THE IRAN-CONTRA AFFAIR AND THE INTELLIGENCE OVERSIGHT PROCESS

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I. THE ISSUE OF PRIOR NOTICE OF COVERT ACTION

The "Recommendations" chapter of the *Report of the Congressional Committees Investigating the Iran-Contra Affair* begins as follows: "It is the conclusion of these Committees that the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance."[1] Nonetheless, its first recommendation is that: "Section 501 of the National Security Act be amended to require that Congress be notified prior to the commencement of a covert action except in certain rare circumstances and in no event later than 48 hours after a Finding is approved."[2]

The report claims to propose this change "to assure timely notification to Congress of covert operations" (which the Executive is already legally obliged to provide);[3] however, by defining "timely" notification in such a strict manner, it, in fact, represents a substantive change in the legal regime governing covert action. This proposed change is incorporated into the Intelligence Oversight Act of 1988. The Act has passed the Senate; a companion bill in the House was not acted upon during the 100th Congress.

Several months before the report was issued, Admiral Stansfield Turner, President Carter's Director of Central Intelligence (DCI), testified before the House Permanent Select Committee on Intelligence against a strict prior notice requirement. He noted that: "when a similar provision was discussed in 1980 in connection with the Intelligence Oversight Act of that year, I recommended to President Carter that he veto such a bill if it did pass the Congress. I believe the President was inclined

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1. REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. No. 433, 100th Cong., 1st Sess. 423 (1987) [hereinafter Iran-Contra Report].

2. *Id.* This requirement is referred to, following common usage, as one of "prior notice" despite the fact that technically a covert action could be initiated before congressional notice; perhaps "concurrent notice" would be a more accurate term since, especially once the delay between the Presidential decision and the actual beginning of the operation is factored in, the covert action is almost certain to still be underway when Congress is notified.

3. 50 U.S.C. § 413(b) (1988) [hereinafter The National Security Act of 1947] (corresponds to The National Security Act of 1947, § 501(b), 94 Stat. 1981, 1982).

to do so at that time."[4]

Although a strong friend of congressional oversight of intelligence,[5] Turner said he had undertaken three covert actions (all involving attempts to rescue the Americans held hostage in Teheran in 1979-81) without providing prior notice to Congress. He characterized these as cases in which: "a Chief of Intelligence finds it desirable to ask an American employee of the Intelligence Community or a foreign agent to put his or her life at risk in some covert action."[6]

He implied that he would not have been able to undertake these activities (one of which was preparatory to the "Canadian caper," the smuggling out of Iran of six Americans who had taken refuge in the Canadian Embassy in Teheran) had he been required to notify members of Congress before the operations were completed. Referring to the danger faced by the operative being sent to Iran, he testified that: "in my conscience I could not have informed anyone else who was not essential to the operation."[7]

Before the same subcommittee, Congressman Mineta, testifying generally in favor of the proposed prior notice provision, suggested that an additional problem with notifying Congress in this case was the Canadian government's opposition. Since the cooperation of the Canadians was obviously crucial for the success of the activity, and since their own personnel were being put at risk because of it, disregarding their wishes in the matter would have been very difficult.[8]

II. THE ARGUMENTS IN FAVOR OF PRIOR NOTICE

Congressional oversight of covert action is supported on both "public policy" and "constitutional" grounds. The public policy arguments stress the supposed benefits of a wider discussion of covert action proposals than would exist within the executive branch; the congressional Intelligence Committees, consisting of members representing a wide spectrum of political opinion, are better able to test the proposal against public opinion in general. The committees' consideration of the proposal acts as a surrogate for the public debate which would ordinarily accompany an

4. *H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to Congress: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 100th Cong., 1st Sess. 45 (1987) [hereinafter *1987 Hearings*].

5. His memoirs have this to say about congressional oversight: "It is time to acknowledge that secret intelligence faltered badly without some form of accountability. If we want to have good intelligence over the long run, our only option is to make oversight work." S. TURNER, SECRECY AND DEMOCRACY 270 (1985).

6. *1987 Hearings*, *supra* note 4, at 48.

