Investigating Iran-Contra

Louis Fisher[1]

Early in the 1980s, the Reagan administration initiated a supposedly secret war against the Sandinista government in Nicaragua. In 1981 and 1982 the United States had provided covert assistance to the Contra rebels, but the operation was too large to remain hidden. Congress, the executive branch and the courts would eventually spend a decade dealing with what became known as the Iran-Contra affair. At issue throughout was the scope of presidential power over foreign affairs and the extent to which it could be controlled by Congress.

A. Statutory Limitations

By December 1982, Rep. Tom Harkin, D-Iowa, had sufficient information to introduce legislation designed to deny funds to the CIA and the Defense Department to furnish any military assistance to groups and individuals in Nicaragua.[2] He was able to point to various articles in newspapers and national magazines that described military activities in Nicaragua. During debate on Harkin's amendment, Rep. Edward Boland, D-Mass., disclosed that the House Intelligence Committee had already adopted restrictive language in a classified annex to the intelligence authorization bill. No funds authorized in the bill could be used "to overthrow the Government of Nicaragua or to provoke a military exchange between Nicaragua and Honduras."[3] Congress then enacted language prohibiting the CIA or the Defense Department from furnishing military equipment, military training or advice, or any other support for military activities "to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras."[4]

These legislative restrictions proved ineffective. Insurgent forces in Nicaragua openly admitted their intent to use military force to overthrow the Sandinistas.[5] In a May 1983 report, the House Intelligence Committee remarked: "This is no longer a covert operation. The public can read or hear about it daily. Anti-Sandinista leaders acknowledge U.S. aid."[6] Early in 1984, Congress learned that the administration relied on the CIA to mine the harbors of Nicaragua, putting at risk both domestic and foreign vessels. Congress enacted this statutory language in response: "It is the sense of Congress that no funds heretofore or hereafter appropriated in any Act of Congress shall be obligated or expended for the purpose of planning, directing, executing, or supporting the mining of the ports or territorial waters of Nicaragua."[7]

1. Louis Fisher is scholar in residence at the Constitution Project. From 1970 to 2010 he worked at the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and specialist in constitutional law at the Law Library. In 1987, he served as research director of the House Iran-Contra Committee, writing sections of the majority report. Many of his articles and congressional testimony are posted on his personal webpage: http://loufisher.org.

2. 128 Cong. Rec. 29457 (1982).

3. *Id.* at 29466.

4. 69 Stat. 1865 § 793 (1982).

5. H.R. Rep. No. 122, pt. 1, at 11 (1983).

6. *Id.* at 12.

7. 98 Stat. 1210 § 2907 (1984).

Later in 1984, Congress enacted what is called the Boland Amendment, preventing any funds from being used to support the Contras. The objective was to adopt all-embracing language to prevent any further evasions by the administration. The full text stated:

> During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.[8]

Congress drafted this exacting language because the Reagan administration had demonstrated a willingness to exploit every possible loophole. Congress hoped to close them all. Even so, some lawmakers suspected the administration would find some way to assist the Contras. During a Senate hearing on March 26, 1985, Senator Christopher Dodd, D-Conn., remarked that there

> have been a number of rumors or news reports around this town about how the administration might go about its funding of the contras in Nicaragua. There have been suggestions that it would be done through private parties or through funneling funds through friendly third nations, or possibly through a new category of assistance and asking the Congress to fund the program openly.[9]

His instincts and judgments were good.

In testimony at the hearing, Assistant Secretary of State for Inter-American Affairs Langhorne S. Motley assured Senator Dodd that the administration would make no attempt to circumvent the Boland Amendment by soliciting funds from private parties or foreign governments. He said the administration would comply fully with statutory policy: "Nobody is trying to play games with you or any other Member of Congress. That resolution stands, and it will continue to stand; and it says no direct or indirect. And that is pretty plain English; it does not have to be written by any bright, young lawyers. And we are going to continue to comply with that."[10]

Motley offered similar assurances to the House Committee on Appropriations on April 18, 1985, testifying that the administration would not attempt to solicit funds from outside sources to assist the Contras.[11] When President Reagan signed the continuing resolution that contained the strict language of the Boland Amendment, he did not issue a statement that Congress had overstepped its authority and the administration would be at liberty to pursue its policy in Nicaragua. Neither Attorney General Edwin Meese nor the Office of Legal Counsel in the Justice Department raised any legal objections to the Boland Amendment. National policy seemed to be clear and settled.

However, at the very moment that Motley was testifying before the two legislative hearings, executive branch officials were actively soliciting funds from private parties and foreign governments to assist the Contras. Working closely with the White House and the National Security Council, private citizens raised more than $10 million from private contributors, most of it for the Contra cause. Potential donors were given a list of weapons and ammunition, with a price assigned to each item.[12] Several foreign governments agreed to provide funds, setting up the problem that the U.S. government, at some future date, would have to respond with a quid pro quo. Congress would later pass legislation to deal with that issue.

8. 98 Stat. 1935 § 8066(a) (1984).

