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Congress and the Executive: Who Calls the Shots for National Security? – Remarks by Lori Fisler Damrosch

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As for congressional acquiescence, Congress needed a constitutional substitute for the legislative veto. The fast-track approval procedure was one alternative, but another was to tie appropriations more explicitly to foreign policy objectives, as had been done with some success with the various Boland Amendments. Another alternative was to reenact certain key foreign policy statutes to specify more clearly that Congress was neither authorizing nor acquiescing in certain types of presidential conduct. If the President vetoed these revised measures, then Congress would have an opportunity to test its political will in these areas by voting to override the veto, as it had done in 1986 with respect to the South African sanctions bill.

Finally, as for curbing judicial tolerance of Executive excesses, Professor KOH suggested that Congress could increase the justiciability of certain questions by incorporating congressional standing provisions into statutes, as had been done in the Gramm-Rudman bill, and could be more diligent in wording statutory delegations of powers so that they would contain clear statements of Executive authority the Executive could not manipulate so easily. If Congress truly desired a greater role in national security policymaking, then it would have to seize the initiative to express its nonacquiescence in what the Executive had been doing. Only time would tell if Congress would exploit that opportunity wisely.

Professor LOWENFELD commented on how difficult it was to be a lawyer for an agency like the CIA or for the State or Defense Department. There the temptation was to be a "can do" lawyer and offer the kind of legal opinions that would ingratiate one with the President or the Secretary of State. Yet such lawyers needed to realize that the more they were called upon to give opinions on matters where there was ambiguity or the probability of nonjusticiability, the more they should try to play a neutral role, much like a judge. It was interesting that in France, for example, the legal adviser of the government, *i.e.*, of the executive, was the same person as the legal adviser of the legislature. He was a professional, and somehow in the United States we had not developed that same notion for our agency legal advisers.

REMARKS BY LORI FISLER DAMROSCH*

Professor Firmage's reaffirmation of the Framers' conception of a President who would wait for congressional instructions appeals to traditional values of democratic control and congressional primacy that have deep roots in our national consciousness. But this model of presidential passivity has some of the same strengths and weaknesses as the advocacy of chastity to solve today's problems of teenage pregnancy and sexually transmitted disease. The basic values may be sound, but when one moves from the assertion of those values to the identification of policy prescriptions, then it becomes clear that contemporary problems are too complex to be solved by simply returning to traditional values. Even though Professor Firmage made a strong case for reassertion of congressional prerogatives, the difficult questions facing the political system today need to be examined in their real-life complexities.

In the covert action area, contrary to Professor Firmage's vision, Congress has made a conscious decision to lodge with the President a rather generous measure of authority to initiate and carry out policies, subject to ex post facto review rather than ex ante congressional approval. Several statutes illustrate this trend. If, as recent events seem to suggest, the Executive may have violated the congressional intent in certain cases, the policy prescriptions would be quite different from calling for a return to the Framers' original conception. In such cases, the policy decision would be

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whether to amend existing statutes so that Congress can tighten the controls over authority that it has previously delegated. It is all the more important to identify statutory ambiguities and defects to determine whether Congress expressed its intention imperfectly or whether there were other reasons why the President was able to get away with so much.

A first illustration would be the relationship of the War Powers Resolution to covert actions. Professor Firmage treated the War Powers resolution as if it were relevant to the conflict in Central America, but the legislative history of the resolution shows that Congress deliberately chose not to make it applicable to covert actions. Rather, Congress intended to establish a separate structure for oversight of covert actions that expressly would permit the President to initiate and to carry out covert actions without obtaining congressional approval. The War Powers Resolution by its terms applies to involvement in hostilities by "United States Armed Forces," and the legislative history relevant to that term includes the rejection by the Congress of a proposed amendment that would have expanded the resolution to cover "any person employed by, under contract to, or under the direction of any U.S. agency." The fact that Congress rejected that proposed amendment by a vote of 34 to 53 is persuasive evidence that covert military operations were not intended to be covered by the War Powers Resolution.