7. *Id.* at 46.

8. *Id.* at 158.

overt foreign policy initiative, thus combining the benefits of both democratic debate and secrecy.

Congressional oversight is also defended as helping to counteract what are seen as certain characteristic pathologies of executive branch decisionmaking. These are variously described as the "can do" attitude of the intelligence community, which does not willingly admit that it is unable to accomplish a much desired goal; the tendency towards "group think," which prevents individual members of the executive branch from dissenting from an emerging consensus or from known Presidential desires; and the amoral "technocratic" or "goal-oriented" thinking which is alleged to lead executive branch personnel to overlook longer term considerations or political or moral "values."

While this analysis may have had some validity in explaining some of the excesses of the CIA in the late 1950's and early 1960's, it is probably less useful today. As the Iran-Contra experience shows, an Administration intent on risky covert action adventures was led to circumvent the intelligence community bureaucracy rather than rely on it. While congressional consideration would undoubtedly have aborted the Iran arms sales, it was precisely this prospect which led the Administration to cut out the intelligence professionals who might have been able to undercut the program or divert it to tamer channels.

The constitutional arguments emphasize the Congress' role in foreign policy formation, and conclude that Congress therefore requires access to information about covert action in order to fulfill its responsibilities. The congressional "power of the purse" is particularly relevant to the issue; in deciding whether to appropriate funds to support covert action, it is obviously relevant to look at how previous year's funds were spent. Many other congressional powers[9] also may require information about some (although not necessarily all) covert action programs.[10]

However, it does not appear that any of these constitutional powers

9. S. REP. No. 276, 100th Cong., 2d Sess. 21 (1988) [hereinafter SSCI Report]. The SSCI Report makes reference to the following:

— power to declare war
— power to raise and support armies
— power to provide and maintain a Navy
— powers under the "necessary and proper" clause.

Id.

10. *Id.* The SSCI Report refers specifically to Congress' power to "make the fundamental determination whether the U.S. will be at peace or at war with particular countries" as a basis for its being notified of any covert action program which might "involve the United States in conducting or supporting armed hostilities against other countries" or which might "lead to retaliatory measures against the U.S. or its allies." *Id.* This particular argument, if it proves anything, proves too much: diplomatic activity of any sort could have the same effect. There seems to be no getting away from the fact that, despite Congress' power to declare war, the President can unilaterally put the country in a position where Congress has little choice in the

require *prior* notification of *all* covert actions. To exercise the "power of the purse," more specifically, to decide on the annual appropriation of funds, it would be sufficient for Congress to be informed how the money was spent in the ordinary course of the budget cycle. In the case of other congressional decisions (*e.g.*, a rather unlikely necessity to decide on a declaration of war), Congress would need to be informed about all sorts of executive branch actions, diplomatic activity as well as covert action, that bore on the particular situation.

The Senate Select Committee on Intelligence (SSCI) defends prior notice (as opposed to the general necessity for Congress to obtain information about covert actions) in rather vague terms. It says merely that prior notice must be given "in order to provide Congress with an opportunity to exercise its responsibilities under the Constitution."[11] Similarly, the absolute requirement to notify Congress within forty-eight hours of a "finding" is designed "to maximize Congress' opportunity to play an effective role with respect to the execution of such activity."[12]

It is quite unclear what "effective role with respect to the execution of such activity" it is envisioned the Congress could play. In fact, the Intelligence Oversight Act of 1988 retains a provision of current law which makes clear that the Intelligence Committees do not exercise any veto power over the conduct of covert actions.[13] In principle, prior notification would allow the committees to draft new legislation to prohibit the expenditure of funds for the proposed covert action, and then attempt to pass the legislation (and override the President's veto) in time to prevent its initiation; as a practical matter, this seems to be a far-fetched proposition.

