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The Intelligence Authorization Act of 1991 and Its Implications for Congressional Oversight of Covert Action

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Although the Intelligence Authorization Act of 1991 enacted several important statutory requirements for the approval and reporting of covert operations, loopholes remain in the legislation that permit the president to delay notification of covert operations to Congress for extended periods of time and to involve nongovernmental entities in the conduct of such actions. The ambiguity created by such loopholes serves to blur the line between the powers of the executive and legislative branches and to increase the possibility of conflict between the president and Congress in the future. Effective oversight of covert operations in the 1990s will therefore rely heavily on the good faith of both members of Congress and executive officials and on the willingness of both parties to work together in an honest and cooperative fashion.

In *Covert Intervention: The Limits of Intervention in the Postwar World* (1987), Gregory F. Treverton notes that "'secret' operations in a democracy are a paradox" (p. 3). The American political system has traditionally been an open one, in which information is shared freely and the separate branches of government are held account-

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able for their actions by an elaborate system of checks and balances. Yet covert action calls for secrecy, planning behind the scenes, and at times unilateral decisions that are made without the benefit of appropriate oversight. It is in this contradiction between openness and secrecy that the dangers inherent in covert action lie. As author Loch K. Johnson has noted, "the enduring irony of intelligence is its potential to destroy as well as to guard democracy" (Johnson 1992–93, 69). In the last twenty-five years much effort has been expended to bring democracy to the intelligence community, to hold it accountable for its actions and decisions, and to establish a system of oversight that will allow the U.S. government to pursue activities vital to its national security while observing basic democratic and constitutional principles.

Former Director of Central Intelligence (DCI) Stansfield Turner has declared that in the 1990s there is "no greater need than to sort out the problems of oversight" (Johnson 1992–93, 67). The Intelligence Authorization Act of 1991 (Public Law 102-88) is the most significant attempt to date to deal with these problems. The act embodies a set of reforms that grew out of the destructive consequences of the Iran-Contra affair. For the first time, the term "covert action" is statutorily defined. In an effort to correct earlier legislative ambiguities, the act also expands the requirements for the approval and reporting of presidential "Findings", which are submitted (usually by the DCI) to Congress to authorize covert actions. It requires that findings be in writing, prohibits these documents from retroactively authorizing covert actions, and calls for them to list all nongovernmental agencies and third parties to be involved in a given operation. It also explicitly prohibits covert actions intended to influence U.S. political processes, public opinion, or media. In doing so, it attempts to mitigate fears that have existed since 1974, when it was revealed that the CIA had engaged in large-scale espionage operations domestically, compiling files on thousands of Americans through Operation CHAOS.

The act, however, is as significant for what it neglects as for what it accomplishes. Like the Hughes-Ryan Amendment and other pieces of oversight legislation before it, the Intelligence Authorization Act allows a loophole for the president to withhold the disclosure of a covert action to Congress for longer than the expected period of 48 hours after the initiation of the operation; he need only report to the Congress in a "timely fashion" (Intelligence Authorization Act 1991, 105 Stat. 443). The ambiguity of this term

allows the president to postpone the disclosure of a covert action for an extended period. The potential for future abuse of the oversight system, like that witnessed in the Iran-Contra affair when President Reagan felt he had the constitutional and governmental authority to postpone the disclosure of the arms for hostages deal indefinitely, is therefore very real.

The Act's definition of covert action also exempts from the findings requirement any preliminary diplomatic contacts with foreign governments by U.S. government officials that seek to determine the willingness and/or feasibility of their conducting covert actions on behalf of the United States. It therefore allows another loophole through which the president could skirt congressional authority, in this case by permitting a third party that is not accountable to Congress (for example, the security forces of another nation) to conduct covert operations at the president's request.