9. *Security and Development Assistance: Hearings before the S. Comm. on Foreign Relations*, 99th Cong., 1st Sess. 908 (1985).

10. *Id.* at 910.

11. *Department of Defense Appropriations for 1986: Hearing before the H. Comm. on Appropriations*, 99th Cong. 1092 (1985).

12. S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and H. Select Comm. to Investigate Covert Arms Transactions with Iran, Report of the Cong. Comm. Investigating the Iran-Contra Affair, H.R. Rep. No. 100-433 and S. Rep. No. 100-216, at 85-103 (1987) [hereinafter Iran-Contra Report].

B. The Story Begins to Break

On October 5, 1986, a C-123 aircraft carrying small arms, ammunition, uniforms, and medicine for the Contras was shot down over Nicaragua. One crew member, Eugene Hasenfus, survived and was captured by the Sandinistas. Documents recovered from the plane connected it to Southern Air Transport (SAT), a former CIA proprietary charter airline based in Miami, Florida.[13] Hasenfus told his captors that he worked under someone named Max Gomez, the "CIA's overseer" of operations out of a base where the flight had originated.[14] Max Gomez was the code name for Felix Rodriguez, a retired CIA officer who helped the Reagan administration provide assistance to the Contras.[15] When national security adviser John Poindexter briefed President Reagan about the shoot-down of the C-123, he gave assurances that the government had no connection with Hasenfus's aircraft.[16]

Illegal assistance to the Contras became linked with another Reagan initiative: supplying arms to Iran. Previously, the Reagan administration had told the American public and allies that all nations should be neutral in the war between Iran and Iraq, and had a policy not to deliver weapons to either country. The Reagan administration also emphasized that it was firmly opposed to providing any concessions to terrorists. But on November 3, 1986, a Lebanese weekly named *Al-Shiraa* reported that the United States had secretly sold arms to Iran. The Iranian government confirmed this report. The Reagan administration initially denied it, but on November 25, 1986, Attorney General Edwin Meese acknowledged weapons being sold to Iran and diverted to the Contras.[17] The purpose of the arms sales, the administration said, was to gain the assistance of Iran for the release of American hostages held by terrorists.

C. The Tower Commission Report

The administration, aware of the damage to its credibility, acted quickly. On December 1, 1986, President Reagan issued Executive Order 12575, creating a special review board of three persons to study the role of the National Security Council staff in operational activities, "especially extremely sensitive diplomatic, military, and intelligence missions." The board was given 60 days to submit its findings. All departments, agencies, and independent instrumentalities were directed to provide to the board, "to the extent permitted by law," information requested.[18] Former Senator John Tower served as chairman, and the board was commonly called "the Tower Commission." The other two members were former Secretary of State Edmund Muskie and former national security adviser Brent Scowcroft.

In issuing its report, the board said that some key witnesses had refused to testify before any forum, vital documents were not available, nor were important witnesses from other countries available. The board had no authority to subpoena documents, compel testimony, swear witnesses, or grant immunity.[19] Several individuals who were central to the Iran-Contra affair, including John Poindexter and Oliver North, declined to appear before the board.[20] John Tower wrote to President Reagan, asking that he order the two men to appear. White House counsel Peter Wallison advised Tower that Poindexter and North had a constitutional right not to testify.[21] As to the role of NSC staff in support of the Contras, the board "had neither the time nor the resources to make a systematic inquiry into this area."[22]

The board described NSC as an advisory body, not designed to be decision-making or operational. To the extent that the national security advisor assumes operational responsibilities, "the legitimacy of that role and his authority to perform it

13. *Id.* at 287.
14. Lawrence E. Walsh, Firewall: The Iran-Contra Conspiracy and Cover-Up 21 (1997).
15. *Id.* at 21.
16. *Id.* at 244.
17. Iran-Contra Report, *supra* note 12, at 269.
18. Report of the President's Special Review Board 100 (1987) [hereinafter Tower Commission Report].
19. *Id.* at 16.
20. *Id.* at 17, 511-14.
21. *Id.* at 515-16.
22. *Id.* at 3.

may be challenged."[23] The board recommended that the national security advisor "should focus on advice and management, not implementation and execution," as the latter "is the responsibility and the strength of the departments and agencies."[24]

D. The Congressional Investigation

Congress, aware that the administration had regularly lied about its adherence to statutory policy, decided that the implications for U.S. foreign policy and the rule of law required a full-scale inquiry. On January 6, 1987, the Senate established the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition. The next day, the House established the Select Committee to Investigate Covert Arms Transactions with Iran. The two chambers initially focused on four major areas: arms sales to Iran, the diversion of funds to the Contras, violations of federal law, and the involvement of National Security Council staff in the conduct of foreign policy. These investigations necessarily implicated the constitutional question of how the two elected branches formulate and execute national security policy.