The year after the War Powers Resolution was passed, Congress adopted the Hughes-Ryan Amendment to the Foreign Assistance Act that began the current structure for congressional oversight of covert actions. There are sound policy reasons why Congress chose to divorce the treatment of covert actions from the War Powers Resolution. The framework of the War Powers Resolution for reporting and for congressional consideration would assume a public debate on the merits of the operation. In contrast, covert actions must remain secret. Congress could have chosen to forswear covert capability, but it declined to do so. Rather, Congress adopted a system of committee oversight of intelligence activities in 1974 and gave that system more elaborate expression in the Intelligence Oversight Act of 1980. The 1974 Hughes-Ryan Amendment (as amended in 1980) and the Intelligence Oversight Act now require that the President make a finding that a covert action is important to the national security of the United States, and they further require that he keep the intelligence committees of the House and Senate "fully and currently informed" of intelligence activities, including "any significant anticipated intelligence activity." One issue being studied in the current congressional investigations is whether there are circumstances under which "prior" notice need not be given.

But regardless of the outcome of the "prior notice" debate, it is very clear that Congress deliberately and unambiguously renounced one of the constitutional prerogatives that Professor Firmage has claimed for it, namely the power to decide whether a covert action should be initiated. Section 501(a)(1)(A) of the National Security Act provides that the provisions concerning notice to the committees "shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity." This statute is easily read as a delegation from Congress to the President of authority to go ahead and initiate a covert action: if Congress doesn't like it, the President will find out in due course.

Congress does want and expect to be involved with a covert action before the fact—not in order to approve, but to be notified. As previously mentioned, a heated debate has been in progress about the concept of prior notice under the Intelligence Oversight Act. Unfortunately, the statute is drafted quite badly. Congress thought it was getting a prior notice provision, while the Executive thought that it had avoided that

outcome. The legislative history reads as if the statute did require prior notice, but the statutory language is open to other constructions. Admiral Stansfield Turner, who is a strong proponent in general of a cooperative oversight process, has written in his book, *Secrecy and Democracy*, that the 1980 compromise specifically did not require prior notice. Admiral Turner has given various reasons why he held out against the concept of prior notice and why that bargain should not be changed. In recent testimony to the House Intelligence Committee, Admiral Turner has reaffirmed his position and has argued against efforts to require prior notice in circumstances where the lives of the persons undertaking the covert operation could be jeopardized.

On the question of statutory interpretation, Congress probably does have the better argument. The preferable construction of the statute would be that in general, covert operations are to be notified in advance to the intelligence committees. In extraordinary circumstances, prior notice can be limited to eight designated congressional leaders. In extra-extraordinary circumstances, where the window of opportunity will close in a matter of hours unless the President acts first and notifies later, he can act and then give notice "in a timely fashion," with timeliness being measured in hours or days rather than months or years. In no circumstances would a deferral of notice for months or years be justifiable. Thus, by deferring notice of the Iranian arms sales for some 11 or more months, the President did act contrary to the will of the Congress as expressed in the statutory law governing intelligence oversight. But there is enough ambiguity in the statute resulting from the murkiness of the 1980 compromise that the President's legal advisers apparently were prepared to defend the decision to defer notice indefinitely. Under Professor Koh's suggestion, perhaps such legal opinions of the executive branch could be subjected to some sort of congressional scrutiny. In any event, much of the blame for the prior notice problem has to be attributed to the fact that when the two sides compromised in 1980 on the question of the timing of notice, they had different understandings of what that compromise was.