Both of these loopholes were added to the act after its original draft (S. 2834) was pocket-vetoed by President Bush on November 30, 1990. Bush viewed S. 2834's stringent 48-hour reporting requirement as an infringement on the authority granted to his office by the Constitution. He noted that there might be cases in which the extreme sensitivity of an operation would require his office to postpone the submittal of a finding to Congress for more than two days, but that in "almost all instances, prior notice will be possible" (Conference Report 1989, 27). Bush was also concerned with the Act's statutory definition of covert action, which he felt might "seriously impair" (Conner 1993, 53) the effective conduct of U.S. foreign relations. Bush felt foreign governments would be hesitant to engage in secret negotiations or to conduct covert operations in tandem with the U.S. if they believed that they, too, would be held accountable to congressional oversight procedures. Regardless of the substance or weight of these claims, the Intelligence Authorization Act for Fiscal Year 1991 emerged as a flawed jewel. It enacted several important statutory reporting requirements while preserving certain loopholes and ambiguities that have caused tension and disagreements between the president and Congress in the past. Whether or not the act will permanently eliminate the possibility of "rogue" intelligence community activities and provide for a thorough and cooperative system of intelligence oversight remains to be seen.

The Evolution of Public Law 102-88

In November 1986, press disclosures exposing the secret sale of U.S. arms to Iran called into question the inclination of the executive branch to honor existing oversight arrangements. Further reports that profits from the arms sales had been channeled to the Contras in Nicaragua through Swiss bank accounts in clear violation of an act of Congress (the Boland Amendment) transformed the situation into a full-blown scandal. Members of the House and Senate were outraged that they had to learn about these operations through reports emerging from the Middle East media. The "Era of Distrust" in relations between Congress and the president had formally begun.[1]

These initial revelations led to a number of investigations. President Reagan appointed a special review board, headed by former Senator John Tower (R-Texas), to investigate the allegations. Special committees created by the House and Senate held joint hearings on the affair in 1987. It was soon discovered that the covert activities of the Iran-Contra affair were conducted and directed by the staff of the National Security Council (NSC). By removing the operations from the hands of the CIA, the NSC officials involved had excused themselves from observing and abiding by established governmental procedures of oversight and cooperation. It was also revealed that President Reagan knew of the arms sales to Iran (though he denied knowledge of the diversion of arms sales profits to the Contras) and had only retroactively authorized the operation when the CIA insisted on a finding (Crabb and Holt 1989, 186). The finding expressly ordered the DCI not to report the operation to Congress. When questioned about his failure to present Congress with a finding in a timely fashion, President Reagan referred to a 1986 memorandum from the Justice Department's Office of Legal Counsel, which offered a more liberal interpretation of presidential discretion. Known as the Cooper Memorandum, this document concluded that, because of powers granted to his office by the Constitution and by the 1980 amendments to the National Security Act, a president has "virtually unfettered discretion" (Congressional Record 65 1991, H 2624) in deciding what constitutes timely notice. Many members of Congress reacted sharply to this interpretation, which they felt violated the good faith implicit in existing oversight obligations. As one member later noted, "[The] memorandum was used by the Reagan

administration in an effort to justify its failure to ever provide Congress with the required notice of the covert actions in the Iran-Contra Affair" (Congressional Record 119 1991, H 6160).

The congressional committees investigating the affair noted that it "was characterized by pervasive dishonesty and inordinate secrecy" (House Select Committee to Investigate Covert Arms Transactions with Iran and Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition 1987, 13). Vice Admiral John M. Poindexter, National Security Adviser (NSA) during most of the affair, readily admitted to such deceptive practices and noted that "our objective here all along was to withhold information" (Crabb and Holt 1989, 187). The majority report of the congressional committees offered the following conclusion regarding the administration's abuse of proper procedure:

> The findings process was circumvented. Covert actions were undertaken outside the specific authorizations of presidentialfindings. At other times, covert actions were undertaken without a presidential finding altogether. Actions were undertaken through entities other than the CIA, including foreign governments and private parties. There were claims that the findings could be used to override provisions of the law. The statuatory option for prior notice to eight key congressional leaders was disregarded throughout, along with the legal requirement to notify the intelligence committees in a 'timely fashion.' (House and Senate Select Committees 1987, 378–79)

As Frank J. Smist Jr. has noted, "such contempt for the American constitutional form of government was unprecedented" (Smist 1990, 264).

