is generally workable, with Iran-

Contra being the exception. They believe their advice does have an impact and that important secrets are kept.

One thing that may have motivated Senate Intelligence Committee members of both parties to press for new oversight legislation has been the executive branch's failure on two crucial occasions to acknowledge the reality of this constructive relationship. The first occasion was the drafting of a Justice Department legal opinion on the ten-month delay in notification to Congress of the Presidential finding on sale of arms to Iran. The current oversight statute, enacted in 1980, provides for notice to the oversight committees, or a group of eight congressional leaders, prior to the initiation of a covert action, but acknowledges the possibility of subsequent notice so long as the committees are informed "in a timely fashion." The opinion by the Assistant Attorney General for the Office of Legal Counsel removed any substance from the word "timely" by saying it meant whenever the President decided it was appropriate to give notice.[5]

"Timely" has to mean something. At the very least, it means pretty soon. It means having an obligation to do it as quickly as you can; it does not mean whenever you want. If an opinion had been written conceding that the delay in notice of the Iran finding was too long, and that it was indeed at least a technical violation of the oversight statute, the reaction might have been very different on the Hill. I believe such an opinion might have been written under Attorney General William French Smith. I also suspect that Attorney General Smith, had he known of the finding, would have paid more attention so that we might not have had "timely" become ten months.

Congress is almost compelled to legislate as long as the Justice Department opinion is not changed or superseded. If a President or an Attorney General were to adopt the position that "timely" means "as soon as I can," and acknowledge an obligation to notify promptly, perhaps that would defuse some of this issue. But we do not have such an opinion, and the Congress faces an executive branch interpreting the current statute in a way that cannot be accepted as a fair reflection of legislative intent. The sizeable majority for the new bill in the Senate is testimony to that.

The second occasion where an opportunity was lost arose in mid-1987 when a new National Security Decision Directive (NSDD) was being drafted to establish covert action review, approval, and notice procedures. The Senate Intelligence Committee first addressed this issue, prior

5. *Proposals which Address the Issue of Affording Prior Notice of Covert Actions to the Congress: Hearings on H.R. 1013 and H.R. 1373 Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 100th Cong., 1st Sess. 247-273 (1987).

to the introduction of any legislation, in a letter to National Security Advisor Carlucci in July of 1987. The committee proposed a set of principles to be embodied in procedures for covert action approval and notice, and there were some very constructive discussions that might have resulted in a new NSDD that could have deflected some of the impetus to legislation.

The result, however, was a directive which codified the President's authority to withhold information by establishing a formal procedure for denying notice even to the eight leaders whom the President may confine notice in exceptional circumstances under current law. The NSDD said that every two weeks the President and the NSC would review and reconsider the decision to withhold notice, but it was clearly a procedure that permitted indefinite withholding of information from Congress.[6] If such a procedure had not been adopted—if instead the NSDD had used some other language that was more elliptical and less explicit about denying information—it might have lessened the force of some of the arguments for new legislation.

At its heart, oversight legislation is symbolic. For many people, it is symbolic of that model of oversight that sees constraints and resistance to constraints; but I urge you to look at it with a different model of oversight in mind. New oversight legislation could symbolize the ability of the Congress and the executive branch to come up with a workable mechanism that takes into account the conception of constitutional balances that prevails today.

I did not say "the Constitution"—I said the conception of constitutional balances that prevails today. And that brings me to my concluding comments. I would like to suggest that in the mid-1970's we went through a constitutional revolution. It was comparable to what happened to the Constitution in the 1930's. From the 1890's until the 1930's, a body of constitutional law developed to constrain the ability of government to deal with a variety of economic policy matters. In the 1930's we discarded that body of constitutional doctrine because it did not suit the needs of the country.

Similarly, during and after World War II, we developed a powerful, permanent national security structure based on military, intelligence and diplomatic institutions that was fundamentally different from anything we had previously had in our history. Covert action and intelligence operations were a significant part of that structure. They were essentially free from any significant involvement of the Congress with those aspects

6. *Oversight Legislation: Hearings on S. 1721 and S. 1818 Before the Senate Select Comm. on Intelligence*, 100th Cong., 1st Sess. 203-206 (1988).

that were conducted in secrecy. In the mid-1970's we made fundamental changes in that system. At a conference sponsored by the ABA Standing Committee on Law and National Security at the University of Chicago Law School in 1980, Dean Gerhart Casper used the term "framework legislation" to describe how this was done. Examples include the Freedom of Information Act amendments of 1974, the Foreign Intelligence Surveillance Act of 1978, the Hughes-Ryan amendment of 1974, and the Intelligence Oversight Act of 1980. The least workable was the War Powers Act.

In addition to legislation, other measures taken by the executive branch were closely modeled on legislative proposals and have achieved almost the status of law because people are held accountable for adhering to them. I refer to the Executive orders and guidelines that parallel what would have been FBI and intelligence "charters," which were not enacted, but which influenced the decision by the Reagan administration in the early 1980's to retain the essential features of previous Executive order constraints and Attorney General guidelines adopted in the Ford and Carter administrations.

This combination of statutory and administrative actions resulted in a fundamental change of constitutional dimensions. As a political scientist, I find it helpful to look at the Constitution, not just from the viewpoint of court decisions, but from the viewpoint of institutional arrangements, widely shared attitudes and perceptions. The Iran-Contra experience has reaffirmed the framework that was established in the 1970's. It was the departure from the expectations that people had about proper official conduct that resulted in such a dramatic reaction. We have a set of expectations today in the body politic that were violated by Iran-Contra, and their violation did more to affirm those principles and institutional arrangements than to denigrate them. There is no indication that they lost either popular support or their overall efficacy.

In closing, let me suggest that we try to look at the issues of intelligence oversight with this idea in mind of an American Constitution that has successfully found a way—through a variety of institutional arrangements developed from the mid-1970's until today—to bring secrecy and the powers required for national security more closely into line with the principles of legitimacy and representative government expected in our modern democracy. And I would urge that you support continued efforts to make those arrangements work.