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INTELLIGENCE OVERSIGHT

THE CONTROVERSY BEHIND THE FY 1991
INTELLIGENCE AUTHORIZATION ACT



WILLIAM E. CONNER

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**The Controversy Behind
The FY 1991
Intelligence Authorization Act**

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INTRODUCTION

The Intelligence Authorization Act for FY 1991¹ represents the first significant remedial intelligence oversight legislation in more than a decade. The Act provides the first statutory definition of covert action, repeals the 1974 Hughes-Ryan Amendment² governing notification to Congress of covert actions, requires presidential "findings" for covert actions to be in writing, and prohibits the President from issuing retroactive findings. The history and evolution of the FY 1991 Intelligence Authorization Act demonstrate, however, that even vital national security and intelligence policies are not immune from the vagaries of politics.

On 14 August 1991 President George Bush signed into law H.R. 1455, the Intelligence Authorization Act for FY 1991. Just ten months earlier, however, President Bush had become the first President in U.S. history to veto an intelligence authorization bill. The vetoed bill, S. 2834,³ was nearly identical to H.R. 1455. This unprecedented action was necessitated in the President's judgment by congressional attempts to reform, in the wake of the Iran-Contra affair, the way in which covert actions are conceived, reported, and implemented.

The "invitation to struggle" over the scope and conduct of covert actions has traditionally centered primarily on two aspects: the timeliness of congressional notification; and the degree of congressional oversight of the Central Intelligence Agency's (CIA) management of covert actions. The Majority Report issued by the congressional committees investigating the Iran-Contra affair concluded 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."⁴ The 1991 Intelligence Authorization Act furnishes a statutory basis for established covert action reporting requirements and, therefore, does not attempt to fix what was not broken regarding covert action oversight.

By examining the legislative history of the FY 1991 Intelligence Authorization Act, this monograph seeks to demonstrate that compromise between Congress and the President has yielded practical solutions to thorny national security issues. In short, the system works, and generally works rather well. As former acting Deputy Director of Central Intelligence (DDCI) John F. Blake asserts, "proper intelligence oversight is like a good marriage or a successful bilateral contract; it is based on mutual trust and respect."⁵

INTELLIGENCE AND THE INTELLIGENCE COMMUNITY

The term "intelligence" has resisted precise definition over the years. Nevertheless, intelligence, at its most fundamental level, can be divided into two distinct but related elements: (1) a body of evidence and the conclusions drawn therefrom which is acquired and furnished in response to known or perceived requirements of consumers; and (2) a term used to refer collectively to the functions, activities, or organizations which are involved in the process of planning, gathering, and analyzing information of potential value to decisionmakers and to the production of intelligence as defined above.

Intelligence activities may be characterized as belonging to one of three types: (1) collection and analysis; (2) counterintelligence; and (3) special activities. Collection, which consumes an overwhelming portion of the estimated \$28 billion national intelligence budget, is traditionally subdivided into three broad categories: imagery/photographic intelligence (IMINT/PHOTINT), signals intelligence (SIGINT), and human intelligence (HUMINT).^{*} Counterintelligence activities con-

^{*} While imagery and signals intelligence are normally considered more timely, responsive, and reliable, human intelligence is vital because it is the only type of intelligence which can reveal an opponent's intentions. Over-emphasizing technical intelligence collection (as opposed to solely deemphasizing HUMINT) is one of the mistakes both President Jimmy Carter and DCI Stansfield Turner made in the late 1970s. Interview with John F. Blake, former acting DDCI (25 November 1991); and John Ranelagh, *The Agency: The Rise and Decline of the CIA* (New York: Simon & Shuster, 1986), pp. 643-44.

According to Sen. David Boren (D-OK), then Chairman of the Senate Select Committee on Intelligence (SSCI), the share of the overall intelligence budget for HUMINT is "tiny," about 5%, and increasing it to 10% (about \$3 billion) "won't be easy considering the budget constraints we're facing." George Lardner, "In A Changing World, CIA Reorganizing To Do More With Less," *The Washington Post*, 5 July 1991, p. A9.

In recent years the SSCI has placed special emphasis on enhancing HUMINT capabilities, especially in the aftermath of the Gulf War. See S. Rep. No. 117, 102d Cong., 1st Sess. (1991), p. 5; Bud Shuster, "Hi-Tech vs. Human Spying," *The Washington Post*, 11 February 1992, p. F3; and Bill Gertz, "CIA Pursues Human Touch Over Hardware," *The Washington Times*, 11 May 1992, p. A3.

ducted within the United States are primarily the responsibility of the Federal Bureau of Investigation (FBI). Special activities or covert actions are intelligence operations designed to influence foreign governments, individuals, or events surreptitiously, in ways that benefit the U.S. without revealing U.S. involvement, or at least while maintaining "plausible deniability." Specifically, the FY 1991 Intelligence Authorization Act defined covert action as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."*

Covert actions can be further subdivided into five general categories: propaganda (the dissemination of unattributable communications to alter the conditions under which governments act); political action (money, advice, and assistance to individuals or groups in a foreign country); paramilitary assistance (furnishing secret military assistance and guidance to foreign forces and organizations); coup d'etat (assistance to or backing of a faction within a foreign country that carries out a consciously conceived and swiftly executed seizure of government power through the removal of the current leadership); and secret intelligence support (security assistance and intelligence training to the leader of a foreign country to protect him or her and to preserve the regime).⁶

The notion of a distinct "community" exclusively charged with implementing the nation's intelligence requirements is a relatively modern development. Prior to World War II, the U.S. practice regarding intelligence was to hastily and often haphazardly build up a national intelligence capability to combat an immediate threat, and then to permit that capability to atrophy in subsequent years of isolationism or relative calm. Following World War II, and with the

*Prior to the FY 1991 Intelligence Authorization Act's statutory definition, the traditionally accepted official definition of covert actions was found in President Reagan's Executive Order 12,333 and reads as follows:

. . . activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions.

advent of the Cold War, the U.S. addressed itself to developing a dedicated, coordinated, and permanent national intelligence capability. The result was passage on 26 July 1947 of a landmark piece of legislation, the National Security Act of 1947,⁷ which created the CIA and much of the present day national intelligence framework.

Within the current national security structure, the National Security Council (NSC) is the highest executive branch organization providing direction to the national intelligence effort. The NSC's statutory members are the President, Vice President, Secretary of State, Secretary of Defense. On January 20, 1993, President Bill Clinton added the Secretary of the Treasury, the Assistant to the President for Economic Policy, the U.S. Ambassador to the United Nations, and the White House Chief of Staff to the NSC by presidential directive. The Assistant to the President for National Security Affairs, commonly known as the National Security Adviser, serves as the titular head of the NSC. Broadly stated, the NSC has three principal missions: to promulgate foreign intelligence goals and priorities, to review proposals and make recommendations to the President regarding intelligence activities and covert actions, and to assess sensitive intelligence collection programs.

Subordinate to the NSC, Executive Order 12,333 lists the following twelve members of the Intelligence Community: the CIA, the National Security Agency (NSA), the Defense Intelligence Agency (DIA), the State Department's Bureau of Intelligence and Research (INR), Army, Navy, Marine Corps, and Air Force intelligence elements, the Justice Department (the FBI and the Drug Enforcement Administration), the Department of Energy's Office of Intelligence, the Department of the Treasury (the Office of Intelligence Support and the Customs Service), and the National Reconnaissance Office (NRO).*

*On 17 September 1992, the Defense Department declassified the existence of the NRO, which had never before been officially acknowledged during its 32-year history. See Barton Gellman, Remember You Didn't Read It Here; Pentagon Officially Lifts Secrecy Veil On Spy Satellite Office, *The Washington Post*, 19 September 1992, p. A4; and Bill Gertz, The Secret Mission of the NRO, *Air Force Magazine*, June 1993, p. 60

In 1992, the CIA and the Department of Defense created a Central Imagery Office (CIO). According to the CIO's charter which former Secretary of Defense Dick Cheney approved on May 6, 1992, during peacetime the CIO will coordinate the collection, analysis, and dissemination of imagery and photographic intelligence. During wartime, the CIO will direct only national-level sensors, and local military commanders will control tactical intelligence systems. The CIO is a response to congressional criticism of duplicative efforts within the Intelligence Community and a reaction to the lessons learned from the Gulf War. See Neil Munro, Imagery Office Centralizes Oversight of Sply Data Funds, *Defense News*, 15 June 1992, p. 12.