In the wake of these revelations, the Reagan Administration moved quickly to upgrade and refine existing oversight procedures. The principal recommendations of the Tower Commission were implemented through a series of National Security Decision Directives (NSDDs). NSDD 266, signed by Reagan on March 31, 1987, stated the intent of his office to assure 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" (Conner 1993, 47).

NSDD 276, signed on June 9, 1987, established and confirmed NSC committees charged with supervising covert actions in accordance with NSDD 266. NSDD 286, signed by Reagan on October 15, 1987,

banned the NSC staff from conducting covert actions altogether. It also required presidential findings to be in writing and prohibited them from being issued retroactively. The reasons for any delay in the notification of Congress were required to be in writing and would be evaluated by the NSC's National Security Planning Group every ten days. President Reagan was satisfied with these reforms, stating that they were evidence of his "determination to return to proper procedures, including consultation with Congress" (Conner 1993, 48).

Concerns were still voiced, however, regarding the "timely fashion" language incorporated into existing oversight directives and legislation. Congress soon moved to codify many of the reforms introduced in President Reagan's NSDDs and to introduce tougher oversight provisions. Two new bills were introduced: S. 1721 in the Senate, and H.R. 3822 in the House. This new legislation signified the intent of many members of Congress and both intelligence committees to limit presidential notification to a strict 48-hour period. Congressional fears stemmed from a belief that presidential notification could be withheld indefinitely as long as the NSC planning group, the NSPG, decided to continue its ten-day evaluations required in NSDD 286. It was clear, however, that any bill that tried to impose a strict time limit on notification would meet with a presidential veto and that the House would not be able to override such a veto. Congress therefore decided to postpone consideration of intelligence oversight legislation until the Bush administration took office. Meanwhile, the use of covert action as a foreign-policy tool was becoming far less commonplace. White House officials noted that the number of operations conducted had been cut in half from 1987 to 1989 (Twentieth Century Fund 1992, 40).

On July 10, 1990, SSCI Chairman Boren introduced the 1991 Intelligence Authorization Bill, S. 2834, on the floor of the Senate. Representative Anthony Beilenson (D-California) introduced the House version of the bill, H.R. 5422, on August 1, 1990. The bills contained measures that would enforce a 48-hour reporting requirement for Presidential findings, statutorily defined covert action, and required the president to notify Congress whenever he requested a nongovernment entity or foreign government to engage in a covert operation on behalf of the United States. findings were also to be in writing and could not retroactively authorize a covert action.

President Bush, concerned about the new reform proposals of the intelligence oversight committees, forwarded a letter to their chairs on October 30, 1989, in an attempt to clarify his position on the "timely fashion" issue. In the letter he stated that he fully intended to "provide notice in a fashion sensitive to congressional concerns" (Conference Report 1989, 27). He then added, "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 Consititution" (Conference Report 1989, 27). With these assurances from President Bush, Congress decided to drop the stringent 48-hour reporting requirement from their oversight legislation. Problems still remained, however. The Bush administration did not wish requests to foreign governments to undertake covert actions on behalf of the United States to be treated formally as actual U.S. covert operations, and was therefore skeptical about Congress' attempts to statutorily define covert action.

Congress, believing that the President was in favor of the bill as a whole despite certain reservations, sent him S. 2834 for signature. Bush refused to sign the bill, however, and it was pocket vetoed on November 30, 1990. In a memorandum of disapproval, Bush stated that he felt the statutory definition of covert action would go too far in restricting U.S. dealings with foreign governments, adding that "the mere existence of this provision could deter foreign governments from discussing certain topics with the United States at all" (Conner 1993, 53).

Congress reacted with surprise at these objections. In a joint explanatory statement that was sent to Bush with S. 2834, it had been stated clearly that the provision was designed "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" (Ibid., 54). As one member of Congress noted, "the purpose of the provision . . . was simply to make it clear that the President could not use surrogates to accomplish what he was legally prohibited from doing directly" (Congressional Record 65 1991, H2615). Nonetheless, the intelligence committees soon moved to revise the bill and remove those provisions objectionable to the president.