Even this weak constitutional reed is pulled out from under the Intelligence Oversight Act of 1988 in that it continues to permit the President, in cases of exceptional sensitivity, to limit notification to the "Group of Eight"[14] (the chairmen and ranking members of the two Intelligence Committees, and each party leader in each House) and, going beyond current law, permits him to further limit notice to the "Group of Four" (the party leaders).[15] The implication of the legislation is that these Congressmen will not tell their colleagues about the covert action

matter. The strange intimation of congressional omnipotence (*i.e.*, the disregard of the possibility that war will come to the United States due to the decision of some other country) which lurks within the SSCI's description of the congressional war power indicates where the problem lies. *Id.*

11. *Id.*
12. *Id.*
13. The National Security Act of 1947, *supra* note 3, § 413(a) (first proviso).
14. *Id.* § 413(a).
15. *Id.* § 503(c)(4).

of which they have been notified;[16] but, if they do not, it is clear that no legislative purpose can be served by the notification.

III. THE ARGUMENTS AGAINST PRIOR NOTICE

Although the issue was debated somewhat during the Church and Pike committee investigations of 1975-76, there seems to remain little doubt with respect to the President's inherent constitutional power to conduct covert action;[17] the Intelligence Oversight Act of 1988 would, for the first time, grant the President explicit (and exclusive) statutory authority to do so.[18] Congress has further sanctioned this state of affairs by annually appropriating funds for covert action.

If the conduct of covert action is an inherently Presidential power, then the constitutional issue turns on whether the prior notice requirement effectively takes away this power. The key constitutional argument against the prior notice provision rests on the assertion that: "Under some circumstances, communicating findings to Congress within 48 hours could well frustrate the President's ability to discharge [his constitutional] duties."[19]

As we have seen, this view is supported by the testimony of former DCI Turner, who claimed that a prior notice requirement would have made it impossible to carry out certain covert actions. The SSCI, on the other hand, "does not share the view that a statutory requirement to communicate findings to the Congress, in the manner prescribed by [the Intelligence Oversight Act of 1988], would frustrate the President's ability to discharge his constitutional duties."[20] Even leaving aside, however, the vexed question of security and leaks,[21] the SSCI does not

16. For example, if the President notifies only the "Group of Four," he is required to provide a weekly statement to them reconfirming his decision to withhold notice from the Intelligence Committees. *Id.* This provision would not make sense if the four party leaders were themselves free to inform the Intelligence Committees.

17. The SSCI notes, but does not controvert, that "[t]he authority of the Executive to conduct intelligence activities, including special activities (*i.e.*, covert action) has been implied as a necessary extension of these (explicitly mentioned foreign policy) responsibilities." SSCI Report, *supra* note 9, at 20.

18. The National Security Act of 1947, (as proposed to be amended), section 503(a) grants the statutory authority; *id.*, section 501(a), first proviso, makes clear the absence of a legislative veto.

19. SSCI Report, *supra* note 9, at 19-20 (testimony of Charles J. Cooper, Assistant Attorney General).

20. *Id.* at 20.

21. The question of leaks and security is, of course, a major one. From the point of view of the discussion in the text, however, the main question appears to be whose judgment concerning the risk of informing Congress is to be controlling. If it is the executive branch's judgment (under the National Security Act of 1947, the DCI is responsible for the protection of intelligence sources and methods), then it would seem that the prior notice requirement does indeed "frustrate the President's ability to discharge his constitutional duties" on this account.

address the possibility that a prior notice requirement will make it impossible to carry out a covert action by depriving the executive branch of the necessary cooperation of some foreign government or individual.

These constitutional questions, of course, reflect important public policy issues as well. With respect to both foreign and domestic policy, the investigating committees assert that: "[t]he theory of the Constitution is that policies formed through consultation and the democratic process are better, and wiser, than those formed without it."[22] While there is some truth in this assertion, it misses at least half of what the Constitutional Convention was up to. After all, the major effect of its action, in this realm, was to replace the Articles of Confederation Congress by a strong and *unitary* executive which would be independent of the legislature, and would be able to act with that "energy" which, Hamilton said, is "a leading character in the definition of good government."[23]

In defending the Convention's decision to create a unitary executive (one of the most fundamental choices it made), Hamilton distinguishes between executive and legislative functions precisely in terms of whether they are best vested in unitary or plural organs. With respect to legislative functions, "[t]he differences of opinion, and the jarrings of parties . . . though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority."[24] On the other hand, in the executive arena:

> no favorable circumstances palliate or atone for the disadvantages of dissension. . . . They serve to embarrass and weaken the execution of the plan or measure to which they related, from the first step to the final conclusion of it. They constantly counteract those qualities in the Executive which are the most necessary ingredients in its composition—vigor and expedition, and this without any counterbalancing good.[25]

IV. Is Foreign Policy a "Shared Power"?

It has become axiomatic, in discussions such as those found in the Iran-Contra Report, to view foreign policy as a "shared power" between the executive and legislative branches.[26] At the heart of this debate has been the question of how to determine the bounds of executive power relative to foreign policy, given that the very phrase "foreign policy" nowhere appears in the document. The usual method of approaching this

22. Iran-Contra Report, *supra* note 1, at 392.
23. THE FEDERALIST No. 70 (A. Hamilton).
24. *Id.*
25. *Id.*
26. For example, "Foreign Policy as a Shared Power" is the title of one of the subchapters. Iran-Contra Report, *supra* note 1, at 391.

problem (that adopted, for example, by the Iran-Contra Report[27]) is to list those apparently scanty foreign policy powers which are expressly granted to either the President or the Congress, and then assume that the remaining powers are up for grabs.

This neglects the fact that as a general matter, the conduct of foreign policy was regarded as, in its nature, "executive altogether."[28] One would not be surprised to find this view expressed by Alexander Hamilton; but even Thomas Jefferson, better known for his fear of, and reaction against, the "monocratic tendencies" he detected in the policies of John Adams and Alexander Hamilton, advocated it when he advised President Washington that: "The transaction of business with foreign nations is Executive altogether. It belongs then to the head of the department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly."[29]

The exceptions in question evidently are the Senate's "advice and consent" power with respect to making treaties,[30] and appointing ambassadors, other public ministers and consuls. (An additional exception is the congressional power to declare war.) Jefferson's behavior as President—most notably his use of the Navy without congressional authorization to suppress the Barbary pirates[31]—is consistent with this theoretical statement, which dates from his service as Secretary of State under President Washington.

Nevertheless, the congressional role is not limited to the Constitution's explicit "exceptions" in favor of the Senate or the Congress as a whole. The reason is that many other congressional powers, legislative in their nature, impinge on the foreign policy process and effectively constrain the President's actions in a multitude of ways.

Thus, for example, Congress' "power of the purse," as well as its power to "raise and support armies" and to "provide and maintain a navy," have obvious foreign policy relevance. If Congress were to refuse

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27. *Id.* at 388.

28. Even an advocate of congressional prerogatives such as Louis Henkin recognizes this point. Henkin, *Foreign Affairs and the Constitution*, 65 FOREIGN AFF., Winter 1987-88, at 284, 289.

29. T. JEFFERSON, 5 WRITINGS 161-62 (1892-99) cited in Schmitt, *Jefferson and Executive Power: Revisions and the 'Revolution of 1800'*, 17 PUBLIUS: THE JOURNAL OF FEDERALISM 16 (1987) (emphasis in original).

30. THE FEDERALIST No. 75 (A. Hamilton) (Hamilton defended the Senate's role in making treaties on the grounds that that power had both executive (as it involves foreign negotiations) and legislative (in that treaties become "the supreme law of the land") characteristics.).

31. This incident, including Jefferson's less than candid report to Congress concerning what he had in fact ordered the Navy to do, is discussed in detail in A. SOFAER, WAR, FOREIGN AFFAIRS AND THE CONSTITUTION 208-16 (1976); *see also* Schmitt, *supra* note 29, at 17-18.

to raise an army, or to support only a small one, it would narrowly circumscribe the kind of foreign policy a President could conduct. The President's power to pursue a more active diplomatic policy does not give him the power to create an army of the size or kind he would need to back it up. Similarly, Presidential foreign policy initiatives that require the enactment or modifications of laws (*e.g.*, regarding tariffs, other foreign commerce regulations or immigration) also require independent congressional action to be brought to fruition.