In addition to the above agencies and offices, the Intelligence Community Staff (IC Staff) has played an important role within the Intelligence Community. The Director of the IC Staff traditionally supported the Director of Central Intelligence (DCI) in the exercise of Intelligence Community responsibilities, examined cross-disciplinary intelligence problems, coordinated Community priorities and requirements, maintained Community planning mechanisms, and assisted in the development of the National Foreign Intelligence Program (NFIP) budget.* As of 1 June 1992, however, the IC Staff was abolished and replaced by the DCI Community Management Staff charged with similar responsibilities and headed by an Executive Director for Intelligence Community Affairs.

The largest by far of the Community's members is not the CIA, as is often popularly believed, but NSA. In fact, the CIA accounts for less than 15% of the Intelligence Community's personnel and budget.⁸ As DCI Richard Helms once remarked, while the DCI was theoretically responsible for 100% of U.S. intelligence activities, he controlled less than 15% of the Community's assets while almost 85% was controlled by the Secretary of Defense and the Joint Chiefs of Staff.⁹ According to Helms, when the DCI "clashes with the secretary of defense, [the DCI] isn't a big enough fellow on the block."¹⁰ Moreover, covert actions, while attracting a large amount of media and public attention, consume only a small fraction of the CIA's resources. Former DCI Robert Gates has acknowledged that over 95% of the national intelligence budget is devoted to the collection and analysis of intelligence information, and that less than 3% of the CIA's personnel are involved in covert actions.¹¹

*Most of the Defense Department's peacetime intelligence activities are included in the National Foreign Intelligence Program (NFIP). The Central Intelligence Agency Program is also included within the NFIP. Tactical Intelligence and Related Activities (TIARA) programs are developed and managed by the services and the defense agencies to respond to operational commanders' requirements to gather and interpret time-sensitive intelligence.

CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES

Although the Continental Congress established the nation's first foreign intelligence directorate, the Committee of Secret Correspondence in 1775, formal congressional oversight of the nation's intelligence activities is a relatively recent phenomenon, dating only from the beginning of the Cold War. For most of the nation's history, Congress rarely intruded into executive-dominated national intelligence matters. Occasionally, members of Congress sought to challenge presidential hegemony regarding intelligence, but with little success.

Modern congressional oversight of intelligence has evolved principally through two stages. The first stage, the "era of splendid isolation," roughly from 1947 to 1974, was characterized by "congressional undersight." During this period, Congress played an extremely limited role in U.S. intelligence policy. Subcommittees of the armed services committees and the appropriations committees in the House and Senate exercised total responsibility for congressional oversight. These subcommittees were small, had modest staffs, and were ill-suited to monitoring intelligence policy closely. More importantly, many subcommittee members did not believe Congress should become too deeply involved in intelligence matters which they viewed as an entirely executive prerogative. Senators Richard Russell (D-GA) and John Stennis (D-MS), both of the armed services committee, were regarded as kindly intelligence overseers, intelligence operations were rarely scrutinized, and, as Sen. Barry Goldwater (R-AZ) recalled, "we didn't want to know everything."¹² Senator Allen Ellender (D-LA), Chairman of the Senate Appropriations Intelligence Operations Subcommittee, reportedly admitted that he did not want to learn details of the CIA budget for fear that he might talk in his sleep.¹³ This attitude apparently endured into the 1980s. Several months prior to becoming the chairman of the Senate Select Committee on Intelligence (SSCI) in 1981, Sen. Goldwater declared that "[t]here are many bits of information that I would just as soon not know."¹⁴

The second phase of congressional oversight, from 1974 to the present, represents, especially during the late-1970s, the opposite extreme from the first phase. While this present stage may be

subdivided into distinct periods, each characterized by a particular event or climate, the overarching attribute of this stage is that Congress awoke from a 30-year stupor and began to exercise true oversight responsibilities.* This stage also witnessed Congress evolve into a major consumer of intelligence information. In 1990, for example, the CIA provided Congress with over 6,000 intelligence reports and over 1,000 briefings.¹⁵

The initial period of this stage constituted congressional "oversight in depth." In the wake of revelations over the Watergate affair, and amid persistent allegations of Intelligence Community, particularly CIA, illegalities and improprieties involving domestic surveillance of U.S. citizens opposed to the Vietnam War and the destabilization of Chilean President Salvador Allende's regime, the Ford Administration and Congress quickly established investigatory panels. Both Congress and the media conducted spectacular, excruciating, and highly politicized inquiries into the affairs of the Intelligence Community, an area of government that had previously never been subjected to such public scrutiny. Thus, the era of splendid isolation came to an abrupt end in the naked glare of the media's and Congress' probing spotlights.

During 1975 and 1976 two executive and two legislative investigatory bodies examined allegations on wrong-doing by intelligence agencies, assessed the adequacy of intelligence organizations and functions, and recommended corrective measures.** On 27

* In an interview shortly before he stepped down as DCI, Robert Gates remarked that "after 15 years of continuous oversight ... there is not enough of it - that is, by members of Congress." Gates urged Congress to take more seriously its intelligence oversight responsibilities. See "CIA Is Overlooked, Gates Says; More Supervision Needed, Outgoing Chief Tells Congress," *The Houston Chronicle*, 16 January 1993, p. A17.

** The Commission on CIA Activities Within the United States chaired by Vice President Nelson Rockefeller was established on 4 January 1975 and was the first step taken by the Ford Administration in response to allegations of domestic surveillance by the CIA. The Commission on the Organization of the Government for the Conduct of Foreign Policy, chaired by former Ambassador Robert Murphy, was established in 1972 to make findings and recommendations for a more effective system of foreign policy formulation, including intelligence activities. The remaining two investigatory bodies were the Church and Pike Committees.

January 1975 the Senate created the Select Committee to Study Governmental Operations with Respect to Intelligence Activities chaired by Sen. Frank Church (D-ID) (the Church Committee) consisting of six Democrats and five Republicans. The House created its Select Committee on Intelligence chaired by Rep. Otis Pike (D-NY) (the Pike Committee) consisting of nine Democrats and four Republicans on 17 July 1975.¹⁶ While both committees' investigations (like the Iran-Contra committees' investigations a decade later) were controversial at the time, they had a lasting, positive impact on the Intelligence Community.

Acting on recommendations of the Church Committee, the Senate created the SSCI on 19 May 1976 composed of 15 members (eight from the majority party and seven from the minority party) drawn two each from the appropriations, armed services, foreign relations, and judiciary committees, and seven from the Senate at large.* The House Permanent Committee on Intelligence (HPSCI) was established on 17 July 1977, with powers comparable to those of the SSCI, but with 13 members reflecting the ratio of the House (nine Democrats and four Republicans) drawn from similar committees as the SSCI and the House at large.

* Both Britt Snider, former Counsel to the Church Committee and John F. Blake, former SSCI Majority Staff Director, recalled that during the establishment of the SSCI some senators questioned the wisdom of serving on a dedicated intelligence committee. The senators viewed the personal political benefits of committee membership as meager due to anticipated strict security and lack of experience in dealing with intelligence matters. Today, however, SSCI membership is considered a coveted assignment due, in part, to the importance of the committee's work, the reliance the Senate at large places on the committee's recommendations, and the general mystique surrounding intelligence matters.

**INTELLIGENCE OVERSIGHT
ON THE EVE OF
THE IRAN-CONTRA AFFAIR**

The CIA's "mandate" for conducting covert actions has never been expressly defined by statute. Section 403(d) of the National Security Act of 1947 required the agency to:

- (1) advise the [NSC] on matters . . . relate[d] to national security;
- (2) make recommendations to the [NSC] for coordination of such intelligence activities of the departments and agencies of the Government . . . ;
- (3) correlate and evaluate intelligence . . . and provide for [its] appropriate dissemination . . . within the Government
- (4) perform, for the benefit of existing intelligence agencies, such additional services of common concern as the [NSC] determines can be more efficiently accomplished centrally;
- (5) perform such other functions and duties related to intelligence affecting the national security as the [NSC] may from time to time direct.