Meanwhile, as of November 1990, no funding had as yet been approved for the intelligence community for fiscal year 1991. Two new bills were soon introduced, H.R. 1455 in the House in March

of 1991 and S. 1325 in June in the Senate, which contained most of the changes in language and content that the President had requested. Negotiations, however, dragged on for months regarding the specific wording of certain provisions.

Congress found itself losing political ground, however, as the Iran-Contra affair faded from public memory and successes in the Gulf War resulted in strong approval ratings for the Bush administration. Many members of Congress were also in disagreement over the issue of how far a stringent oversight bill would go in affecting the ability of the United States to successfully carry out intelligence activities during periods of conflict. As one legislator noted:

> It is my understanding, confirmed in several ways, that had [S. 2834] been enacted into law and not vetoed, Desert Shield and Desert Storm would have been totally different from, and flawed to the extent that perhaps those excellently concluded missions would not have ended in victory for the coalition . . . The wording of that original bill . . . would have hampered American intelligence efforts on a dozen different fronts, including in the diplomatic and military portions of Desert Shield and Desert Storm (Congressional Record 65 1991, H2616).

With Congress divided, the intelligence committees soon acquiesced to the president's position by placing the "timely fashion" language back into H.R. 1455. In rationalizing their legislative setback, the committees even went as far as to concede 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" (Conner 1993, 56). On August 2, 1991, H.R. 1455 was presented to President Bush for signature. On August 14, after almost two years of debate and negotiation, Bush finally signed the Intelligence Authorization Act, Fiscal Year 1991. In his statement upon signing the act, Bush reaffirmed his intention to notify Congress within a few days when prior notice could not be given and expressed his confidence that the bill would put to rest disputes that in the past had arisen between Congress and the executive branch. He also stated his belief, however, that certain provisions in the act were unconstitutional and that its statuatory definition of covert action was "unnecessary" (Signing the Intelligence Authorization Act 1991, 1138). As he further noted:

> Several provisions in the act requiring the disclosure of certain information to the Congress raise constitutional concerns. These

provisions cannot be construed to detract from the President's constitutional authority to withhold information the disclosure of which could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. (Ibid., 1138)

A mere four years after the Iran-Contra affair, it was thus painstakingly obvious that many of the ethical and constitutional issues the scandal raised had yet to be settled. The legislative loophole present in the words "timely fashion," which led to so much abuse of the oversight system during the Reagan administration, had yet to be closed. Congress and the president also continued to view their powers and prerogatives within the intelligence community through very different constitutional and moral lenses.

The Intelligence Authorization Act of 1991: Scope and Effect

The Intelligence Authorization Act of 1991 stands to this day as the most important piece of legislation affecting congressional oversight of covert action. Its reforms represent an attempt to ensure more executive accountability to Congress by placing oversight procedures and regulations within a more democratic framework that stresses the integrity and necessity of our constitutional system of checks and balances.

Not all of the act's provisions pertain to the oversight of intelligence activities. Title III of the bill contains reforms aimed at bringing the CIA's retirement systems in line with systems in effect at other federal agencies. Title IV consists of general provisions, one of which declares that authorizations in the act are not to be interpreted as providing authority for intelligence activities not otherwise authorized "by the Consitution or laws of the United States" (Ibid., 105 Stat. 434). Title V of the act contains several provisions of importance to the Department of Defense (DOD).

The most important provisions in the act, however, are contained in Title VI, entitled "Oversight of Intelligence Activities," in which several measures serve to reform existing intelligence oversight law and codify informal reporting procedures. The requirements for the reporting and approval of findings are substantially modified. The act requires that findings be in writing, calls for them to specify all government agencies and third parties involved in the conduct of a covert action, bans them from retroactively authorizing covert actions, and prohibits any findings that authorize actions

that "would violate the Constitution or any statute of the United States" (Ibid., 105 Stat. 443). In addition, it is stated that the president may not authorize a covert action unless he determines that the operation is "necessary to support indentifiable foreign policy objectives of the United States and is important to the national security of the United States" (Ibid., 105 Stat. 442).