The two committees merged their investigations and hearings and shared all the information they obtained. The staffs worked together in reviewing more than 300,000 documents and interviewing or examining more than 500 witnesses. The joint committee held 40 days of public hearings and several executive sessions, and issued a joint report.[25]

The committee conducted its investigation with a mix of advantages and drawbacks. One benefit was the decision of President Reagan to completely waive executive privilege, the first president to do so. It is likely that he took this step to lessen the risk of impeachment. By waiving executive privilege, Reagan instructed all relevant agencies to produce their documents and witnesses. He made available extracts from his personal diary, although he rejected the request of the joint committee to refer to those entries in the final report on the ground that he did not wish to establish a precedent for future presidents.[26]

On the downside, a key witness—CIA Director William Casey—resigned on January 29, 1987, incapacitated with a brain tumor. He was thus unavailable for visitors from the committee or the office of Independent Counsel Lawrence Walsh. He died on May 6, 1987. Moreover, members of the National Security Council shredded relevant documents in the fall of 1986. The committee therefore lacked evidence that could have resolved the problem of witnesses offering inconsistent testimony and often stating that they could not recall certain events. Finally, the committee operated under an extremely tight schedule, determined to holds hearing from May 5 to August 6 and issue its final report on November 17, 1987.

Why agree to such an unrealistic deadline, given the time needed to hear witnesses and carefully analyze hundreds of thousands of agency documents? One factor was the presidential election in 1988. Releasing a report in the middle of that year would likely have an impact on the candidates. As noted by Senators William Cohen and George Mitchell, an investigation that "spilled into 1988 could only help keep Republicans on the defensive during an election year."[27] The deadline also provided "critical leverage for the attorneys of witnesses in dealing with the Committee on whether their clients would appear without immunity and when in the process they might be called."[28]

As to granting immunity, witnesses before a congressional committee may invoke the Fifth Amendment privilege against self-incrimination but a procedure is available to force certain testimony. Witnesses may receive full or absolute immunity. Compelled testimony in the company of absolute immunity meets the essential purpose of the Self-Incrimination Clause. There is also partial or "use" immunity. Under this procedure, a witness can be compelled to testify and later be prosecuted so long as the witness's testimony (or evidence derived from it) is not used in the prosecution. North received partial immunity when he testified before the Iran-Contra committee, as did Poindexter.

23. *Id.* at 11.

24. *Id.* at 92.

25. The first section of the report runs from pages 1 to 427, followed by a minority report signed by eight Republican members, covering pages 437 to 586. These members were Senators James McClure (Idaho) and Orrin Hatch (Utah) and Representatives Dick Cheney (Wyo.), William Broomfield (Mich.), Henry Hyde (Ill.), Jim Courter (N.J.), Bill McCollum (Fla.) and Michael DeWine (Ohio). Three Republican senators did not sign the minority report: Warren Rudman (N.H.), William Cohen (Maine), and Paul Trible (Va.).

26. Iran-Contra Report, *supra* note 12, at xvi.

27. William S. Cohen & George J. Mitchell, Men of Zeal: A Candid Inside Story of the Iran-Contra Hearings 30 (1988).

28. *Id.* at 31.

Because of the decision to grant immunity, witnesses were not deposed by committee staff before they appeared before the committee. A private meeting with North, Poindexter, and others might have helped the committee members and their counsel decide how to ask questions during the hearings. Understandings could have been reached to avoid time-consuming and embarrassing challenges and confusion before a witness testified, as happened on numerous occasions.

There is an obvious tension between the decision of Congress to grant immunity in order to better inform itself and the efforts of prosecutors to convict wrongdoers. Independent Counsel Walsh did not object to the committee granting immunity. He offered this explanation on how national priorities are established: "If the Congress decides to grant immunity, there is no way that it can be avoided. They have the last word and that is a proper distribution of power....The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need."[29]

E. Congressional Hearings

The purpose of the hearings was to determine which officials in the administration knew about the assistance to the Contras in violation of the Boland Amendments, who was involved in the transfer of arms to Iran, and who (such as President Reagan) knew that profits from the arms sales went to the Contras. Those were the specific issues, not the larger question of covert operations in U.S. history. However, when North appeared before the committee on July 7, 1987, House chief counsel John Nields decided to question North about covert operations and the need for secrecy.

Nields began by asking whether North was involved in support of the Contras during the time the Boland Amendment was in effect and in the sale of arms to Iran. North responded "Yes." Nields further asked whether the operations were carried out in secret. North answered: "We hope so." Nields asked whether they were covert operations. North answered that they were. Here Nields went far afield from the specific objectives set for the hearings. He asked whether covert operations "are designed to be secrets from our enemies?" North gave the obvious answer: "That is correct." Nields added: "But these operations were designed to be secrets from the American people." North responded: "Mr. Nields, I am at a loss as to how we can announce it to the American people and not have the Soviets know about it. I am not trying to be flippant, but I don't see how you can possibly do it."[30]

At that point, Nields directed his objection not to the specific issues of assisting the Contras despite a statutory ban, selling arms to Iran, and using proceeds to benefit the Contras. He objected in general to covert operations and reliance on secrecy. He told North: "In certain Communist countries, the Government's activities are kept secret from the people, but that is not the way we do things in America, is it?"[31] North responded by stating the obvious: "By their very nature, covert operations or special activities, are a lie. There is great deceit—deception practiced in the conduct of covert operations. They are at essence a lie. We make every effort to deceive the enemy as to our intent, our conduct, and to deny the association of the United States with those activities." The intelligence committees, he explained, hold hearings on these activities but do so in secret session, with the information kept from the public and even other lawmakers not on those committees.[32]