This last directive, or "fifth function," is usually proffered as statutory authority for CIA covert actions. Clark Clifford, an adviser to President Truman and one of the principal drafters of the National Security Act of 1947, testified before Congress that the "perform such other functions and duties" language in the Act was intended to be a "catch-all" for future contingencies, including covert action, and was purposely not specified: "We did not mention [covert actions] by name because we felt it would be injurious to our national interest to advertise the fact that we might engage in such activities."¹⁷ The Church Committee concluded that "[t]he Select Committee's record shows that the legislating committees of the House and Senate intended for the [National Security Act of 1947] to authorize [the CIA]

to engage in espionage.”¹⁸ Since 1976, the CIA has also relied on specific authorization for covert actions contained in a series of executive orders issued by Presidents Ford, Carter, and Reagan.¹⁹

Contrary to popular belief, the CIA does not initiate covert actions, it merely responds to tasking from higher authority. Moreover, covert action approval and implementation is institutionally rigorous. According to one former CIA official:

Approval of [covert actions] is difficult and time consuming. Various committees within the CIA exhaustively examine every [covert action] proposal on the basis of objective criteria, such as feasibility, practicability, legality, and acceptance by the American public if the operation became known. At each stage the proposal may be nixed. Even after reaching the DCI for approval, he may decide to shelve it. If he does not, he must submit it to the [NSC], which, after careful discussion, may decide to disapprove it. If the NSC gives its go-ahead and refers it to the president, he, in turn, may decide to kill it. Only a presidentially approved proposal receives the blessing of a “finding,” which is a written statement that states clearly that he, the president, finds the proposed activity to be in the national interest of the United States.²⁰

This “finding” also must include a description and justification of the proposed activity.²¹ Once signed by the President, the CIA is charged by law with informing both congressional intelligence committees of the finding.²² While Congress has no formal veto power over covert actions, the SSCI and the HPSCI can use their influence with the President and their leverage over funding to modify, or even terminate, a covert action proposal.* The CIA also routinely informs the Senate and House defense subcommittees of the appropriations committees since congressional appropriation is required for any federal government activity, including covert action.

* Congress appropriates money annually to maintain a “reserve for contingencies fund” for the CIA out of which most covert actions are initially financed. Interview with Britt Snider, General Counsel to the SSCI (13 November 1991).

In December 1974, as a result of growing mistrust between Congress and the executive, Congress passed the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961.²³ This amendment, sponsored by Sen. Harold Hughes (D-IA) and Rep. Leo Ryan (D-CA), prohibited congressional expenditure of funds for covert actions unless the President issued a finding that a covert action was “important to the national security of the United States,” and reported the finding to “the appropriate committees of the Congress” in a “timely fashion.” This reporting requirement did not, however, translate into congressional approval. In addition, by incorporating the phrase “to the appropriate committees of the Congress,” the amendment theoretically permitted virtually any congressional committee having jurisdiction over some aspect of intelligence to request Intelligence Community officials to testify before it. While the number of newly “cleared” individuals appeared alarming, the actual access enjoyed by members of Congress and their staffs to sensitive information remained limited.*

Acting on recommendations from the Church and Pike Committees, the SSCI and HPSCI quickly flexed their oversight muscles by enacting the Intelligence Authorization Act for FY 1979.²⁴ This Act for the first time placed intelligence agencies on the same annual authorization and appropriations basis as other executive branch agencies. Previously, Congress had never enacted specific intelligence authorization bills and intelligence appropriations had been concealed in defense appropriations bills. By providing for separate, annual intelligence authorization and appropriations bills stipulating the amount and manner that funds could be spent, Congress ensured its oversight edicts could be directly reinforced by its “power of the purse.” Specific intelligence authorization bills also served to remove a large measure of fiscal autonomy from the Intelligence Community, forcing it to become more accountable to Congress. (Due to its sensitive nature, Intelligence Community funding appears as Schedules of Authorizations in classified annexes to the annual authorization bills.)

* There is disagreement over the access to classified information that members of Congress and their staffs actually possessed following passage of the Hughes-Ryan Amendment. While some commentators appear to have arrived at elevated figures by merely counting the number of committee members and staff who, in theory, could have requested intelligence data, in reality very few members or staff were informed. Interview with Britt Snider, General Counsel to the SSCI (13 November 1991); and Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community 1947-1989* (Knoxville: University of Tennessee Press, 1990), p. 119.

The FY 1979 Intelligence Authorization Act was soon followed by one of the most important pieces of intelligence oversight legislation, the Intelligence Authorization Act for FY 1981, more commonly known as the Intelligence Oversight Act of 1980.²⁵ This Oversight Act instituted four significant changes to both the Hughes-Ryan Amendment and the National Security Act of 1947. First, it codified reporting requirements and oversight procedures which had been adopted informally by the Intelligence Community and the intelligence committees. The 1980 Oversight Act required the DCI and "the heads of all departments, agencies, and other entities of the United States involved in intelligence activities" to keep both intelligence committees "fully and currently informed" of all intelligence activities, including anticipated activities, and to "report in a timely fashion" any illegal intelligence activity or significant intelligence failures.* Second, the Oversight Act modified the Hughes-Ryan Amendment to expressly include covert activity conducted by the CIA under these reporting requirements. While it failed to impose a deadline on notice, the Oversight Act required that notification be made prior to the commencement of a covert action, but left room for the President to inform Congress subsequent to the initiation of a covert action in an emergency. Third, the Oversight Act gave the HPSCI and the SSCI sole authority to oversee the Intelligence Community by reducing the number of committees receiving notification of covert actions from eight to two (the HPSCI and the SSCI). Finally, the Oversight Act provided for restricted notification to eight congressional leaders under extraordinary circumstances. The so-called "Gang of Eight" consists of the majority and minority leaders of the Senate, the speaker and the minority leader of the House, and the chairman and ranking minority member of each of the intelligence committees.

During a mark-up session on the bill which became the Oversight Act of 1980, S. 2284, CIA General Counsel Daniel Silver explained the Carter Administration's understanding of how the bill's language limited the prior notice requirement:

* The requirement to "fully and currently inform" the intelligence committees of "any significant anticipated intelligence activity" was apparently intended by Congress to mean that the intelligence committees shall be informed at the time of the presidential finding authorizing the covert action. See S. Rep. No. 730, 96th Cong., 2d Sess. (1980), p. 9.

My reading, sir, is that the administration would be obligated to tell the oversight committees about all significant anticipated intelligence activities, both collection activities and so-called covert actions, subject to the two principles enunciated in the preambular language, [Section 501 (a) of the Oversight Act] namely, the reservation of the President's constitutional authority in exceptional cases, and the reference to a due regard to the protection of intelligence sources and methods. . . . In what I would expect to be highly unusual cases, the President may act in the exercise of his constitutional authority or in rare circumstances, under the second preambular phrase, and not give prior notice to anyone in the Congress.²⁶

Many members of Congress, disagreeing with the administration's interpretation, declared that the constitutional language Mr. Silver referred to merely recognized that both branches have constitutional prerogatives that cannot be abridged by statute. In the opinion of HPSCI Chairman Edward Boland (D-MA), the Intelligence Oversight Act of 1980 "[left] the Constitution as it [found] it."²⁷ Nevertheless, Congress chose not to contest the administration's assertion that the President possessed constitutional authority to withhold prior notice of covert actions. Instead, Congress added Section 501(b) to the Oversight Act which directed the President to notify Congress of covert actions "for which prior notice was not given" and to be accompanied by a "statement of reasons for not giving prior notice." This provision apparently reflected an understanding between the administration and Congress "that in rare extraordinary circumstances if the President withholds prior notice of covert actions, he is obliged to inform the two Intelligence Committees in 'a timely fashion' of the action and the reasons for withholding of such prior notice."²⁸ While the Intelligence Oversight Act of 1980 fell woefully short of its original purpose of reorganizing the Intelligence Community,* and while neither the

