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I am submitting herewith a dissertation written by Anthony Duane Simones entitled "A Legacy of Uncertainty: The Constitution and the Iran-Contra Affair." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.

Dr. John M. Scheb, Major Professor

We have read this dissertation
and recommend its acceptance:

Accepted for the Council:

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and Dean of the Graduate School

A LEGACY OF UNCERTAINTY:
THE CONSTITUTION
AND THE IRAN-CONTRA AFFAIR

A Dissertation

Presented for the

Doctor of Philosophy

Degree

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Anthony Duane Simones

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DEDICATION

This dissertation is dedicated to my wife, Tracy,
a bastion of love and support
during bizarre and uncertain times.

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ABSTRACT

The objective of this dissertation was to provide a constitutional explanation of the Iran-Contra Affair. Bibliographic research was conducted to examine the guidance provided by the constitutional system on questions involving the allocation of foreign policy and national security power, and the manner in which the system was interpreted and implemented by Congress and the Reagan Administration. The research revealed that the constitutional system provided no clear answers to the questions at the heart of the Iran-Contra Affair, instead practically forcing the executive and legislative branches into conflict and even stalemate. The research also revealed that in carrying out this conflict, Congress and the Reagan Administration consistently failed to take advantage of the power each had at its disposal, and instead resorted to a dubious, constitutionally suspect course of action.

It was concluded that the Iran-Contra Affair was the product of an overly ambiguous, uncertain, even contradictory constitutional system, as misused by Congress and the Reagan Administration, in a political environment created by an ambivalent American public.

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INTRODUCTION

In the years since it became front page news and captured the attention of the entire nation, numerous attempts have been made to explain the Iran-Contra Affair. However, many of these explanations seem incomplete, and most raise more questions than they answer. Some place blame squarely on the Reagan Administration. Hannah Bentley cites the administration's "unwillingness to comply with" the rules established by Congress (p. 645). David Fagelson looks to the administration's obsession with secrecy, writing that "It was precisely this accountability which the actors were trying to avoid and which drove the operation into the state of secrecy that enabled it to go so monumentally awry" (p. 343). Louis Fisher captures the essence of this perspective, writing that the Iran-Contra Affair "did not have its origins in legislative encroachments or usurpations. It had its beginnings in attitudes within the executive branch that assumed that foreign policy is within the exclusive control of the president" (1988, p. 153). These works ignore a substantial body of precedent that justified not only secrecy, but also the refusal to comply with the law, as well as the attitude to which Fisher alluded. In addition, by focusing

exclusively upon the sins of the Reagan Administration, this perspective fails to recognize any kind of congressional responsibility for the Iran-Contra Affair.

Others blame Congress. Donald Jameson characterizes the Iran-Contra Affair as "symptomatic of a progressive suffocation of Presidential authority in the conduct of foreign affairs in general, and covert operations in particular" (p. 24). Anthony Ricci contends that "President Reagan's reaction to Congress' usurpation of presidential foreign policy powers led to the Iran-Contra affair" (p. 570). The sentiments of this school of thought are encapsulated in the title Gordon Crovitz chose for one of his many articles which lambasted the Congress of the 1980's: "Boland Laws May Be the Real Crime" (Wall Street Journal, p. 30). However, those who blame only Congress make essentially the same error as those who criticize only the Reagan Administration. They neglect the fact that a key line of precedent justifies an extensive congressional role in both foreign affairs and covert action. The constitutional system does not give the president complete, unfettered control of foreign policy. And even if their points about congressional interference are valid, these authors refuse to consider the dubious nature of the administration response.

Rather than focusing on the culpability of Congress or the Reagan Administration, some scholars look to the structure and rules under which foreign policy is formulated and implemented. Kenneth Sharpe sees the Iran-Contra Affair as the result of "the chronic tension between America's democratic domestic political system and its nondemocratic national security system" (1987, p. 19). Yet Sharpe fails to take into account that the same forces which shaped one also shaped the other. It seems questionable to label as nondemocratic a system which is a reflection of what the people wanted, what Congress allowed, what the courts sanctioned, and what a string of popularly elected presidents did. Sharpe refuses to see the distinction between a nondemocratic system and an ambiguous system which has occasionally been used in a nondemocratic manner.

Perhaps the most impressive work in this area is that of Harold Koh. Koh claims the Iran-Contra Affair revealed that "our national security system is <u>inadequately</u> regulated" (1988, p. 1320), and calls for additional legislation by Congress, greater involvement by the courts, and a more constrained president in the realm of foreign policy. While Koh's ideas are imaginative and interesting, he would do well to remember the warning of Gregory Treverton, who notes that Iran-Contra "testifies to the limits whereby process can impose wisdom on the making of

American public policy" (1990, p.71). Koh writes that the Iran-Contra Affair "should be understood not as a case of bad people violating good laws (as the various investigators concluded), or of good people violating bad laws (as Oliver North's supporters maintained), but of seriously misguided people violating seriously ineffective national security laws" (1990, p. 3). For Koh the answer lies in tinkering with the structure of foreign policy making, an approach fraught with the danger of throwing the proverbial baby out with the bath water. Perhaps a better answer would be to address the misguided people of which Koh speaks; their role in bringing about the Iran-Contra Affair, and the necessity of replacing them with responsible people, in whose hands we can put such awesome power.

A complete and totally convincing explanation of the Iran-Contra Affair is still forthcoming. The scope of much of the work is limited by the partisan and ideological orientations of the author. Some fail to admit the responsibility of Congress, others ignore the culpability of the Reagan Administration. Very few grasp the context in which the Iran-Contra Affair took place, since most commentators simply refuse to acknowledge the entire range of precedent. Some see the system only as a blueprint for an all-powerful presidency, while ignoring the role of Congress. Others see the system only as a means of assuring

congressional involvement at any cost, ignoring the tremendous power and responsibility given to the president. Still others look at Iran-Contra as an opportunity to change the system, to sacrifice what is advantageous while eliminating what is dangerous. Obviously there is room for at least one more study of this episode. The objective of this dissertation is to provide a constitutional explanation of the Iran-Contra Affair, one which takes into account the wide range of precedent which exists on both sides of the constitutional conflict between the president and Congress, and the responsibility borne by the Reagan Administration as well as Congress. The thesis of this dissertation is that the Iran-Contra Affair was the product of an uncertain, even contradictory constitutional system, and the manner in which that system was used by the Reagan Administration and Congress.

To what extent was the Iran-Contra Affair a reflection of a contradictory and uncertain constitutional system? Shakespeare wrote, "What's past is prologue." The Iran-Contra Affair stands as a monument to the wisdom of this statement. The Iran-Contra Affair was not the constitutional anomaly which some tried to make it out to be. It did not occur simply because Oliver North went to work for the National Security Council, nor because Congress suddenly decided to impose limits on the president's ability

to conduct foreign policy. The Iran-Contra Affair represented the culmination of an ambiguous, uncertain, and contradictory constitutional system on three basic questions at the heart of the conflict between the Reagan Administration and Congress. Which branch of government is to dictate the course of American foreign policy? This question will be addressed in chapter Two. Can secrecy and accountability coexist in a democracy? This will be the focus of chapter Three. What is the president's obligation to faithfully execute the law in the realm of foreign policy? Chapter Four will address this question. The way in which our constitutional system has dealt with these issues set the stage for the Iran-Contra Affair.

In taking the actions which brought about the Iran-Contra Affair, each branch was following a pattern. Chapters Two, Three, and Four will define these conflicting patterns, precedents created and justified by constitutional provisions, the guidance of the framers, the decisions of the courts, and past presidential-congressional relationships. I will examine the precedents which would lead the Reagan Administration to conclude that it could unilaterally determine the direction of foreign policy, that it could act secretly and withhold information from Congress and the American people, and that it could execute the law in a manner at odds with the will of Congress. I will also

examine the precedents which would lead Congress to believe it could participate on an equal basis with the president in defining U.S. foreign policy, that it would have access to important national security information, and that it could reasonably expect the administration to adhere to the standards and restrictions established by the law. By identifying the contradictory guidance provided by our constitutional system, these chapters will establish how the past was indeed prologue for the Iran-Contra Affair.

To answer these questions I will engage in bibliographic research, mining the extensive literature which has accumulated. The development of presidential power has been the subject of any number of classics (Corwin, 1957; Henkin, 1972; Koenig, 1981; Neustadt, 1960; Pious, 1979; Rossiter, 1956; Schlesinger, 1973). In addition, the postwar years have witnessed more and more policy makers providing their perspectives on history (Acheson, 1969; Brezezinski, 1983; Carter, 1982; Ford, 1979; Kissinger, 1979, 1982; Nixon, 1978). I will make use of these memoirs as well. Much has been written on the foreign policy role of Congress, with a heavy emphasis on the resurgence of the 1970's (Crabb, 1989; Fisher, 1985; Franck and Weisband, 1979; Glennon, 1990; Rourke, 1983; Spanier and Nogee, 1981; Sundquist, 1981; Wilcox and Frank, 1976). The revelation of rampant intelligence abuses in the mid 1970's

prompted an exploration of the conflict between secrecy and democracy which continues even today (Berger, 1974; Colby and Forbath, 1978; Hamilton, 1976; Jeffreys- Jones, 1989; Johnson, 1985, 1989; Orman, 1980; Powers, 1979; Prados, 1986; Ranelagh, 1987; Treverton, 1987). Although the literature is not extensive on the freedom given to the president in his enforcement of the law (Bork, 1989; Miller, 1987), it will increase with the growing conflict between the power of the presidency and the congressional use of its lawmaking power in the area of foreign policy.

While the nature of the constitutional system made Iran-Contra possible, and even likely, the right participants were needed to make it a certainty. Chapter Five will address the flawed interpretation and use of the system by the Reagan Administration and Congress and how it served to make the Iran-Contra Affair an inevitability. This chapter will examine the manner in which the Reagan Administration and Congress viewed the power available to them, the actions which they undertook pursuant to their interpretation, and how these actions squared with the precedents which sanctioned their involvement in the first place. Once again, my research will be bibliographic. To examine the Reagan Administration's and Congress' manipulation of the constitutional system, I will utilize official reports and government documents (Report of the

Iran-Contra Committees, 1987; Tower Commission Report, 1987). I will also make extensive use of the testimony provided by key participants (reported by Congressional Quarterly). The Iran-Contra Affair has been the subject of works by journalists (Mayer and McManus, 1988; Smith, 1988) and biographers (Bradlee, 1988; Persico, 1990; Woodward, 1987). In addition a number of players in the Iran-Contra drama have put forth their version of what happened (Cohen and Mitchell, 1988; Ledeen, 1988; Menges, 1987; Reagan, 1990). Finally, the Iran-Contra Affair has inspired any number of excellent scholarly works (Arnson, 1989; Bentley, 1987; Fagelson, 1989; Koh, 1988, 1990).

This dissertation is significant because it does what other studies have either failed or refused to do. First of all, it looks at the Iran-Contra Affair from a constitutional perspective. While Iran-Contra has been examined from a broad range of perspectives, more frequently than not the vital constitutional issues are given short shrift. Not only will I look at the constitutional issues, I will examine them from an impartial point of view. What has been done on the constitutional aspects of the Iran-Contra Affair, like many constitutional studies, tends to avoid entire lines of precedent because they don't coincide with the author's personal view of the proper allocation of foreign policy power. This dissertation will

not only look at the competing bodies of precedent, it will address the consequences of this conflict. Finally, many works on the Iran-Contra Affair seem intent on pushing a political agenda, on crucifying one branch while exonerating the other. Once again, this dissertation will have the advantage of balance, holding the actions of both the Reagan Administration and Congress up to scrutiny. Only by rising above partisan and ideological leanings and a selective examination of precedent can the true nature of the Iran-Contra Affair be understood. My dissertation will attempt to accomplish this.

CHAPTER I

ANATOMY OF A SCANDAL

Ronald Reagan took his second oath of office in January 1985 a very happy man. He had just completed an extraordinarily successful first term. He had just been reelected in an overwhelming landslide. The American economy was strong. American prestige around the world had been reestablished. However, things were by no means perfect. Americans were being held hostage in the Middle East and Ronald Reagan wanted them returned. A Marxist regime held power in the Central American nation of Nicaragua and Ronald Reagan wanted it ousted. Despite his enormous personal popularity and the considerable power of the presidency, Reagan had been unable to achieve these objectives. Ultimately, his efforts to resolve these problems would threaten to bring down his presidency, as well as raising questions about the constitutional allocation of power between the president and Congress in the making and execution of foreign policy. This chapter will examine the Reagan Administration's policy initiatives with regard to Iran and Central America, congressional

obstacles to achieving Reagan's goals, and how the administration attempted to overcome those obstacles.

I.

Iran

On February 11, 1979, as Ronald Reagan planned his strategy for the presidential campaign of 1980, Ayatollah Ruhollah Khomeini assumed power in Iran. Nine months later the United States embassy in Tehran was attacked, and fifty-two Americans were taken hostage. Iran demanded the return of the hated Shah, who was in the United Sates for cancer treatment. President Carter refused, thus initiating an agonizing period of stalemate. Over the next tension-filled year, Carter froze Iranian assets in the United States, severed diplomatic relations, and ordered a rescue mission which failed in the desert of Iran. On September 22, 1980 Iraq attacked Iran, beginning a decade-long war. Jimmy Carter was defeated by Ronald Reagan in November 1980. Two months later, on the day in which Carter left the White House, the hostages were released.

Iran's release of the hostages did not thaw the chilly state of its relationship with the United States. Upon the hostages' return, Reagan warned, "Let terrorists beware: when the rules of international behavior are violated, our

policy will be one of swift and effective retribution" (Mayer and McManus, p. 91). Presumably this warning was also applicable to those who aid terrorists, and in the summer of 1982 the Reagan Administration learned of Iranian support for international terrorism. In 1983 the State Department launched Operation Staunch (see Iran-Contra Report, p. 159). Citing Iran's sponsorship of terrorist groups and activities, Secretary of State George Shultz pressured U.S. allies to isolate Iran and refuse to sell weapons to the Ayatollah. The administration also imposed an extensive ban on exports to Iran. Relations were further strained in October 1983 when 241 Marines were killed in Beirut in a suicide bombing. The group which took credit for the massacre was a Lebanese Shiite organization with ties to Iran.

While Reagan and Shultz embraced a vigorous anti-Iran position, some within the administration questioned the wisdom of such an absolute policy when dealing with a country as strategically important as Iran. A State Department study on U.S.-Iran relations warned that the United States had "no influential contacts" (Congressional Quarterly, 1987, p. A-4) with present or future Iranian policy makers and characterized the U.S. as veritably powerless in a nation it used to virtually control. The October 1984 study suggested the possibility of employing

arms sales to reestablish American influence. The CIA acknowledged this lack of influence, and raised the ominous possibility of a pro-Soviet Marxist, Mujaheddin E Khalq, succeeding Khomeini as leader of Iran. In May 1985 Graham Fuller, the CIA national intelligence officer for Near East and South Asia submitted a memo to William Casey, the Director of Central Intelligence. The Fuller memo cited an impending power struggle in Iran, a struggle in which the "U.S. has almost no cards to play; the USSR has many ... Our urgent need is to develop a broad spectrum of policy moves designed to give us some leverage in the race for influence in Tehran" (Tower Report, p. 112). Fuller suggested having "friendly states sell arms that would not affect the strategic balance as a means of showing Tehran that it had alternatives to the Soviet Union" (Tower Report, p. 114). Based on these considerations a draft National Security Decision Directive was circulated in June 1985 which recommended that U.S. allies be used to "help Iran meet its import requirements ... This includes provision of selected military equipment as determined on a case by case basis" (Tower Report, p. 117). Shultz dismissed the idea as "contrary to our interest" (Mayer and McManus, p. 124). Secretary of Defense Caspar Weinberger scribbled on his copy, "this is almost too absurd to comment on" (Mayer and McManus, p. 124). Casey, however, was interested. Despite

the opposition of Shultz and Weinberger, the seeds of the sale of arms to Iran had been planted.

As the administration debated policy, events transpired which led Reagan to reevaluate his hardline position on Iran. In June 1985 TWA flight 847, which was transporting 135 U.S. citizens, was hijacked and landed in Beirut. Although one American was killed, the remaining U.S. citizens were released, reportedly pursuant to the request of Ali Akbar Hashemi Rafsanjani, the leader of the Iranian Parliament. Rafsanjani's intervention intensified the desire by some within the administration to improve relations with Iran (see Mayer and McManus, pp. 124-25). A second influential series of events was the taking of ten American hostages in Lebanon from 1982 to 1985. Although three had been released, in June 1985 seven Americans were being held captive in a foreign land. This was a bothersome and ironic problem for Reagan, who had lambasted President Carter on the 1980 campaign trail for his ineffective handling of the hostage crisis. The final event which led Reagan to rethink his position on Iran was a meeting he had with the families of the remaining hostages. The President emerged from the emotionally brutal session with a new determination to gain the hostages' freedom (see Mayer and McManus, pp. 101-104).

National Security Adviser Robert McFarlane, who was asked every morning by Reagan about the latest news on the hostages, soon found himself in a position to provide encouraging news to his president. In July 1985 a message from Israeli Prime Minister Shimon Peres was relayed to McFarlane. Iran was interested in reestablishing a relationship with the West. Perhaps gestures of good faith could be exchanged between the new friends. In return for TOW antitank missiles, Iran would use its influence with the kidnappers to gain the release of the American hostages. At this point the effort to improve relations with Iran became linked with Reagan's obsession with the hostages, and this Iranian initiative would develop a momentum which would not subside until it was exposed to the harsh glare of the public spotlight some fifteen months later. Reagan instructed McFarlane to explore the possibility of a deal only weeks after blasting Iran as a member of a "new international version of Murder Incorporated" (Congressional Quarterly, 1987, p. A-9). To use an ancient but applicable analogy, Ronald Reagan had made a deal with the devil. And unlike Daniel Webster, Reagan would not emerge unscathed.

Nicaragua

Also in 1979 Nicaraguan dictator Anastasio Somoza was overthrown. This revolution had a broad base of support,

including the middle class, the church, business, and a group of hard core revolutionaries known as the Sandinistas. A coalition government was established, which promised "free elections, a free press, free enterprise, an independent judiciary and an end to political oppression" (Iran-Contra Report, p. 27). Within a year, the more militant Sandinistas had forced the moderate elements out of the coalition government. As the Sandinistas became more powerful in the government, the government became more repressive. The Sandinistas gained control over television and radio stations, cracked down on opposition parties and newspapers, and took land without compensation. The final step in its consolidation of power was the government's announcement that it would postpone elections for five years. President Reagan condemned the Sandinistas' actions as a betrayal of the revolution.

While the Reagan Administration was disturbed by Nicaragua's brutal repression of its own people, it was even more concerned about the course upon which Nicaragua had embarked in its foreign policy. The Sandinistas became embroiled in entanglements with adversaries of the United States. Military advisers arrived in Nicaragua from Cuba, East Germany, and Bulgaria. Intelligence and military assistance was provided by the Soviet Union. Weapons arrived from Cuba and were transported by Nicaragua to

Communist insurgents in neighboring El Salvador (see Iran-Contra Report, p. 27). This was precisely the kind of Soviet involvement in the Western Hemisphere which candidate Reagan had railed against in 1980. Thus, it was no surprise when President Reagan cancelled all aid to Nicaragua in 1981. This was merely a first step. The President was not content to simply ignore Nicaragua and the threat it posed to democracy in Central America. Reagan wanted the Sandinistas out, and he was not alone.

A diverse group of Nicaraguans regarded the repression of the Sandinistas as no better than the corruption of Somoza. Some Sandinistas grew disenchanted with the policies of President Daniel Ortega and left the party. Other Nicaraguans who had not been active in the revolution opposed the Sandinistas based on the ever-present oppression and constant state of clampdown. Ironically, these groups joined with right wing supporters of Somoza to form an anti-Sandinista opposition which came to be known as the contras. In 1981, President Reagan signed an executive order authorizing covert U.S. support for the contras. The CIA trained contra fighting forces and supervised military operations in Nicaragua (see Persico; Woodward). The contras engaged in hit and miss acts of sabotage and assassination from their bases in Honduras and Costa Rica. Unfortunately the contras also engaged in acts of senseless

brutality against innocent civilians, which jeopardized their chances of gaining the essential support of the Nicaraguan people (see Iran-Contra Report, p. 33). Their failure to win significant military victories discouraged supporters within the Reagan Administration and Congress. Exacerbating these problems was the tendency of the contra leadership to bog down in intramural squabbling among its diverse membership (see Prados, pp. 382-88).

Despite an extraordinarily popular president's support of the "freedom fighters" in Nicaragua, the people of the United States were dubious of becoming involved with the contras (see Arnson, pp. 219-20). While most Americans opposed the presence of another Soviet-backed nation in Central America, they also opposed contra aid. These seemingly inconsistent positions were probably attributable to the concern on the part of many Americans about becoming involved in another Vietnam. Just as our involvement in Vietnam began with a few advisers, the eventual presence of American troops in the jungles of Nicaragua could begin with a little harmless aid to the contras.

There was also considerable uncertainty about the objective of our support for the contras. President Reagan justified his initial support for the contras as necessary to interdict the flow of arms from Nicaragua to Communist rebels in El Salvador. While that explained contra activity

on the northern border of Nicaragua, it hardly justified contra activity on the southern border with Costa Rica (see Persico, p. 292). Thus a second justification was cited by the administration, "to pressure the Sandinistas to negotiate a treaty with surrounding countries" (Iran-Contra Report, p. 35). It hardly seems unreasonable to conclude that no matter what the administration stated publicly, Reagan's ultimate goal in supporting the contras was the ouster of the Sandinista government.

Public opposition and questionable objectives prompted Congress to take action (see Arnson). A Republican Senate which was supportive of contra aid battled over the course of two years with a Democratic House of Representatives which was opposed to contra aid. Congressional supporters of the President warned of the spread of Communism throughout the region and pointed to the necessity of bringing democracy to Nicaragua. Opponents of the policy claimed the U.S. was meddling in Nicaragua's domestic affairs, thus violating the charters of the United Nations and the Organization of American States. With our sponsorship of this civil war, it was argued, the United States was forcing the Sandinistas to become even more brutal and repressive (see Iran-Contra Report, p. 33).

In late 1982 Democratic Representative Edward Boland introduced and Congress approved an amendment to the Defense

Appropriations Bill. This amendment stipulated that "None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or 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" (PL 97-377). As restrictions go, the first Boland Amendment was not very restrictive. The CIA could still provide covert assistance to the contras. The purpose of that assistance, however, had to be the interdiction of the flow of arms to El Salvador (Bentley, p. 626).

Throughout 1983, concern about contra funding continued. The House voted in July and October to terminate aid to the contras. The Senate refused to go along. A compromise was reached by a conference committee working on the fiscal 1984 Defense Appropriations Bill, which approved a second Boland Amendment. This amendment provided that "during fiscal year 1984, not more than $24,000,000 of 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" (PL 98-215).