Congress' "power of the purse" is affirmed in Section 603 (c) of the act, which states that no funds may be appropriated for, or expended by, any U.S. Government agency or entity for a covert action unless a Presidential Finding has been signed or otherwise issued in accordance with the above requirements. The act also explicitly states that "no covert action may be conducted which is intended to influence United States political processes, public opinion, policies, or media" (Ibid., 105 Stat. 444). Operations similar to those conducted in Operation CHAOS are thereby officially outlawed.

The act greatly clarifies oversight procedures by introducing more concrete and formalized procedures for the reporting and approval of covert actions. The intelligence committees must now be informed of "any significant change in a previously approved covert action, or any significant undertaking pursuant to a previously approved finding" (Ibid., 105 Stat. 443). The DCI is also required to provide periodic statements to Congress explaining the continuing need for ongoing covert operations. Section 501 (e) of the act encourages openness between the legislative and executive branches by stating that "nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods" (105 Stat. 441).

Once again, the president is given the authority to report a finding to a select group of eight members of Congress, consisting of the chairs and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate, if he feels that it is "essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States" (105 Stat. 443). The president is also again provided with a loophole through which to postpone notification of a covert

action indefinitely. Section 503 (c) (3) of the act states that whenever a finding is not reported pursuant to the requirements listed in the act, "the President shall fully inform the intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice" (105 Stat. 443). As in prior legislation, what period of time constitutes a "timely fashion" is not considered or defined.

The act also statutorily defines covert action for the first time 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 U.S. Government will not be acknowledged publicly" (105 Stat. 443). Certain activities are then exempted from this definition, including traditonal counterintelligence activities, diplomatic or military activities, law enforcement activities, and activities to provide routine support to overt activities.

Effective Oversight or Political Compromise?

There is little doubt that the Intelligence Authorization Act was an important piece of legislation with important consequences for the future of intelligence oversight. Yet, in view of the concessions granted to President Bush after his pocket veto of the act's original draft, it is tempting to wonder whether Congress strayed too far from its original position in enacting a compromise on the bill to the detriment of democratic and constitutional principles.

In the fall of 1990, the Twentieth Century Fund convened a distinguished group of scholars and former government officials[2] to consider the future of covert action. The "Task Force on Covert Action and American Democracy" discussed the implications of the Intelligence Authorization Act at length and made several recommendations in its final report as to how oversight reforms in the act can be further upgraded and enhanced in future legislation and presidential directives.

The group concluded that, although covert action is inherently in conflict with the democratic aspirations of our society, "covert action may be justified when a prospective threat creates a compelling national interest that cannot be met prudently by overt means alone" (Twentieth Century Fund 1992, 5). The use of such operations thereby necessitates a set of laws or regulations that serve to minimize the historic tension between covert undertakings and democratic accountability. The task force calls for future reform

efforts in the field of intelligence oversight to establish procedures that ensure effective executive and congressional oversight, "plugging all the gaps revealed five years ago by the Iran-Contra Affair." It is also suggested that a broad consensus be built on the principles under which covert operations may be undertaken. New objectives and methods for covert action will have to be established that address the changing threats and challenges facing the United States in the post–Cold War era.

The task force was critical of the loophole in the Intelligence Authorization Act that allows the president to provide notice in timely fashion in extraordinary circumstances, noting that this "leaves intact a presidential claim of authority to keep Congress uninformed—the very claim invoked in Iran-Contra" (Ibid., 6). It also expresses concern over the Act's apparent acknowledgement of the legitimacy of using private nongovernmental entities to conduct covert actions. Such entities are frequently accountable to no one, as was shown during the Iran-Contra affair.