Nields said, accurately, that the American people were told by the Reagan administration that the government had "nothing to do with the Hasenfus airplane, and that was false, and it is a principal purpose of these hearings to replace secrecy and deception with disclosure and truth, and that is one of the reasons we have called you here, sir."[33] Yes, the principal purpose of the congressional investigation was to establish the facts about the Iran-Contra affair and to make it public, but there was no need to recommend that all covert operations be abolished or prohibit the secrecy needed to

29. Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 Houston L. Rev. 1, 9 (1988). For proposals to change the immunity statute to make congressional grants of immunity less costly to prosecutors and to Congress, *see* Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 Minn. L. Rev. 407 (1995).

30. *The Iran-Contra Investigation: Joint Hearings Before the S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the H.R. Select Comm. to Investigate Covert Arms Transactions with Iran*, 100th Cong. 7 (1987) (hereinafter *Iran-Contra Hearings*).

31. *Id.* at 9.

32. *Id.*

33. *Id.* at 10.

maintain those programs. The Iran-Contra committee understood the need for secrecy. Instead of publicly identifying the foreign governments involved, they were identified in the hearings and final report as Country 1, Country, 2, Country 3, etc.

F. Committee Findings

Given the serious statutory and constitutional violations committed by the Reagan administration, it was important for Congress to clearly identify those violations and restore the country to fundamental principles. That did not happen because Congress split into two factions: Democrats and some Republicans willing to hold the administration accountable, versus a number of Republicans in a minority report objecting that Congress had intruded into policy areas left exclusively to the president. The position in the minority report did not have a steady shelf life. It was applied while President Reagan served in office, revived again under President George W. Bush and Vice President Dick Cheney, but if Democratic presidents Bill Clinton and Barack Obama decided to act unilaterally in making and carrying out national policy, or could be accused of not telling the truth, Republicans were ready to hold them to account.

The majority report was signed by all Democrats and three Republican senators. The report recognized the value of covert action provided they were done with "prior authorization of the President and timely notice to Congressional committees specially constituted to protect the secrecy necessary for effective operations."[34] With Iran-Contra, covert actions were taken outside specific authorization by the president and by actions through entities other than the CIA.[35] In particular, NSC staff took "an increasingly active role in support of the Contras," raising money for the Contras and creating an organization outside the government to procure arms and resupply the Contras.[36] No presidential finding covered the effort to ransom hostages in the Middle East, ship arms to Iran, or divert money from the Iran program to the Contras.[37] Accountability to Congress was further undermined when senior administration officials misled Congress, withheld information, destroyed documents, and failed to speak up when they knew other officials had given Congress incorrect information.[38]

By relying on funding from private citizens and foreign governments, Iran-Contra violated the basic constitutional principle that all government operations must be funded from appropriated monies of funds made known to oversight committees.[39] As for the field of foreign policy, the majority report emphasized that control is vested in both Congress and the president and the system of checks and balances.[40] During the hearings, several witnesses claimed that the Supreme Court in *United States v. Curtiss-Wright Export Corporation* vested broad inherent power over foreign policy to the exclusion of Congress.[41]

The Reagan administration relied heavily on *Curtiss-Wright* to justify its actions during Iran-Contra. Charles J. Cooper, head of the Office of Legal Counsel, wrote a lengthy memo on December 17, 1986, stating that the president has substantial discretion in deciding when to report to Congress about activities in the realm of foreign policy. He claimed that the president possesses "inherent and plenary constitutional authority in the field of international relations."[42] Throughout this 17-page memo, Cooper cites *Curtiss-Wright* eight times in an effort to establish the president's exclusive power over external affairs.

34. Iran-Contra Report, *supra* note 12, at 375.

35. *Id.* at 378.

36. *Id.* at 379.

37. *Id.*

38. *Id.* at 381.

39. *Id.* at 383.

40. *Id.* at 387.

41. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

42. Charles J. Cooper, The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act, 10 Op. O.L.C. 159, 160 (1986). His legal memo was printed in *Iran-Contra Hearings*, Vol. 100-9, at 1546-72. For the degree to which the Reagan administration relied on *Curtiss-Wright*, see Theodore Draper, A Very Thin Line: The Iran-Contra Affairs 591-92 (1991).