While $24 million gave the Reagan Administration a little time, it was able to read the proverbial writing on the wall. Congress was growing increasingly willing to deny contra aid. In a report to McFarlane a Special Interagency Working Group contended, "Given the distinct possibility we may be unable to obtain additional funding in FY84 or FY85, our objective should be to bring the Nicaragua situation to a head in 1984 ... our covert action program should proceed with stepped up intensity" (Iran-Contra Report, p. 36). The President agreed. A number of paramilitary operations were executed in late 1983 and early 1984, including speedboat attacks on Sandinista patrol craft, air attacks on Sandinista communications and naval installations, attacks on Nicaraguan oil facilities at Corinto, and the mining of Nicaraguan harbors (Woodward, p. 322). In April 1984, a number of ships travelling in Nicaraguan waters were damaged by the mines. The explosion in Sandino harbor was nothing compared to the explosion in Congress when it was learned that the CIA had supervised the mining. In something of an understatement, McFarlane noted that "the disclosure that harbors had been mined was received very badly" (Iran-Contra Report, p. 37). A more accurate indication of congressional and public reaction was expressed by Republican Senator

Barry Goldwater in a note to Casey, "It gets down to one, little, simple phrase: I am pissed off" (Woodward, p. 322). With the mining incident, public support for the contras plunged and congressional opposition to the President's policy peaked. Reagan's plan to assist the contras was about to run headlong into its most significant challenge.

Many in the Reagan Administration regarded the first two Boland Amendments as overly intrusive, an unconstitutional usurpation of the President's power to conduct foreign policy. Things would get worse before they got better for the administration (see Iran-Contra Report, pp. 395-410). The revelation of the mining of the Nicaraguan harbors produced a ground swell of popular opposition to the contras. Congress responded by passing the third and most restrictive Boland Amendment. The amendment provided that "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" (PL 98-473). The prohibition would cease to apply after February 28, 1985 if the President reported to Congress that Nicaragua was

engaged in providing support to insurgents in El Salvador or any other Central American country, in which case up to $14 million could be made available to the contras.

While Congress refused to provide this additional $14 million, it did begin to chip away at the absolute ban of the third Boland Amendment. Nicaraguan President Daniel Ortega's open courting of Soviet support prompted many members to reevaluate their positions. In the summer of 1985 Congress reversed a previous vote and released $27 million in humanitarian assistance for the contras, as well as allowing the exchange of "information with the Nicaraguan democratic resistance" (PL 99-88). Arguably, this reopened the door for CIA participation. Thus, what had been considered a flat ban had become a complex web of restrictions and exceptions. In December 1985, Congress extended the restrictions of the previous amendment to fiscal year 1986, but with even more exceptions, including allowing the CIA to provide communications equipment and intelligence information and advice to the contras and the State Department to solicit humanitarian assistance for the Nicaraguan democratic resistance (PL 99-169). In October 1986 Congress removed all doubt about what was and was not legally permissible by reestablishing military aid to the contras.

II.

Circumventing Boland

In his struggle to overcome the limitations of the Boland Amendments, Reagan pursued a number of strategies. One was to return repeatedly to Capitol Hill in an attempt to persuade Congress to reconsider its refusal to support the contras. While this effort at persuasion may seem to be a textbook example of the separation of powers in action, certain alternative strategies were not. As he fought political battles in Washington, the President sought alternatives for maintaining the Nicaraguan resistance. Reagan instructed McFarlane that he wanted the contras kept alive "body and soul" (Congressional Quarterly, 1987, p. C-24). These instructions were relayed by McFarlane to a member of the National Security Council staff, Lieutenant Colonel Oliver North. A decorated veteran of the Vietnam War, North applied a can-do Marine enthusiasm to any task (see Bradlee). As congressional support for the contras dwindled, North initiated his intense effort to protect the body and soul of the freedom fighters so dear to his commander in chief's heart.

If the administration could not get support for the contras from public coffers, then it would tap into the generosity and anticommunist sentiment of the private sector

(see Iran-Contra Report, pp. 85-103). North played an integral part in orchestrating private donations to the contras. John Singlaub, a retired general who engaged in an extensive private effort to support the contras, testified before the House and Senate Iran-Contra Committees that in 1985 North reviewed and approved a list of weapons to be purchased by Singlaub for the contras (Congressional Quarterly, 1987, p. C-36). To raise funds, North frequently joined with Carl Channell in what Senator Warren Rudman called "the one-two punch" (Congressional Quarterly, 1987, p. C-38; see also Mayer and McManus, pp. 154-157). North would meet with what became known as the blue haired brigade, a group of predominantly elderly Americans with fat checkbooks and anticommunist dispositions. After North made his presentation on the threat posed to democracy by a Communist stronghold in Central America and the needs of the freedom fighters, he would allow Channell to solicit tax-exempt contributions to his National Endowment for the Preservation of Liberty (NEPL). Channell, who would later plead guilty to tax fraud, would then transfer the money to Swiss bank accounts where it would be used to provide support for the contras. Millions were raised by the North-Channell tandem.

While North emphasized that he never explicitly asked for contributions, the influence of the administration is

undeniable. A number of big donors, including Texas heiress Ellen Garwood, investor William O'Boyle, and beer magnate Joseph Coors testified that it had been North's eloquence and commitment which had persuaded them to make hefty contributions to NEPL (see Congressional Quarterly, 1987, pp. 37-39). On a number of occasions, Channell arranged meetings for his donors with Ronald Reagan, who personally thanked them for their "selfless devotion to the cause of freedom and democracy" (Mayer and McManus, p. 203). The President also wrote Channell in October 1985 thanking him for his "remarkable contribution to the course of democracy in Central America. Keep up the good work" (Congressional Quarterly, 1987, p. A-13). Reagan later claimed ignorance of the fact that the money was spent on lethal aid for the contras. His belief was that the contributions would go toward pro-contra advertisements (see Iran-Contra Report, p. 96). North's understanding of Reagan's knowledge was indicated in a memo to Poindexter which stated "the President obviously knows why he has been meeting with several select people to thank them for their support for democracy in CentAM" (Tower Report, p. 476). North's perception, even if incorrect, was certainly not unfounded.

Even before Congress completely banned aid, the administration was working on a contingency plan for keeping the contras alive. Other nations would be encouraged to

provide support while the United States was prohibited from doing so. One of the biggest contributors was Saudi Arabia (see Bradlee, pp. 193-95; Woodward, pp. 351-55). Following discussions with McFarlane, the Saudis provided $1 million a month to the contras from July of 1984 to February of 1985. After a visit to the White House by King Fahd, Saudi Arabia contributed $16.5 million between February and April of 1985. Despite the timing of the Saudi generosity, Reagan and McFarlane denied making a direct solicitation. After some encouragement by North, Assistant Secretary of State Sigur obtained a $1 million contribution from Taiwan in the summer of 1985, followed by an additional $1 million in October (see Bradlee, p. 210). Assistant Secretary of State Elliott Abrams solicited a $10 million contribution from Brunei (see Mayer and McManus, pp. 259-61). Unfortunately Abrams had been provided by North with an incorrect bank account number and the money never made it to the contras. Among other nations solicited for "third country" contributions were Israel, Singapore, and South Korea.

Central American nations were also pressured into providing assistance to the contras (see Washington Post, April 7, 1989, p. 1). Increases in military aid to El Salvador were linked to the Salvadoran government providing lethal aid to the contras. Reportedly Vice President Bush met with the president of Honduras in March of 1985,

promising increased economic aid in return for Honduran support of the contras. In the summer of 1985, Ambassador to Costa Rica Lewis Tambs was instructed by North to open a second front in the battle against the Sandinistas (see Tower Report, p. 471). Tambs was also told to obtain permission from the government of Costa Rica to construct an airstrip which would serve as a staging area for contra supply missions. In September 1986, Costa Rican President Oscar Arias threatened to expose the secret airstrip. The Tower Report claimed that North threatened Arias with the loss of over $80 million in U.S. foreign aid should the president go public with the information (pp. 473-74).

Contra leader Adolfo Calero claimed that the rebels received $32 million in third country assistance during the Boland Amendment's ban on contra aid. The administration's solicitation of other nations for contra support represents a sharp contrast to the conventional wisdom on the Iran-Contra Affair. First, it was not merely a shadow government composed of a few twisted individuals which conspired to evade the limitations imposed by Congress (see Washington Post, April 7, 1989). The policy of using other nations to provide assistance was known even by well respected officials such as George Shultz, who suggested the use of El Salvador, and James Baker, who questioned whether the President was engaged in an impeachable offense. In

addition, this episode calls into question the Tower Report's characterization of Ronald Reagan as a man totally ignorant of events transpiring in his own administration. As Stephen Engelberg wrote in the New York Times in the wake of evidence revealed at Oliver North's trial, "Mr. Reagan was at the center of the contra effort" (April 9, 1989, p. 16). Not only was Reagan involved, he recognized the danger in being involved, as indicated by his prediction to his advisers that in the event of public disclosure, "we'll all be hanging by our thumbs in front of the White House" (Washington Post, April 7, 1989, p. A7).

Raising money, while difficult, was merely half the battle. A second and even more complicated task was getting the money to the contras and ensuring the continuation of the war against the Sandinistas. Since the law prohibited the involvement of the usual governmental channels, North sought to create an entity outside the government to coordinate assistance to the contras. One of North's first actions was to hire Richard Secord (see Mayer and McManus, pp. 141-47). A retired Air Force general and covert operation specialist, Secord brought his business partner Albert Hakim into the picture. Secord's mission was the acquisition of weapons, ammunition, and other supplies for the contras, as well as the transportation of these supplies by air drop to the rebels in the field. Secord and Hakim

created a structure which they called "the Enterprise" to facilitate the transfer of money raised by the administration and the sale and transportation of weapons to the contras. The Enterprise was a network of corporations, foreign bank accounts, and individuals which handled the day to day execution of contra support (see Iran-Contra Report, pp. 59-84; 327-59). While Richard Secord directed the Enterprise, he coordinated with Oliver North. Together they mapped out grand strategy as well as operational detail, engaging in everything from establishing goals and setting priorities to deciding the time and location of specific air drops. North would subsequently claim that all of his actions had the support of his superiors, a contention disputed by Reagan and McFarlane.

While the Boland Amendments restricted the involvement of the CIA in theory, in fact the influence of the CIA was prevalent in the contra war (see Persico; Woodward). Former CIA operative and veteran of the Bay of Pigs Felix Rodriguez, operating in El Salvador, assisted in the coordination of the contra supply effort. Colonel Robert C. Dutton, a retired Air Force officer who was also involved in the contra supply effort, claimed that the involvement of Thomas Castillo was an essential part of the establishment of a southern front against the Sandinistas. Castillo was an alias of Joseph Fernandez, the CIA station chief in Costa

Rica. Castillo kept North informed on what the contras needed and where they were located at any given time. Of equal importance, Castillo obtained and passed on information from the CIA on how to avoid Nicaraguan troops, radar sites, and missile installations (see Tower Report, pp. 463-64). In addition, Castillo testified that he kept his superiors at the CIA informed of his actions, and that they never ordered him to sever his connection to the private supply network. Instead, they covered up his actions and advised him not to get caught (see Congressional Quarterly, 1987, pp. C-44-47).

Perhaps the most important link between the CIA and North's contra operation was William Casey (see Persico; Woodward). North claimed that it was Casey who anticipated congressional restrictions on the CIA and suggested the creation of a private organization to continue aid to the contras. It was Casey who recommended that North recruit Secord. It was Casey who provided guidance to North in virtually every phase of the operation, from the fine art of hiding financial transactions from Congress to the proper techniques of secure communication. One intelligence officer asserted that "Without Casey's help at every stage, Ollie North would not have been able to do any of what he did for the contras" (Congressional Quarterly, 1987, p. A-40), an assessment endorsed by those who participated in

the effort to assist the contras. General Secord testified that he received "logistical assistance" (Congressional Quarterly, 1987, p. A-44) from Casey. McFarlane noted before the Iran-Contra Committees that North and Casey maintained "close contact" and North "may have been taking instructions directly from him concerning contra support strategy" (Congressional Quarterly, 1987, p. A-44).

Casey's intimate involvement could hardly be considered surprising. In November 1985 Casey had written a blistering letter to Senate Intelligence Committee chairman David Durenburger, criticizing him for engaging in "oversight of the intelligence community ... conducted off the cuff through the news media" which resulted in "the repeated compromise of sensitive intelligence sources and methods" (Woodward, p. 426). Casey sought to remedy the problem, not by revising the law or persuading Congress to change its actions, but rather by privatizing the conduct of covert operations. In fact, providing covert assistance to the contras was merely the first step. Casey had plans for the Enterprise to be converted into a permanent unaccountable network for secret operations, beyond the control of the public, the Congress, and even the president. As North testified, "the Director was interested in the ability to go to an existing, as he put it, off-the-shelf, sustaining, stand-alone entity that could perform certain activities on

behalf of the United States" (Congressional Quarterly, 1987, p. C-91).

A final source of support for the Nicaraguan resistance would arise from another secret presidential endeavor.

Obtaining Freedom for the Hostages

Despite inconsistencies with his previously stated position on Iran and his administration's tough policy on terrorism, Reagan decided to pursue the Iranian initiative. Although the President subsequently admitted that he could not recall doing so, McFarlane claimed that in July 1985 Reagan gave him the go ahead (see Iran-Contra Report, pp. 168-70; Tower Report, pp. 148-54). The plan involved Israel shipping 100 American made TOW missiles to Iran. The United States would provide Israel with replacements, and Iran would use its influence to gain the release of the hostages. Unfortunately, the shipment of August 30 failed to gain the release of a single American. A second shipment of 408 TOWs on September 14 was rewarded with an Iranian consolation prize. McFarlane would have the option of choosing one hostage to be released. After considerable agonizing, McFarlane was forced to "play God" (Congressional Quarterly, 1987, p. C-25) and single out CIA agent William Buckley. McFarlane did not know that Buckley was already dead. On September 15 Reverend Benjamin Weir was released.

Even though Iran had given the Reagan Administration little or no reason to believe it could be trusted, a second transaction occurred in November 1985 (see Iran-Contra Report, pp. 176-77; Tower Report, pp. 154-75). Proposed by Israel, a plan for a second transfer of arms was relayed by McFarlane to Reagan in early November. Once again, the President was unable to recall his specific authorization for the transaction. Nonetheless, McFarlane believed he had the President's approval and a deal was struck whereby the United States would replenish 80 HAWK antiaircraft missiles to be shipped by Israel to Iran, in return for the release of more American hostages. Having learned the lesson of the first transaction, McFarlane insisted on the release of hostages before shipment. Unfortunately, the Iranians insisted that the weapons precede the release of hostages, and preferred those hostages to be released one at a time.

Complicating the matter further was the refusal by Portugal to allow the Israeli plane carrying the HAWKs clearance to land (see Iran-Contra Report, pp. 179-85). North, who had been placed in charge of the operation by McFarlane, called Duane Clarridge, chief of the European division of the CIA's directorate of operations. Clarridge contacted Portugese officials in an attempt to gain clearance for the Israeli plane, and when that failed, put North in contact with St. Lucia Airways, a CIA proprietary.

Finally, on November 25 St. Lucia planes, with a cargo identified as oil drilling equipment, delivered 18 HAWKs to Iran. No hostages were released.

A failure to secure the release of hostages was the least of John McMahon's concerns. McMahon, deputy director of the CIA, was enraged to learn of the use of a CIA proprietary airline for any purpose, whether for transporting drilling equipment or missiles, without the support of a presidential finding (see Iran-Contra Report, pp. 185-87; Tower Report, pp. 175-77). He contacted CIA general counsel Stanley Sporkin, who drafted a finding to cover CIA involvement in assisting the mission. The retroactive finding stated that "certain foreign materiel and munitions may be provided to the government of Iran which is taking steps to facilitate the release of the American hostages" (Iran-Contra Report, p. 186). Noticeably absent from the finding's justification for the arms transfer were improving relations with Iran and providing support for Iranian moderates. In fact, the language used led the Iran-Contra Committees to conclude that the finding authorized "a straight swap of arms for hostages" (Iran-Contra Report, p. 186). Nevertheless, President Reagan signed the finding on December 5, 1985.

A period of uncertainty and debate followed the November shipment of HAWKs (see Iran-Contra Report, pp.

197-99; Tower Report, pp. 182-88). Shultz and Weinberger continued to express their opposition to the sale of arms to Iran. Weinberger in particular raised questions as to the legality of these transactions. The President's response was clearly indicative of his priorities. "The American people will never forgive me if I fail to get these hostages out over this legal question" (Congressional Quarterly, 1987, p. C-114). The Iran initiative continued to enjoy the support of others in the administration, including Casey and McFarlane's successor as national security adviser, John Poindexter.

Even those who supported continued arms sales expressed hesitancy about the involvement of Manucher Ghorbanifar (see Iran-Contra Report, pp. 199-201). An Iranian arms merchant, Ghorbanifar acted as an intermediary between the United States, Iran, and Israel, and made millions from the arms sales, despite the fact that he had been branded a "talented fabricator" (Woodward, p. 413) by the CIA as early as 1984. Following a December 1985 meeting, McFarlane reported to Reagan that Ghorbanifar was "a borderline moron" (Iran-Contra Report, p. 199) and "the most despicable character I've ever met" (Mayer and McManus, p. 181), a man who could not be trusted and should be relieved of his role as intermediary. When Casey requested that Ghorbanifar take a lie detector test, he failed virtually every question,

responding truthfully only as to his name and nationality (see Congressional Quarterly, 1987, p. C-141). Despite his questionable reliability, Ghorbanifar continued in his capacity as intermediary and persisted in his demand for additional transactions. If more arms were not sent, Ghorbanifar instructed North, more Americans would be killed.

When those who favored continuation of the initiative focused on the threat to the hostages, it was almost inevitable that Reagan would approve a third transaction. Things this time, though, would be different (see Iran-Contra Report, pp. 206-209). This transaction would be preceded by a presidential finding. In January 1986 President Reagan signed a finding authorizing the CIA to "assist selected friendly liaison services, third countries, and third parties sympathetic to U.S. government interests ... for the purpose of (1) establishing a more moderate government in Iran, (2) obtaining from them significant intelligence not otherwise obtainable, to determine the current Iranian government's intentions with respect to its neighbors and with respect to terrorist acts, and (3) furthering the release of the American hostages held in Beirut and preventing additional terrorist acts by these groups" (Tower Report, pp. 218-19). This final objective was included at the insistence of CIA counsel Sporkin and

despite the opposition of North. The finding also instructed "the Director of Central Intelligence to refrain from reporting this finding to the Congress ... until I otherwise direct" (Tower Report, p. 217).

A second difference with previous transactions was the elimination of Israel as middleman. The United States would sell weapons directly to Iran (see Iran-Contra Report, pp. 213-21). The first step was for the Defense Department to sell arms to the CIA, despite Weinberger's continued reluctance about the entire affair. When Weinberger ordered the deputy assistant secretary of defense Noel Koch to initiate the transfer of weapons, Koch questioned whether legal problems existed and whether someone would go to jail. Weinberger was reported to have snapped a curt "yes" (Mayer and McManus, p. 185). The weapons would be transported on CIA planes, supervised by Secord. Iran would then place funds into the Swiss bank accounts of Secord's Lake Resources. On February 17, 1986, 500 TOW missiles arrived in Iran. From February 24 to 26, North and Secord met with Ghorbanifar and an official from the office of Iran's prime minister. At this meeting the Iranians demanded intelligence which would assist them in their war with Iraq, as well as Phoenix air to air missiles. Possibly then, they contended, the issue of hostages could more fully be considered. On February 27, 500 more TOW missiles were sent to Iran.

One aspect of the February transactions which was not different from previous sales was the inability or unwillingness of the Iranians to uphold their end of the bargain. No hostages were released. This is not to say, however, that the administration was not presented with a windfall. Through a pricing mistake made by the Defense Department, Iran paid more for the TOWs than the CIA was charged. The result was a $10 million profit (see Iran-Contra Report, p. 215). North thus faced an interesting problem. What should be done with these profits?

The Diversion

North's answer was to use the profits to benefit the contras (see Iran-Contra Report, pp. 269-74). Some controversy exists as to the origins of the diversion scheme. Some point to Amiram Nir, antiterrorism expert and adviser to Israeli prime minister Shimon Peres. Nir met with North in January 1986 and suggested that any residuals from the arms sales could be used to finance other projects in which North might be involved. However, North claimed that Nir never explicitly mentioned the contras. In fact, North testified Ghorbanifar suggested the diversion to him in a bathroom in London's Winston Churchill Hotel in January 1986. Ghorbanifar denied this bathroom conspiracy. General

Secord's attorney pointed the finger at Albert Hakim. Finally, The Wall Street Journal cited the existence of notes taken at a December 1985 meeting between North and an Israeli official in which North suggested the diversion (September 21, 1987).

An even more controversial question involved who had knowledge of the diversion in the administration (see Iran-Contra Report, pp. 225-26). North claimed to have informed Poindexter, Casey, and McFarlane. Poindexter approved the diversion scheme in January 1986, but kept the information from the President. Poindexter testified that he "wanted the President to have some deniability so that he would be protected, and at the same time we would be able to carry out this policy and provide opposition to the Sandinista government" (Congressional Quarterly, 1987, p. C-100). Regardless of the source of the diversion and the extent of the President's knowledge, the reality was that the sale of arms to Iran in 1986 yielded almost $14 million in profits, $3.5 million of which was utilized to provide the contras with weapons and supplies. At a time in which such aid was prohibited, many in the administration shared Oliver North's opinion of the diversion as a "neat" way of using the Ayatollah's money to evade the limitations of the Boland Amendments.

Frustration and Revelation

The failure of the February transactions to gain the freedom of any hostages left even Poindexter frustrated with the Iran initiative. However, Ghorbanifar continued to claim that Iran was eager to establish a relationship with the United States. And North, eager to capitalize on an additional source of funding for the contras, pushed for further transactions. Poindexter relented, but found himself repeating the futile demand of McFarlane: no arms until all of the hostages were released.

In March, North was approached about the possibility of a meeting with the Iranians (see Iran-Contra Report, pp. 237-42; Mayer and McManus, pp. 230-42; Tower Report, pp. 287-338). Ghorbanifar promised that a U.S. delegation would be met by senior Iranian officials. Iran wanted HAWK missile parts to accompany the delegation, but an agreement was reached whereby only one quarter of the parts would be brought. Poindexter kept knowledge of the upcoming meeting from both Shultz and Weinberger. McFarlane was recruited to lead the delegation, which included North, Nir, NSC staffer Howard Teicher, and ex-CIA Tehran station chief George Cave. The Americans arrived in Tehran on May 25, 1986. They were not met by any senior officials and were taken to a hotel, where they were largely ignored for days. On May 27, a frustrated and angry Robert McFarlane demanded the release

of all the hostages by 6:30 the next morning. When the Iranians responded with only a promise to release two hostages, with the possibility of two more after the remaining parts were sent, a furious McFarlane ordered the delegation home. The bizarre nature of this entire scenario is intensified by the contention of the Tower Commission that North and Cave knew beforehand that if the U.S. delegation did not bring all the HAWK parts, only one hostage would be released. Amazingly, McFarlane was not aware of this. In a meeting with Reagan on May 29, McFarlane urged that the sale of arms to Iran be discontinued.