The task force's report listed a series of specific recommendations aimed at improving current oversight procedures. In regards to the issue of notification, the task force suggested that, even in cases of extraordinary sensitivity, Congress should be informed of a covert operation within 48 hours of its initiation. In all other instances notification should occur well in advance of the start of an operation, so that the president would receive feedback from Congress on the action's potential pitfalls or weaknesses. The task force also felt that civil and criminal penalties should be enacted for the violation of oversight laws and regulations, including the giving of false or misleading information to Congress. It also strongly recommended that the attorney general, DCI, and secretaries of state and defense provide the president with preliminary statements of concurrence or objection before a Finding is signed. Covert actions should also be used to support only publicly articulated policies and interests.

The task force concluded that while the Intelligence Authorization Act "closes several loopholes that allowed Iran-Contra to happen . . . several significant gaps remain" (Ibid., 10). It notes that the Iran-Contra affair was made possible by private entities with no formal government status or accountability. Under present law, such entities can still play a role in covert activity. As Loch K. Johnson has noted, such privatization of covert actions invariably

has the effect of removing intelligence policy from a system of proper constitutional checks and balances (Johnson 1989, 254).

Some critics of modern congressional oversight have focused more closely on the constitutional issues involved in the division of power between the legislative and executive branches in the realm of foreign policy. Many supporters of presidential supremacy in the foreign-policy arena refer to Article II, Section 1, in our Constitution which declares that the president shall have responsibilty for our nation's foreign affairs. They also note the writings of Thomas Jefferson, who believed that the transaction of business with foreign governments should be executive altogether.

Proponents of congressional checks on executive power disagree with this interpretation. Michael J. Glennon believes that the constitutionality of congressional oversight of intelligence activities rests on the same framework applicable to other executive activities, such as the war power and executive agreements. Glennon notes that the case for the constitutionality of restraints on covert operations is further strengthened by the fact that "Congress, not the President, created the CIA and assigned its functions and responsibilities" (Glennon 1990, 304). Congress should therefore hold the power to decide when the president can or cannot use the facilities and resources of the CIA to conduct covert actions. As Glennon tells us, "even the minority report of the Iran-Contra committees acknowledged the constitutionality of a statute that would 'set rules for the use' of funds Congress makes available to the intelligence community" (Ibid., 304). He then refers to the Supreme Court's decision in *Youngstown Sheet & Tube Co.* v. *Sawyer,* which reinforced Congress' prerogative to oversee executive activities in the field of foreign relations. Glennon points to the remarks of Professor William Van Alstyne who, in looking at the decision, concluded that

> to the extent Congress desires clarity, certainty, and reliability in highly problematic areas of executive direction of foreign intelligence activity, it is both appropriate and essential that Congress should say so, by law, as concretely as it can agree to do. (Ibid., 306)

Glennon's own view is that "if we are truly a government of laws, then laws limiting [the CIA's] discretion, and not merely words of good will uttered by executive officials at closed congressional hearings, are absolutely essential" (Ibid., 303). Such laws must place the "most rigorous limitations" (Ibid., 304) on covert operations.

Most observers would agree, however, that any oversight law or procedure is largely impotent if it is not observed in good faith by both the executive and legislative branches. As Frank J. Smist has observed, "truth is the vital ingredient that enables oversight to work" (Smist 1990, 265). In Smist's mind, such honesty and forthrightness was the main casualty of the Iran-Contra affair. Vice Admiral Poindexter personified the unwillingness of executive officials to cooperate with congressional oversight when he declared that he withheld information because he "simply did not want any outside interference" (Johnson 1989, 128).

Trust and good faith are two-sided coins, however, and executive officials are far more willing to cooperate with intelligence committee members when they feel that congressional members can be trusted with sensitive national secrets. Executive distrust of Congress has often led to calls for the creation of a joint congressional intelligence committee, where fewer individuals would have to be briefed by CIA officials. As Senator John W. Warner (R-Virginia) has noted, such proposals are "rooted in the belief that Congress cannot keep information secret" (Warner 1989, 108). While Warner refutes this assumption by declaring that most information leaks actually come from the executive branch, he recognizes that its mere existence has been a historic source of tension between the president and Congress (Ibid., 108). It is therefore apparent that the effectiveness of the Intelligence Authorization Act and any future oversight legislation will be determined largely by the level of cooperation between the legislators and executive officials charged with implementing it.