* The Oversight Act was the eventual outgrowth of a much broader effort to reorganize the Intelligence Community. Sen. Walter Huddleston (D-KY) introduced S. 2525, the National Intelligence Reform and Reorganization Act, on 9 February 1978. Rep. Boland introduced an identical bill, H.R. 11245, in the House on 2 March 1978. Had one of these bills (which each comprised 263 pages) been enacted, it would have provided the most extensive charter in the history of intelligence legislation. See John M. Oseth, *Regulating U.S. Intelligence Operations: A Study in Definition of the National Interest* (Lexington: University of Kentucky Press, 1985), pp. 122-48 and S. 2525, 95th Cong., 2d Sess. (1978) reprinted in Vol 124 *Congressional Record* 3110-41 (1978).

administration nor Congress was totally satisfied with the Act, a workable statutory scheme was successfully forged which governed covert action reporting requirements for a decade. The Oversight Act, therefore, represented "a classic compromise, a seeming truce in the separation-of-powers tug-of-war between the executive and legislative branches of government."²⁹

Soon after President Reagan assumed office in 1981, the administration conducted formal consultations, to include the intelligence committees, regarding specific intelligence oversight issues addressed in Executive Order 12,333, issued by President Reagan on 4 December 1981. As a result of these consultations, Executive Order 12,333 added a provision not included in President Carter's Executive Order 12,306 designed to fill a gap in existing intelligence oversight law and to preclude the need for new legislation. The Hughes-Ryan Amendment (as modified by the Intelligence Oversight Act of 1980) required a presidential finding for covert action only if conducted by the CIA, but not for covert action conducted by the military or by other government entities. This loophole was thought to have been closed by the new provision contained in Executive Order 12,333 stating that the finding requirements of the Hughes-Ryan Amendment "shall apply to all special activities as defined in this order." As events later proved, however, the fact that this provision was contained in an executive order rather than in a statute presented an opportunity for abuse.

THE IMPACT OF THE IRAN-CONTRA AFFAIR

The Iran-Contra affair had profound repercussions for the entire Intelligence Community, leading directly to the present statutory oversight scheme. The Iran-Contra affair, however, represented the second major breach of faith between the executive and Congress following the enactment of the Intelligence Oversight Act of 1980. The first breach involved a rift over U.S. foreign policy in Central America, culminating with the CIA's mining of three Nicaraguan harbors in early 1984.

In December 1981, President Reagan signed his first presidential finding, pursuant to the Hughes-Ryan Amendment, specifically authorizing covert paramilitary action against the Sandinista government which was "important to the national security of the United States."³⁰ Congress, ambivalent on the question of supporting the Nicaraguan Contras or "freedom fighters," responded in December 1982 with the Boland Amendment to the Defense Appropriations Act for FY 1983 which prohibited the CIA's use of funds "for the purpose of overthrowing the Government of Nicaragua."³¹

Throughout 1983 the administration struggled to keep its Nicaraguan policy alive. However, as the Iran-Contra committees later noted, "the Contras failed to win either popular support or military victories in Nicaragua and could not, without both, sustain public support in the United States."³² On 19 September 1983, President Reagan signed a new finding authorizing covert action designed to pressure the Sandinistas to negotiate a treaty with nearby countries, and limiting participation in paramilitary operations to third-country nationals and not U.S. citizens.³³ With increasing media and congressional attention focusing on U.S. involvement in Central America, the House voted in October to prohibit all funding to paramilitary groups fighting the Sandinistas. The Republican-controlled Senate, however, sought to continue aid. In December, the House and the Senate compromised and passed the second Boland Amendment, which placed a \$24 million ceiling on Contra funding.³⁴

The administration, realizing that \$24 million was an insufficient sum to sustain its Nicaraguan operations for the entire fiscal year,

decided to intensify its covert activities before the funds were depleted. In January and February 1984, the CIA sowed the harbors at Sandino and Corinto on the Pacific and at El Bluff on the Atlantic with magnetic mines. By the first week of April, ten commercial ships, only four of which were Nicaraguan, had struck mines. Two Nicaraguans were killed and 15 sailors of various nationalities, including five Soviets, were injured.³⁵ After the first ships were hit, one of the mining scheme's architects exclaimed that "[w]e never dreamed that merchant captains would keep sailing in."³⁶ The mining operation was intended to wreck the Nicaraguan economy but the action backfired; instead of attracting support, the administration's strategy had actually lost it.*

By May 1984, the Contras had exhausted the \$24 million appropriated by Congress the previous December. While the administration explored various methods and schemes to continue the funding, Congress passed the third Boland Amendment, prohibiting all U.S. aid to the Contras, on 1 October 1984.³⁷ Only days later, Congress passed the fourth Boland Amendment prohibiting military and paramilitary aid, but permitting humanitarian aid under certain conditions as part of an omnibus appropriations bill signed into law by President Reagan on 12 October.³⁸

While funding for the Contras became an increasingly consuming issue for the Reagan Administration (leading directly to the diversion of funds from arms sales to Iran to sustain the Contras), the mining incidents led to intense friction between the administration and the intelligence committees and resulted in new intelligence oversight legislation. The Intelligence Authorization Acts for FY 1986 and FY 1987 included amendments to the National Security Act of 1947 which

* On 26 April 1984, DCI William Casey "apologize[d] profoundly" and admitted that disclosure to Congress (as required by the decade-old Hughes-Ryan Amendment) had been inadequate. Iran-Contra Report, p. 37; and Joseph E. Persico, *Casey, The Lives and Secrets of William J. Casey: From the OSS to the CIA* (New York: Penguin, 1990), p. 373. Sen. Barry Goldwater, the SSCI Chairman, remarked in frustration that "I've pulled Casey's nuts out of the fire on so many occasions. I feel like such a fool. I feel betrayed." Later, Goldwater uncharacteristically distributed to the press a letter highly critical of Casey which began: "Dear Bill . . . I've been trying to figure out how I can most easily tell you my feelings about the President having approved mining some of the harbors of Central America. It gets down to one, little, simple phrase. I am pissed off." Persico, p. 375; and Vol 134 *Congressional Record* pp. 3,133-34 (1988).

strengthened established oversight procedures* Both amendments were directly related to congressional efforts to monitor and restrict covert funding of the Contras.

Former National Security Adviser Robert McFarlane testified before the Iran-Contra committees that President Reagan on 18 July 1985 had authorized shipments of weapons to Iran via Israel to secure the release of U.S. hostages in Lebanon. The President was at Bethesda Naval Hospital recovering from surgery performed five days earlier. Relying on the President's oral approval, McFarlane arranged for shipments of TOW and HAWK** missiles to Iran in August, September, and November 1985. As a result of the initial shipments, one hostage, Rev. Benjamin Weir, was released on 15 September. President Reagan initially told the Tower Commission that he did in fact approve these shipments, but later testified that he had no memory of it.³⁹

* The Intelligence Authorization Act for Fiscal Year 1986 (Pub. L. No. 99-169, section 401, 99 Stat. 1002, 1004-06, 99th Cong., 1st Sess. (1985)) provided for greater congressional participation in intelligence funding decisions, particularly with regard to use of CIA contingency funds and transfers of funds among the various intelligence agencies.

The Intelligence Authorization Act for Fiscal Year 1987 (Pub. L. No. 99-569, section 602, 4759, 100 Stat. 3190, 3202-03, 99th Cong., 2d Sess. (1986)) required reporting to the intelligence committees of covert arms transfers of \$1 million or greater under the provisions of the Intelligence Oversight Act of 1980. In addition, an arms transfer of less than \$1 million might have required reporting if "it represent[ed] a material change in an authorized covert action...." See H.R. Rep. No. 106, 99th Cong., 1st Sess. (1985), pp. 7-12.

** The TOW (an acronym for Tube-launched, Optically-tracked, Wire-guided) missile is a ground-launched antitank weapon. The HAWK (Homing All the Way Killer) is a surface-to-air anti-aircraft missile.