Ghorbanifar was not extraordinarily honest, but he was perceptive, and he realized his meal ticket was about to be revoked. He urged Iran to release a hostage or any future deals would be off. On July 26, 1986 Reverend Lawrence Jenco was given his freedom. Jenco's release sparked a flurry of activity in the White House (see Mayer and McManus, pp. 254-57). Poindexter continued to insist that all of the remaining hostages be released before any further arms transfers. Casey and North argued that if the U.S. failed to respond, it would result in death for some or all of the remaining hostages. Reagan resolved the dispute by sending to Iran the HAWK parts which had been withheld in the May transaction. The spare parts were delivered on

August 3. Any doubt as to whether this was an arms for hostages deal surely ended with this transaction.

Despite the release of Jenco, the Reagan Administration had grown weary of Ghorbanifar and opened discussions with the "second channel," a relative of Speaker Rafsanjani (see Iran-Contra Report, pp. 249-53). North, Cave, Secord, and Hakim met with the second channel in September and October of 1986. North offered weapons and other support in exchange for the release of the remaining hostages. The Iranians responded with a promise to release one hostage. Before a deal could be made, North was called back to Washington to handle a problem with the contra supply network. In what was certainly the low point of this entire affair, Hakim took over as negotiator for the United States and agreed to an exchange of 500 TOWs for the release of one or two hostages, as well as promising American involvement in obtaining the freedom of seventeen terrorists incarcerated in Kuwaiti prisons (see Iran-Contra Report, pp. 256-58).

By the fall of 1986, the operation had begun to unravel. The emergency which had forced North to leave the meeting with the second channel was the downing in Nicaragua of a plane which was running supplies to the contras. Three of the plane's crew were killed and a fourth, Eugene Hasenfus, was captured. The plane crash and the spectacle

of Hasenfus on display in Nicaragua led to renewed interest in illegal efforts to arm the contras. Also in October Roy Furmark met with his old attorney William Casey to tell him that Canadians who acted as middlemen in the arms sales and had not been reimbursed were contemplating a suit which would expose the Iran initiative (see Woodward, pp. 481-84). Even though David Jacobsen was released on November 2 following the delivery of 500 TOWs to Iran, the operation was about to come to an end. The next day, November 3, 1986, a Beirut magazine, Ash-Shiraa, revealed the McFarlane trip to Tehran. The fact that Ronald Reagan would pay ransom to the despised Ayatollah Khomeini set off a firestorm of controversy. That controversy was intensified by the subsequent revelation that profits from the arms sales were diverted to the contras.

Deception

Exposure of the arms sales was followed by an initial effort to keep the truth from the public. North, Poindexter, and McFarlane spent two weeks putting together a chronology of the arms sales. "At best" the Tower Commission asserted, "these chronologies suggest a sense of confusion about both the facts and what to say about them. At worst, they suggest an attempt to limit the information that got to the President, the Cabinet, and the American

public" (p. 480). The chronology went through numerous drafts, as facts were distorted, information deleted, disinformation inserted, and untruths asserted. Prior U.S. knowledge of the TOW shipments in August and September of 1985 was denied. Specific mention of the November 1985 HAWK shipment was omitted. Instead, the chronology merely stated that "later in the fall, other transfers of equipment were made between Israel and Iran" (Iran-Contra Report, p. 300). The retroactive finding of December 1985 was not mentioned. The claim was made that all appropriate Cabinet officers had been consulted and the transactions were "within the limits of established policy and in compliance with all U.S. law" (Iran-Contra Report, p. 300). North subsequently testified that he and Poindexter "knew that this version of the document was wrong, intentionally misleading" (Congressional Quarterly, 1987, p. C-78). McFarlane attributed his participation to "an instinct that the President should not be harmed" (Congressional Quarterly, 1987, p. C-30).

As the false chronology was being prepared, the fine art of deception was also being practiced in testimony before the House and Senate intelligence committees. On November 20, a meeting was held in Poindexter's office attended by Casey, Attorney General Meese, North, Assistant Attorney General Cooper, NSC legal adviser Thompson, and CIA deputy director Gates (Iran-Contra Report, pp. 301-302). A

prepared statement to be read by Casey to the committees was reviewed and a number of revisions proposed. An insertion was made into Casey's statement which claimed the CIA had been informed that the November 1985 HAWK shipment was oil drilling equipment and that the truth was not discovered by the CIA until January 1986. North intensified the lie by changing it to "no one in the U.S. government knew" (Mayer and McManus, pp. 318-19) about the November arms shipment. No one at the meeting objected. However, State Department legal adviser Abraham Sofaer objected when he learned of the planned deception, and threatened to resign (see Mayer and McManus, pp. 319-21). When he was informed of the misrepresentations to be made by Casey, Shultz complained to the President. Thus, in his testimony on November 20, Casey did not make the assertion that the CIA was under the impression its cargo was oil drilling equipment, but neither did he acknowledge that the CIA knew its cargo was HAWK missiles. Casey's reputation as the master of obfuscation was certainly intact after his appearance before the committees (see Woodward, pp. 492-94). Poindexter on the other hand, simply lied, claiming the United States learned of the 1985 TOW and HAWK shipments only after the transactions were completed.

The deception was not limited to false chronologies and misleading testimony. Incriminating documents were also

destroyed. Perhaps the most infamous instance was Poindexter's destruction on November 21, 1986 of Ronald Reagan's retroactive finding authorizing the November 1985 shipment of HAWKs. Poindexter's justification was not national security, but rather that "I thought it was a significant political embarrassment to the President and I wanted to protect him from possible disclosure" (Congressional Quarterly, 1987, p. C-98). North likewise engaged in what he referred to as a "shredding party" (Congressional Quarterly, 1987, p. C-30). North not only destroyed documents relating to the arms for hostages deal, but also memos, phone logs, and other information regarding his efforts in support of the contras. Assisted by his able secretary Fawn Hall, North shredded, altered, and smuggled out of his office incriminating materials (see Bradlee, p. 466; Mayer and McManus, pp. 326-28). His justification for these actions included "the fact that we had lives at risk, we had a program at great risk" (Congressional Quarterly, 1987, p. C-87). North stated he was thrust into the position of making "judgments over lives or lies" (Congressional Quarterly, 1987, p. C-87). While the protection of lives was certainly a worthy goal, North did not deny that he also shredded to avoid "political embarrassment" (Congressional Quarterly, 1987, p. C-89).

This is not to suggest, however, that the lies and misrepresentations started only after the operation was exposed. Deception had long been a cornerstone of the administration's initiatives. In addition to a consistent failure to comply with reporting requirements in the case of covert operations, certain members of the administration lied to congressional committees. Elliott Abrams lied to the House Intelligence Committee and the House Foreign Affairs Committee when he denied U.S. government knowledge of and involvement in the contra supply effort. CIA deputy director of operations Clair George made the same claim before the House Intelligence Committee (see Iran-Contra Report, pp. 145-47).

The most consistent practitioners of the deception of congressional committees were McFarlane and North. During his tenure as national security adviser, McFarlane wrote a series of letters to and met with members of the House and Senate intelligence committees, providing them with a steady stream of misrepresentation and disinformation. McFarlane consistently provided assurance of compliance with the "letter and the spirit" (Iran-Contra Report, p. 127) of the Boland Amendments. He denied solicitation of funds and claimed ignorance as to how the contras obtained financial support. McFarlane also covered up the role of North in assisting the contras, claiming "North did not use his

influence to facilitate the movement of supplies to the resistance ... the allegation that Lieutenant Colonel North offered the resistance tactical advice and direction is, as I indicated in my briefing, patently untrue" (Iran-Contra Report, p. 127). North met with members of the House Intelligence Committee in the White House Situation Room on August 6, 1986, where he denied raising funds for or offering the contras military advice and proclaimed that he "did not in any way, nor at any time violate the spirit, principles or legal requirements of the Boland Amendment" (Iran-Contra Report, p. 141). Afterward, Poindexter applauded North's deception, sending him a note saying, "well done" (Iran-Contra Report p. 141).

What was the reason for this pattern of deception? North asserted that he sought to avoid "a shut off of help for the Nicaraguan resistance" (Congressional Quarterly, 1987, p. C-84). With Congress on the verge of approving renewed contra aid, North's belief that Congress would terminate that aid if it discovered the truth was probably justified. North, like many in the administration, believed Congress could not be trusted to keep covert operations secret. "I did it because we have had incredible leaks from discussions with closed committees of the Congress" (Congressional Quarterly, 1987, p. C-84). Perhaps the most telling justification and the attitude which permeated the

entire initiative to free the hostages and support the contras was provided by John Poindexter: "I simply didn't want any outside interference" (Congressional Quarterly, 1987, p. C-105).

Alexander Hamilton wrote in Federalist 29 of the danger "that select corps may be formed, composed of the young and the ardent, who may be rendered subservient to the views of arbitrary power" (Rossiter, 1961, p. 184). For many, the actions dealt with in this chapter constituted a realization of the worst fears of Hamilton and the framers. In the following chapters, I will consider whether the Iran-Contra Affair was simply an isolated instance of the ardent acting pursuant to arbitrary power, or ultimately the product of our constitutional system; whether the Iran-Contra Affair was an aberration, or a culmination.

CHAPTER II

WHO DICTATES FOREIGN POLICY?

Ronald Reagan's foreign policy gave new life to the doctrine of containment, and this policy would be put to the test in Nicaragua. The Reagan Administration believed it had the power and the right to eliminate the threat to American interests posed by the Marxist Sandinista regime. Congress, with the Damoclean sword of Vietnam hanging over its head, opposed the policy of assisting the Contras. The dispute over Nicaragua was yet another instance of the conflict between Congress and the president to dictate the course of U.S. foreign policy, a conflict which our constitutional system not only failed to resolve, but exacerbated. This section will examine the contradictory answers provided by the system. As Congress and the Reagan Administration entered this battle, each had reason to believe that it was right. One line of authority supported the idea of congressional coequality in the formulation and implementation of foreign policy. A second and very different line of authority supported the position of presidential preeminence in the realm of foreign affairs.

I.

The Roots of Congressional Coequality

Congress contended that before the United States could provide military assistance to a group embroiled in a civil war, the president would have to gain congressional approval. Our system provides considerable support for congressional coequality, the idea that Congress should fully participate in establishing foreign policy goals, as well as the best means of accomplishing those goals. The men who wrote the Constitution understood the vital role which Congress was to play in this new system, as well as the potential threat posed by the president. With the memory of King George fresh in their minds, the framers were not about to give the president too much power. James Madison wrote in Federalist 48, "the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire" (Rossiter, 1961, p. 309). Alexander Hamilton, an advocate of a strong presidency, nonetheless wrote in Federalist 75, "the history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a

magistrate created and circumstanced as would be a President of the United States" (Rossiter, 1961, p. 451). A powerful and coequal Congress would be one of the most effective instruments of checking the president.

The framers viewed the participation of Congress in foreign policy making as essential. First and foremost, as Hamilton noted, "this legislature was to be a popular body, consisting of the representatives of the people periodically elected" (Rossiter, 1961, p. 158). By giving Congress a coequal role in establishing policy, the framers gave the people a voice in determining the path which the nation would pursue. According to Hamilton, foreign policy should be made with "due dependence on the people, and a due responsibility" (Rossiter, 1961, p. 424). This would be insured with the participation of Congress, which was "best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests" (Rossiter, 1961, p. 424). To guarantee this deliberation, wisdom, and representation, Congress was made a coequal in foreign policy and vested with an extraordinary range of power by the Constitution. Among the powers given to Congress were a couple at the heart of the Iran-Contra Affair, the power to declare war and the power of the purse.

War, Peace, and Foreign Affairs

The precedent for a congressional check on presidential adventurism is as old as the Constitution itself. In Article I, Congress is provided with the power to declare war. This power was given to Congress to preclude the president from enjoying an unfettered prerogative to commit the nation to war or foreign conflicts. Madison argued that the branch which wielded the sword was not to be given free reign in matters of war and peace. The possession of this power to declare war gave Congress an imposing check on the president's power, a fact recognized by the Court in United States v. Smith (1806), when it noted that "it is the exclusive province of Congress to change a state of peace into a state of war" (27 F. Cas., 1230). It could be argued that the power to declare war is not applicable to Nicaragua. Reagan did not want war with the Sandinistas. The administration did not advocate actually sending American forces into Nicaragua. However, Reagan's policy did involve facilitating acts of aggression against the Sandinistas and becoming involved in a situation which, as Vietnam demonstrated, could very well lead to a gradual American presence in Nicaragua, and ultimately involvement in war in Central America. Thus, at stake in this conflict between the administration and Congress was the very real possibility of a transformation from a state of peace into a

state of war, a situation which necessitated congressional involvement.

Madison, writing as Helvidius, indicated that the power to declare war gives Congress a dominant role in foreign affairs (Sofaer, p. 113). This awesome power produces in Congress the incentive, as well as the responsibility to involve itself in the circumstances which might thrust the nation into conflict.

Nicaragua was hardly the first time the president and Congress clashed on the issue of American involvement in a foreign conflict. The war between England and France produced considerable debate as to which nation the United States should support. President Washington decided upon a policy of neutrality, and this action is cited by advocates of presidential power as evidence of the president's ability to make unilateral foreign policy decisions (Congressional Quarterly, 1988, p. 7). However, as Thomas Mann points out, after proclaiming neutrality, Washington "provided a full explanation to Congress when it reconvened later in the year and conceded that he had no power to keep Congress from charting a different course in the war" (p. 6). Even though Congress approved the policy of neutrality, Washington acknowledged the power of Congress to make the ultimate decision of whether to become involved. Almost one hundred and fifty years later, neutrality was once again an issue.

In this instance Congress took the lead in dictating U.S. policy, passing a series of neutrality acts in the 1930's which limited American involvement in the European conflict. Two of our most powerful presidents, Washington and Franklin Roosevelt, recognized the role of Congress. Clearly, there was precedent for Congress to use its power over war and peace to determine whether the United States should become involved in Nicaragua.

To paraphrase General Sherman, war has always been hell, but in the nuclear age it has become especially complicated. The development of nuclear weapons means a formal declaration of war would virtually ensure the end of the world as we know it. Since World War II, presidents have avoided all-out conflict and instead pursued military operations short of war. Some contend that the impracticability of a formal state of war has rendered the role of Congress on these questions limited at best, and even moot (see Katzenbach in Sundquist, p. 245). If this is true, then perhaps it was totally within the power of the president to engage in a military action against the Sandinisatas. However, this is not necessarily the case.

Even at a time in which a declaration of war is neither advisable nor sought, Congress must continue to serve as a check on the president. This is not an idea which emerged as a result of the nuclear age or the Cold War. In fact, it

is a precedent which has its origins in the naval conflict between the United States and France during the administration of John Adams. The Supreme Court in Bas v. Tingy (1800) referred to such a conflict as an imperfect war, and acknowledged the ability of Congress to place limitations on the president's conduct of such a "limited, imperfect war" (4 U.S., 45). Justice Patterson wrote that "as far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations" (4 U.S., 45). The scope of permissible presidential action was determined by Congress, a fact noted by Justice Washington, who wrote "those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission" (4 U.S., 40). Arguably, the Court gave Congress greater power in the event of a limited war than in the case of total war. Once Congress formally declares war, the president assumes total control in his capacity as commander in chief. However, Congress not only has the power to recognize a state of imperfect war, it has the power to define the parameters of acceptable presidential conduct of such a war (see Firmage; Wormuth and Firmage). Judged against this standard, it would seem that the restrictions which Congress placed on the Reagan Administration's efforts against the Sandinistas were tame indeed.

Over a century later, the Court reaffirmed the power of Congress to act as a limitation on the president in his capacity as commander in chief in Youngstown Sheet & Tube Co. v. Sawyer (1952). President Truman, facing the possibility of a strike by steelworkers during the Korean War, ordered the Secretary of Commerce to take possession of and operate most of the nation's steel mills. The President justified the seizure as necessary to avert a national catastrophe which would result from a stoppage of steel production. To respond to what he referred to as a grave emergency, Truman contended it was necessary to act "within the aggregate of his constitutional powers as the nation's chief executive and the commander in chief of the armed forces," as well as pursuant to his "inherent power supported by the Constitution, by historical precedent, and by court decisions" (343 U.S. 582, 584). The Supreme Court, in a decision written by Justice Black, ruled President Truman's seizure unconstitutional, justified by neither the Constitution nor Congress. The President's course of action was not within the realm of Article II, not supported by inherent power, and in fact had been specifically rejected by Congress in its passage of the Taft-Hartley Act.

Justice Jackson's concurring opinion, widely regarded as the most enlightened examination of the allocation of foreign policy making power, stressed the importance of

congressional involvement. Jackson noted that "presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress" (343 U.S., 635) and suggested the following framework:

1. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."

2. "When the President acts in absence of either a congressional grant or denial of authority, he can rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."

3. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject" (343 U.S., 635-38).

At the very least, this kind of analysis recognized that Congress has an important role to play. Given the extensive power bestowed by Article I upon Congress in the field of foreign affairs, congressional participation in foreign policy making can not be denied. Even the

president's imposing power as commander in chief fails to present an impenetrable barrier to congressional involvement, since Congress is "empowered to make rules for the government and regulation of land and naval forces, by which it may to some unknown extent impinge upon even command functions" (343 U.S., 644).

Jackson also dealt harshly with the idea of unlimited executive power in the guise of inherent power, implied power, incidental power, plenary power or emergency power, which he contended must be "subject to limitations consistent with a constitutional republic whose law and policy making branch is a representative Congress" (343 U.S., 645-46). The coequal status of Congress is implicit in Jackson's warning that "Presidential claim to a power at once so conclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system" (343 U.S., 638).

Thus, in decisions stretching from an early nineteenth century conflict with France to American involvement in Korea, the Court consistently upheld the principle of congressional coequality. The mere fact that foreign policy is involved or an emergency exists does not create a need for unilateral presidential action. Under our Constitution, a crisis does not create the necessity for a monarch or a dictator. Even under such exigent circumstances, Congress

continues to play a vital role. The Court's conclusion that the actions which the president may take, and even the amount of power which the president may possess, are contingent upon the will of Congress is a clear rejection of absolute presidential power and an expression of congressional coequality.

On numerous occasions in the nuclear age, presidents have sought congressional approval for military actions in conditions short of war. Eisenhower in particular acknowledged the vital role of Congress (see Koenig, p. 217). In 1955, China threatened the islands of Quemoy and Matsu. Rather than take unilateral action, Eisenhower obtained "a congressional resolution authorizing the president to employ American forces in any way necessary" to defend these territories against the Chinese (Sundquist, pp. 114-15). In 1957, when Eisenhower encountered an explosive situation in the Middle East, the President obtained a similar resolution, once again empowering him to use force as he deemed necessary (see Eisenhower, pp. 294-301). Seven years later Lyndon Johnson informed the nation of a North Vietnamese attack upon American destroyers in the Gulf of Tonkin. Johnson sought and received congressional approval in the form of the Tonkin Gulf Resolution, which authorized the president to take all necessary measures including the use of force to repel attacks and to prevent further

aggression in Southeast Asia (see Halberstam, pp. 500-11). These postwar presidents did not believe the impracticability of a formal state of war meant the exclusion of Congress from questions of American military commitment.

Thus, the power to declare war extends beyond the power to decide between a state of war and a state of peace. Congress also has the power to decide between a state of peace and a state of conflict which represents something short of war. In the wake of Vietnam, Congress strengthened its power to determine whether the United States would become involved in limited or imperfect war. By enacting the War Powers Act over Nixon's veto, Congress sought to prevent undeclared and unauthorized presidential wars by imposing a sixty to ninety day limit on military actions which did not have congressional approval. With the passage of the National Commitments Resolution and the Case Act, Congress placed limits on the ability of the president to make secret agreements with other nations which might eventually draw the United States into futile and costly conflicts without the approval of the American people. This kind of legislation sent a clear message to the president, that military or paramilitary action was no longer to be the exclusive realm of the executive. Congress, and the American people, would be participants in the debate as well.

The development of the powers springing from the prerogative to declare war makes congressional participation on the question of military action against Nicaragua not only wise, but essential. The intent of the framers, the decisions of the courts such as Smith, Bas, and Youngstown, and the development of presidential-congressional relations from Washington and Roosevelt to Eisenhower and Johnson strongly suggest that Congress, as representative of the American people, is to participate in the question of whether the nation should become involved in conflicts with other nations. By rejecting covert military operations against Nicaragua, Congress was merely following a pattern created long before Ronald Reagan sought the ouster of Daniel Ortega.

The Power of the Purse

Congress attempted to prevent American involvement in Nicaragua with a series of Boland Amendments, which deprived the administration of the money necessary to conduct military activities against the Sandinistas. Even though some members of the Reagan Administration complained about the constitutionality of these amendments, Boland was merely the latest assertion of the most fundamental congressional power, the power of the purse. Madison referred to this power as "a constitutional and infallible resource" by which

Congress could overcome "all the overgrown prerogatives of the other branches of government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people" (Rossiter, 1961, p. 359). Justice Jackson wrote in Youngstown, "Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent" (343 U.S., 643). In an era in which the declaration of war was no longer a viable option as a limitation on the executive, Congress chose to make its influence felt over issues of war and peace by using the formidable weapon of the purse.

As the United States played a vital role in the post World War II world, the importance of Congress in its capacity as holder of the purse strings expanded. Europe lay in ruins and needed to be rebuilt. Colonialism collapsed and new nations were created. Communism threatened to spread like an ideological plague. Foreign policy increasingly grew to mean foreign aid, and as it did, Congress once again became a major force in the realm of foreign affairs. The Truman Administration developed ingenious plans for the reconstruction and revitalization of Europe. Brilliant ideas, however, were not enough. In order to turn these brilliant ideas into reality, Truman,

the president who was to make numerous unilateral foreign policy decisions, had to get the approval of Congress. And while Congress agreed to fund programs like the Marshall Plan, NATO, and the Truman Doctrine, it did not do so based on blind faith in the wisdom of the executive branch or a belief in presidential domination of foreign affairs. It was not deference to the president which motivated Congress, but rather a shift in policy preference as to the role the United States should play in the world (see Mann, p. 11). Congress did not believe it was rubber stamping presidential policies, but rather using its constitutional power to play a key role in foreign affairs. Money was one of the most valuable weapons in the Cold War, and as long as Congress took its constitutional responsibility seriously, it was guaranteed coequality in shaping foreign policy.