As a result, there is some basis for referring to foreign policy as a "shared power" in the sense that the President will require some congressional support to pursue almost any line of policy.[32] However, in those cases where congressional support is not needed, (*e.g.*, when President Carter abrogated the U.S.-Taiwan defense treaty and established full diplomatic relations with the People's Republic of China) the President's hands are not tied by such a nebulous concept as that of "shared powers."

V. CONCLUSION

A key reason why the framers implemented the separation doctrine was to create an energetic executive power, the lack of which was responsible, in their view, for many of the problems the United States had experienced under the Articles of Confederation. As far as was consistent with republican principles, it was to be a power whose existence and ability to act vigorously would never be in doubt. At the same time, both the framers' notion of what was required to safeguard liberty, as well as the country's republicanism, required the provision of means for taming and moderating that power with due deliberation.

However, as James Ceaser has pointed out, this was done at the cost of tremendously complicating the problem of formulating comprehensive and coherent policies.[33] What this means, in effect, is that either branch (the President somewhat more than the Congress) is free to pursue its own policy, doing the best it can with the powers it possesses, while trying to induce the other branch to help it.

Clearly, this is a recipe for chaos unless the system's participants can

32. In this connection, the distinction elaborated by James Ceaser between "primary powers" (*i.e.*, the specific powers granted by the Constitution to each of the branches) and the "policy-making process" (*i.e.*, the planning, initiating, mobilizing support for, and carrying out of policies) is very useful. While the Constitution allocates the primary powers according to a "separation of powers" principle, it is not explicit about where the "policy-making process" is to take place; indeed, at different times in our history, the locus of the predominantly policy-making influence has shifted among institutions and branches of government. *See* J. CEASER, IN DEFENSE OF SEPARATION OF POWERS, SEPARATION OF POWERS—DOES IT STILL WORK? 168, 174-77 (1986).

33. *Id.* at 172.

be disciplined to act with the peculiar strengths and weaknesses of the American constitutional system in mind. In some key respects, the two branches have turned matters on their head. Congress, through legislation and the oversight process, has infused its characteristic institutional tendencies to compromise and deliberate into a mechanism (such as covert action) whose design should be to maximize secrecy, decision and dispatch. On the other hand, the executive branch has been seen at times as using covert action to put in place what amounts to broad new policy initiatives.

Absent a clear consensus about foreign policy objectives, it is unrealistic to expect implementation of a program like the Reagan doctrine to be free of controversy and the inevitable political turmoil that accompanies it. Whether or not the Administration chooses the covert route in order to avoid the more difficult task of building a consensus for its policy, it remains most unlikely that covert programs will be sustained if they operate outside the general sense of the nation's perceived interest. This is true regardless of the kind of oversight that is being exercised. The heyday of American covert action, the 1950's, was not only a result of "relaxed" congressional oversight but, more importantly, it was the product of an era in which an overwhelming unanimity existed regarding the country's foreign policy objectives.

On the other hand, it seems unlikely that any President will be able to rebuild a consensus in the area of foreign policy. Leaving aside the intellectual problems, the institutional roadblocks are daunting: the decline of discipline within the political parties; the dramatic fragmentation of the power of the leadership in the Congress (somewhat reversed in the House of Representatives during the past year); and the tendency of the electorate to ignore party labels in federal elections. All these factors make attempts to forge a working alliance between the two branches appear fruitless. Indeed, it may seem so hopeless at times that it virtually "invites" policymakers to turn to the "black" mechanisms.

The effect of this dysfunction in the body politic is the creation of temporary congressional majorities determined by the lines of least political resistance. Thus, the history of the Boland amendments is one of bare congressional majorities unwilling to take decisive action to end a policy with which they were uncomfortable. While the Iran-Contra Report complains that the Administration sought to exploit loopholes in the various Boland amendments, it forgets that those loopholes were deliberately left in the legislation to enable Congress to avoid hard choices.[34]

34. This is seen most clearly in the discussion of "Boland I," in which the Administration is blamed for exploiting a loophole which the House of Representatives had explicitly decided not to close. Iran-Contra Report, *supra* note 1, at 395-96.