On 25 November 1985, with DCI William Casey abroad, DDCI John McMahon, who had opposed a covert arms for hostages swap, learned of the weapons shipments and balked at continued CIA support absent a presidential finding.* McMahon immediately contacted CIA General Counsel Stanley Sporkin and demanded a retroactive presidential finding authorizing the arms shipments. Sporkin and his staff drafted such a finding the following day, 26 November, and forwarded it to the White House. On 5 December 1985, President Reagan signed this finding authorizing, retroactively, arms shipments to Iran and expressly withholding notification to Congress.⁴⁰

By December 1985, events had conspired to induce the NSC's deputy director for political-military affairs, Lieutenant Colonel Oliver North, to recommend to the national security adviser, Vice Admiral John Poindexter, a covert plan to deliver arms directly to Iran. President Reagan approved of the direct transfer plan, but, on 6 January 1986, mistakenly signed a draft finding authorizing additional arms shipments through Israel.⁴¹ Secretary of Defense Caspar Weinberger testified before the Iran-Contra committees that he objected to this finding because he felt it violated the Arms Export

* McMahon, when informed at a morning briefing that "those guys" at the NSC had "used our proprietary to send over some 'oil supplies'" to Iran, was livid: "I said goddamn it, I told you not to get involved. And he [the briefing officer] said, we're not involved. They came to us and we said no. And they asked if we knew the name of a secure airline and we gave them the name of our proprietary. I said, for Christ's sake, we can't do that without a Finding." McMahon's view was that any use of a CIA airline proprietary at the direction of the CIA without a presidential finding was illegal. See *Iran-Contra Report*, p. 185.

CIA "proprietary companies" are "business entities, wholly owned by the [CIA], which either actually do business as private firms, or appear to do business under commercial guise." Senate Select Committee To Study Governmental Operations With Respect to Intelligence, Final Report, Bk. I, S. Rep. No. 755, 94th Cong., 2d Sess. (1976) p. 205 (*Church Committee Report*).

Control Act (AECA).* On 17 January, President Reagan signed a second version of the draft finding he had inadvertently signed eleven days earlier, authorizing direct arms shipments.⁴² CIA General Counsel Sporkin advocated signing this second version because he had come around to Secretary Weinberger's view that involving a third party (Israel) in the arms shipments would indeed violate the AECA.⁴³ On that same day, President Reagan entered into his diary: "I agreed to sell TOWs to Iran."⁴⁴

The net result of all of this was that direct arms shipments could now be concealed (and were) from Congress as a covert operation. Indeed, the 5 December 1985 finding explicitly directed the CIA not to inform Congress until specifically instructed to do so, thus precluding normal notification procedures under the Hughes-Ryan Amendment. In addition, taking advantage of what was considered a legal loophole in the fourth Boland Amendment prohibiting U.S. funding to the Contras, the NSC staff turned to third countries and private sources as well as diverted funds from the weapons sales to Iran to keep the Contras "body and soul together."⁴⁵ In November 1986, U.S. involvement became publicly known, and Congress was subsequently notified of the findings.

Following these and subsequent disclosures, both the President and Congress established investigatory panels to examine the Iran-Contra affair and make recommendations regarding the Intelligence Community. Pursuant to Executive Order 12,575, President Reagan established a three-member board chaired by the late Sen. John Tower (R-TX) to conduct "a comprehensive study of the future role and procedures of the National Security Council staff in the development, coordination, oversight, and conduct of foreign and national security policy."⁴⁶ As a result, the Tower Commission's nine recommendations dealt primarily with the organization and functioning of the NSC staff and its role in supervising the Intelligence Community.

* 22 U.S.C. section 2753(a) (1982). The AECA regulates the sale, transfer, and leasing of all military arms for export by public or private sources in the U.S. Under the AECA, Israel was prohibited from transferring arms to any third country without first obtaining the express written consent of the United States. Such consent may not be given by the President unless: (1) the United States itself would transfer arms to that country; (2) the transferee agrees in writing not to further transfer the arms without the President's consent; and (3) the President notifies Congress of the transfer.

Both the House and Senate created select committees to investigate four primary aspects of the Iran-Contra affair: the arms sales to Iran, the possible diversion of funds to the Contras, suspected violations of federal law, and the NSC staff's involvement in the conduct of foreign policy. In addition, a special prosecutor was appointed by the Attorney General, pursuant to the Ethics in Government Act,⁴⁷ to conduct his own investigation. The congressional committees' bipartisan Majority Report contained 27 recommendations of which 14 dealt with covert actions and presidential findings. Five of the nine major provisions in the Intelligence Authorization Act for FY 1991 are virtually identical with the Majority Report's recommendations. The Minority Report issued by eight Republicans from both committees listed five additional recommendations.

President Reagan chose to implement the Tower Commission's and the congressional committees' recommendations through a series of National Security Decision Directives (NSDDs). On 31 March 1987, President Reagan signed NSDD 266, Implementation of the Recommendations of the President's Special Review Board, pledging that "all requirements of law concerning covert activities, including those relating to Presidential authorization and congressional notification, be addressed in a timely manner and complied with fully."⁴⁸ Two years earlier, on 18 January 1985, however, President Reagan had signed NSDD 159 which established detailed procedures for approving and coordinating covert actions. According to the Tower Commission, NSDD 159 "included comprehensive interagency evaluation of proposed covert actions, coordinated review of actions undertaken, and notification of Congress in accordance with statute.... The NSDD also specified that the President would approve in writing all covert action findings made pursuant to section 501 of the National Security Act."⁴⁹ NSDD 266, issued in response to the Tower Commission's final report, was drafted as an unclassified document and promptly sent to Congress.⁵⁰ On 9 June 1987, President Reagan signed NSDD 276, National Security Council Interagency Process, which established or confirmed various NSC committees charged with supervising covert activity pursuant to NSDD 266.⁵¹ The President next signed NSDD 286 on 15 October 1987 which promulgated revised procedures for presidential approval and review of all "activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent and acknowledged publicly."⁵² NSDD 286, issued subsequent to consultations between the administration and Congress, sought to address congressional concerns over the manner in

which presidential findings were initiated and implemented with regard to the Iran-Contra affair.

As promulgated in an unclassified excerpt, NSDD 286 was intended to:

- (1) ensure that all special activities conducted by, or at the direction of, the United States are consistent with national defense and foreign policies and applicable law;
- (2) provide standards ensuring the secrecy of such activities even when the results become publicly known or the activities themselves are the subject of unauthorized disclosure; and
- (3) implement section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), concerning notification to Congress of such activities.⁵³

In addition, NSDD 286 directed that neither the national security adviser nor the NSC staff could conduct covert actions, thus reaffirming the principle that only the CIA is responsible for conducting covert actions.* NSDD 286 required that presidential findings be in writing, directed detailed justification to be specified in the finding, and imposed a ban on retroactive findings. These same requirements were later incorporated into the FY 1991 Intelligence Authorization Act. The directive also provided that the only exception to the requirement for prior notification of covert actions is in "rare, extraordinary circumstances" in which "the President otherwise directs in writing pursuant to his constitutional authorities and duties."⁵⁴ The reasons for the notification delay were required to be in writing and the decision reviewed by the NSC's National Security Planning Group (NSPG) every ten days.⁵⁵ As DCI William Webster testified before the SSCI, this reconsideration every ten days "will ensure that where a delay in notification is deemed necessary, the rationale for that decision will be continually reassessed to ensure that the delay will be kept to the absolute minimum length of time"⁵⁶ President Reagan expressed the view that these "reforms and changes . . . are evidence of my determination to return to proper procedures, including consultation with the Congress."⁵⁷

* The military services do, however, have authority to conduct covert actions during wartime.

Although the Iran-Contra committees concluded that “[c]overt actions are a necessary component of our Nation’s foreign policy,”⁵⁸ the committees determined that the “Administration’s conduct in the Iran-Contra Affair was inconsistent” with section 501 of the Intelligence Oversight Act of 1980 because the intelligence committees were not informed of the Iranian arms sales “in a timely fashion.”⁵⁹ Armed with the Iran-Contra committees’ recommendations, the SSCI and the HPSCI began the task of formulating new, remedial intelligence oversight legislation. Two bills, S. 1721 and H.R. 3822, were introduced in Congress aimed at strengthening the oversight process and codifying many of the requirements promulgated by NSDD 266 and NSDD 286 to preclude future administrations from circumventing or changing oversight requirements via executive orders or NSDDs. As events unfolded, however, the Intelligence Authorization Act for FY 1991, not S. 1721 or H.R. 3822, was to become the first significant post-Iran-Contra affair intelligence oversight legislation.