As the Cold War progressed, however, Congress began to defer more and more to the wisdom of the executive branch. As Louis Fisher points out, congressional "faith in executive expertise in the field of national security, combined with the postwar tradition of bipartisan foreign policy, had accustomed the legislature to accept rather uncritically most presidential definitions of military need" (Congressional Quarterly, 1982, p. 81). From the late 1940's through the late 1960's, a string of assertive presidents and influential advisers, from Marshall, Acheson,

and Dulles to McNamara, Rusk, and Bundy, told Congress what they needed to battle Communism. For the most part Congress complied, seemingly willing to forfeit the ability to use its spending power to share in questions of foreign policy.

This bipartisan postwar consensus began to crumble by the latter half of the 1960's, and the battle lines were drawn over the issue of Vietnam. Congress had provided the funds for the prosecution of the Cold War, and now it sought to terminate U.S. involvement in Southeast Asia with its power of the purse. The end would come not in a mighty swoop of the spending axe cutting off all funds to conduct the war, but with a series of limited, specific prohibitions on how those funds could be spent. It would be Nixon who provoked Congress to take action, as he increased the bombing of North Vietnam and ordered the mining of North Vietnamese ports, as well as spreading the battle into neighboring neutral nations, without consulting Congress. The Cooper Amendment stipulated that aid to Thailand and Laos would not include sending American combat troops into these nations. James Sundquist noted that the Cooper Amendment "marked the first time since before World War II that the Congress had asserted control over military operations on foreign soil. The action did not change the status quo, since the Senate understood no ground troops were fighting in Laos - only air units - but it set a limit

on what the president could do in two countries without the consent of Congress" (p. 249).

Cambodia proved to be not only a battleground for American forces and the North Vietnamese, but also for the president and Congress (see Schlesinger, 1973, pp. 193-97). In 1970 Nixon ordered troops into Cambodia to eliminate staging areas for enemy attacks. Congress responded with the Cooper-Church Amendment, which prohibited funds for the reintroduction of ground troops in Cambodia. However, Cooper-Church applied only to ground troops, and when the North Vietnamese continued to use Cambodia as a base for operations, Nixon ordered aerial attacks on Cambodia. Congress responded by cutting off funds for the Cambodian bombing, and Nixon responded to the congressional attack with his veto pen. Undaunted, Senate Majority Leader Mansfield promised to use the spending power "again and again and again until the will of the people prevails" (Sundquist, p. 256). Nixon, reading the proverbial writing on the wall, relented and in the summer of 1973 agreed to end the bombing of Cambodia and to seek congressional approval for any further military operations in Indochina (Nixon, p. 888). As Franck and Weisband noted, Nixon's actions were seen by Congress "as a continued presidential assault on its most basic constitutional prerogatives - the power to declare war and the power to determine how funds

are spent" (p. 15). Congress responded to this assault with its power of the purse, reinvigorating the precedent that the power to determine how funds are spent is the ultimate check on the president, even in the realm of national security and foreign policy.

Even after U.S. forces had been withdrawn, Congress continued to use its power of the purse to dictate policy toward Southeast Asia (see Haley). In preparing the budget for 1974, the executive branch battled with Congress over military and economic aid to Cambodia, Laos, and South Vietnam. Congress, dubious of pouring even more money into Southeast Asia, made dramatic cuts. The conflict over aid reached a new level of intensity when Communist forces violated the ceasefire agreement and launched new offensives in Cambodia and South Vietnam. President Ford requested emergency aid, arguing that "we cannot turn our backs on these embattled countries ... with adequate United States military assistance, they can hold their own" (Ford, p. 250). Congress was not persuaded and denied the funds. Debate over military aid for fiscal year 1975 took place as the Khmer Rouge advanced upon Phnom Pehn and as the North Vietnamese approached Saigon. Ford continued to push for the financial support which he deemed to be "our profound moral obligation" (Sundquist, p. 278). Once again Congress was reluctant. Some in Congress wanted to terminate once

and for all U.S. involvement in Southeast Asia. Others, sympathetic to the struggle of Cambodia and South Vietnam, were hesitant about pumping hundreds of millions more into an ultimately lost cause. Congress had effectively used its power of the purse to thwart the will of the executive. In the spring of 1975, Phnom Penh and Saigon fell to the Communists.

Having dealt the president a defeat in Southeast Asia, Congress was on a roll and pounced on another opportunity to use its power of the purse to challenge the president's foreign policy. The next clash focused on Africa. Angola had recently gained its freedom from Portugal and a number of factions were engaged in a struggle for control. The Popular Movement for the Liberation of Angola (MPLA) received both manpower and firepower from the Soviet Union and Cuba. The National Union for the Total Liberation of Angola (UNITA) was supported by China and subsequently South Africa. The United States, not to be denied an opportunity to contain Communist expansion, began to provide covert assistance to Holden Roberto, the leader of a third group, the National Front for the Liberation of Angola (FNLA), while also supplying weapons to UNITA (see Treverton, 1987, pp. 148-160).

When Congress learned of this cloak and dagger maneuvering, it expressed concern "that the president had

embarked on yet another war the United States could not win, and that he had done so covertly, without the constitutionally required consent of Congress" (Franck and Weisband, p. 46). Once again, the remedy for a misguided and adventurous president was the power of the purse. Senator John Tunney of California, facing a tough primary battle against Tom Hayden and in need of a high profile issue, took the lead in challenging the Ford Administration. Tunney introduced an amendment to the defense appropriation bill to cut $33 million which would be spent in Angola. Congress, still in a post-Vietnam, anti-executive mood, voted in favor of Tunney's amendment, leading Franck and Weisband to conclude "the Angola war was lost in the California primary" (p. 53). The Tunney Amendment was followed by the Clark Amendment, which made permanent the prohibition of funds for covert action in Angola. Ford, whose will was once again stifled, complained that "Congress had lost its nerve" (Ford, p. 359).

Regardless of Ford's contention, Congress showed that it had the nerve to use its power of the purse to assert its coequality. With public opinion on its side, Congress eagerly stepped forward and demonstrated its resolve. By the mid 1970's the American people were reeling from the disappointment of Vietnam and the shock of Watergate. A sentiment pervaded the nation which was decidedly

antagonistic toward the executive branch. Arguably Congress won these battles fought in the wake of Vietnam because it "had caught the mood of the public and the media; the executive had not" (Franck and Weisband, p. 54). With these victories, Congress had acquired a taste for challenging the president, and it wanted to indulge. Throughout the 1970's Congress continued its tight grip on the nation's purse strings, and strengthened the precedent of using the funding power to influence foreign policy. Aid was cut to Turkey in 1975 despite the Ford Administration's claim that such an action would threaten NATO. Ford also saw Congress cut military aid to Chile, Uraguay, and South Korea. Congress continued to use the purse during the Carter Administration, making its influence felt on controversies involving Panama, Nicaragua, Turkey, and Zaire. In the case of Zaire, Carter was limited in the amount of assistance he could provide to repel an invasion of Cuban-backed Angolan troops. Carter, by no means a Cold Warrior, echoed his predecessor when he complained that the refusal by Congress to provide adequate funding impaired "the ability of our government to help countries whose security is threatened" (Koenig, p. 220). By the time Reagan assumed office, Congress had gone to great lengths to reject the deference of the 1950's and 1960's and reestablish the precedent of using the power of the purse to participate in the formulation of foreign policy.

The courts have also provided consistent encouragement for Congress to use the power of the purse to assert its coequality. As Franck and Glennon point out, "the Supreme Court has never held unconstitutional any use of the appropriations power to limit the exercise of power by the executive branch" (p. 676). The closest the Court has come to limiting Congress was its decision in United States v. Lovett (1946). Congress attempted to force the President to fire Lovett, Watson, and Dodd by passing legislation prohibiting the payment of salary to these three advisers. The Court rejected the contention that the congressional power over appropriations was plenary and not subject to judicial review, and concluded that Congress had violated the Constitution by enacting a bill of attainder. However, Justice Black pointed out that "we need not decide whether section 304 is an unconstitutional encroachment on executive power" (328 U.S., 307). In so doing, the Court left the door open for Congress to use its spending power to influence foreign policy.

If the door was left open by the Court, it was up to Congress to walk through. In a number of cases springing from the conflict in Vietnam, federal courts pointed out the consequences of Congress failing to use its power of the purse to express its opposition to executive policy. In Berk v. Laird (1970) and Orlando v. Laird (1971), it was

established that "votes on military appropriations, on selective service, and on other measures sustaining the escalation policy" created "the reality of collaborative action of the executive and the legislative required by the Constitution" (Schlesinger, 1973, p. 290). In Massachusetts v. Laird (1971), the First Circuit Court of Appeals held that if the president "continues to act not only in the absence of any conflicting congressional claim of authority but with steady congressional support, the Constitution has not been breached" (Schlesinger, 1973, p. 292). The message of these decisions is clear. If Congress provides funds for a policy, a presumption exists that Congress approves of that policy. By the same token, if Congress opposes a policy, it should manifest that opposition by refusing to appropriate the money. Congress seemed to have learned this lesson. After these decisions Congress asserted its power of the purse against the president with a vengeance.

Thus, it is not surprising that when Congress in the early 1980's opposed Reagan's Nicaraguan policy, it responded with the Boland Amendments. Historical and judicial precedent seemingly demanded action, not acquiescence. Boland was the progeny of legislation such as the Cooper-Church and Clark Amendments, and apparent evidence that Congress had learned the lesson of Vietnam taught by experience and by the courts. If you oppose a

foreign policy initiative, don't fund it. The Boland Amendments were merely the newest stitch in a pattern developed long ago. It was a pattern created by the enormous power of the purse, combined with the power over matters of war and peace. It was a pattern which gave Congress a coequal role in determining the direction of U.S. foreign policy, and which empowered Congress to reject the course pursued by the Reagan Administration.

II.

An Energetic Executive

Diplomatic and legal history demonstrate that Congress can lay claim to immense power in foreign policy, power which would sanction measures such as the Boland Amendments. The lessons of history are complex, however, and subject to conflicting interpretation. Just as our constitutional system can be said to justify congressional coequality, so too can it support the idea of presidential preeminence. Obviously, this does not mean that the president is to have the power of a monarch. Not only would such a contention be constitutionally suspect, it would be politically unrealistic. As Edward S. Corwin once wrote, "the fact remains that no presidentially devised diplomatic policy can long survive without the support of Congress" (p. 215).

Nevertheless, in our scheme of government the president is in a position to play a central, preeminent role in the formulation and execution of foreign policy. Corwin also wrote that "the most important single factor in the determination of American foreign policy has been presidential guidance of it" (p. 215). At the time Corwin put forth this contention, the powerful postwar presidency was in its infancy. In the subsequent years, the constitutional system would allow the power of the president in foreign policy to reach staggering dimensions, and it would seem to justify Ronald Reagan's belief that it was within his power to determine the course of policy with regard to Nicaragua.

A quick glance at Article II will not reveal the blueprint for an all-powerful presidency. The power to appoint and receive ambassadors would hardly seem to sanction presidential preeminence in foreign policy. Even the more important and impressive tasks assigned to the president in Article II are shared with the legislative branch. The power as commander in chief is arguably triggered the declaration of war, the responsibility of Congress. The power to negotiate treaties is checked by the requirement of Senate ratification. Yet, these powers, along with the provision that "the executive power shall be vested in a President," plant the seeds for presidential dominance of foreign policy.

Despite the brevity of Article II, the writings of the framers reveal that a strong president had been created. While Congress was an important part of this new system of government, it was not to be dominant, especially in foreign affairs. Hamilton wrote of congressional foreign policy weaknesses in Federalist 75: "the multitudinous composition of that body forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and dispatch, are incompatible with the genius of a body so variable and so numerous" (Rossiter, 1961, p. 453). In Federalist 70, Hamilton argued that "all men of sense will agree in the necessity of an energetic executive" (Rossiter, 1961, p. 423). Foreign policy would be the responsibility of this energetic executive, who would enjoy the advantage of "unity ... decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man" (Rossiter, 1961, p. 423). The framers understood the necessity of making and executing foreign policy decisions without the obstacles posed by the cumbersome legislative process. Hamilton wrote, "the energy of the executive is the bulwark of the national security" (Rossiter, 1961, p. 427), and with this responsibility would come preeminence in the realm of foreign affairs.

Our early presidents asserted a preeminent role in foreign policy (see Sofaer). George Washington set the standard for a powerful presidency. His handling of the Genet affair established the precedent of presidential recognition of foreign governments, as well as exclusive presidential communication with other nations (Corwin, p.212). Washington asserted the power to send individuals unconfirmed by the Senate on foreign policy missions (Schlesinger, 1973, p. 79). In addition, Washington created the precedent for excluding the Senate in the negotiation of treaties, and his proclamation of neutrality in the war between England and France was evidence of the president's power to seize the initiative in foreign affairs (Congressional Quarterly, 1988, p. 7). Thomas Jefferson reacted to piracy in the Mediterranean by dispatching U.S. warships, not pursuant to an authorization by Congress, but based on his power as commander in chief (Sofaer, pp. 208-16). Despite the fact that the Constitution did not authorize it, Jefferson negotiated and executed the Louisiana Purchase (Sofaer, pp. 196-97). In spite of the possibility of war with Spain, James Monroe used forces led by Andrew Jackson to blaze a trail of expansion through Florida (Sofaer, chapter Five). And, the Monroe Doctrine was the action of a president who sought to dominate foreign affairs. By unilaterally defining what U.S. foreign policy

would be, and taking actions to implement that policy, our earliest presidents gave life to Hamilton's energetic executive and set the standard for presidential preeminence in foreign policy matters.

Global Power-Powerful President

With the coming of the twentieth century, the United States began to emerge as a global power and sampled a "taste of empire" (Jones, p. 273). As it did, the president's foreign policy power increased even further. LaFeber writes that at this time President McKinley "stretched the constitutional restraints on his power until they assumed an entirely new shape" (1987, p. 704). When Congress wanted war with Spain, McKinley resisted. And when Congress resisted, McKinley plunged the nation into war. In addition, he sent troops to China and the Philippines without obtaining the approval of Congress (see Goldsmith). Theodore Roosevelt, McKinley's successor, staked out an even greater claim for unilateral action. Roosevelt was fond of the old African proverb, "speak softly and carry a big stick." Roosevelt would employ that stick not only against our enemies, but also against Congress (see Beale). He formulated the Roosevelt Corollary to the Monroe Doctrine, in which the United States would act as a hemispheric police force. In 1904 Roosevelt implemented his corollary by

sending the Navy to Santo Domingo to crush a revolution. When the Senate refused to ratify a treaty dealing with the Dominican, TR obtained the result he wanted by going behind the Senate's back and concluding an executive agreement. This would be a strategy Roosevelt would repeat when he encountered Senate opposition on controversial arrangements with Japan.

Roosevelt advocated what came to be known as the stewardship presidency. The president, as the steward of the people, had "not only the right but the duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or the laws" (Roosevelt, pp. 371-72). Roosevelt put the stewardship theory into practice in Panama. He once commented, "if I had followed traditional conservative methods I would have submitted a dignified State paper of probably 200 pages to Congress and the debates on it would have been going on yet; but I took the Canal Zone and let Congress debate; and while the debate goes on the Canal does also" (Jones, p. 285). Roosevelt combined his big stick and stewardship theories with his disdain for Congress in responding to Japanese aggression in 1907. In a move calculated to send a message to Japan, Roosevelt ordered a fleet of battleships on a world tour. Congress was dubious and claimed it would not provide funds for the journey of "the Great White Fleet."

The President informed Congress "that he had enough money to send the ships halfway around the world. If Congress wanted them back, it could give him the funds. Congress surrendered" (LaFeber, 1989, p. 239). It was this tendency to take unilateral action which led one congressman to conclude that Roosevelt had "no more use for the Constitution than a tomcat has for a marriage license" (LaFeber, 1989, p. 224).

During the administration of Woodrow Wilson, the U.S. experiment with global dominance would reach its crescendo and ultimately subside, and with it would go the foreign policy dominance of the president. While Wilson envisioned a world in which international law would be used to harmonize diverse global interests, many of the policies which he pursued were a continuation of those embraced by McKinley and Roosevelt (see Link). Wilson talked of noninterventionism, but sent Marines into Haiti, Cuba, the Dominican Republic, and Mexico. To achieve his objectives, the President felt free to disregard the role which Congress was in theory to play. Wilson once wrote, "the initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely" (LaFeber, 1987, p. 708). One congressional power which Wilson could not ignore was the power to declare war, and in 1917 he had to convince Congress to enter the

first world war, the war to end all wars. Another power which Wilson could not ignore, and which ultimately led to his greatest defeat, was the Senate power to ratify treaties. After years of being treated as second rate and barren of any intellect, the Senate exacted its revenge by rejecting the Treaty of Versailles and Wilson's precious League of Nations. After a brief shining moment, presidential preeminence in foreign affairs lapsed into dormancy.

World War I quenched America's thirst for global influence, and the United States entered into a period of isolationism. This isolationist sentiment intensified with the coming of the Great Depression, and resulted in the further decline of the president's foreign policy power. Thus, when Franklin Roosevelt sought to offer assistance to Great Britain as it stood alone against Hitler, he had to deal with a Congress which was hesitant to become involved in another European war (see Lippmann). When Congress expressed reluctance to provide materials to Britain, Franklin Roosevelt took a page from the book of his distant cousin Theodore Roosevelt and concluded the deal in the form of an executive agreement. Roosevelt exchanged fifty U.S. destroyers for ninety-nine year leases on British naval bases. Long before Congress declared war, Roosevelt proclaimed a state of emergency and initiated a number of

war-like actions, including dispatching troops to Iceland and Greenland and ordering U.S. warships to attack Nazi submarines in the Atlantic (see Langer and Gleason). The fact that FDR was able to help Churchill, even at a time when isolationist sentiment pervaded the nation, indicated the enormous power of the president to unilaterally dictate the course of American foreign policy. It also provided a glimpse of things to come.

The Court and Presidential Preeminence

While the foreign policy power of the president is prone to the occasional political setback, the Supreme Court has been quite consistent in its support for the idea of presidential preeminence. In fact, if the president wants to dominate national security and foreign policy and impose his will on a reluctant Congress, the Supreme Court has provided him with ample precedent to justify this domination. The ultimate statement of presidential power in foreign policy came in United States v. Curtiss-Wright Export Corp. (1936). In this case, President Roosevelt, pursuant to congressional authorization, prohibited the sale of weapons to Bolivia and Paraguay, nations involved in the Chaco conflict in the early 1930's. Curtiss-Wright was prosecuted for conspiring to sell machine guns to Bolivia, and appealed its conviction on the theory that Congress had

unconstitutionally "abdicated its essential functions and delegated them to the Executive" (299 U.S., 315). The Supreme Court rejected this argument and upheld the President's action. While the Court at that time was very sensitive to the matter of excessive legislative delegation to the president in the realm of domestic affairs, Sutherland's majority opinion noted that "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved" (299 U.S., 320). This technically was the basis for the Court's decision in Curtiss-Wright.

Sutherland, however, had much more to say on the subject of the power of the president. Although Congress in this particular instance had sanctioned Roosevelt's action, Sutherland noted that "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power" (299 U.S., 320). The permission of Congress is not a prerequisite to decisive presidential action. In what has become the most influential, controversial, and frequently cited statement of the Court on the allocation of foreign affairs power, Sutherland noted "the very delicate, plenary,

and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress" (299 U.S., 320).

To justify this expansive interpretation of executive power, Sutherland did not look to the president's enumerated powers. In fact, he hardly even mentioned Article II or the Constitution. Instead, Sutherland's explanation focused on sovereignty. Sovereignty necessarily included the power to conduct foreign policy, which raised the question of exactly who was in possession of this sovereign right. Sutherland noted that "during the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown" (299 U.S., 316). Following the Declaration of Independence and the Revolutionary War, "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America" (299 U.S., 316). Sutherland asserted that even if the power to conduct foreign policy "had never been mentioned in the Constitution, (it) would have vested in the federal government as necessary concomitants of nationality" (299 U.S., 318). If the federal government maintained possession of this sovereign power over foreign policy, an additional question is raised. Which branch of the federal government

should exercise this sovereign power? For Sutherland, the answer was easy. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation" (299 U.S., 319). Thus, according to Sutherland, the absence of specific presidential foreign policy power in Article II is not a matter for concern. The president possesses an extraconstitutional, inherent power to control U.S. foreign policy.

The flaws in Sutherland's opinion are numerous, and criticisms of Curtiss-Wright have been put forth for half a century (Glennon, 1988; Lofgren). Nevertheless, the continued validity of Curtiss-Wright as a precedent cannot be denied. Regardless of the opinion of scholars, judges have relied on Curtiss-Wright for over fifty years to uphold presidential power in foreign affairs. In fact, it would take on a life of its own as the specifics of the case faded from memory. The Court in United States v. Mazurie (1975) would recall Curtiss-Wright as a case in which the president possessed "independent authority over the subject matter" of foreign policy (419 U.S., 557). In Haig v. Agee (1981) the Court cited Curtiss-Wright as evidence of "the generally accepted view that foreign policy was the province and responsibility of the executive" (453 U.S., 293-94). In

Regan v. Wald (1984), Curtiss-Wright would be cited as justification for the "traditional deference to executive judgment in this vast external realm" (468 U.S., 242-43). Thus as a precedent, Curtiss-Wright is bloodied, but unbowed.

Sutherland was given an opportunity in the subsequent year to reaffirm his theory of inherent presidential power. In 1933, the United States recognized the government of the Soviet Union and established diplomatic relations. Pursuant to this renewed cooperation, Roosevelt concluded an executive agreement known as the Litvinov Assignment, which involved the settlement of all U.S. claims against the Soviet Union. In United States v. Belmont (1937) the Supreme Court upheld the Litvinov Assignment, ruling that an executive agreement superceded contrary state law. Sutherland's majority opinion also elaborated on the power of the president to act in the realm of foreign affairs without the involvement of the Senate. Citing his language from Curtiss-Wright, Sutherland noted that "the Executive had authority to speak as the sole organ" of the United States, which allowed the President to conclude agreements which "did not, as in the case of treaties ... require the advice and consent of the Senate" (301 U.S., 330).

While the basis of this power to transcend the constitutionally prescribed treaty process was a somewhat

generic reference to "the authority of the President" (301 U.S., 330), Sutherland stood firm with the proposition that the power to conclude an executive agreement is "within the competence of the President (and) may not be doubted" (301 U.S., 330). Not only did Belmont offer Sutherland another chance to apply his idea of inherent presidential power, it offered the opportunity to expand it. The assertion of inherent presidential power in Curtiss-Wright could be dismissed as dicta, since Roosevelt acted pursuant to congressional authorization. In Belmont, the Court upheld the president's ability to act without the sanction of Congress, and seemingly his ability to circumvent the constitutional requirement that international agreements be concluded through the treaty process, with the check provided by Senate ratification. While Belmont is dismissed by some as being primarily a case involving federalism, the vision of presidential power put forth by Sutherland can not be ignored. The president's inherent power in foreign affairs could allow him to impose his will on the legislative branch, even where the Senate is given a textually demonstrable role to play.