However, the majority report explained that *Curtiss-Wright* did not involve any inherent or exclusive power of the president. Instead, it concerned only presidential action in placing an arms embargo in a region in South America pursuant to express statutory authority from Congress.[43] In *Curtiss-Wright*, Justice George Sutherland relied heavily on a speech by John Marshall in 1800 when he served in the House of Representatives.[44] Marshall said that the president "is the sole organ of the nation in its external relations, and its sole representative with foreign nations." The majority report correctly noted that Marshall was *not* promoting inherent and exclusive power of the president over external affairs. Instead, he merely defended president John Adams for turning over to England a British subject charged with murder, a power given the president by the Jay Treaty.[45] President Adams was not making national policy unilaterally. He was simply carrying out an extradition provision in a treaty agreed to by both branches. To the majority report, actions by the Reagan administration weakened the president and damaged the constitutional system of government.[46]

The minority report in its introduction conceded that President Reagan and his staff "made mistakes in the Iran-Contra Affair" but gave credit to Reagan for taking "the hard step of acknowledging his mistakes and reacting precisely to correct what went wrong." Moreover, the mistakes "were just that—mistakes in judgment, and nothing more. There was no constitutional crisis, no systematic disrespect for 'the rule of law,' no grand conspiracy, and no Administration-wide dishonesty or cover-up. In fact, the evidence will not support any of the more hysterical conclusions the Committees' Report tries to reach." The minority report claimed that no one in government "was acting out of corrupt motives."[47]

According to the minority report, the dispute originated from "an aggrandizing theory of Congress' foreign policy powers that is itself part of the problem." Compounding the friction between the two branches was a "history and legitimate fear of leaks" by Congress and "vaguely worded and constantly changing laws to impose policies in Central America that went well beyond the law itself."[48] Judgments about the Iran-Contra affair "ultimately must rest upon one's views about the proper roles of Congress and the President in foreign policy." To prevent future disagreements, Congress "must recognize that an effective foreign policy requires, and the Constitution mandates, the President to be the country's foreign policy leader." Although no president "can ignore Congress and be successful over the long term," Congress needed to realize that "the power of the purse does not make it supreme."[49] Still, the report acknowledges that the president "cannot use the country's resources to carry out policy without congressional appropriations."[50]

The minority report relies extensively on Justice Sutherland's erroneous "sole organ" dicta in *Curtiss-Wright* to conclude that the president possesses "inherent" foreign policy powers that are not subject to congressional control, either through statutory restrictions or withholding appropriations. That doctrine is undermined by sections in the minority report that concede the president's dependence on appropriations from Congress. Building on the sole-organ doctrine, the minority states that "it is beyond question that Congress did not have the constitutional power to prohibit the President from sharing information, asking other governments to contribute to the Nicaraguan resistance, or entering into secret negotiations with factions inside Iran."[51] Justice Sutherland's obvious misreading about John Marshall's speech was finally acknowledged by the Supreme Court in *Zivotofsky v. Kerry* (2015). When the Justice Department relied on the sole-organ doctrine to justify exclusive and independent presidential power over external affairs, the court responded: "This Court declines to acknowledge that unbounded power."[52]

43. Iran-Contra Report, *supra* note 12, at 388.

44. *Curtiss-Wright*, 299 U.S. 304 at 319.

45. Iran-Contra Report, *supra* note 12, at 389-90.

46. *Id.* at 392.

47. *Id.* at 437.

48. *Id.* at 437-38.

49. *Id.* at 438.

50. *Id.* at 478.

51. *Id.* at 473.

52. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2089 (2015). On July 17, 2014, I filed a brief *amicus curiae* with the Supreme Court in this case, analyzing the erroneous sole-organ dicta in *Curtiss-Wright* and asking the court to publicly make a correction, *see* Brief for Louis Fischer as Amicus Curiae Supporting Petitioner, Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (No. 13-628), http://www.loufisher.org/docs/pip/Zivotofsky.pdf.

The minority report appears to end on a critical note about claims of exclusive and plenary presidential power over external affairs. It states that the Constitution "gives important foreign policy powers both to Congress and the president. Neither can accomplish very much over the long term by trying to go it alone." It rejected the theory that the president may use "the country's resources to carry out policy without congressional appropriations."[53] At face value, such language prevents presidents from attempting to use funds from private parties and foreign countries to implement their national security policies. Having gone back and forth on its understanding of the Constitution, the minority report offers a broad reading of presidential power over national security policy: "The executive branch's functions are the ones most closely related to the need for secrecy, efficiency, dispatch, and the acceptance by one person, the President, of political responsibility for the result. His basic framework must be preserved if the country is to have an effective foreign policy in the future."[54]

G. Prosecutorial Efforts

Walsh's effort to prosecute individuals involved in Iran-Contra was undermined in many ways, partly by the documents that suspects were able to destroy and the immunity granted by Congress to further its investigation. As part of his investigation, Walsh looked into the activities of Joseph Fernandez, the CIA station chief in Costa Rica who helped North supply the Contras in violation of the Boland Amendment. On June 20, 1988, a grand jury indicted Fernandez for false statements and obstruction and for conspiring with North and others to carry out the covert action. The conspiracy count was later dropped. The prosecution of Fernandez would likely have shed further light on the CIA's role and put others at risk. That line of inquiry closed when Attorney General Richard Thornburgh refused to release classified information needed for the trial.[55]