Conclusion

During the congressional debate on the Intelligence Authorization Act , one member of Congress noted, "we need laws on the books that erase ambiguities and set up clearly defined procedures" (Congressional Record 65 1991, H 2614). While the Intelligence Authorization Act does enact several important statutory requirements for the approval and reporting of covert operations, a "zone of twilight" (Warner 1989, 109) still seems to exist between where the president's powers cease and those of Congress begin. Lingering ambiguities seem to center around the loopholes in the act that allow the president to delay notification of covert operations to Congress for extended periods of time in certain cases and to

involve private nongovernment entities in the conduct of such actions.

Specific time-limit legislation was incorporated into S. 2834 and would have become law if not for President Bush's pocket veto in late 1990. After the onset of Operation Desert Storm, Congress seemed to lose much of the political capital it had acquired after the Iran-Contra affair. Time-limit guidelines were therefore never enacted in the Intelligence Authorization Act, which leaves intact the language of "timely fashion." The pressing need for specific time-limit legislation had been described eloquently by Senator John W. Warner:

> The Constitution gives the power to appropriate funds to Congress and, by statute, that appropriated funds shall be expended only for purposes authorized by Congress. Because Congress authorizes and appropriates funds, it has, according to the Courts, the implied power to oversee all government spending and seek such information as necessary to make informed decisions. In order to exercise this authority over covert actions, the intelligence committees must be informed at the earliest possible moment (Warner 1989, 108).

If such legislation proves difficult to enact, there are fallback positions preferable to those taken by Congress after the pocket veto of S. 2834. A compromise might be reached, as Lloyd Cutler has suggested, in which the president informs the intelligence committees straightaway: "I have signed a Finding" and because of extraordinary circumstances a full report on the activities involved will have to be delayed (Johnson 1989, 253–4). This option at least allows Congress to track delays in presidential notification and avoid embarassing situations in which it has to be informed of covert operations by executive leaks or the media.

Equally disturbing is the fact that private nongovernmental entities can still be used to conduct covert activities, providing that the president provides Congress with a list of all the third parties he forsees engaging in a given operation. Actors that are not directly accountable to any branch of government will therefore continue to be trusted with our nation's most sensitive secrets and with the responsiblity for carrying out operations vital to the national security of the United States. The reality of this situation became a nightmare in November of 1986, when media reports concerning the Iran-Contra affair began. That the possibility of another such scandal occurring exists seven years later is shocking.

In the twenty years since the passing of the Hughes-Ryan Amendment, intelligence oversight has come a long way. The Intelligence Authorization Act, Fiscal Year 1991, is a symbol of Congress' continuing determination to address its oversight responsibilities seriously. The act has gone far to clarify the president's responsibilities in reporting covert operations to the legislative branch. Many ambiguities were also cleared up in the act, such as the precise definition of covert action. But the act retains many loopholes that blur the lines between congressional and executive authority and allow for the possibility of future conflict. The willingness of executive officials to work in a cooperative and honest fashion with their legislative counterparts will therefore play an important role in determining how capable the Intelligence Authorization Act is of providing effective oversight. As Loch K. Johnson has noted, it is important for executive officials to abide by the policy of "the four cs" in their briefings of Congress: consistency, candor, completeness, and correctness (Johnson 1992–93, 67–68). Only in this manner can Congress and the executive once again enter an "Era of Trust," this time on an equal constitutional footing and with cooperation as a respected goal.

Notes

[1]The term, "Era of Trust," was used to describe the period from 1947–1974 by Loch K. Johnson. See Johnson, *America's secret power: The CIA in a democratic society*, (1989), p. 9.

[2]Among the more notable members of the group were Richard E. Neustadt, Gregory F. Treverton, Admiral Stansfield Turner, Theodore C. Sorenson, Lloyd N. Cutler, and John C. Whitehead.

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