COVERT ACTION AND CONGRESSIONAL OVERSIGHT

by

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Covert action is defined as an attempt to influence politics and the course of events in other countries without revealing one's involvement or at least by maintaining plausible deniabilty. Over the last two decades a spirited debate has taken place within the U.S. body politic over the place of covert action in the foreign policy arena. A major issue has been whether and to what degree it is appropriate for a democracy to undertake secret interference in the politics of another country. An important and related question, the subject of H.R.1013, is the extent to which the President has constitutional authority to employ covert action as an instrument of foreign policy.

In response to the question of whether a democracy should engage in covert action, four quite different perspectives have emerged:

- o Under no circumstances should the United States be involved in covert action. It violates our democratic values and permits the President to undertake foreign policy initiatives without first testing their viability in the marketplace of public discussion.

- o Covert action is an instrument of last resort. It should be utilized after all else fails and the other alternatives are either to send in the marines or remain passive.

- o The United States should only carry out non-controversial covert actions. In other words, only do covertly that which, if it becomes public knowledge, will cause very little embarrassment.

- o Covert action is an instrument of foreign policy. All foreign policy is, in effect, has to address the nexus between foreign and domestic policy in other countries. This can be carried out both overtly and covertly. Covert action as a tool of foreign policy can be either a carrot or stick.

The issue is to what degree the President has the Constitutional authority to exercise this instrument of foreign policy. In my estimation the proposed amendment to section 501 of the National Security Act of 1947, as contained in H.R.1013, infringes on Executive

authority. It goes beyond separation of powers, as understood by the Framers of the Constitution. Additionally, it appears to be reminiscent of the way Congressional oversight proceeded during the mid-1970s. Recall that by the end of the decade Congress itself was impelled to modify these earlier legislative enactments. The Intelligence Oversight Act of 1980 is a case in point.

PRESIDENTIAL AUTHORITY AND FOREIGN POLICY

The Framers of the Constitution were cautious both in how they defined the powers of government and the way they distributed these powers among the three branches that had been constructed to use them. They were also of the opinion that certain branches were better equipped to exercise specific powers than others. Separation of powers, therefore, was a double-edged sword. It could prevent power abuse, but also provided for power to be more effectively exercised. This was apparent in the Framers' deliberations over the role and powers of the executive branch, particularly in the areas of national security and foreign policy. Influencing the Framer's judgment was the ineffectiveness of the Congress in these issues under the Articles of Confederation. As a deliberative and legislative body, the Framers viewed Congress as ill-equipped to act with the energy and dispatch required in international relations. The composition and modus operandi of the legislative branch made timely action either difficult or impossible. Consequently, separation of powers resulted in the Framers designating the executive branch as the more appropriate body to exercise control over foreign policy.

Nevertheless, the Framers also recognized that while separation of powers established a division of authority and responsibility, it

was inevitable that at different times and in different situations the degree to which the three branches exercised authority and checked one another would vary. The changing role of the President and Congress in the arena of intelligence presents a good example.

From 1947 to the end of the 1960s, Congress did not actively pursue its formal oversight authority. There was a consensus both over the parameters of American foreign policy and recognition that its conduct was the responsibility of the executive. Intelligence was viewed as an instrument of foreign policy and Congress was reticent to impinge upon the constitutional authority of the President. Only a few members of each house of Congress informally took part in the oversight of intelligence, and by choice their involvement was held to a minimum.

The events of the 1970s reversed Congressional reticence and the mechanism of oversight, which always existed, came to be vigorously exercised. Clearly, the pendulum began to swing away from Presidential dominance. Underlying this was the shattering of the post-World War II consensus over the course of U.S. foreign policy. Congressional restraint turned into activism, and this was no where more evident than in the field of intelligence oversight.

By the second half of the decade, many argued that Congress had pushed the pendulum too far, particularly with respect to the President's ability to employ covert action as an instrument of foreign policy. This argument centered around the Hughes-Ryan Amendment to the 1974 Foreign Assistance Act, which called for explicit Congressional oversight of the President's use of covert action. Hughes-Ryan required that the President notify the

appropriate Congressional committees prior to or immediately upon initiation of a covert action. Under the prescription of the amendment a total of eight committees had to be informed of each planned covert operation.