On August 4, 1993, Independent Counsel Walsh released his final report. He explained that after a grand jury on March 16, 1988, handed down a 23-count indictment against Poindexter, North, Secord, and Hakim, U.S. District Judge Gerhard Gesell ordered severance of the trials because Poindexter, North, and Hakim had given immunized testimony to the Iran-Contra Committee. North was tried and convicted by jury in May 1989 of altering and destroying documents, accepting an illegal gratuity, and aiding and abetting in the obstruction of Congress. His conviction was reversed on appeal in July 1990 and the charges were dismissed in September 1991 on the ground that trial witnesses had been tainted by North's televised testimony to Congress. Poindexter was convicted by a jury on five felony counts of conspiracy, false statements, destruction and removal of records, and obstruction of Congress. His conviction was reversed on appeal because of the immunized testimony issue. Secord pled guilty to falsely denying to Congress that North had personally benefited from his involvement in Iran-Contra. Hakim pled guilty to a misdemeanor count of supplementing North's salary.[56]

On June 16, 1992, a grand jury indicted Secretary of Defense Caspar Weinberger for five felonies, including one count of obstructing the congressional investigation, two counts of false statements, and two charges of perjury. President George H. W. Bush was likely to be called to Weinberger's trial to testify. Bush had denied knowing that Weinberger and Secretary of State George Shultz had opposed the sale of arms to Iran, but a supplemental indictment of Weinberger disclosed that Bush, as vice president, had attended a White House meeting where Reagan had overridden both Weinberger and Shultz.[57]

On November 2, 1992, Walsh filed a supplemental indictment against Weinberger. Whatever further prosecutorial efforts Walsh intended were blocked when President Bush on December 24, 1992, issued pardons to six people involved in the Iran-Contra affair. At the top of the list was Weinberger. The others were Robert McFarlane, Elliott Abrams, and CIA officials Clair George, Alan Fiers, and Duane Clarridge.

53. Iran-Contra Report, *supra* note 12, at 478.

54. *Id.*

55. Walsh, *supra* note 14, at 210-11, 218-19.

56. Lance Cole & Stanley M. Brand, Congressional Investigations and Oversight 236-37 (2011).

57. *Id.* at 415, 419.

H. Subsequent Evaluations

In a study published in 2011, Lance Cole and Stanley M. Brand focused on the issue of the Self-Incrimination Clause raised by the Iran-Contra investigation. In his final report, Walsh weighed the tension between congressional oversight and efforts to enforce existing law in this manner: "When a conflict between the oversight and prosecutorial roles develops—as plainly occurred in the Iran/contra affair—the law is clear that it is Congress that must prevail." He added that Congress, in exercising this judgment, must be "sensitive to the dangers posed by grants of immunity to the successful prosecution of criminal conduct."[58] The costs to society are significant. As in Iran-Contra, "the more peripheral players are convicted while the central figures in the criminal enterprise escape punishment." The failure to punish "may lead the public to believe that no real wrongdoing took place."[59] Disrespect for Congress by a popular president like Reagan and his appointees was obscured when Congress accepted "the tendered concept of a runaway conspiracy of subordinate officers and avoided the unpleasant confrontation with a powerful President and his Cabinet."[60] To Walsh, the evidence he acquired established that the Iran-Contra affair was "not an aberrational scheme carried out by a 'cabal of zealots' in the National Security Council staff, as the congressional Select Committees concluded in their majority report." It was instead the product of two foreign policy directives issued by Reagan that "skirted the law and which was executed by the NSC staff with the knowledge and support of high officials in the CIA, State and Defense departments, and to a lesser extent, officials in other agencies."[61]

Walsh underscored that the extensive role of the NSC in formulating and carrying out national security policy was facilitated by the regular departments failing to exercise control. He singled out two Cabinet officers—Defense Secretary Weinberger and Secretary of State Shultz—who opposed the sale of arms to Iran because it was illegal and bad policy. Yet they "either cooperated with the decision once made, as in the case of Weinberger, or stood aloof from it while being kept informed of its progress, as was the case of Schultz [sic]."[62]

In a study published in 2011, David L. Hostetter evaluates the Tower Commission, the Iran-Contra hearings, and Independent Counsel Walsh. To Hostetter, the quick work of the Tower Commission, pledging to make information publicly available and working through a bipartisan board, "shielded President Reagan from any sustained consideration of impeachment by Congress." Moreover, Walsh's efforts "were hampered by the congressional investigation, which granted immunity to many of the key players in order to get them to testify publicly."[63] As for the hearings, Hostetter initially focused on the Iran-Contra committee selecting Arthur Liman as chief counsel for the Senate and John Nields as chief counsel for the House. They were chosen for their professional qualifications, "not their ability to project a likable persona to a television audience." Liman, "the gruff New Yorker whose unruly hair often draped over his eyes, and Nields, young-looking with a coif that brushed the collar of his suit jacket, often appeared as if they were imperious tribunes persecuting brave individuals who were only trying to do what they thought was right." The image they conveyed "was at odds with the neat hair and military bearing of many of the witnesses."[64]

Alone among the witnesses, McFarlane "expressed remorse for his actions." He had attempted suicide in February 1987 because of his role in the scandal. Despite misgivings at the time, he explained how he had "falsified the chronology of events to help cover up the illegalities of the affair."[65] Assistant Secretary of State Elliott Abrams admitted to the committee that he had misled Congress about the funding of the Contras. He had reached out to the sultan of Brunei, a small monarchy on the island of Borneo in the Pacific, to seek $2 million for the Contras. However, because of a clerical error by North's secretary, Fawn Hall, the money ended up in the wrong Swiss bank account and never reached the Contras. When Abrams continued to evade questions put to him by committee members, Rep. Jack Brooks, D-Texas, asked: "Do you have to be authorized to tell the truth?"[66]

58. *Id.* at 325.