An alternative justification for presidential preeminence in foreign affairs was stated in United States v. Pink (1942). For the second time in a five year span, the Supreme Court upheld the constitutionality of the

Litvinov Assignment. The majority opinion of Justice Douglas differed from the controversial opinions of Sutherland in Belmont and Curtiss-Wright in a number of ways, most notably in its focus on the president's implied powers rather than extra constitutional inherent power. The Court took the position that if the president is given a power by the Constitution, he should also possess a power which is necessary to carry out that enumerated power. Douglas argued that since the president held the power to recognize foreign governments, he should also have the power to engage in actions which were "part and parcel" of the new policy of recognition (315 U.S., 227). Roosevelt sought to recognize the Soviet Union, and "settlement of all American claims against Russia was one method of removing some of the prior objections to recognition" (315 U.S., 227). Douglas concluded that "power to remove such obstacles to full recognition as settlement of claims of our nationals is certainly a modest implied power of the President" (315 U.S., 229). Even though they both upheld the president's ability to conclude an executive agreement, the implied powers approach of Douglas was less controversial and on stronger constitutional ground than the inherent power approach of Sutherland.

While it has achieved less notoriety than Curtiss-Wright, Pink can be read as an even greater

justification for presidential preeminence in foreign affairs. While taking a different approach, Pink certainly reinforced the idea of a dominant president suggested by Curtiss-Wright. Douglas even cited authoritatively Sutherland's "sole organ of the federal government in the field of international relations" language (299 U.S., 320). In fact, Pink answered one of the questions left open by Curtiss-Wright, indicating that the president's power as sole organ went far beyond merely communicating a policy forged by consensus. Douglas contended that the power of recognition "includes the power to determine the policy which is to govern the question of recognition" (315 U.S., 229). Thus, the Court in Pink not only upheld the ability of the president to carry out foreign policy with an executive agreement, it affirmed the power of the president to unilaterally formulate that policy. After Pink, it seems safe to assume that when the Court said sole organ, it referred to a dominant president in foreign policy, rather than a mere channel of communication.

The Court's explanation of the source and extent of implied powers also indicated a willingness to accept presidential preeminence. Douglas' explanation went beyond merely asserting the president should possess powers incident to his Article II powers. The Litvinov Assignment was upheld because it was part and parcel of the president's

power of recognition. However, it is important to bear in mind that recognition is itself an implied power, incident to the president's power to receive ambassadors. Thus, not only are powers to be implied from Article II, but implied powers may give rise to additional implied powers. This impressive array of implied powers may be employed, according to Pink, to prevent the president's power in foreign policy from being "thwarted or seriously diluted" (315 U.S., 230). Douglas justified this expansive vision of presidential power as necessary for "effectiveness in handling the delicate problems of foreign relations" (315 U.S., 229). A president who searches Pink for guidance and who encounters the Court's conclusion that the executive enjoys substantial implied powers which permit him to determine policy to the extent necessary to ensure "effectiveness in handling the delicate problems of foreign relations," would not be unreasonable in his conclusion that he is to dominate foreign policy.

Presidential preeminence has also been cited by the Supreme Court when it has been called upon to rule on executive action in a crisis situation. The Court has consistently ruled that the president's power as commander in chief allows him to respond quickly and decisively to emergency situations. As far back as the early 1800's the Court stated that "the authority to decide whether the

exigency has arisen belongs exclusively to the President, and ... his decision is conclusive upon all other persons" (Martin v. Mott, 12 U.S. 19, 30, 1827). The Court would expand upon this notion of emergency presidential powers in The Prize Cases (1863). At issue was President Lincoln's blockade of southern ports and seizure of vessels. The President's order was challenged as an act of war taking place without a declaration of war by Congress. The Court upheld Lincoln's response to the Confederacy's secession from and attack upon the United States. The Court stated that the President had the power to take action "without waiting for Congress to baptize (it) with a name" (67 U.S., 669). If the president is put in a situation in which he is "bound to resist force by force," he must accept the challenge without waiting for any "special legislative authority" (67 U.S., 668). A matter regarding the nation's survival "is a question to be decided by (the president), and this Court must be governed by the decisions and acts of the political department of the government to which this power was entrusted" (67 U.S., 670).

The message of decisions such as The Prize Cases is presidential preeminence. The president is to have exclusive power to identify and respond to emergency situations, without waiting for legislative authority. It is tempting to discount the applicability of Prize and other

wartime cases, since they involve unique circumstances and arguably are of dubious applicability today. Just because Lincoln could exercise extraordinary power during the Civil War does not necessarily mean that Reagan could employ similar powers in facing contemporary problems. On the other hand, as the Court noted in 1981 in Haig v. Agee, "history eloquently attests that grave problems of national security and foreign policy are by no means limited to times of formally declared war" (453 U.S., 303). If the Court is willing to recognize that the nation faces threats to national security in times of peace as significant and compelling as threats in time of war, then it is not inconceivable that the Court would be willing to allow the president to take extraordinary measures, perhaps of the character upheld in The Prize Cases, in order to respond to these contemporary dangers. Even though we live in a world in which formally declared war is an anachronism, the second half of the twentieth century has been characterized as an age of permanent crisis. If this is true, then the president should possess the power requisite to respond to emergencies, and this emergency power would seem to make the president the dominant actor in the realm of foreign policy and national security.

Whether it based its decisions on inherent powers, implied powers, or emergency powers, the Supreme Court has

throughout history handed down rulings which send an unmistakable message to the occupant of the White House and those who work for him: on questions of foreign policy and national security, the president is the dominant, preeminent actor.

The National Security Presidency

World War II ended with the explosion of two atomic bombs. The development of nuclear weapons not only ended this particular war, it virtually precluded any future world wars. Instead, the world learned to engage in smaller conflicts, involving limited force, conventional weapons, and covert operations. The United States was no exception. The use of military force evolved from an alternative of last resort into an instrument of foreign policy. The merging of military and foreign policy resulted in a combination of the president's powers as commander in chief and chief diplomat, creating a national security presidency which would dominate the complex problems of foreign affairs. The national security president would not only have the power to define foreign policy objectives, but also to determine the means of achieving those objectives.

The dominance of the national security presidency was made possible by the deference of Congress, which still questioned its ability in the realm of foreign affairs after

the miserable failure of isolationism in the 1930's. Indicative of this deference was the comment of Senator Richard Russell on the possibility of Eisenhower dispatching military advisers to South Vietnam: "I think this is the greatest mistake this country's ever made. I could not be more opposed to it ... but if he does it I will never raise my voice" (Sundquist, p. 114). Senator William Fulbright expressed reluctant acquiescence when he stated, "it is distasteful and dangerous to vest the executive with powers unchecked and unbalanced. My question is whether we have any choice but to do so" (Sundquist, p. 120). The national security presidency was also bolstered and embraced by the American public, as a consensus was forged on the necessity of containing Soviet aggression and expansion as well as on the ability of the president to accomplish this task. We had to prevail against Communism and we expected the president to lead the noble fight.

The first Cold War president was Harry Truman, and his actions set the standard for the dominance of the national security presidency. In fact, Truman determined the policy which would drive the nation throughout much of the postwar age, that the United States would assist free people anywhere in the world who were struggling against Communist aggression. While he involved Congress when it was necessary, for example to provide funding for the Truman

Doctrine or the Marshall Plan, Truman never hesitated to take unilateral action. Even when Congress refused to provide him with money, as in the case of development of the H bomb, Truman believed it to be the president's prerogative to push forward and find alternative sources of funding (Rossiter, 1956, p. 10). Without bothering to get the approval of Congress, Truman sent American troops to Europe to join the newly created NATO forces. While he informed a few committees beforehand, the President argued, "I do not have to unless I want to. But of course I am polite, and I usually always consult them ... I don't ask their permission, I just consult them" (Sundquist, p. 111). This led even Clinton Rossiter, one of the most vehement advocates of a powerful presidency, to criticize Truman for "his cavalier disregard of the sensibilities and prerogatives of Congress" (1956, p.123). Obviously, Truman would allow neither the congressional power of the purse nor the wrath of scholars to deter him from doing what he thought best for the nation, a sentiment seemingly shared by Reagan as well.

Truman's most famous Cold War action was taken in response to North Korea's invasion of South Korea. When Secretary of State Dean Acheson phoned the President at his home in Missouri with the news, Truman reportedly responded, "Dean we've got to stop the sons of bitches no matter what"

(M.Miller, p. 266). If possible, it would be interesting to ask Truman whether he meant no matter what opposition the Communists could muster, or no matter what the American people and the United States Congress thought. Within two weeks of the invasion, American forces were fighting the North Koreans. While Congress had not been consulted prior to the decision to send Americans to Korea, some advisers subsequently counseled Truman to obtain a congressional resolution of support. Among those who disagreed with such a course of action was Acheson, who wrote that he "recommended that the President should not ask for a resolution of approval, but rest on his constitutional authority as commander in chief of the armed forces ... the harm it could do seemed to me far to outweigh the little good that might ultimately accrue" (Acheson, pp. 414-15). Years later, Acheson wrote that Truman's decision not to get congressional approval was motivated by the President's "passionately held conviction" that "his great office ... pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power to send our forces into battle" (p. 415).

On his flight from Independence to Washington, Truman pondered the response of the United States to the Korean

invasion. A student of history, he recalled Munich and the failure to stop Hitler as the Germans took Europe. On the ride from the airport the President said to Acheson, "By God, I'm going to let them have it" (Isaacson and Thomas, p.508). This statement perfectly captured the attitude of the national security presidency. He did not say the United States would let them have it. I am going to let them have it. In the era of the national security presidency, the United States and the occupant of the Oval Office were one and the same. With his decision not to get congressional approval, Truman threw open the Pandora's Box of presidential power. The effects would continue to be felt over thirty years later, as Ronald Reagan considered the options for battling Communism in Central America.

Dwight Eisenhower enjoyed the power and prestige passed on by Truman, while learning from Truman's mistakes. When the American people became disgruntled with the Korean war, Truman stood alone to take the blame. Congress capitalized on being left out of the decision making process and led the charge against Truman. Eisenhower sought to establish the appearance of congressional involvement, while maintaining a dominant position in foreign affairs. By minimally involving Congress, the President covered himself politically at home, while sending a message to other nations that the government of the United States was unified

in its foreign policy. When Eisenhower felt it necessary to become involved in the world's hot spots, he would go to Congress and request authorization to take whatever action he deemed necessary to defend democracy, global stability, and most important, American interests. Congress responded with legislation such as the Formosa and Middle East Resolutions, which gave the President discretion to take virtually any action which he judged appropriate. With these resolutions, Eisenhower succeeded in getting Congress to take "itself out of the decision making process altogether," thus strengthening the national security presidency (Sundquist, p. 110).

Of course, Ike believed he had the independent power to formulate policy and use any means at his disposal to implement that policy. Regarding Formosa, Eisenhower stated, "Authority for some of the actions which might be required would be inherent in the authority of the commander in chief. I would not hesitate, so far as my constitutional powers extend, to take whatever emergency action might be forced upon us" (Sundquist, p. 115). Eisenhower later demonstrated just how far the constitutional powers of the national security president extended when he sent Marines into Lebanon, not on the basis of the Middle East Resolution, but based on his power as commander in chief (see Eisenhower, pp. 262-291).

With John F. Kennedy at the helm of the national security presidency, Congress became a veritable non-entity on global matters (see Schlesinger, 1965; Sorenson). Kennedy attempted to live up to his inaugural promise that the United States would "pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and success of liberty" (Sorenson, p. 246). To accomplish this goal, JFK felt compelled to go beyond programs like the Peace Corps and the Alliance for Progress. To assure the survival and success of liberty, Kennedy provided assistance to anticommunist forces in the Congo and Laos. Just what price Kennedy was willing to pay was demonstrated in the Cuban Missile Crisis (see Allison; Schlensinger, 1965). In October 1962, when the United States discovered Soviet missile installations in Cuba, JFK demanded that they be removed. Soviet refusal led to confrontation, an eventual blockade of Cuba, and the possibility of nuclear war. Once again, it was the executive branch making the decisions which would determine whether the nation would plunge into a state of war. Congress was involved peripherally at best, with a few members being called in to urge an air strike against Cuba, advice which the President ignored. The Cuban Missile Crisis reinforced the idea that in dire circumstances, the president is the dominant actor.

Perhaps the ultimate test of JFK's inaugural rhetoric would come in Vietnam (see Halberstam). The Kennedy Administration believed North Vietnamese efforts to undermine and overthrow the government of South Vietnam to be backed by Moscow and Peking, and thus yet another challenge to contain the spread of Communist influence. Over the course of his presidency, Kennedy would supplement an initial dispatch of advisers with growing numbers of American troops and increasing amounts of military aid. By 1963, South Vietnam had been provided with 16,000 American troops and over $180 million in aid. In one of his final press conferences, Kennedy stated that "for us to withdraw from that effort would mean a collapse not only of South Vietnam but Southeast Asia. So we are going to stay there" (Jones, p. 590). Kennedy's statement made it clear that whether we would become involved in the conflict in Southeast Asia was an issue which the president would decide. Under the Constitution, it would seem that this kind of question of war or peace would be a matter for Congress to resolve. However, in the age of the national security presidency, not only would the executive make this decision, Congress and the American people would go along.

For Lyndon Johnson, the main foreign policy concern would be Vietnam, and he would employ the full power of the national security presidency to deal with it. When the

North Vietnamese fired upon American destroyers in the Gulf of Tonkin, Johnson responded with firepower and then went to the Congress for a resolution of support. In early 1965, LBJ ordered the bombing of targets in North Vietnam, dispatched two divisions of Marines to Southeast Asia, and obtained additional aid for South Vietnam. By the end of 1965, over 150,000 Americans were in Vietnam. Even though Congress had issued no formal declaration, the United States was at war. Vital decisions regarding Vietnam were made, not in consultation with Congress but in meetings among Johnson, Dean Rusk, Robert McNamara, and Walt Rostow, which reportedly "began with a prayer and ended with selecting bombing targets" (LaFeber, 1989, p. 582).

As Johnson's term drew closer and closer to an end, antiwar sentiment spread throughout society, as well as in Congress. Some in Congress questioned the President's authority, since Congress had not formally declared war. Johnson's Assistant Attorney General, Nicholas Katzenbach, testified before Congress that "the expression of declaring a war is one that has become outmoded in the international arena" (Sundquist, p. 245). The President, Katzenbach asserted, possessed independent constitutional power to pursue his course of action in Vietnam. There was considerable validity to Katzenbach's statement. Even if Article II did not expressly give the president this power,

the events of the previous decades provided compelling justification for the administration's position. However, like Truman before him, Johnson learned the hard way that the enormous power of the national security presidency provided no immunity against domestic problems. The war, as well as the president who fought it, had become very unpopular, and after a poor showing in the New Hampshire primary, Johnson chose not to seek reelection in 1968.

Richard Nixon inherited the war, and in his attempt to bring it to an end, he would stretch the national security presidency to its limits. Nixon's planning of the Cambodian invasion of 1970 was indicative of his understanding of the roles of the president and Congress in the realm of national security. In a memo to Henry Kissinger Nixon wrote, "I think we need a bold move in Cambodia" (Nixon, p. 448). Although the man from Missouri would spin in his grave at the comparison, Nixon's remarks are quite similar to those of Harry Truman as he prepared for war in Korea. Even though a bold move was in order, a move which would further expand the undeclared war, Nixon felt it was within his power to make the decision. Congress was involved only after Nixon decided to send forces into Cambodia to destroy Communist sanctuaries. The President met with the congressional leadership and told them, "I just wanted you to know that whether you think its right or wrong, the

reason I have decided to do this is that I have decided its the best way to end the war and save the lives of our soldiers" (Nixon, p.451).

The invasion of Cambodia was but one of many foreign policy actions taken with neither the involvement nor the support of Congress (see Hersh). In February 1971, the President provided air cover for a South Vietnamese invasion of Laos. In December 1971, Nixon ordered the most intensive bombing of targets in North Vietnam since the days of Johnson's saturation bombing. Nixon responded to North Vietnamese incursions into the DMZ in the spring of 1972 with the bombing of Hanoi and the mining of harbors in Haiphong. When the North Vietnamese balked at the peace talks, the President bombed them into submission with a steady barrage of firepower in December 1972. While it can be argued that Nixon's actions were no more egregious than those of any other wartime president, it must be recalled that Congress never declared war against North Vietnam, and had repealed the Tonkin Gulf Resolution. Nixon was acting pursuant to his own vision of presidential power.

While Vietnam was his priority, Nixon found additional outlets for the exercise of the tremendous power of the national security presidency. When the Soviets threatened to become involved in the Yom Kippur War of 1973, Nixon used his power as commander in chief to put United States nuclear

forces on alert, taking the world once again to the brink of nuclear war. In his capacity as chief diplomat, Nixon made the decision to normalize relations with China. As Watergate revealed, Nixon also used his power to trample the civil liberties of American citizens, to obstruct the administration of justice, and to steamroll the separation of powers. In Nixon's hands, the national security presidency was a blunt instrument, which he used with relish against his enemies, both foreign and domestic, and both real and imagined. Before his second term was completed, the American people and Congress had grown weary of Nixon and wary of the national security presidency.

Did the national security presidency end with Nixon? Certainly the congressional acquiescence which was present for much of the postwar period ended during Nixon's term. It can be argued that the actions of Richard Nixon were the proximate cause of the resurgence of Congress. Some of the most important pieces of legislation passed by Congress in the early 1970's were reactions to Nixon's conduct of national security policy. Nixon's successors would be forced to pay for his sins, as they struggled with a steady stream of legislation aimed at limiting the president's foreign policy prerogatives. In addition, the consensus on the containment of Communism was shattered during the Nixon presidency. Vietnam made even the most conservative

segments of the American public question the necessity of considering every foreign conflict to be of vital importance to the United States. Thus, by the 1970's, the congressional deference to, as well as popular support for, the national security presidency was at a postwar low.

On the other hand, it can be argued that the national security presidency was not dead, but in yet another period of dormancy. After witnessing the flawed administrations of Ford and Carter, and the expansion of Soviet influence throughout the world, the public was not quite ready for a permanently weakened presidency. Even after Vietnam, Crabb and Mulcahy were able to write, "it needs to be equally appreciated that presidents have become powerful because the public has expected them to act in such a fashion. Presidential predominance in foreign affairs may disturb constitutional scholars and members of Congress, but it has been a development that has largely reflected the wishes and interests of the American people" (p. 36). In addition, it is questionable whether the legislation of the 1970's, as impressive as it was, really destroyed the precedents created in the years from Truman through Nixon. The president still maintained the power to deploy the armed forces, despite passage of the War Powers Act. The president still possessed the power to engage in covert operations, despite the passage of the Hughes-Ryan

Amendment. And, the president still held the power to conclude executive agreements without Senate approval, despite passage of the Case Act. As Sundquist noted, "no simple act of the Congress, even if signed by the president, can change the Constitution. So whatever constitutional powers William McKinley used in sending troops to China, Woodrow Wilson to Mexico, Franklin Roosevelt to Iceland, Harry Truman to Korea, Dwight Eisenhower to Lebanon, Lyndon Johnson to Vietnam, and Richard Nixon to Cambodia remain, still fuzzy but intact" (p. 265).

Reagan bought into the idea of the national security presidency. He bought it with a vengeance, and why wouldn't he? The national security presidency was the logical extension of the framers' "energetic executive" and "bulwark of the national security." It was the creation of Curtiss-Wright's edict that the president is the "sole organ of the federal government" in the realm of foreign affairs. It was the culmination of numerous presidents who had taken the reins of government and dictated to Congress what foreign policy actions the country would pursue. Why wouldn't Reagan believe he could determine that the United States would assist the contras? By the time Reagan took office, a broad pattern of presidential domination of foreign policy had been established. On a more specific level, Reagan encountered a precedent of unilateral

presidential action in Central America, from Monroe's doctrine and McKinley's war to Roosevelt's corollary, Wilson's Marines, and Johnson's invasion of the Dominican Republic. By comparison, Reagan's desire to provide assistance to the contras seems positively subdued. If the actions of past presidents are indicative of what current presidents can do, then Reagan had every reason to believe it was within his power to assist the contras.

Who is to dictate U.S. foreign policy? Our constitutional system gives us no real answers, no rules. Instead, it provides only a vast array of contradictory principles and precedents. Many of these principles would lead Congress to conclude that it, as holder of the purse strings and the branch which decides between war and peace, would make the ultimate determination on the issue of the contras. The system offers additional, equally persuasive precedents which would lead Reagan to conclude that he, as the sole organ of the federal government in foreign relations and heir to the tradition of Jefferson, Roosevelt, and Truman, would dictate what our policy on Nicaragua would be. The fact that the constitutional system could lead both to believe that they were right created the environment for the Iran-Contra Affair.

CHAPTER III

OF SECRECY AND ACCOUNTABILITY

At the heart of the Iran-Contra Affair was the struggle over information. The Reagan Administration asserted the power to pursue its objectives secretly and to withhold information about those operations from Congress. Congress asserted the power to obtain this information from the administration. A substantial body of constitutional precedent existed in support of both contentions. On one hand our constitutional system provides us with a line of precedent grounded in the need for secrecy in the realm of international relations, which acknowledged the power of the president to conduct covert actions and to withhold information from Congress and the American people. However, our system gives us a second, very different line of precedent, based on the necessity of presidential accountability and the sanctity of checks and balances, as well as the idea that an informed Congress is an effective Congress. This line of precedent strongly suggests that Congress should have had access to any information held by the Reagan Administration, no matter how diplomatically or

militarily sensitive it might be. This chapter will examine these contradictory precedents, and the environment of uncertainty in which the Reagan Administration and Congress engaged in their struggle over secrecy and accountability.

I.

The "Grand Inquest": Knowledge is Power

Congress had every reason to believe that it would have access to information relating to the Reagan Administration's efforts to assist the contras and to secure the release of American hostages in the Middle East. Congress has throughout history been privy to this kind of information. If it is true that knowledge is power, then it is doubly so in the case of Congress. For Congress to effectively exercise much of its power, it must be able to acquire information from the executive branch. Not only is the ability to obtain such information vital for Congress to perform its constitutional responsibilities, it is essential to the existence of our constitutional system. This section will examine the line of precedent which supports the power of Congress to acquire information from the president.

One of the most important features of our Constitution is the system of checks and balances, and the underlying assumption that each branch will be accountable to the

others, and ultimately to the American people. Presidential accountability would best be insured by allowing Congress, as the direct representative of the American people, to obtain information from the executive branch about its activities. It seems the framers wanted Congress to enjoy the same power relative to the president which Parliament maintained with regard to the King, the authority to act as "the Grand Inquest of the Nation" (Berger, 1977, p. 336). Raoul Berger points out that Montesquieu, "the oracle repeatedly cited by the founders on the separation of powers, stated that the legislature has the right, and ought to have the means of examining in what manner its laws have been executed" (1977, p. 337). To deny Congress access to information held by the executive branch is to sacrifice the idea of presidential accountability and ultimately to undermine the system of checks and balances.