Hughes-Ryan did not give Congress veto authority over the President's use of covert action. However, the fact that the members of eight committees were in the know made it very difficult to guarantee that covert programs would remain secret. The amendment gave any member of the eight committees a de facto veto over any proposed covert action he or she might find objectionable. The result was that Presidents would be willing to undertake only noncontroversial covert actions, which, if they became public knowledge, would cause little political discord.

Did Hughes-Ryan push the pendulum too far in terms of separation of powers and Presidential authority? Article II, section 1 of the Constitution places executive power in the President. This is the source of the President's wide and inherent discretion to act for the United States in foreign and national security affairs. Of course, this is subject to those limits the Constitution delegates to the Congress. Nevertheless, even before the Constitution was ratified, it was asserted in The Federalist that the President's executive power would include the conduct of foreign policy. Historical practice and legal precedents have confirmed this authority in formulating and implementing foreign policy.

While in certain areas the President's power in foreign policy may be constrained constitutionally, the conduct of secret intelligence operations lies at the center of executive authority.

This does not mean that Congress is excluded, as the oversight process has demonstrated. In fact, the wording of the Hughes-Ryan amendment itself recognized this fact. It did not give Congress formal veto power over a covert action authorized by the President, although the way the amendment was constructed an unauthorized and de facto veto power ensued. The 1980 amendment to the National Security Act of 1947 not only sought to correct this situation, but recognized the ultimate discretionary power of the President in covert action. Consequently, while the Senate Select Committee on Intelligence (SSCI) and House Permanent Select Committee on Intelligence (HPSCI) were to be kept fully and currently informed about covert actions initialed by the President, this was within the framework of what was "consistent with all applicable authorities and duties, <u>including those conferred by the Constitution upon the executive</u> and legislative branches." The language in quotations is precisely that which H.R.1013 seeks to excise from the National Security Act of 1947.

In sum, the Framers assigned to the President a broad and independent Constitutional authority to conduct foreign policy. In retrospect, it is now generally held that in the 1970s Congress pushed the pendulum to the point where the Framers' concept of separation of powers was circumvented. This was quite apparent in the direct and indirect impact of the Hughes-Ryan amendment. The Intelligence Oversight Act of 1980 restored the balance. The Hughes-Ryan amendment, along with other legislative efforts (including the Foreign Intelligence Surveillance Act of 1978 and the proposed but never enacted charter legislation drafted by the SSCI (S.2525)), dominated the Congressional oversight process of the 1970s. These measures were

enacted during a period highly charged with political crisis and executive-legislative confrontation. Beginning in 1979-1980, in a period of greater political tranquility, certain of these legislative actions were either revised or as in the case of the proposed charter never enacted. H.R.1013 would result in a repetition of the oversight pattern of the early mid-1970s.

POLITICAL CRISIS AND CONGRESSIONAL OVERSIGHT -- THE HUGHES-RYAN AMENDMENT AND H.R.1013

In many respects, the Hughes-Ryan Amendment and H.R.1013 have a great deal in common. To begin with, both grew out of a highly charged political crisis. Recall the climate surrounding the enactment of Hughes-Ryan. In 1971, the Pentagon Papers were published in the midst of the domestic turmoil over the Vietnam War. The next year was marked by the beginning of the Watergate scandal which resulted in the resignation of President Nixon in 1974. At that time, the controversial covert program in Chile was exposed, as were certain domestic intelligence operations run by the CIA. This led to the creation of House and Senate special committees to investigate past and present activities of the intelligence community. In many ways, the Chairman of the Senate special committee, the late Senator Frank Church, summed up the political tenor of this oversight period in his charge that the CIA was a "rogue elephant" out of control. Neither his committee nor the sister committee in the House found evidence to support this claim. The broad charge of massive and systematic abuses and illegal activities by the intelligence community was never documented.

Nearly everyone looking at the oversight process at that time recommended some kind of permanent committee system for intelligence.