59. *Id.* at 326.

60. *Id.*

61. *Id.* at 327.

62. *Id.* at 328.

63. David L. Hostetter, *The Iran-Contra Hearings, 1987*, in 2 Congress Investigates: A Critical and Documentary History 976 (Robert Burns et al. eds., rev. ed. 2011).

64. *Id.* at 977.

65. *Id.*

66. *Id.* at 978.

Testimony from several attorneys in the administration gave insight into the kind of values and calculations that led to Iran-Contra. Bretton Sciaroni, a lawyer and sole staff person on the Intelligence Oversight Board, offered his opinion that the Boland Amendments pertained only to the Defense Department and the CIA, not to NSC. Assistant Attorney General Charles Cooper, who worked on the Meese investigation in November 1986, made it clear that the slow pace of that investigation gave North and others ample time to destroy documents. When asked whether he thought North's testimony could be believed, he told the committee that he did not think "an oath in any way enhances the obligation of truthfulness."[67] Fawn Hall, after being granted immunity, testified that she helped North destroy phone logs and e-mail messages to eliminate evidence of illegality, explaining that in the pursuit of just ends "sometimes you have to go above the written law."[68]

As Hostetter notes, North had generally worn civilian clothes while working at the National Security Council but appeared before the committee in his Marine uniform "festooned with medals." With his partial immunity, he admitted that he had shredded documents, lied to Congress, misled the CIA, and engaged in subterfuge. Aided by his counsel, Brendon Sullivan, over a period of six days he defended his actions in such a spirited way that it led to an outpouring of public support called "Olliemania." Heavy-handed efforts by the Iran-Contra committee to discredit him helped make him a hero in the eyes of many. North made it seem that Congress, not the administration, had damaged the national interest by withholding funds from the Contras and "interfering with sensitive operations related to the attempt to gain freedom for American hostages."[69]

In 2014, Malcom Byrne published a detailed analysis of the Iran-Contra affair, focusing on Reagan's role in supporting unchecked abuse of presidential power. Byrne is deputy director and research director at the National Security Archive, which has a long history of seeking confidential documents and having them declassified for public access. This book benefits from access to a number of previously unavailable Iran-Contra documents. To Byrne, far from being the work "of a few mid-level 'rouge operatives,'" Iran-Contra involved "at various stages an array of senior officials including the president and vice president themselves." By presenting the diversion of funds from arms sales to Iran to the Contras as the main issue, the administration "managed to marginalize the importance of other critical elements."[70] Among those were Reagan's evident support for the Contras in violation of the Boland Amendments and his clear knowledge and approval of selling weapons to Iran. As Byrne notes: "The president approved every significant facet of the Iran arms deals, and he encouraged conduct by top aides that had the same aim and outcome as the diversion—to subsidize the Contra war despite the congressional prohibition on U.S. aid."[71]

Byrne clarifies that many top officials in the Reagan administration knew that various elements of Iran-Contra were not only illegal and unconstitutional but invited impeachment. When it was argued that it would be entirely lawful for the administration to seek money from foreign governments for resources that Congress had not only denied but prohibited, Secretary of State Shultz objected: "I would like to get money for the Contras also, but another lawyer, Jim Baker [the president's chief of staff], said that if we go out and try to get money from third countries, it is an impeachable offense."[72] According to Weinberger, Reagan was so intent on rescuing American hostages held in the Middle East that "he could answer charges of illegality but he couldn't answer [the] charge that 'big strong President Reagan passed up a chance to free hostages.'"[73] Shultz confirmed Weinberger's recollection. Reagan believed that the public could not understand if four hostages died because "I wouldn't break the law." His attitude: "They can impeach me if they want."[74]

67. *Id.* at 979.

68. *Id.*

69. *Id.* at 980.

70. Malcolm Byrne, Iran-Contra: Reagan's Scandal and the Unchecked Abuse of Presidential Power 3 (2014).

71. *Id.*

72. *Id.* at 78.

73. *Id.* at 106.

74. *Id.* at 107.