The ability to acquire information is necessary for Congress to perform its constitutional responsibilities. In Federalist 53 Madison wrote, "No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge on the subjects on which he is to legislate" (Rossiter, 1961, p. 332). As previously indicated, the subjects on which Congress was to legislate extended well into the realm of foreign affairs. Its power of the purse, its constitutional obligations in

matters of international commerce and agreements, as well as matters of war and peace guarantee a role for Congress to play. If that role is to be played effectively, Congress must have access to information. The idea that Congress would provide funding for a president's foreign policy without extensive knowledge of that policy undercuts the reason for giving Congress the power of the purse in the first place. Berger asks, "On what theory is Congress, in whom the vast bulk of war powers is vested, to be kept in the dark as to any moves that may lead to commencement or spread of war? On what ground can secrets respecting foreign relations be kept from the Senate which is a partner in the conduct of foreign affairs" (1977, p. 341)? Without access to information, Congress cannot effectively perform the tasks assigned to it, and if the legislative branch fails to function in the manner outlined in the Constitution, the system of checks and balances will falter.

The Supreme Court has consistently given its approval to the idea of the congressional "Grand Inquest." In McGrain v. Daugherty (1927), the Court stated that the congressional power to obtain information through investigation was an "attribute of the power to legislate" (273 U.S., 161), as well as "an essential and appropriate auxiliary of the legislative function" (273 U.S., 174). In Barenblatt v. United States (1959), the Court noted that

Congress maintains the power to secure information "needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution" (360 U.S., 111). Similarly, in Watkins v. United States (1957), the Court stipulated "the power of the Congress to conduct investigations is inherent in the legislative process. That power ... encompasses inquiries concerning the administration of existing laws" (354 U.S., 187). Arguably an inquiry into the Reagan Administration's enforcement of the Boland Amendments and compliance with various statutes dealing with arms sales and covert operations would fall within this broad power.

However, as the Court has pointed out on numerous occasions, the power of inquiry is by no means unlimited. In Kilbourn v. Thompson (1881) a congressional investigation was held unconstitutional because "it could result in no valid legislation on the subject to which the inquiry referred" (103 U.S., 195). The Court in Watkins noted "no inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress" (354 U.S., 187). This standard would not be a problem for a Congress looking into administration efforts to assist the contras. Given the extensive power of Congress in foreign affairs, it had every right to this sort of information, as necessary for the performance of its constitutional

responsibilities. The Court stated in Barenblatt that "since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government" (360 U.S., 111-12). Only the most extreme interpretation of Curtiss-Wright, combined with a total disregard for Article I, would justify invalidating a congressional investigation based on the assertion that foreign policy is the "exclusive province" of the executive branch.

In United States v. AT&T (1976), the District of Columbia Circuit Court of Appeals addressed the confrontation between the power of Congress to obtain information and the power of the president in the realm of national security affairs. The court indicated that even landmark decisions like Curtiss-Wright "do not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers" (551 F.2d, 392). The considerable power of the president is "unclear when it conflicts with an equally legitimate assertion of authority by Congress to conduct investigations" (567 F.2d, 128). With these observations, the court was simply recognizing an idea put forth by the framers, and endorsed by the Supreme Court for over a

century. Congress is to act as the "Grand Inquest," and have access to information, even information of a sensitive nature held by the executive branch.

Congress Learns the Hard Way

Woodrow Wilson once wrote, "The informing function of Congress should be preferred even to its legislative function" (Stephens and Scheb, p. 78). Congress should have access to information not only to facilitate its own legislative performance, but also to enlighten and educate the American people. Justice Stewart, concurring in the Pentagon Papers case, argued "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry - in an informed and critical public opinion which alone can here protect the values of democratic government" (403 U.S., 728). One of the best ways of achieving this enlightened citizenry is to allow Congress access to information held by the executive branch, information which would then be conveyed to the American people. By allowing congressional access, the system ultimately ensures what Michael Glennon referred to as "a vigilant body politic" (1990, p. 301).

A problem arose in the postwar years as the United States adopted the strategy of accomplishing many of its

foreign policy objectives by employing secret diplomacy and covert operations. Congress and the executive realized that the public debate normally associated with a democratic society would eliminate any possibility of secrecy. Thus, it was agreed that a few members of the Foreign Affairs, Appropriations, and Armed Services Committees would act as surrogates for the public, and be provided with information regarding these secret operations. In theory, this plan seemed to be a reasonable compromise between the desirability of an informed and critical public opinion and the necessity of secret action in a dangerous world. In fact, it did not work. The few members of Congress who were involved tended to be informed in a rather perfunctory manner, while Congress as an institution never scrutinized these excursions into the dark. Even though it had the right to information held by the executive branch, for much of the postwar era Congress did not vigorously exercise that right. The postwar deference given to the president included a virtual absence of oversight of the executive branch in the area of national security affairs. As a result of this deference and its hesitancy to insist on information from the 1940's through the 1970's, Congress was forced to learn some difficult lessons. Put simply, Congress learned that the president could not necessarily be trusted.

Congress turned a blind eye toward many of the secret activities of the president, trusting him to act in the best interests of the nation as well as in a manner consistent with democratic principles. In fact, a commitment to democratic principles became secondary to defeating what a succession of presidents regarded as the forces of darkness. This shift in priorities was indicated in the report of the Doolittle Commission to President Eisenhower. The report stated, "It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply. If the United States is to survive, long standing American concepts of fair play must be reconsidered" (Leary, p. 144).

This reconsideration of fair play resulted in the adoption of a new form of warfare, one by which we would battle the Communists on their own terms. This new strategy became known as covert action. In NSC 10/2, covert operations were defined as "propaganda, economic warfare; preventive direct action, including sabotage, anti-sabotage, demolition and evacuation measures; subversion against hostile states, including assistance to underground resistance movements, guerrillas and refugee liberations groups, and support of indigenous anti-communist elements in threatened countries of the free world" (Leary, p. 133).

The specific actions this rather vague list would inspire were revealed to the American public in the 1970's. Seymour Hersh of the New York Times, Bob Woodward and Carl Bernstein of the Washington Post, the Pentagon Papers, the Rockefeller Commission, and the Church and Pike Committees exposed the bitter fruits of the Doolittle Report and NSC 10/2, the costs of our reconsideration of American concepts of fair play. It became painfully clear to the American people that a strategy of secrecy was pursued for decades because the actions taken by the executive branch in the name of democracy contradicted everything America was supposed to stand for. A long line of presidents conspired to overthrow governments, conduct secret wars, and even take action against American citizens. In the decade prior to Ronald Reagan's assumption of power, the American public was offered a reminder of what happens when Congress does not insist upon access to information, and the president is allowed to elude accountability.

Charged with the responsibility of containing the expansionist Soviet Union and accountable only to their own conscience, the postwar presidents routinely thrust themselves into the domestic affairs of other nations. The CIA was instructed to employ propaganda and covert political action to influence the outcome of elections in Europe, Asia, Africa, and Latin and South America. Elections in any

country, no matter how remote or seemingly insignificant, were viewed as essential in the world wide battle against Communism. The perspective, and some would suggest the arrogance, of the United States was expressed by Henry Kissinger, who stated "I don't see why we need to stand by and watch a country go Communist due to the irresponsibility of its own people" (Ranelagh, p. 515). The country to which Kissinger referred was Chile, a nation which provides a veritable case study of this type of executive interference.

Throughout the 1960's, the CIA managed to dictate the outcome of Chilean presidential elections. However, in 1970 the Socialist candidate, Salvador Allende, attracted enough support to threaten the status quo which the CIA had worked so hard and spent so much money to establish. The prospect of an Allende presidency alarmed the Nixon Administration. President Nixon pointed out that with Allende in Chile and Castro in Cuba, "what you will in effect have in Latin America is a red sandwich, and eventually it will all be red" (Powers, p. 234). Even more disturbing was Allende's Socialist agenda, and the threat it posed to American corporate interests in Chile. Therefore, it was decided in the Oval Office that the people of Chile could not be allowed to have Allende serve as their president. Nixon told CIA deputy director of plans Thomas Karamessines that "it was absolutely essential that the election of Mr.

Allende to the presidency be thwarted" (Hersh, p. 285). The CIA poured hundreds of thousands of dollars into "spoiling operations" to discredit Allende (Hersh, p. 265).

Much to the displeasure of the Nixon Administration and corporate America, Allende received enough votes to force a runoff, which would be decided in the Chilean Congress. The administration authorized the expenditure of hundreds of thousands more for bribes to members of Congress. However, it was Nixon's hope that the runoff would be unnecessary. The CIA was ordered to engineer a right wing military coup which would render the election moot. Eventually General Rene Schneider, who stood in the way of the coup, was assassinated. Ironically, the assassination had the effect of galvanizing support for Allende. Despite the secret efforts of Nixon and the CIA, Allende became president.

Chile also demonstrates a second point. The executive branch did not draw the line at attempting to influence the outcome of elections. Governments which were deemed unacceptable were overthrown. Publicly, Richard Nixon took steps to disrupt the Chilean economy, hoping to provoke an economic disaster for which Allende would be blamed. Secretly Nixon instructed the CIA to make it impossible for Allende to succeed. According to John Orman, while Allende was president the CIA "made contacts and infiltrated about every sector of Chilean life, including the major

newspapers, the military, the business community, the labor community, and the political community" (p. 131). Over $8 million was spent, much of it going to support opposition parties and candidates. Seymour Hersh writes that "By late 1971, there were almost daily contacts with the Chilean military and almost daily reports of coup plotting. By then, too, the station in Santiago was collecting the kind of information that would be essential for a military dictatorship in the days following a coup" (p.295). In 1973, General Augusto Pinochet led a successful military coup, during the course of which Allende was either killed or committed suicide. Allende had been made to pay the ultimate price for being unacceptable to the White House.

Allende was not the first. Left to their own devices, the postwar presidents attempted to topple governments like a child knocks over a tower of blocks. In fact, some of the most renowned successes of the CIA involved the ouster of regimes unpopular with the Oval Office. In 1951, Muhammad Mussadegh replaced the Shah of Iran. Once in power, he took a series of actions which sealed his fate. Mussadegh angered the British by nationalizing the Anglo Iranian Oil Company and alarmed the United States by taking steps to establish relations with the Soviet Union. Foreign policy makers in Washington and their counterparts in London decided that Mussadegh had to go (see Ranelagh, pp. 260-64).

In 1953 the CIA launched Operation Ajax, which would bring about the overthrow of Mussadegh. Thomas Powers characterized Ajax as "a classic of quiet political subversion, accomplished by Kermit Roosevelt with a handful of aides and a suitcase full of money" (p. 85). Within two months, the Shah was returned to power.

The overthrow of governments could not always be carried out with subtle pressure applied by men in trench coats with suitcases of money. President Eisenhower realized this, and provided support for paramilitary operations against regimes which he found unacceptable. Jacobo Arbenz had been elected president by the people of Guatemala in 1950. However, he made the mistake of showing tolerance for the Guatemalan Communist party and nationalizing land owned by the United Fruit Company. The Dulles brothers made him pay for his mistakes. Ranelagh writes that "between January and mid June 1954 the CIA spent, by some estimates, about $20 million, organizing a guerrilla army and a secret air force, setting up secret radio stations, and finding a leader - Colonel Carlos Castillo Armas - to replace Arbenz" (p. 266). Faced with this kind of opposition, Arbenz stepped down.

Encouraged by the success of Iran and Guatemala, the Eisenhower Administration turned its attention to President Sukarno of Indonesia. Sukarno had exploited Cold War

tensions and played the United States and the Soviet Union against each other, hoping to receive support from both sides. The CIA was ordered to provide money, arms, and support to the Sumatran rebels who sought to oust Sukarno. Unfortunately, as Powers points out, "the rebels were given plenty of equipment, but they had little stomach for fighting" (p. 91). Sukarno retained power. Some scholars have argued that the failure in Indonesia should have awakened the executive branch to the fact that success in toppling governments was not inevitable (see Jeffreys-Jones, p. 99; Powers, 91). Events in the early 1960's would demonstrate that this lesson had not been learned.

The Bay of Pigs fiasco has been the subject of a number of exhaustive, excellent studies (see George). For our purposes, suffice it to say that the Bay of Pigs was a glaring example of what can go wrong when a largely unaccountable president embarks upon a secret course of action to dictate events in another nation. President Kennedy signed on with vigor to the plan developed in the Eisenhower Administration to finance, train, and support a band of Cuban exiles in an effort to overthrow Fidel Castro. It turned out to be a foreign policy disaster, damaging American prestige around the world and encouraging Khrushchev to boldly pursue Soviet global objectives. The Bay of Pigs also raised doubts in the minds of some about

presidential secrecy and the role of the CIA. Perhaps the most famous skeptic was the man who was president at the time the CIA was created. Harry Truman criticized the CIA for becoming "a government all of its own and all secret. They don't have to account to anybody. That's a very dangerous thing in a democratic society, and it's got to be put a stop to ... Secrecy and a free, democratic government don't mix. And if what happened at the Bay of Pigs doesn't prove that, I don't know what does" (M. Miller, p. 392).

During the postwar years, presidents asserted the power to order armies into battle without a declaration of war. However, for many in the executive branch this was not enough. As the Bay of Pigs indicates, the secret presidency conducted secret wars. Congress and the American people knew about U.S. involvement in Vietnam. What they did not know was that a series of presidents made the decision to extend the field of battle throughout Southeast Asia. President Eisenhower regarded Laos, not Vietnam, as the nation which warranted America's attention. To assist the Laotian government in its battle against the Communist Pathet Lao, John Kennedy ordered the CIA to organize, arm, and train over ten thousand Meo tribesmen. The border between Laos and Vietnam offered little protection from the war. As Laos was sucked into the conflict, Johnson used the Meo to battle the Viet Cong and ordered massive secret

bombings of North Vietnamese positions in Laos. Orman writes, "Eisenhower's determination not to lose Laos to the Communists, which was passed on to Kennedy, had been adopted by the Johnson Administration" (p. 102). Nixon intensified the secret war in Laos, increasing air and ground missions. Laos was pounded with bombs and artillery because Nixon wanted "to show the enemy that we were still serious about our commitments in Vietnam" (Hersh, p. 170).

On the campaign trail in 1968, candidate Nixon promised to end the war if elected. Upon assuming power, President Nixon seems to have realized that to end the war, it had to first be expanded. Such a move would have been unpopular with a significant portion of the American people. Nixon wrote in his memoirs that he wanted to avoid "the problem of domestic antiwar protest. My administration was only two months old, and I wanted to provoke as little public outcry as possible at the outset" (Nixon, p. 382). Nixon decided that what the American people didn't know wouldn't hurt them, and more importantly, wouldn't hurt him. The war in Vietnam would also include a secret war in Laos. Another problem was Cambodia. Although neutral, Cambodia was the location of North Vietnamese sanctuaries and staging areas for attacks upon American positions in South Vietnam. Therefore, for fourteen months, from 1969 to 1970, over 3500 secret B-52 flights dropped some 100,000 tons of bombs on

Cambodia. Louis Koenig branded the secret bombing of Cambodia as "the worst assaults on democratic norms" (p. 213), and some members of the House Judiciary Committee regarded it as grounds for impeachment.

While Harry Truman showed that a president could take the nation to war without its permission, John Kennedy, Lyndon Johnson, and Richard Nixon showed that a president could take the nation to war without its knowledge. Secret wars, although contradictory to the most basic principles of constitutional government, became a hallmark of the unaccountable presidency.

Former CIA Director Richard Helms once advised the American people to "take it on faith that we too are honorable men devoted to the nation's service" (Colby, p. 459). While this is undeniably true, these honorable men occasionally engaged in actions on behalf of the president which were not so honorable. It is said that Helms used to remind his CIA colleagues that "We're not in the Boy Scouts" (Powers, p. 126). This became obvious with the revelation of CIA activities which made their participation in secret wars seem tame by comparison. The CIA owned a proprietary, Air America, which transported weapons, supplies, and reportedly, drugs throughout Southeast Asia (Jeffreys-Jones, p. 61). During the Vietnam War the CIA operated Counter Terror (CT) programs. State Department official Wayne

Cooper described the CT operations: "CIA representatives recruited, organized, supplied and directly paid CT teams, whose function was to use Viet Cong techniques of terror - assassination, abuses, kidnappings and intimidation - against the Viet Cong leadership" (Ranelagh, p. 440). Eventually, these CT teams were brought into Operation Phoenix, which was run by the man who would become in the mid 1970's Director of Central Intelligence, William Colby. Phoenix was designed to identify the Viet Cong command and control structure which had disappeared into the South Vietnamese civilian population. Of those identified, some were prosecuted and imprisoned. Others were killed, the fate of 20,000 between 1968 and 1971 (see Colby, pp. 266-76). While attempting to "determine the effects and possible uses of LSD by hostile intelligence or political forces," the CIA gave the drug to one of its own unknowing agents (see Colby, pp. 425-26). The "experiment" provoked a severe depression, and ultimately, the agent's suicide.

Perhaps the most controversial presidential use of the CIA was in the area of assassinations. As Ranelagh points out, the CIA was "closely associated with plotters who assassinated Rafael Trujillo in the Dominican Republic, Ngo Dinh Diem in Vietnam, and General Rene Schneider in Chile" (p. 336). The Agency had plans to kill Patrice Lumumba of the Congo, but his own countrymen did the job first

(Jeffreys-Jones, p. 126). Both the Eisenhower and Kennedy Administrations plotted to get rid of Fidel Castro (see Church Committee). Some of the plans were more reminiscent of Maxwell Smart than James Bond, such as the idea to sprinkle a compound inside of Castro's shoes, which would cause his beard to fall out and thus destroy the macho dictator's credibility with the Cuban people. One plan called for the placing of an explosive seashell in one of Castro's favorite swimming areas. Still other plots involved killing Castro with contaminated wet suits, poison pens, and doctored cigars. The most unpalatable plan involved the CIA in an unholy alliance with the mob, which had been driven out of Cuba with the fall of Batista.

The CIA was hardly a Murderers Incorporated or a Killer Elite. However, as Loch Johnson points out, many of these assassination plots "failed from ineptitude and bad luck rather than lack of serious intent" (1985, p. 266). And although there is little hard evidence of presidents actually ordering assassinations, it is clear that the CIA believed it was carrying out presidential wishes. Even if it is true, as Senator Frank Church once alleged, that the CIA had become a rogue elephant, a long line of presidents created the environment in which such a beast could exist, an atmosphere in which worthy ends were seen as justification for unconscionable means.

During this period in which it transcended accountability, the White House did not draw the line at conducting secret wars, overthrowing governments, and plotting assassinations. Just how far the secret presidency had spun out of control was indicated by the fact that it turned its considerable power inward. In the name of national security, the citizens of the United States were subjected to government sanctioned mail openings, illegal wiretaps, and even burglaries. Perhaps the most Orwellian episode involved a CIA operation known as Chaos. Initiated by Lyndon Johnson, Chaos involved a CIA investigation to determine the extent of foreign influence in and involvement with the antiwar movement. When DCI Helms reported no such involvement occurred, a disappointed and disbelieving Johnson ordered the CIA to continue its investigation of various student protest groups. Richard Nixon expanded Chaos to include the actual infiltration of these groups.

Some commentators have pointed out that Chaos began as a legitimate inquiry into foreign infiltration of domestic groups (Powers; Ranelagh). However, it quickly lost that legitimacy, degenerating into a CIA covert operation on American soil, an action clearly in violation of the National Security Act. Chaos eventually became "an extralegal, and at times downright illegal, program to break an opposition which Nixon found politically inconvenient"

(Powers, p. 249). A sentiment pervaded the CIA itself that Chaos constituted "a monitoring of the political views and activities of Americans not known to be or suspected of being involved in espionage" (Ranelagh, p. 534). Over the course of Operation Chaos, the CIA opened files on over 7000 American citizens. When the nation learned of the CIA's domestic activities, it reacted with outrage. William Colby characterized the revelation of operations like Chaos as casting "a shadow of meanness, cynicism and amorality over the intelligence profession" (Colby, p. 455). Colby was on the right track, but he didn't go far enough. This shadow encompassed not only the CIA, but also the entire executive branch, and ultimately the whole idea of governmental secrecy. The danger of an unaccountable presidency had literally come home.

Just as disturbing as the dubious policies and questionable actions was the deception routinely practiced by the executive branch during this period. One of the essential features of covert action was plausible deniability, the idea that the involvement of the United States government should be hidden from the rest of the world. As the years went by and the secret presidency became more powerful, plausible deniability came to mean keeping the truth about presidential actions from Congress and the American people. Even the grandfatherly Eisenhower

was not above the subterfuge. Eisenhower and John Foster Dulles boldly denied any U.S. role in the Indonesian coup attempt (Powers, p. 88). Ike candidly admitted his lies to the American people and the world about the ill fated U-2 flight of Francis Gary Powers (Orman, p. 97). Lyndon Johnson, one time Senate majority leader, frequently played his former colleagues for fools. LBJ never bothered to inform the entire Congress about the extensive bombing of Laos, and Orman writes that the "few members of Congress who were selectively informed about the Administration's Laotian bombing were led to believe that the bombing was minimal" (p. 105). To justify his invasion of the Dominican Republic, Johnson "misled Congress about the threat to American lives ... and the true purpose of the intervention" (Sundquist, p. 239).

Perhaps Johnson's greatest deception involved events in the Gulf of Tonkin in the summer of 1964 (see Fulbright in Glennon, 1990, p. xiii). Johnson went to Congress and the American people and told them of an unprovoked attack upon two U.S. destroyers by North Vietnamese forces. Congress responded to this outrage by immediately passing the Tonkin Gulf Resolution, which Johnson regarded as the equivalent of a declaration of war. Thousands of lives, millions of dollars, and a couple of years later, some disturbing questions began to surface. Was this really an unprovoked

attack, or had American forces been engaged in a radar jamming mission against the North Vietnamese? Another question was the extent of the attack on the American destroyers. At the time Johnson characterized it as just short of Pearl Harbor. He would later admit, "For all I know, our Navy was shooting at whales out there" (Halberstam, p. 503). Most disturbing was the fact that Johnson and his advisers were aware of these questions in the summer of 1964. Johnson's deception angered his old friend Senator William Fulbright, who led the fight for the passage of the Tonkin Gulf Resolution, the entire Congress, and ultimately the American people.

Maybe it was just something about Southeast Asia which made it impossible for presidents to tell the truth. Whatever the reason, Nixon continued the chicanery practiced so artfully by Johnson. If Johnson was an expert, Nixon was a master. Nixon kept the war in Laos secret in much the same way as Johnson had, with the systematic deception of Congress. However, Laos was only one of his problems. Nixon also had to find a way to hide the bombing of neutral Cambodia. To accomplish this, Nixon authorized the falsification of official bombing reports. The reports would claim that bombs which were in fact dropped on Cambodia were being dropped on positions in South Vietnam. The reports would then be sent by the Department of Defense

to the Senate Armed Services Committee (see Koenig, p. 213). Lying to Congress was seemingly preferable to provoking further domestic opposition to the war. While the war in Vietnam was the subject of much of the deception practiced by the Nixon Administration, it was not the only one.