As to policy prescriptions, it makes a difference whether one believes, as Professor Firmage does, that the President cannot do anything until Congress gives him a green light or whether one believes on the other hand that the light blinks yellow until Congress decides that the time has come to switch the signal to red. Congress has been considering a proposal that would amend the existing law to limit the period for deferral of notice to 48 hours. That change would be a desirable improvement to the law. Significantly, however, the bill would not make any change in the existing concept that neither Congress nor the oversight committees must give prior approval of a covert operation. Under the proposed bill the operation would go forward on Presidential initiative; notice would occur within 48 hours, and Congress would have to act affirmatively in order to stop it. In my judgment, it would not be wise to change the law to require advance congressional approval at the present time.

Concerning arms sales and the Arms Export Control Act, there is no doubt that as a matter of constitutional power Congress can reserve to itself total control over what arms may be exported and to whom. We have seen some hard-fought battles over controversial exports to Saudi Arabia, Jordan, and elsewhere, which show our democratic processes working so that every interest group can be heard and every argument considered. What went wrong in the Iranian case? Apparently, because of imperfections in the way the Arms Export Control Act is now formulated, the executive branch was able to exploit some loopholes and ambiguities in the law, such as a $14-million cut-off point before the act's requirements come into play. The provision that bars exports of arms to states that support international terrorism is subject to a presidential waiver. Once again, therefore, the issue is not one of constitutional power in

the Congress to regulate such exports, but rather of statutory authorization and procedural regularity in the application of the statute. If the President did make such a waiver, it was apparently not transmitted to Congress, but even if it had been, it is not clear that Congress could or would have been able to act on the information.

The final issue concerns funding. Congress can exercise its most meaningful leverage under the power of the purse. If Congress has the political will, it can impose funding limitations either before or after the fact. The funding controls that Congress imposed in the Central American program are far more complex than is sometimes realized. There were various controls in effect at various times, including controls on the purposes for which funds could be expended and on the agencies that could disburse them. A total temporary suspension was in effect for a period of time, and during part of the relevant period there was a ban on using funds for military as opposed to humanitarian purposes. Sweeping statements that Congress did not permit aid to the Contras in the period of diversion of the proceeds of the Iranian arms transfers are an oversimplification. If Congress is to reassert itself, it must make progress toward positive and detailed control in the funding area.

Many other statutes, such as the National Emergencies Act and the International Emergency Economic Powers Act, embody a congressional decision to allow the President to act without prior congressional approval: if it wishes, Congress can complain after the fact. Under the emergency powers legislation, the President by executive order may trigger a sweeping array of statutory emergency powers, including powers in the area of foreign commerce where Congress indisputably could reserve plenary authority to itself if it wished. The emergency powers legislation even has been used to affect individual liberties, such as in the area of travel control. If we are unhappy with this model of presidential initiation subject to congressional oversight and ex post facto control, we need what Congressman Leach has suggested: a Congress that will no longer abdicate its responsibilities. We do not need an exhortation that we should return to the original conception of the Framers.

If Congress is to take these matters in hand and assert its own policies affirmatively, it will have to make changes in the many statutes that either confer upon or confirm in the President authority to act first and take instructions later. Congress then would have to replace those provisions with a significantly different system of procedures or prohibitions. In the area of covert action, Congress could decide whether it wanted to write off the covert capability entirely, or it could decide to set up a system for congressional deliberation and approval in secret in advance. Such a system might not be feasible, and in any event it would be quite different from anything tried to date.

On the other hand, if we accept the idea that at least in the area of covert actions a debate prior to the approval of the operation is not feasible, then energy must be directed to strengthening congressional oversight of policy decision and implementation in ways that are more likely to make covert actions effective and acceptable than to render them impossible. The procedural improvements could include requiring written findings, transmitting the findings to the oversight committees as well as to key executive branch officers, limiting specifically the circumstances when notice could be deferred and imposing an outside limit of 48 hours on deferral of notice. Finally, the recommendation in the Tower Commission report for consolidating the intelligence oversight committees into a single joint committee with a common staff in theory could improve security and possibly help to foster the conditions of trust between the branches that have been sorely lacking in recent year. What is needed is the congressional will to take these matters in hand and to act affirmatively to establish new procedures.