To Byrne, the Iran-Contra affair did not provide any instructive lessons to avoid future scandals. The congressional and independent counsel processes "failed to create a disincentive for future administrations against ill-conceived exercises of presidential power."[75] Cheney, one of the leaders of the minority report, took steps in the George W. Bush administration to expand the reach of the executive branch. In 2005, he told reporters that the minority report was the best "road map" to understand the proper constitutional relationship between Congress and the President.[76] The increase in independent executive power under the Bush II administration led to "enhanced interrogation" of terrorism suspects, warrantless surveillance of U.S. citizens, deceptive arguments to justify war against Iraq, and increased secrecy "ranging from counterterrorism to economics."[77] The inability of Congress and the courts to check the abuse of Iran-Contra "leaves the way open for future presidents—and their staffs—to press their advantage as far as politics will allow, posing predictable hazards to the broader public interest."[78]

I. Conclusion

As described above, there are many takeaways from the Iran-Contra investigation. Two bear emphasis: one that resulted immediately from Congress's oversight and the other that has had an impact over time. At stake are fundamental constitutional principles, including separation of powers, the system of checks and balances, and the Framers' concern that power not be concentrated, particularly over the war power.

First, the Iran-Contra investigation discredited Reagan's image as a strong, decisive, and accountable commander in chief. He said he did not know about various decisions by executive officials, including continued funding of the Contras despite the Boland Amendment and the diversion of profits from the sale of weapons to Iran to assist the Contras. Vice President George H. W. Bush, supposedly closely involved in matters of national policy and ready to take over as president if Reagan became incapacitated, claimed to know little about Iran-Contra. He said he knew about the sale of arms to Iran but not about the diversion of funds to the Contras.[79] As to key meetings on Iran-Contra, he recalled: "it appears I was not there. I can not possibly reconstruct events. I can not remember details and nobody can."[80]

Second, the Iran-Contra hearings and committee report offered Congress an opportunity to restore fundamental constitutional principles about the rule of law and the power of the purse. The majority report did that, but the minority report adopted an entirely different model of national security policy, granting to the president extensive independent powers to initiate military action even in the face of statutory prohibitions. That model has been costly to the nation.

Consider presidential actions from World War II to the present time. In 1950, Truman decided to go to war against North Korea without seeking congressional authority. Truman and the Democratic Party paid dearly with the resulting military stalemate and heavy loss of lives.[81] President Johnson decided to seek congressional authority with the Tonkin Gulf Resolution in August 1964 after announcing that North Vietnam had made two attacks on U.S. vessels, a claim doubted at the time and later found to be false in a NSA study released in 2005. What was thought to be a second attack consisted of late signals coming from the first.[82] Johnson's decision to escalate the war split the country and persuaded Johnson not to run for another term.

75. *Id.* at 338.

76. *Id.*

77. *Id.* at 338-39.

78. *Id.* at 339. For further analysis of Cheney's determination to apply the lessons of Iran-Contra in his effort to rebuild inherent and plenary presidential power in the Bush II administration, see Charlie Savage, Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy 50-63, 83, 202 (2007).

79. George Bush, All the Best: My Life in Letters and Other Writings 354 (1999).

80. *Id.* at 356.

81. Louis Fisher, Presidential War Power 80-103 (3d ed., 2013).

82. Robert J. Hanyok, *Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2–4 August 1964*, Cryptologic Quarterly, Feb. 1998, http://www.nsa.gov/public_info/files/_files/gulf_of_tonkin/articles/rel1_skunks_bogies.pdf (declassified by the National Security Agency on Nov. 3, 2005).

In 2002, President George W. Bush did come to Congress to seek statutory authority for taking military action against Iraq, but lost credibility with his justifications. In his State of the Union address on January 28, 2003, Bush said that the British government "has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."[83] Why rely on British intelligence instead of U.S. intelligence? As it turned out, the document used by the British government turned out to be a fabrication, containing crude errors that undermined its value.[84] The administration offered five other reasons why Saddam Hussein possessed weapons of mass destruction, with all found to be entirely empty of substance.[85]

In 2011, President Obama decided against seeking congressional authority when he used military force against Libya. Initially, he said the action would be "a matter of days and not a matter of weeks."[86] It lasted seven months. When military operations exceeded the 60-day deadline of the War Powers Resolution, requiring him to cease operations unless Congress provided statutory authority, he asked the Office of Legal Counsel to write a memo that the WPR did not apply because there were no "hostilities" in Libya, despite the use of Tomahawk missiles launched from the Mediterranean, attacks by military aircraft, and use of armed drones. OLC refused to write the memo. Jeh Johnson, general counsel in the Defense Department, also refused Obama's request. Finally, White House counsel Robert Bauer and State Department Legal Adviser Harold Koh came to Obama's rescue, making the fatuous assertion that no hostilities existed in Libya.[87]

Following the model adopted by the Iran-Contra committee minority report, presidents from Truman to Obama have damaged themselves, the country, and the Constitution by invoking implausible arguments about access to inherent and independent powers over national security policy.

83. President George Bush State of the Union Address, 1 Pub. Papers 88 (Jan. 28, 2003).

84. Joby Warrick, *Some Evidence on Iraq Called Fake*, Wash. Post, March 8, 2003, at A.

85. Fisher, *supra* note 81, at 216-21.

86. President Barack Obama's News Conference with President Sebastian Pinera Echenique of Chile, 1 Pub. Papers 271 (Mar. 21, 2011).

87. Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. Times, June 18, 2011, at A1; see also Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 Pres. Stud Q. 176 (2012).