Chile was another. Seymour Hersh writes the "official distortions and lies about Chile reached a point equaled by only one other issue in Nixon's first term: the June 1972 Watergate break-in, with its subsequent cover-up ... With Chile as with Watergate, records were destroyed and documents distorted. With Chile as with Watergate, much of the official testimony provided to congressional investigating committees was perjury" (p. 278). Nixon and Kissinger wanted their operation in Chile to remain secret, and primary responsibility for keeping it secret fell in the lap of DCI Helms. Helms was perfect for the job. He was perfect, not because he was a pathological liar, but because he was a lifetime Company man who believed in the necessity of secrecy. In his frequent testimony before Congress, Helms sometimes had to walk a fine line between refusing to disclose the truth and resorting to lies. In the case of Chile, he stumbled across that line. Helms later explained, "I had sworn my oath to protect certain secrets. I didn't want to lie. I didn't want to mislead the Senate. I was simply trying to find my way through a very difficult

situation in which I found myself" (Powers, p. 304). The difficult situation to which Helms referred was a congressional inquiry, and he found his way through by denying CIA efforts to fund opponents of Allende and to overthrow the Allende government.

At Helms' trial for perjury, Judge Barrington Parker articulated the outrage and frustration of an entire nation when he rejected the idea of secrecy over accountability, and stated "public officials at every level, whatever their position, like any other person, must respect and honor the Constitution and the laws of the United States" (Powers, p. 305). As the extent of decades worth of deception was made public, Americans were forced to confront the hard reality that their public officials would not always be forthcoming, and might even resort to lies. America was forced to realize that in our quest to defeat the enemy, we had become more like him than we ever thought possible.

The actions described in this section were not the sins of a single president. The simple act of voting a particular rascal out of power would not be enough. The actions of a succession of administrations, which were made public in 1975, "The Year of Intelligence," called into question the precedent of presidential secrecy. In the postwar years the executive branch had been given a sword, and it had fallen on that sword. In addition, these actions

underlined the necessity of congressional oversight and supervision. By the 1980's, Congress and the American people had learned the hard way that no administration, Democratic or Republican, conservative or liberal, beloved or despised, should be allowed to transcend accountability. The actions which the Reagan Administration sought to take were disturbingly reminiscent of the actions which had been so discredited in the turbulent 1970's. In the decade prior to Reagan's inauguration, the revelation of clandestine wars, interference in the domestic affairs of other nations, secret deals, and official deception had shattered the confidence the American people had in their government. Why would Congress be expected to sit back and allow the same actions to be repeated in the 1980's? For Congress not to insist upon information from the Reagan Administration would be an abdication of constitutional responsibility, as well as a failure to learn the lessons of the recent past.

Once Bitten, Twice Shy: Congress Responds

By the 1970's, Congress believed it could no longer automatically defer to the wisdom of the executive on matters of national security policy. Having seen what happened when it did not insist on access, Congress sought to shatter the precedent of presidential secrecy and terminate the executive monopoly on information. With a

number of laws in the 1970's, Congress attempted to bring national security policy out of the shadows. High on the list was the problem presented by covert operations.

The Hughes-Ryan Amendment to the Foreign Assistance Act of 1974 denied funds to the CIA "for operations in foreign countries other than activities intended solely for obtaining necessary intelligence unless and until the president finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of each operation to the appropriate committees of Congress." If it in fact ever did, the CIA would no longer be allowed to engage in operations without the knowledge of the president. In addition, the president would be required to attest as to the importance of these operations, as well as to provide Congress with information about them. Congress would then be in a position to take action against covert operations of which it disapproved. Franck and Weisband wrote that Hughes-Ryan "imposed the first real congressional control over covert activities" (p. 117). Loch Johnson applauded it as "nothing less than a bold attempt to replace plausible deniability with a clear trail of accountability for covert action" (1989, p. 108). Even former DCI William Colby characterized congressional passage of Hughes-Ryan as "a first step toward assuming its full constitutional role of

reviewing and approving or disapproving the actions of the Executive" (Colby, p. 458).

As Colby points out, Hughes-Ryan was merely a first step. In an attempt to focus and intensify congressional oversight of secret activities, intelligence committees were created in both houses of Congress. Accountability was further strengthened with the passage of the Intelligence Oversight Act of 1980. The Oversight Act requires the Director of Central Intelligence to keep the intelligence committees "fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity." Gone were the days in which the DCI would merely inform a few friends on the Armed Services Committee about covert operations.

While the Oversight Act provided some freedom for the president when secrecy was absolutely essential, it did not allow him the carte blanch of the past. When the president determines that "it is essential to limit prior notice to meet extraordinary circumstances affecting the vital interests of the United States," he has the option of notifying what has come to be known as the gang of eight: the chairman and ranking members of the intelligence committees, the Speaker and minority leader of the House,

and the majority and minority leaders of the Senate. The DCI is also required to "furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities." The Oversight Act sent a clear message to the executive branch that when Congress asks questions, it will be provided with answers. With the passage of Hughes-Ryan and the Intelligence Oversight Act, Congress demonstrated that it was ready to assume in practice the role it had played in theory for decades. Congress would now act as a surrogate for the American people.

The Year of Intelligence prompted a reevaluation by both the legislative and executive branches of the delicate balance between secrecy and accountablity. Francis Bax writes that a frequently divided Congress was inspired to unite "in opposition to the executive around what came to be seen as a crucial issue of institutional integrity - congressional access to information" (Congressional Quarterly, 1982, p. 79). Hughes-Ryan and the Intelligence Oversight Act were only a part of this congressional resurgence. The War Powers Act, in addition to imposing a sixty to ninety day limit on the commitment of troops,

required the president to provide Congress with the information necessary to make prudent decisions on the use of the U.S. military. The Case Act required the Secretary of State to inform Congress within a sixty day period of any executive agreement negotiated by the president. The actions of a number of presidents strengthened this renewed precedent of access. With the exception of the War Powers Act, presidents willingly affixed their signatures to these laws. In addition, Ford and Carter issued executive orders which outlawed assassinations, imposed limitations on intelligence activities, and further insured congressional access to information (see Jeffreys-Jones, p. 214; Leary, p. 153-68). Thus, not only Congress, but also Reagan's predecessors recognized the end of the unfettered secret presidency, and the emergence of a new era of accountability.

Congress in the 1970's imposed limitations on the president's ability to engage in covert action, to order clandestine military operations, and to make secret deals with other nations. No longer could the executive hoard information in the name of national security. Gregory Treverton noted that in our post-Watergate, post-Vietnam quest "to strike a balance between expediency and accountability ... the balance has moved toward accountability" (1990, p. 107). The magnitude of the

congressional effort to ensure access to information led James Sundquist to write in 1981, "By the end of the decade, the Congress appeared to have won its point. There could be no more secret wars, no more secret covert operations, not even secret scandals" (p. 332). Before those who enjoy the benefit of hindsight criticize Sundquist for being overly optimistic, it should be noted that he went on to point out "whether this represented a durable change in relations would not be tested until the next time that the executive and legislative branches were controlled by opposing parties" (p. 332).

Although the American people twice provided Ronald Reagan with enormous victories in presidential elections, they had no intention of reviving the unaccountable presidency. The precedent which had been reawakened in the 1970's remained strong. Thus, Congress had every reason to believe it would have access to information regarding the Reagan Administration's foreign policy initiatives, as well as its compliance with any number of laws. Congress could expect this information, not only because the Supreme Court consistently acknowledged this power of inquiry, not only because when it did not insist on access, disaster resulted, not only because various statutes required it, but because our commitment to the Constitution and our status as a democracy demanded it.

II.

Foundations of the Secret Presidency

Ronald Reagan sought to assist the contras and negotiate for the freedom of the American hostages secretly, and our system gave him ample precedent to believe he could do so. Reagan's pursuit of a secret agenda seemingly violated the very heart of our constitutional system and its bedrock principles of checks and balances and governmental accountability. Yet, some of the framers were comfortable with the idea of presidential secrecy. Alexander Hamilton identified the ability to act with "secrecy and dispatch" as one of the principle advantages of having a president (Rossiter, 1961, p. 424). In Federalist 64, John Jay reiterated this theme when he wrote "So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects" (Rossiter, 1961, p. 393). The ability to act with secrecy and dispatch was obviously important to these men, an essential aspect of the presidency. However, nowhere in Article II is this power enumerated. The implication of their remarks is that inherent in the idea of executive power is the capacity to act secretly.

Jay argued that the realities of international relations practically require secrecy. "There are cases where the most useful intelligence may be obtained, if the person possessing it can be relieved from apprehensions of discovery," Jay wrote in Federalist 64 (Rossiter, 1961, p.392). These are sources of information "who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly" (Rossiter, 1961, p. 392). Jay contended it was the president who should be trusted "to manage the business of intelligence in such a manner as prudence may suggest" (Rossiter, 1961, p. 393). Significantly, decisions regarding what was and was not prudent in matters of intelligence would be left to the president. With their recognition of the inability of Congress to keep a secret and the necessity of secrecy in matters of international relations, the framers laid the foundation for the modern secret presidency.

As the nation's role in world affairs expanded in the twentieth century, the Supreme Court placed its stamp of approval on presidential secrecy. In United States v. Curtiss-Wright Export Corporation (1936), the Court recognized that the president "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in

respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful events" (299 U.S., 320). After World War II the Court continued its endorsement of secrecy. In C&S Airlines v. Waterman (1948), the Court acknowledged that the president, "both as commander in chief and the nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world" (333 U.S., 111). As the Cold War heated up, the Court became more and more accomodating to the idea of presidential secrecy. In Zemel v. Rusk (1965), the Court took notice of "the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature" (381 U.S., 17). Even while ruling against the Nixon Administration's attempted prior restraint in New York Times Co. v. United States (1971), Justice Stewart noted that "it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy" (403 U.S., 728).

While there were numerous instances in which it was abused, secrecy has been an essential aspect of some of the most successful presidential endeavors of the past fifty

years. In 1941, Franklin Roosevelt shrouded within a cloak of secrecy a series of actions aimed at preventing a German conquest of England in the months before the United States formally entered the war. The reason for his "surreptitious" actions was not a reluctance to antagonize Hitler, but because "he had to contend with a divided public opinion" (Morgan, p. 588). Development of the atomic bomb was shielded not only from our wartime enemies, but also from Congress. John Newhouse writes in War and Peace in the Nuclear Age that the Manhattan Project "had somehow to be an instant colossus, yet supersecret. The $2 billion in federal funds it consumed would be largely hidden from congressional oversight" (p. 26). Presidential secrecy became just as much a part of the Cold War as the Berlin Wall or bomb shelters. Plans for the U-2 were hidden from the Soviets and Congress alike (see Leary, pp. 70-72). While communication between Kennedy and Khrushchev during the Cuban Missile Crisis helped to avoid nuclear holocaust, Koenig notes that "an essential feature of the arrangement was the secrecy both countries maintained about the exchange" (p. 230). Secrecy was also vital to the reestablishment of relations with China. Richard Nixon writes that "in order for the initiative to have any chance of succeeding, it would have to be kept totally secret until the final arrangements for the presidential visit had been

agreed upon" (p. 550). Nixon's justification for secrecy was that "With advance warning conservative opposition might mobilize in Congress and scuttle the entire effort" (p. 550). Jimmy Carter referred to his secret effort to rescue a number of American diplomats from the Canadian embassy in Tehran as "a real cloak and dagger story" (Carter, p. 483), and only one of the instances in which "we used secret agents to help us" (p. 484). Thus, Reagan's descent into the world of secrecy was seemingly consistent with the intent of the framers, the decisions of the Supreme Court, and the example set by his predecessors.

The Covert Option: Congress Takes Itself Out of the Game

Ronald Reagan not only sought to assist the contras and obtain freedom for the hostages secretly, to do so he proposed to employ one of the most controversial manifestations of presidential secrecy, the covert operation. And while these cloak and dagger actions were unpalatable to many, the precedent for the accomplishment of foreign policy objectives via covert action was well established by the time Reagan assumed power. It was a precedent shaped not only by a broad interpretation of executive power, but also by decades of presidential use of covert operations combined with consistent congressional acquiescence.

Nowhere in Article II is a presidential power to conduct covert operations specifically identified. Yet, presidents in recent decades have maintained a constitutional prerogative to employ covert action. The president's constitutional authority to engage in covert operations is seen as an extension of his power to conduct foreign policy and his authority as commander in chief. The same factors which justify the president's preeminent role in dictating the course of foreign policy would likewise sanction the president's power to conduct covert operations.

A secret memorandum prepared in 1962 for CIA General Counsel Lawrence Houston provides a glimpse into the executive perspective on the constitutional basis for the use of covert operations. Citing the president's constitutional responsibility for the "successful conduct of foreign relations and the protection of national security" as well as the edict of The Prize Cases that the president may "meet force with force," the memo justified "the conduct of covert activities as necessary" (Orman, p. 214). The document concluded that "In waging a world wide contest to strengthen the free nations and contain the Communist nations ... the President should be deemed to have comparable authority to meet covert activities with covert activities if he deems such action necessary and consistent with our national objectives" (Orman, p. 214).

Former congressman and current Secretary of Defense Richard Cheney reiterated this power succinctly when he wrote of "the president's inherent constitutional authority to initiate covert actions" (p. 207). The constitutional case for covert operations, as stated by Cheney and the Houston memo, based on a theory of inherent presidential power, arguably leaves room for debate. Whatever uncertainty which might have existed as to the president's ability to conduct covert operations was eliminated by the action and inaction of Congress in the latter half of the twentieth century, which served to sanction this presidential power.

The Central Intelligence Agency was created by the National Security Act of 1947, primarily to obtain, evaluate, and coordinate intelligence for the benefit of U.S. policy makers. In addition, Section 102(d)(5) of the 1947 Act empowered the CIA "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." Faced with the expansionist tendencies of the Soviet Union, Harry Truman searched for ways to prevent the spread of Communism. Military conflict seemed out of the question so soon after World War II. Economic assistance to embattled, impoverished nations was aimed at eliminating the conditions in which Communism could flourish. While

undeniably important, these economic programs were merely a first step. As a means of transcending diplomacy but avoiding the costs of war, and in an effort to fight the Soviets on their own terms, the Truman Administration initiated the use of covert operations. In the year following the passage of the National Security Act, the Truman Administration employed the "other functions and duties" provision to justify the use of covert action. National Security Council Directive 10/2 mandated that "a new office of Special Projects shall be created within the Central Intelligence Agency to plan and conduct covert operations" (Leary, p. 131). Section 102(d)(5) was cited as authority for this covert capacity.

Congress could have smothered the infant covert presidency in its crib. It was aware of the Truman Administration's interpretation of Section 102(d)(5) and the new emphasis on covert operations. If Congress truly objected to this course of conduct, it had the opportunity to clarify the meaning of "other functions and duties" and impose limitations on covert action. Instead it responded with the Central Intelligence Agency Act of 1949, which allowed the CIA to operate in a realm beyond the normal congressional appropriations process. Under the 1949 Act, the CIA was authorized to secretly "receive from other government agencies such sums as may be approved by the

Bureau of the Budget, for the performance of any functions or activities authorized" ("Fiscal Oversight," p. 495). Franck and Weisband characterized the situation created by the 1949 Act as "a cozy arrangement that made it unnecessary for the CIA to defend, or even present, a budget to Congress ... Instead, proposed spending for intelligence purposes is hidden among the budget requests for other agencies' programs" (p. 116). The Central Intelligence Agency Act of 1949 pushed the door wide open for an even greater use of covert operations.

While the centerpiece of Eisenhower's foreign policy was John Foster Dulles' doctrine of massive retaliation, Eisenhower's most effective weapon against Communism was Allen Dulles' CIA, and its capacity for covert action (see Ranelagh, p. 259). Even though Eisenhower attempted to distance himself from many of the actions of Truman, one area in which they were in total agreement was the use of covert operations against the Communists. And, like its predecessor, the Eisenhower Administration in National Security Directive 5412/2 identified Section 102(d)(5) of the National Security Act of 1947 as authority for covert action (see Leary, p. 147).

David Fagelson has written of the fallacy of interpreting the "other functions and duties" clause in 102(d)(5) as authorization for covert operations. Fagelson

notes that neither the 1947 Act nor its legislative history ever mentions the idea of covert activities, and that "(d)(5) referred to secret collection activities, not covert operations" (p. 293). His points are well taken. The act does not deal, even remotely, with covert activities. However, his argument fails to take into account a vital point. While the 1947 Act does not explicitly authorize covert operations, successive administrations interpreted the act as authorizing their use. And while this may have been a dubious interpretation, Congress went along with it. It was this congressional acquiescence which rendered an otherwise questionable executive interpretation credible. By the 1960's, presidential authority to employ covert operations was as well established as if Congress itself had mandated it specifically by law.

During this postwar period Congress not only demonstrated acquiescence to the executive branch determination that the 1947 Act authorized covert action, it also indicated that it would play a miniscule role in the oversight of these operations. Government textbooks routinely cite the power to monitor the actions of the executive as one of the most important weapons available to the legislative branch. However, for decades Congress simply declined to put this power to use in the realm of covert operations. Congressional willingness to forego the

power of oversight was perfectly expressed by Senator Leverett Saltonstall, who spoke of his "reluctance, if you will, to seek information and knowledge on subjects which I personally, as a member of Congress and as a citizen, would rather not have" (Treverton, 1987, p. 232). The extent of this reluctance was demonstrated by the Senate's rejection in 1956 of Majority Leader Mansfield's proposed intelligence oversight committee, which would more carefully monitor the activities of the CIA. Instead, oversight would be confined to conversations between Senator Richard Russell and DCI Dulles, thus further weakening the idea of accountability and strengthening the president's power to operate in the dark. Gregory Treverton writes that during this period, "Congress was more interested in making sure the CIA had what it needed in the fight against communism than in overseeing its operations" (1990, p. 73).

Lyman Kirkpatrick once claimed, "it takes a U-2 incident or a Bay of Pigs to interest Congress in intelligence" (Franck and Weisband, p. 116). While this statement is pithy, it is also inaccurate. Even after these embarrassments, Congress refused to thrust itself into the fray. Even with these events etched into its collective memory, the Senate in the 1960's twice rejected Eugene McCarthy's proposal for a more effective means of intelligence oversight. That Congress would allow the

president to continue this course of action following these intelligence disasters added further credence to the idea that covert operations were an acceptable and accepted presidential tool. Some of the most controversial actions embarked upon by the United States in the postwar years took the form of covert operations. Yet, with the exception of the occasional Mansfield or McCarthy, Congress remained mute. It has been suggested that covert operations fall into that twilight zone in which presidential and congressional prerogatives intersect (Fagelson, p. 297). However, from the beginning Congress effectively eliminated itself as a major player, establishing the precedent that the president would be allowed to engage in covert action, and that he could do so with a minimum of congressional involvement and interference.

Some scholars, such as Hannah Bentley, have questioned whether congressional inaction during this period actually constituted acquiescence. Bentley cites approvingly the Church Committee argument that prior to the mid 1970's, only a few congressional subcommittees received sporadic, "general information about some covert operations ... insufficient to constitute notice to the whole Congress" (p. 609). What Bentley and the Church Committee ignore is the fact that these were the ground rules which Congress had helped to formulate over a period of twenty five years. The

somewhat disingenuous contention of the Church Committee is reminiscent of the moment in Casablanca when Louis Renault remarks that he is shocked to learn there is gambling going on in Rick's establishment, even as his winnings are being handed to him. If the emergence of a government committed to secrecy and covert action is something for which blame should be assessed, the silence which Congress maintained for decades implicates it as a co-conspirator. Congress was hardly an unknowing, unwilling dupe. Admittedly, many of these covert operations were ill conceived, poorly executed, and defied good sense. The fact is, however, that a long line of presidents made extensive use of them, and Congress let them get away with it. A precedent was thus given life and made strong.

As the public became disenchanted and disillusioned with government secrecy and deception in the 1970's, Congress responded with legislation which ostensibly imposed limitations on covert operations. In fact, this legislation would ultimately strengthen the precedent of presidential use of covert operations. Lost in an initial glance at the requirements of the Hughes-Ryan Amendment is the fact that for the first time, Congress gave explicit recognition to the president's power to conduct covert operations. Even the limitations imposed by the law were largely illusory. As Loch Johnson points out, the requirement that the

president find such operations to be important to the national security of the United States "still allowed the president to make the essential determination regarding what is and is not important" (1980, p. 151). Once that determination is made, Hughes-Ryan imposes no requirement of prior consultation or even prior notification of Congress before launching an operation, merely an after the fact report in a timely fashion. Despite the symbolic value of its passage of Hughes-Ryan, Congress "did not eliminate the Executive's ability to evade domestic accountability through the use of covert action" (Bentley, p. 615). Even the Church Committee would regard Hughes-Ryan as a failure "to provide the necessary statutory guidelines to ensure that intelligence agencies carry out their missions in accord with constitutional processes" (Franck and Weisband, p. 118).

While the Intelligence Oversight Act of 1980 was intended to plug some of the holes in Hughes-Ryan, it did very little to disrupt the precedent of presidential use of covert operations. Johnson writes that the act "ignores the central issue of when, if ever, covert action should be used" and "fails to set clear standards, other than retaining the Hughes-Ryan requirement that the president find the covert action important to the national security" (1980, p. 151). Bentley criticizes the Oversight Act

because "it left the determination as to when prior notice was due wholly in the Executive" (p. 621). That these concerns transcended mere academic speculation was apparent in the remarks of President Carter as he signed the Intelligence Oversight Act into law. Carter noted that "there are circumstances in which sensitive information may have to be shared only with a limited number of executive branch officials, even though the congressional oversight committees are authorized recipients of classified information" (Johnson, 1989, p. 209). Overall, Bentley and Johnson offer pessimistic assessments of the Oversight Act. Bentley notes that "Congress left a relatively unregulated window for the conduct of paramilitary operations by the Executive" (p. 694). Johnson writes that the act "will represent no more than a few fence posts around which the intelligence agencies may pass with little effort" (1980, p. 153). If these people recognized the gaping holes in these pieces of legislation, it can hardly be considered surprising that the Reagan Administration would as well.

Congress had deferred to the executive branch and acquiesced in the use of covert operations for so long that when it finally took action in the 1970's, it could not stop the momentum of the secret presidency. The genie was out of its bottle. With legislation like Hughes-Ryan and the Intelligence Oversight Act, Congress shifted from

acquiescence to endorsement. With this legislation Congress did not sever the precedent of the use of covert action, it strengthened it, by recognizing the president's power and failing to impose any real limitations on the covert option. And, in the years just prior to Reagan's election, public skepticism about secrecy, covert action, and the role of the CIA eroded as the Soviet Union invaded Afghanistan and Americans were taken hostage in Iran. This was the environment which existed as Ronald Reagan searched for answers to the enormous problems which confronted his administration. With the substantial body of precedent which seemingly justified it, why wouldn't Reagan believe he could pursue his objectives with the use of covert action?