Security Act of 1947 was amended to provide both Congressional oversight and Presidential flexibility in special situations. Section 501(a) provided the following:

- o The SSCI and HPSCI would be kept fully and currently informed of anticipated covert actions. This did not require their approval in order to initiate the operation.

- o The President could limit prior notice to the ranking members of SSCI and HPSCI, the speaker and minority leader of the House and majority and minority leaders in the Senate if extraordinary circumstances existed.

For those situations in which the President determined that to comply with section 501(a) would endanger lives and/or operational security, section 501(b) required the President to inform the SSCI and HPSCI in a "timely fashion." This was to include a statement of the reasons for not giving prior notice. Finally, the 1980 legislation also required reporting of all intelligence failures.

In my estimation, the Intelligence Oversight Act recognized the inherent authority of the President to withhold notification. It was considered within his constitutional authority. It did not view withholding notification as the rule, but more of an exception. Consequently, the act sought to strike a balance. It also implied that the Congress understood the need for Presidential flexibility to act with dispatch and secrecy if the situation so warranted.

Although it would be unfair to compare the Iran crisis with the situation in the early/mid 1970s, H.R.1013 is, in a fashion similar to Hughes-Ryan. It is undertaking legislative restrictions in the heat of political crisis. At issue today is whether the Iran events necessitate a revamping of the 1980 oversight requirements. In my estimation these changes recognized that to set arbitrary time limits infringe on the President's ability to conduct particularly sensitive

But it had become clear by the end of the seventies that speculation, like that of Senator Church, was unfounded and, further, that it created an atmosphere in which balanced judgment suffered. By the end of the decade, the SSCI and HPSCI more prudently concentrated on correcting the real errors and structural deficiencies of the intelligence community. In effect, oversight began to shift away from its legitimate agenda toward an exclusive concern with rules and restraints on the intelligence community and the President's ability to work with it. This was reflected, in the first place, in the Senate's rejection of the charter legislation, which contained a set of complex regulations and prohibitions to rule and restrain every activity of U.S. intelligence.

In the 1980s, as the pendulum began to swing back the agenda broadened to include strengthening the performance of U.S. intelligence. A series of intelligence failures revealed the price of ignoring the requirements necessary to meet hostile intelligence services and to stand up to national security challenges facing the United States. These included the inability to collect sufficient information about the Iranian and Nicaraguan revolutions in order to provide early warning, various counterintelligence failures, mis-estimations of Soviet military power, and the non-existence of any effective capability covertly to influence events abroad.

The Intelligence Oversight Act of 1980 demonstrated both Congressional concern over these intelligence failures and deficiencies, as well as recognition of the fact that in certain situations the President requires discretionary power to employ covert action as an instrument of foreign policy. Consequently, the National

covert operations. While we can debate over whether or not the Iran activities met the stipulations laid down in section 501(b), we should not change the existing procedures. There clearly are operations that are so sensitive, for instance in the counterterrorism arena, that security, secrecy, and dispatch are crucial. We should not lose sight of this in the current political crisis and executive-legislative confrontation. Certainly the forty-eight hour requirement contained in H.R.1013 is a much too tight restriction and denies operational flexibility necessary for dealing with situations which involve grave danger to personal safety or which require speed and stealth. It restricts the range of secret options available to the President to rapid military strike operations. The emphasis thus far on short term and time sensitive actions does not imply that all covert operations of a longer duration require prior notification. While this may generally be the case, one can imagine circumstances where this would not be true.

In sum, if history is to teach us anything, it is to avoid repeating those mistakes that undermined the nation's capacity to defend itself against adversaries in the past. The Hughes-Ryan amendment had this affect by denying the President the option to employ covert action as an instrument of policy in controversial situations. H.R.1013 is bound follow the same course. Congress should recognize that there are instances in which executive notification requires delay. In the midst of the political crisis surrounding the Iran events, it is not prudent to create legislative restrictions and rigidity that the nation may greatly regret later and which Congress may find it necessary either to revise or completely

reverse. What is worrysome are the foreign policy failures that might occur in the period between the enactment of new restrictions contained in H.R.1013 and some future Congressional revision of these regulations.