THE FIRST ATTEMPT: POLITICS THWARTS REFORM

The quest for Intelligence Community authorization for FY 1991 officially began on Tuesday, 10 July 1990 when Sen. David Boren (D-OK), Chairman of the SSCI, introduced S. 2834 on the floor of the Senate.⁶⁰ The bill repealed the Hughes-Ryan Amendment and amended Title V of the National Security Act of 1947. Disturbing to the administration, however, was the fact that the proposed legislation would for the first time statutorily define covert action, impose a strict 48-hour reporting requirement for presidential findings, and require the President to notify Congress whenever he requested a foreign government or private citizen to conduct a covert action on behalf of the U.S. Moreover, S. 2834 imposed the following requirements upon the President which were direct consequences of the Iran-Contra affair and were not found in existing statutory law:

The President must determine that the covert action is necessary to support a foreign policy objective of the United States.

A finding must be in writing.

A finding may not retroactively authorize covert actions which have already occurred.

A finding must specify all government agencies involved and whether any third party will be involved.

A finding may not authorize any action which violates the Constitution of the United States or any statutes of the United States.

“Gang of Eight” notification must be followed by submission of the written finding to the chairmen of the intelligence committees.

The intelligence committees must be informed of significant changes in covert actions.

No funds may be spent on a covert action until there has been a signed, written finding.

Most of the provisions contained in S. 2834 regarding intelligence oversight were included in S. 1721,⁶¹ an earlier bill sponsored by SSCI Vice Chairman William Cohen (R-ME), introduced in the 100th Congress on 25 September 1987. Although S. 1721 passed by a voice vote of 71-19 in the Senate on 15 March 1988,⁶² the bill was never considered by the House. The legislative history of S. 1721 is important, however, since the bill's salient features were later incorporated into S. 2834.

While the Senate committee investigating the Iran-Contra affair conducted hearings, the SSCI began its own hearings as well as a series of consultations with the administration and the Intelligence Community in preparation for the mark-up of S. 1721. The SSCI quickly developed a set of recommendations intended for immediate action by the administration pursuant to current law that could also serve as the basis for future legislation.

On 1 July 1987, the SSCI chairman and vice chairman forwarded a letter to National Security Adviser Frank Carlucci* outlining measures for more effective approval and reporting of covert actions. These recommendations later became integral features of S. 1721 and, subsequently, of S. 2834. President Reagan replied in a letter dated 7 August 1987 that "[i]n all but the most exceptional circumstances, timely notification to Congress under [the Intelligence Oversight Act of 1980] will not be delayed beyond two working days of the initiation of a special activity."⁶³ President Reagan substantially incorporated the SSCI's recommendations into NSDD 286 which clarified the regulations by which covert action were reviewed, approved, and reported to the intelligence committees. Despite the administration's apparent cooperation with Congress in drafting NSDD 286, Congress was less than satisfied with the new directive.

* President Reagan had a total of six national security advisers: Richard V. Allen (January 1981-January 1982); Judge William P. Clark (January 1982-October 1983); Robert C. McFarlane (October 1983-December 1985); Vice Admiral John M. Poindexter (December 1985-December 1986); Frank C. Carlucci (December 1986-November 1987); and Lieutenant General Colin L. Powell (November 1987-January 1989).

The SSCI and the administration had failed to reach agreement over a time frame to inform congressional leaders of a presidential finding authorizing a covert action. The committees favored limiting presidential notification to a strict 48-hours, while the administration urged adherence to the more flexible "in a timely fashion" language set forth by the Hughes-Ryan Amendment and outlined in the so-called Cooper Memorandum, a statement prepared for congressional testimony in 1987 given by Assistant Attorney General Charles J. Cooper.⁶⁴ Congress was concerned that notification of a given finding could be withheld indefinitely so long as NSPG members agreed to continue the ten-day evaluations as specified in NSDD 286. Congress, therefore, viewed NSDD 286 as conflicting with Section 501 of the National Security Act of 1947, the controlling statute governing notification of findings to the intelligence committees which required notification "in a timely fashion" and did not permit such indefinite delay.* It was clear that the President would veto any bill which imposed a strict 48-hour limit and the House could not muster the necessary two-thirds majority to override a veto. Therefore, the 100th Congress eventually adjourned without further action on S. 1721,⁶⁵ and the 101st Congress deferred consideration of an intelligence oversight bill until it could ascertain whether a compromise could be reached with the incoming Bush Administration on the 48-hour notification provision of S. 1721.

Soon after President Bush took office in 1989, the intelligence committees requested that the President clarify his position regarding notification of covert actions and provide explicit assurances as to how he intended to comply with the concept of "timely notice." The administration made it clear to Congress that it was adhering to the Cooper Memorandum. Following nine months of negotiations between Congress and the administration, President Bush forwarded a letter to the intelligence committees dated 30 October 1989 avowing his intent to return to the understanding of the 1980 Intelligence Oversight Act:

* The intelligence committees advocated incorporating into NSDD 286 most of the reporting features later included in S. 1721. The administration, however, balked and Congress proceeded with S. 1721. Interview with Britt Snider, General Counsel to the SSCI (13 November 1991).

DEAR MR. CHAIRMAN: I am aware of your concerns regarding the provision of notice to Congress of covert action and the December 17, 1986 opinion of the Office of Legal Counsel of the Department of Justice, with which you strongly disagree primarily because of the statement that "a number of factors combine to support the conclusion that 'timely notice' language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification."

I can assure you that I intend to provide notice in a fashion sensitive to congressional concerns. The statute requires prior notice to Congress of covert action in a fashion sensitive to these concerns. The statute requires prior notice or, when no prior notice is given, timely notice. I anticipate that in almost all instances, prior notice will be possible. In those rare instances where prior notice is not provided, I anticipate that notice will be provided within a few days. Any withholding beyond this period would be based upon my assertion of the authorities granted this office by the Constitution.⁶⁶

With this clear commitment by the President not to withhold notice pursuant to Section 501 of the National Security Act of 1947 for more than "a few days," the SSCI and HPSCI believed the oversight improvements originally embodied in S. 1721, absent a strict 48-hour statutory reporting requirement, could be enacted.⁶⁷ Accordingly, the SSCI dropped the 48-hour notification requirement from S. 1721, but left intact the basic congressional notification procedures in existing law. This formulation was incorporated into S. 1324, the intelligence authorization bill for FY 1990,⁶⁸ as Title IX.

Title IX, however, was not adopted by the conference committee. While the conferees generally agreed that such provisions would make valuable, needed changes to the oversight framework, the House conferees wished to defer consideration until the second session of the 101st Congress in order to explore whether further improvements might be necessary. With the understanding that the issues addressed in Title IX of S. 1324 would be reconsidered by both intelligence committees in the second session of the 101st Congress, the Senate conferees acquiesced to the House conferees' position.⁶⁹

The SSCI reconsidered the oversight provisions as part of its markup of the FY 1991 intelligence authorization bill, S. 2834, approving the incorporation of the Title IX provisions as Title VII of S. 2834 on 28 June 1990. The Bush Administration, however, harbored serious reservations about legislation that would require mere requests to foreign governments and private individuals to undertake covert actions to be treated as actual U.S. covert actions, and, as such, legally susceptible to congressional notification. Moreover, the administration concluded that a statutory definition of covert action might exclude some activities which had previously been understood to be covert actions, and, perhaps more significantly, might include activities which had not previously been regarded as covert actions.

Congress, in an attempt to clarify its position in order to avoid any misunderstandings, reminded the administration that the proposed statutory definition of covert action in S. 2834 did not apply to a government activity "unless the fact of United States government involvement in the activity is itself not intended to be acknowledged."⁷⁰ Additionally, the covert action definition expressly exempted "traditional counterintelligence activities," although such activities might fall within the definition if they were "undertaken to effect major changes in the national defense policies of such foreign powers or to provoke significant military responses by such foreign powers."⁷¹ The covert action definition also exempted military activities where such activities were "under the direction and control of a United States military commander . . . which immediately precede or take place during the execution of a military operation, where the U.S. role in the overall operation is apparent or is intended to be acknowledged publicly." Such action was to be regarded as "traditional military activity," and not considered a "covert action."⁷²

Congress, acting on earlier informal assurances that the President supported the bill and would sign it, forwarded S. 2834 to the President for signature. Despite indications from administration officials as late as the night the bill was passed by Congress that the President would sign S. 2834, the President withheld his signature. Since Congress had adjourned in the interim, this resulted in a pocket veto on Friday, 30 November 1990. In his Memorandum of Disapproval the President stated that his principal objection was the impact the statutory definition of covert action would have upon foreign governments and third parties:

I am particularly concerned that the vagueness of this provision could seriously impair the effective conduct of our nation's foreign relations. It is unclear exactly what sort of discussions with foreign governments would constitute reportable "requests" under this provision, and the very possibility of a broad construction of this term could have a chilling effect on the ability of our diplomats to conduct highly sensitive discussions concerning projects that are vital to our national security. Furthermore, the mere existence of this provision could deter foreign governments from discussing certain topics with the United States at all.⁷³

Sen. Boren called the veto a "serious mistake,"⁷⁴ and remarked that "[t]he President clearly received bad advice from members of his staff who incorrectly interpreted the legal effects of some minor provisions of the bill."⁷⁵ Rep. Anthony Beilenson (D-CA), the HPSCI Chairman, commented that he was "surprised that the President's advisers . . . would recommend that he withhold his signature from the bill."⁷⁶ It should be noted however, that the intelligence committees had never before had an intelligence authorization bill vetoed. A senior congressional aide characterized the veto largely as an error in judgment on the part of the intelligence committees in weighing the administration's veto warnings: "The Administration has cried wolf - threatening a veto - so many times that the Congress simply miscalculated the risk."⁷⁷

The chairmen of both intelligence committees believed they had made it clear to the President in a letter dated 29 November 1990 that it was not the intent of the covert action definition to change existing policy by requiring presidential findings for and congressional notification of preliminary contacts with foreign governments to determine the willingness and/or the feasibility of their conducting covert actions on behalf of the United States.⁷⁸ Moreover, the intelligence committees' Joint Explanatory Statement which accompanied S. 2834 stated unambiguously that the provision objected to by the President was intended "to prevent the conduct of a covert action at the specific request of the United States that bypasses the requirement for Administration review, presidential approval, and consultation with the intelligence committees";⁷⁹ in other words, to prevent another Iran-Contra affair. Despite the intelligence committees' assurances, the President was "dismayed" that the committees' Joint Explanatory Statement could be construed to undercut the prior

agreement between the intelligence committees and the administration. Nevertheless, the intelligence committees agreed to revise the bill to alleviate the President's apprehension.

The President's Memorandum of Disapproval raised two additional points. First, the Joint Explanatory Statement accompanying S. 2834 explained that when prior notice of covert actions had been withheld from Congress, notice must be provided "in a timely fashion," but did not define precisely what was meant by the phrase. Second, with respect to the bill's language regarding the definition of covert action, the memorandum also pledged that the President would "continue to work with the Congress to ensure that there is no change in our shared understanding of what constitutes a covert action, particularly with respect to the historic missions of the armed forces." As a result of discussions between the intelligence committees and the administration which followed the pocket veto of S. 2834, additional modifications and compromises were made in the reporting language regarding these two points in order to resolve the administration's concerns, and two new bills were soon introduced in Congress by the intelligence committees.

THE SECOND ATTEMPT:

REFORM ENACTED

Although they were high priorities in both Houses of Congress, new intelligence authorization bills were not introduced until Rep. David McCurdy (D-OK), the new Chairman of the HPSCI,* had sufficient opportunity to settle into his new position and to analyze the situation. H.R. 1455, therefore, was introduced by Rep. McCurdy on 18 March 1991. The Senate version, S. 1325, was introduced by Sen. Boren on 19 June 1991. Both bills modified the language of S. 2834 that the President had found objectionable.

Over the next several months, meetings were conducted at the White House at the staff level and above to hammer out a general framework for notification acceptable to both Congress and the administration. As the tedious work of proposing, editing, counter-proposing, and reediting text dragged on, the HPSCI representatives, frustrated and sensing little progress, permitted the SSCI to take the lead in the negotiations. The exhaustive negotiations and revisions continued until a "grand compromise" was arrived at by Sen. Boren and National Security Adviser Brent Scowcroft. According to Britt Snider, the SSCI's General Counsel, "the political concerns overruled the legal concerns."

Of more immediate concern was the funding issue. The President's veto of S. 2834 raised the problem of continued congressional funding for the Intelligence Community absent a specific intelligence authorization bill. The administration adopted the view that the Intelligence Community could continue spending the funds Congress allocated to them despite the fact that the President had vetoed the bill that would have authorized the spending. The administration's

*The HPSCI has had six chairmen: Reps. Edward Boland (D-MA) 1977-84, Lee Hamilton (D-IN) 1985-87, Louis Stokes (D-OH) 1987-89, Anthony Beilenson (D-CA) 1989-91, David McCurdy (D-OK) 1991-1993, and Dan Glickman (D-KS) 1993-present. The SSCI has also had six chairmen: Sens. Daniel Inouye (D-HI) 1976-77, Birch Bayh (D-IN) 1977-80, Barry Goldwater (R-AZ) 1981-84, David Durenberger (R-MN) 1985-87, David Boren (D-OK) 1987-92, and Dennis DeConcini (D-AZ) 1993-present.

rationale was that, while the intelligence authorization bill had been vetoed, the funds earmarked for the Intelligence Community had already been appropriated. Traditionally, Intelligence Community appropriations are hidden within annual defense appropriations acts. The FY 1991 Defense Appropriations Act had been signed into law by President Bush on 5 November 1990. Implicitly, the White House was questioning the need for a separate intelligence authorization bill. The intelligence committees clung to the conviction that only a specific intelligence authorization bill would satisfy constitutional and statutory requirements. Anticipating the administration's position, Sen. Boren and Rep. Beilenson informed the President of the intelligence committees' views in a letter dated 4 December 1990.⁸⁰

The letter also underscored the committees' expectation that the intelligence agencies would comply with all of the limitations and conditions regarding the expenditure of funds contained within the vetoed intelligence authorization bill. The SSCI and HPSCI relied on a 1985 amendment to the National Security Act of 1947 which provided that "appropriated funds available to an intelligence agency may be obligated or expended for an intelligence activity only if those funds were specifically authorized by the Congress for use for such activities."⁸¹ The intelligence committees, however, never had to resort to this amendment. The administration failed to challenge the committees' position in a letter from Gen. Scowcroft to Sen. Boren and Rep. Beilenson in reply to their letter of 4 December.⁸²

The administration and the intelligence committees continued to meet to resolve their differences over a statutory definition of covert action. Congress, however, increasingly found itself on the defensive politically. The Iran-Contra affair, which had spawned the reforms currently being negotiated, had all too quickly faded from front page news and public attention. President Bush and the administration were riding high on an unprecedented wave of public support as a result of the Gulf War. The war too had divided Congress and fractured much of what momentum remained from the Iran-Contra reform movement. Operations Desert Shield and Desert Storm also dramatically pointed out the need for an adequately funded Intelligence Community,⁸³ funding which was in question because Congress and the administration could not agree on the wording of a few sentences in the authorization bill.

Despite personal concerns over the bill, Sen. Boren announced that he was "committed to working with the President during our

conference" to prevent another veto.⁸⁴ The conference report on H.R. 1455, issued on 25 July 1991, emphasized that in reenacting the phrase "in a timely fashion," Congress had not implicitly agreed or acquiesced to the Cooper Memorandum.⁸⁵ The conferees conceded, however, that "if the Constitution in fact provides the President authority to withhold notice of covert actions for longer periods, then the conferees' interpretation cannot be legally binding upon the President."⁸⁶ Conciliatorily, the 36 conferees expressed their belief that the President's stated intention to provide notice "within a few days" was appropriate and consistent with what a majority of them believed was the meaning and intent of the requirement to provide notice "in a timely fashion," while recognizing that the President may assert constitutional authority to withhold notification for longer periods. The Senate and the House agreed to the conference report on H.R. 1455 on 31 July and on 1 August, respectively. H.R. 1455 was presented to the President for signature on 2 August. On Wednesday, 14 August, President Bush signed the Intelligence Authorization Act for FY 1991 into law, 47 days before the end of the 1991 fiscal year, and both intelligence committee chairmen gamely attempted to put a positive spin on the new Act.*

* Rep. McCurdy said the reforms in the bill "represent[ed] real progress" in the intelligence oversight system. Sen. Boren, less effusive, stated only that he was pleased that the President and Congress were able "to find common ground" despite lingering technical difficulties. One senior congressional staff aide called the President's signing statement "bizarre," stating, "it sounds like the President is saying, 'I'm signing this, but I'm doing it under duress.'" George Lardner, "Restrictions Approved on Covert Action," *The Washington Post*, 16 August 1991, p. A22.

CONCLUSION

The FY 1991 Intelligence Authorization Act is unique in that it is the only intelligence authorization act in history to have been vetoed prior to its eventual enactment. It also represents the first piece of legislation that enacts significant Intelligence Community reforms as a result of the Iran-Contra affair. The Act is also significant for what it does not do. It does not aggrandize congressional power at the expense of the executive. It does not provide Congress with a legislative veto* or make covert action dependent upon intelligence committee or congressional approval. It does not institute untried or unfamiliar covert action notification or reporting procedures. It does not restrict the President's flexibility in conceiving, initiating or conducting covert action. Nor does the Act diminish the effectiveness, secrecy or usefulness of covert action as a foreign policy tool.

The FY 1991 Intelligence Authorization Act reveals itself to be a reasonable compromise between divisive political issues and competing interpretations of constitutional responsibilities. While the Act may be narrowly viewed as a remedial congressional attempt to prevent another Iran-Contra affair, in reality it merely memorializes by statute those oversight and reporting practices that, with few notable exceptions, were commonly observed for years by the President and the Intelligence Community. The Act provides stability by statutorily preserving the status quo between the executive and Congress regarding intelligence oversight and reporting issues which have evolved since the inception of the Cold War.

The Act ensures executive accountability by requiring presidential findings to be in writing, a practice first promulgated by President Reagan's NSDD 159 in January 1985. By compelling the President to maintain written, verifiable presidential findings, the Act will facilitate greater trust and cooperation between Congress and the executive, thereby reducing congressional "micro-management"⁸⁷ of intelligence activities, a common executive complaint. Alternatively, by enacting

*The legislative veto is the statutory device by which Congress conditions the legality of a given Presidential Act on congressional action not subject to the President's veto. The Supreme Court invalidated one-House legislative vetoes in *INS v. Chadha*, 462 U.S. 919 (1983), because such vetoes bypassed the bicameral and presentment requirements of Article I, Section 7 of the Constitution.

statutory reporting requirements, the Act should serve to reduce congressional fears of "rogue" Intelligence Community activities. By formalizing and codifying procedures previously promulgated in various statutes, executive orders, lesser presidential decrees, executive-congressional agreements, and official correspondence, the FY 1991 Intelligence Authorization Act strikes a balance between individual and institutional needs; between conservative and liberal agendas; between executive and congressional prerogatives.

Maintaining a written record of presidential findings is crucial, not merely to ensure presidential accountability today, but for the benefit of future decisionmakers and historians. The value of proper discussion and documentation cannot be overemphasized. Presidential historian Michael Beschloss, for example, has aptly observed (eerily reminiscent of the Iran-Contra affair) that:

The Bay of Pigs turned out to be a textbook case of the problems inherent in the covert method of shaping foreign affairs. Planned by a small, closed group, lacking exposure to the press, Congress, bureaucracy, and other institutions that monitor, criticize, and thus improve other government initiatives, the Cuban operation had defects that remained largely undetected. Eager to sell the project to the President, its planners were naturally inclined to minimize its risks.⁸⁸

Moreover, a statutory requirement of generating a written presidential finding hardly seems objectionable in this modern age of sizable legal staffs, ubiquitous word processors, and virtually instantaneous communications. Yet, despite the Act's relative temperance, some problems are not unimaginable. Given the many intelligence and security relationships the United States has cultivated since the Cold War began (and the relationships cultivated since its demise), inflexible statutory reporting requirements could chill a third country's or an individual's willingness to participate in some future intelligence venture. Most of these potential problems, however, have traditionally centered on a strict 48-hour reporting requirement which the Act abandoned. The most commonly cited example is the "Canadian Caper." This covert operation, approved by President Carter, involved Canadian assistance in smuggling six American diplomats out of Tehran through the Canadian Embassy. As a precondition of its cooperation, the Canadian government requested that President Carter not inform Congress. Congress was, therefore,

not notified of the President's finding for over three months, until the operation was successfully concluded.⁸⁹

Significantly, as the Intelligence Community moves increasingly into the murky arena of economic intelligence, the Act's seemingly clear requirements may begin to blur. Few would argue with Sen. Boren's prognostication that, "[g]oing into the next century, our position of world leadership will depend more on our economic strength than even our military strength."⁹⁰ DCI R. James Woolsey has characterized economic intelligence as the "hot topic" of intelligence policy in the 1990s. Former DCI Robert Gates opposed commercial espionage by the CIA, believing that economic intelligence is "potentially a bottomless well for the intelligence community."⁹¹ Gates reportedly had foreseen, however, three areas where the Intelligence Community could make "a unique contribution" regarding economic intelligence: (1) uncovering foreign economic espionage; (2) gathering intelligence about attempts by foreign governments to violate international trade agreements; and (3) tracking foreign technology developments that affect U.S. national security.⁹² Moreover, as the global community continues to develop and adopt a cogent body of international law, the lawfulness and utility of traditional covert actions may be called into question.⁹³ As former DDCI Admiral Bobby Inman remarked during recent testimony before the SSCI: "The world [of the next ten years] I see is one where covert operations is likely to be a small part, hopefully a very small part, of U.S. policy. . . ." ⁹⁴ Policymakers will have to toil long and hard to define the future role, scope, and character of intelligence activities, particularly covert actions. Depending on the results of their efforts and on the course of events, the FY 1991 Intelligence Authorization Act's provisions and guidelines may be of great value or be rapidly overcome by events.*

* On 5 February 1992, Sen. Boren and Rep. McCurdy introduced sweeping new legislation which, if enacted, would dramatically reorganize the entire Intelligence Community structure and create a new Director of National Intelligence. At present, however, the legislation's enactment in its current form appears extremely unlikely. See S. 2198, 102d Cong., 2d Sess. (1992); H.R. 4165, 102d Cong., 2d Sess. (1992); David L. Boren, "The Winds of Change at the CIA," Vol 101 *Yale Law Journal* (1992), p. 853; David L. Boren, "The Intelligence Community: How Crucial?," Vol 71 *Foreign Affairs* (Summer 1992), p. 52; and David L. Boren, "Rethinking US Intelligence", Vol 1 *Defense Intelligence Journal* (Spring 1992), p. 17.

Oversight of intelligence in the United States is peculiar; "no other nation has sought to balance the imperatives of national security with democratic values in so public a fashion"⁹⁵ and, as a result, constantly wage a highly political and often emotionally charged struggle between secrecy and openness; between the government and the individual; between foreign and domestic policies. The Intelligence Authorization Act for FY 1991 is not a panacea to either the administration's or to Congress's intelligence policy concerns. The FY 1991 Intelligence Authorization Act represents an old-fashioned, common sense, political compromise which effectively provides statutory incentive for the President to maintain accountability with regard to intelligence activities, yet provides him with a measure of flexibility vital to the proper formation and conduct of foreign policy.

Each branch of government, divested of its partisan political posturing, has genuine concerns and important responsibilities regarding the oversight of intelligence. Only through open, honest, and continuous dialogue, however, can these concerns and responsibilities be effectively assuaged and managed. The President clearly must retain the flexibility to implement national security policies as circumstances dictate, but he must at all times remain accountable for his decisions and their ramifications, both to Congress and to the American people. For its part, Congress, often imbued with an odd combination of ducking responsibility and telling everyone else what to do, must accept its broad oversight role and must resist the urge to control or micromanage national security policy.

In light of the tensions inherent in our governmental system of checks and balances, it is vitally incumbent upon both Congress and the President to devise reasonable, practical, and effective means of ensuring general agreement and cooperation on the direction and conduct of the nation's intelligence programs and activities. If an atmosphere of trust and responsibility is established, disagreements can be debated and resolved on their merits rather than deteriorating into tiresome attacks upon one branch of government or one political agenda.

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