Keeping Secrets Secret: The Power to Withhold Information

To ensure the secrecy of these operations, the Reagan Administration asserted the power to withhold information about its actions from Congress and the American people. Once again, a significant line of precedent exists in support of this position. From the beginning, presidents have maintained this power, a prerogative, according to Louis Koenig "implied in the executive power clause" (p. 159). As was often the case, George Washington gave life to this precedent. When a House committee requested information regarding the defeat of General St. Clair,

Washington was hesitant, arguing that "there might be papers of so secret a nature as that they ought not to be given up" (R. Turner, p. 106). While the information was ultimately provided, the position of the Washington Administration was "that the executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would endanger the public" (Congressional Quarterly, 1982, p. 214). The decision regarding what was in the public's best interest would rest with the president.

Following the St. Clair controversy, Washington refused to provide the House of Representatives with documents pertaining to the Jay Treaty. Some scholars have questioned the precedential value of Washington's refusal. Their contention is that Washington's actions were based not on the idea that Congress should not have access to sensitive diplomatic information, but rather on the position that the House of Representatives has no constitutional role to play in the ratification of treaties.

This argument ignores an important point. The Jay Treaty had already been ratified by the Senate. The House was not attempting to interfere with the ratification process. Instead, the House was performing its constitutional obligation regarding the implementation of treaties. Therefore, Washington's refusal could not have

been based on the House exceeding its constitutional authority, but on the president's power to withhold vital diplomatic and national security information. That this was the true justification for his refusal was indicated by a message sent by Washington to the House. In this message Washington wrote, "The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions ... might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers" (299 U.S., 320-21).

The precedent established by Washington was followed by a string of nineteenth century presidents. Jefferson, Monroe, Jackson, Tyler, Polk, Fillmore, Lincoln, Grant, Hayes and Cleveland all claimed the power to withhold information from Congress (see Congressional Quarterly, 1982, p.213). The dominance of national security issues in the twentieth century intensified the struggle over information. At one point or another, every president since Franklin Roosevelt has asserted what has come to be known as executive privilege. When Truman and Eisenhower refused to provide information to committees engaged in dubious investigations of Communist influence in the United States

government, they stood on firm constitutional ground. They were also lauded for their principled stands. This was not the case years later when Richard Nixon claimed the same power.

Although Nixon's attempt to withhold information regarding Watergate was ultimately unsuccessful, the litigation produced by his battle yielded a victory for the presidency. United States v. Nixon (1974) came about as the result of the prosecution of a number of former Nixon aides and advisers for fraud and obstruction of justice. A subpoena duces tecum was issued by the District Court for the District of Columbia, calling for President Nixon to produce tape recordings and documents relating to conversations which took place between the President and the defendants. Nixon refused, citing executive privilege. For the first time, the Supreme Court explicitly recognized the idea of executive privilege. Chief Justice Burger, writing for a unanimous Court, reasoned that executive privilege "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers" (418 U.S., 705). Burger argued to the extent that executive privilege "relates to the effective discharge of a President's powers, it is constitutionally based" (418 U.S., 711).

While information within the possession of the president was presumptively privileged, the Court stressed that it was not dealing with an absolute power. The Court would weigh a claim of executive privilege against competing interests, in this case the needs of the judicial process. Burger concluded that when a claim of executive privilege "is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice" (418 U.S., 713). Nixon was forced to release the tapes, and the information revealed signaled the end of his presidency.

Nixon's mistake was regarding executive privilege as a royal prerogative, the mere assertion of which would result in the deference of the other branches of government. The Supreme Court suggested that the result may have been different had Nixon been able to put forth "more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions" (418 U.S., 707). Burger wrote, "Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept" the claim of executive privilege (418 U.S., 706). It seems that the Court's problem was not with the President's position that he could withhold information, but with Nixon's

justification for that position. The language in Nixon suggests that if the president can justify withholding information as vital to protect these military, diplomatic, or sensitive national security secrets, the president will prevail. The Court noted that "as to these areas of Article II duties the courts have traditionally shown the utmost deference to presidential responsibilities" (418 U.S., 710).

Thus, while dealing a fatal blow to this particular president, United States v. Nixon represented a windfall for the presidency. The Supreme Court provided its official endorsement of executive privilege and indicated that this privilege would be a powerful weapon in the struggle over information in the realm of national security affairs. Nixon would seem to loom as a key precedent in favor of the Reagan Administration as it sought to withhold information from Congress on its diplomatic and military initiatives in the Middle East and Central America. However, United States v. Nixon technically involved a conflict between the president and the courts. The Iran-Contra Affair involved a confrontation between the president and Congress. An executive-congressional conflict would be the focus of another case involving Richard Nixon.

In Senate Select Committee on Presidential Campaign Activities v. Nixon (1974), the District of Columbia Circuit Court of Appeals declined to enforce the Select Committee's

subpoena duces tecum for tape recordings of conversations between Nixon and John Dean. Writing for the court, Chief Judge Bazelon, like his old rival Warren Burger, concluded that the information held by the President was "presumptively privileged, even from the limited intrusion represented by an in camera examination" by a court (498 F.2d, 730). Also like Burger, Bazelon acknowledged that executive privilege is not an absolute power. The presumption in favor of the president could be defeated, but "only by an appropriate showing of public need by the party seeking access" (498 F.2d, 730). For Congress to even force a judicial balancing of competing legislative and executive interests, it would be required to show "that the responsibilities of that institution cannot responsibly be fulfilled without access" to the information (498 F.2d, 730). While the president does not enjoy an absolute privilege, the standard established by the court demonstrates a preference in favor of a presidential capacity to withhold information.

Bazelon's application of this standard also indicated the court's tendency to side with the president, as he considered "whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the committee's functions" (498 F.2d, 731). As previously indicated, access to information is essential for Congress to perform its

oversight and informing functions. Yet, the court was not persuaded that the need for this information outweighed the president's interest in secrecy. Bazelon wrote "the need for the tapes premised solely on an asserted power to investigate and inform cannot justify enforcement of the committee's subpoena" (498 F.2d, 732).

It would take something more to overcome the presumption, and the committee argued that the information was essential for its lawmaking task. Once again the court was unpersuaded, noting that "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events" (498 F.2d, 732). The uphill climb faced by Congress in its quest for information is indicated by the court's contention that the committee "points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes" (498 F.2d, 733). The court concluded that the need demonstrated by the committee was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the committee's subpoena" (498 F.2d, 733).

It is possible to discount the precedential value of Senate Select Committee v. Nixon. The argument could be made that the basis of the court's decision was not solely

executive control over information. According to Franck and Weisband, the court feared that the requested information would be leaked by the committee, which would prejudice ongoing criminal proceedings involving Watergate (p. 309). In addition, the Judiciary Committee already had access to much of the information which the Select Committee sought. Thus, the investigating and informing function was being fulfilled and the need for the information was not as compelling.

These are interesting points, but it is questionable whether they were determinative. First, the court's fear of public disclosure of the information seems to constitute judicial recognition of the tendency of Congress to leak, which would strengthen the president's argument for being able to withhold information. In addition, a subsequent decision by the same court would indicate that the president could withhold information, even where these mitigating factors did not exist. In United States v. AT&T (1976), the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, while investigating warrantless national security wiretaps, issued a subpoena for documents held by AT&T. In this case, the District of Columbia Circuit Court of Appeals noted that "if the request letters were only in the hands of the Justice Department, it could have refused to comply with the

legislative demand, citing Senate Select Committee v. Nixon" (567 F.2d, 129). Finally, in Senate Select Committee, Nixon did not assert a national security justification for his claim of executive privilege. If he had, the court would have been even more deferential to the President.

Even as Congress enacted legislation which required presidential disclosure of a wide range of information, the courts gave explicit recognition to a tool by which the president could withhold information from Congress. The Nixon decisions indicate a judicial preference for executive control over information, especially when the president can assert a need to protect diplomatic, military and national security information. These cases, as well as the actions of presidents going back to Washington, strongly suggest that the Reagan Administration's belief that it could withhold information from Congress was justified. This point, combined with the line of precedent which supports the presidential ability to act covertly, creates a compelling case on behalf of the Reagan Administration's secret initiatives in Iran and Nicaragua.

Our constitutional system attempts to encompass both secrecy and accountability. On one hand, we have sought to ensure that the constitutional system remains true to the bedrock principles of checks and balances and governmental accountability. Yet, as we have continuously reshaped our

concept of constitutionality, we have been forced to take into account the realities of existence in a dangerous world and the necessity of secrecy. Unfortunately, the two objectives are often inconsistent. This inconsistency helped create the environment of uncertainty in which the Iran-Contra Affair took place. The president is provided with the power to conduct covert operations, which require secrecy for their success. At the same time, Congress is given the ability to obtain information from the president about these operations. However, the president is also granted the power to withhold this information from Congress, if to do so is in the best interest of our national security. When both Congress and the Reagan Administration sought to avail themselves of the opportunities presented by our constitutional system, the struggle between secrecy and accountability produced a scandal.

CHAPTER IV

FAITHFUL EXECUTION OF THE LAW

As schoolchildren we commit to memory that the legislative branch makes the laws and the executive branch enforces the laws. What we are not taught is the president's obligation when he believes the law to be an unconstitutional intrusion upon his power to conduct foreign policy. Ronald Reagan's objectives of assisting the contras and gaining freedom for American hostages in the Middle East were complicated by a number of statutes. To what extent was the Reagan Administration bound to honor these statutes? This chapter will examine the contradictory answers provided by our constitutional system. One line of precedent suggests a ministerial president who must honor his commitment to the law. A very different line of precedent calls for an independent and vigorous president who may be able to transcend the boundaries of laws which he regards as unconstitutional.

I.

A Ministerial Presidency

The Constitution requires that the president "shall take care that the laws be faithfully executed." It does not provide that the president shall execute only those laws which he vigorously endorses. Nor does it state that the president shall execute only those laws which correspond to his vision of foreign policy. It certainly does not stipulate that the president shall be free to ignore laws of which he does not approve. As Arthur Miller has pointed out, "To say the President's duty to faithfully execute the laws implies a power to forbid their execution is to flout the plain language of the Constitution" (p. 398). Yet, in the opinion of many members of Congress, that is precisely what the Reagan Administration sought to do in the Iran-Contra Affair. Congress expected that the administration would be bound by what it regarded as legitimate restrictions, even in the realm of foreign policy and national security. Certainly precedents had been established and patterns created throughout our history which rendered such an expectation totally reasonable.

As we have seen, the framers regarded congressional participation in matters of foreign policy as a necessity. Congress would play an integral role in making decisions

regarding war and peace, in determining whether the nation would enter into international agreements, and ultimately in deciding whether presidential policies would be funded. Even a proponent of a powerful presidency like John Jay was forced to acknowledge that "affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued," through "the concurrence of the legislative branch" (Rossiter, 1961, p. 392). To claim that the framers gave Congress such a vital part to play in matters of war, treaties, international commerce, and funding, while simultaneously arguing that they would allow the president to disregard the will of Congress strains credulity.

This is not to contend, however, that the framers failed to anticipate policy differences between the president and Congress. In fact they did, and they outlined a process to guide such disagreements. If the president finds himself in opposition to a policy advocated by Congress, he should do battle against that policy before a vote is taken, prior to passage of legislation. If he cannot convince Congress as to the wisdom of his position, he is given the power of the veto. The president can manifest his opposition to the actions of Congress with this powerful weapon. However, if he chooses not to brandish his veto pen, or if his veto is overridden, the battle has

reached its conclusion. As Hamilton writes in Federalist 70, "when a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable" (Rossiter, 1961, p. 427). For the president to embark upon a course of "perverting the instructions or contravening the views" of the legislative branch is to engage in what Hamilton brands as "misbehavior" (Rossiter, 1961, pp. 406-7). And when such misbehavior occurs, Hamilton acknowledges the power of Congress "to punish the abuse of their confidence or to vindicate their own authority" (Rossiter, 1961, p. 407).

Almost every occupant of the Oval Office has strengthened the precedent that the president is responsible for faithfully executing the law. To catalog the instances in which presidents have adhered to the rule of law is to chart the history of the presidency. Our most powerful and highly regarded presidents recognized their commitment to the law. Washington could have shaped the office to resemble that of a monarch. Instead he established the precedent of executive deference to the law. Lincoln chose to ignore his obligation to enforce the law only when the nation ripped apart at the seams, and only to the extent which he felt necessary to restore the union. Even Theodore Roosevelt's stewardship theory, while endorsing a powerful presidency, recognized the limits imposed by the law.

Roosevelt believed the president could take virtually any action, unless it was prohibited by the Constitution or by the law. Where Congress had legislated, the president was bound to acknowledge his limitations and enforce the law. When Churchill requested the loan of destroyers in 1940, Franklin Roosevelt, ever mindful of the limits imposed by the neutrality acts, responded to the Prime Minister, "As you know a step of that kind could not be taken except with the specific authorization of the Congress" (Loewenheim, p. 95). Even as he wrestled with the threat to world order posed by Hitler, the President never forgot his obligation to enforce the law.

Congress Asserts Itself, The President Relents

Congress allowed the president considerable freedom and discretion as the United States became a global power in the postwar era. The requirements of the law became secondary to the wisdom of those in the executive branch responsible for fighting the Cold War. However, the actions of Johnson and to an even greater extent Nixon prompted Congress to insist upon a greater presidential commitment to enforce the law. Koenig writes of the Nixon Administration's "tortuous semantical hair splitting" to justify its conduct in Southeast Asia as "a common scenario of the Indochina war, that of congressional prohibition and executive

circumvention" (p. 233). The cynicism this produced in Congress was perfectly expressed by Senator William Fulbright. Responding to Nixon's justification for the bombing of Cambodia, Fulbright stated "I retain total confidence in the ability of this administration to come up with some specious legal justification for doing exactly what it wishes to do. Like Humpty Dumpty, who would not be mastered by a mere word, the Nixon Administration has shown that it will not be gotten the better of by anything so trivial as a law" (Sundquist, p. 256).

In the 1970's Congress attempted to sever the precedent that foreign policy decisions were to be made and executed in an environment that was somehow beyond the constraints of the law. The congressional resurgence of the 1970's was predicated on the ideal that we should have a foreign policy of laws and not men. The flurry of legislative activity which included the War Powers Act, the Case Act, and the Hughes-Ryan Amendment indicated that the executive branch would no longer be trusted to operate without constraint. This legislation was aimed at creating a new precedent, one of congressional involvement and presidential limitation. The new laws mandated that Congress would be informed of the relevant facts and would participate in decision making, and that the president would be obligated to play by these new rules. In the 1970's, Congress asserted that in the future

foreign policy would be different. Congress would extend its lawmaking power into the realm of foreign affairs, and the president would be required to truly faithfully execute those laws.

Congress sought to institute a new order, and the reaction of the executive branch would determine whether this vision of foreign policy making would become a reality. To a great extent the precedent of faithful execution of the law was strengthened in the 1970's by the actions of Presidents Ford and Carter. Their willingness to accede to the wishes of Congress and enforce legislation which trod upon the sacred ground of foreign policy indicated executive acceptance of these new rules. With their actions, Ford and Carter breathed new life into the president's obligation to faithfully execute the law.

In the summer of 1974 a coup on the island of Cyprus resulted in the assumption of power by a government with ties to the Greeks. Turkey, in an effort to protect Turkish Cypriots, invaded the small island. In its invasion Turkey made extensive use of weapons which it had received from the United States. Such a nondefensive use of U.S. weapons was prohibited by law. Congress, led by members with strong Greek constituencies, sought to punish Turkey by suspending military aid (see Franck and Weisband, pp. 35-45). As he did when assistance to Southeast Asia was jeopardized,

President Ford went to Congress and bargained, pleaded, and cajoled in an effort to prevent a cutoff and the retaliatory measures which Turkey promised. When the cutoff was attached to spending bills, Ford twice used his veto power to prevent the damage an angered Turkey could inflict upon NATO. Even though Ford ultimately lost, the manner in which he fought the battle indicated much about the obligation of the president to execute the will of the resurgent Congress. Ford felt strongly about the course of action advocated by Congress, condemning it as "the single most irresponsible, short-sighted foreign policy decision Congress had made in all the years I'd been in Washington" (Ford, p. 302). Yet in opposing this decision, Ford played by the rules. He attempted to persuade Congress as to the wisdom of his position, and when that failed he wielded his veto pen. In the end, despite his reservations, Ford recognized his obligation to faithfully execute the law.

Ford once criticized Congress for imposing "impermissible shackles" (Sundquist, p. 290) on the president's ability to conduct foreign policy. Nonetheless, he acknowledged the power of Congress, as holder of the purse strings, to impose these shackles. When Ford's covert assistance to anticommunist elements in Angola was made public, Congress responded with legislation prohibiting funds for covert operations in that nation. Despite the

fact that he considered the ban an "abdication of responsibility" (Ford, p. 346), Ford relented. He did not violate the law. He did not engineer Byzantine plots to circumvent the Tunney and Clark Amendments. Ford's actions strengthened the precedent of faithful execution of the law, even when the law dealt with the sensitive area of foreign affairs, and even when the law would produce what the president regarded as dubious consequences. Gerald Ford's commitment to the Constitution created an expectation of compliance on the part of a Congress which in the 1980's would impose a similar ban on assistance to the Nicaraguan contras.

Jimmy Carter had been elected on a platform of honesty, integrity, and commitment to the law. The American people embraced him as the virtual antithesis of Nixon's lawlessness. Among the laws which Carter was expected to execute was a series of statutes on the subject of arms sales. For decades Congress allowed presidents carte blanche in distributing American weaponry to other nations. By the 1970's, however, "some members concluded that arms sales were one path into quagmires. When the U.S. sold high technology defense equipment to a country, it usually contracted to install and maintain it, to train locals in its use, and to provide spare parts. As a result, the U.S. became involved, through the back door, with the purchaser's

security" (Franck and Weisband, p. 98). This concern prompted passage of the Nelson-Bingham Amendment, requiring that Congress be provided with notification of all arms sales of $25 million or more, and giving Congress the opportunity to veto the transaction. Nelson-Bingham would be followed by even more stringent legislation (see Crabb).

The focus of much of Carter's foreign policy efforts was the Middle East, and the main instrument by which a president could make his influence felt in this region was the sale of arms. Like Ford before him, Carter soon learned that any effort to provide hardware to nations in this region would face opposition from Congress, especially when the Israeli lobby flexed its considerable muscle. When Carter proposed a sale of AWACS to Iran in the summer of 1977 it was quickly rejected in Congress. The President, although frustrated, responded according to the rules. Carter writes that when he resubmitted the proposal in September, "the members of my administration did their homework on Capitol Hill, and the sale was not disapproved" (p. 435). It probably never occurred to Carter to attempt to evade the arms sales laws. Even when it frustrated his diplomatic initiatives, Carter did not falter in his responsibility to faithfully execute the law. It would seem that Congress could reasonably expect Carter's successor to likewise comply with the law when he planned an arms sale to the same country less than a decade later.

The 1970's saw the reemergence of the presidential obligation to enforce the law, a precedent which had been prevalent throughout most of our history. Two distinct components combined to revive this precedent. The first was the barrage of legislation passed in the 1970's which mandated congressional participation in foreign policy making, and the conduct of national security affairs pursuant to the law. The precedent was reinforced by the actions of Ford and Carter. By acknowledging the role of Congress and honoring this legislation, Ford and Carter renewed the presidential obligation to enforce the law. By fighting foreign policy battles according to the rules, these presidents strengthened those rules. Thus, the events of the 1970's created in the Congress of the 1980's the expectation that the Reagan Administration would also play by the rules, that it would also provide a faithful execution of the law.

The Court and a Ministerial Presidency

While those in the realm of politics became reacquainted with the idea of faithful execution of the law in the 1970's, arguably the courts never lost sight of this principle in the first place. Although United States v. Nixon (1974) ostensibly was about the presidential power of executive privilege, ultimately it stood for the proposition

that the president is not above the law. At the time, many people regarded this as an extraordinary idea. However, the Court's insistence upon presidential obligation to the law is almost two centuries old. In Bas v. Tingy (1800) it was held that the range of permissible presidential action in fighting a limited imperfect war was determined by Congress. The Court in Bas noted "those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission" (4 U.S., 39-40). This pattern of congressional involvement and presidential restriction was reaffirmed a few years later in another case stemming from our naval conflict with France.

In Little v. Barreme (1804) Congress authorized the seizure of U.S. ships travelling to France. President Adams ordered the seizure not only of U.S. vessels sailing to France, but also coming from France. When a naval officer captured a vessel sailing from France, the Court ruled his action to be unjustified, despite the fact that the officer was acting pursuant to a presidential order. The Court emphasized that "the legislature seems to have prescribed that the manner in which the law shall be carried into execution was to exclude a seizure of any vessel not bound to a French port" (6 U.S., 177-78). It is ironic that the Little decision was written by Chief Justice Marshall, who as a legislator had proclaimed the president to be "the sole

organ of the federal government" in the realm of foreign affairs. It would seem that this sole organ would not be limited by anything as mundane as the law. Glennon considered this question and concluded, "it probably never occurred to Marshall ... that the president, acting within the Constitution ... could disregard this congressional restriction" (1990, p. 8).

A century and a half later, the precedent of Little would be applied in a modern context. Although the Court in Youngstown Sheet & Tube v. Sawyer (1952) could not agree on a single justification for rejecting Truman's actions, a theme which threaded throughout the numerous opinions was the presidential obligation to faithfully execute the law. The underlying basis of Justice Jackson's three tiered test was that Congress, with its enormous constitutional powers and responsibilities, could define acceptable presidential action or prohibit a certain course of presidential conduct. When Congress did act, the president, despite his own considerable power, would be required to enforce the will of Congress. Justice Burton wrote "the controlling fact here is that Congress ... has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency" (343 U.S., 660). Similarly Justice Clark, citing Little v. Barreme, concluded "that where Congress has laid down specific procedures to

deal with the type of crisis confronting the President, he must follow those procedures" (343 U.S., 662). If Youngstown represents the principle that Congress can define the scope of acceptable presidential conduct in a crisis situation, it would seem the path had been cleared for a subsequent Congress to impose lesser restrictions on the day to day conduct of diplomacy of the sort involved in Iran-Contra.

While both the propriety of the congressional role and the presidential obligation to enforce the law were recognized in Youngstown, the Court also stressed that if Congress wanted to make its influence felt, it should actively play its role and aggressively protect its turf. Jackson admitted having "no illusion that any decision by the Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems ... we may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers" (343 U.S., 654). Obviously, before the Court could require that the president faithfully execute the law, Congress would have to enact legislation. Thus, Youngstown represented not only an opportunity, but a challenge for Congress: use it or lose it.

This message would be repeated in a couple of cases decided prior to the passage of the Boland Amendments. In

Haig v. Agee (1981) the Reagan Administration's revocation of renegade ex-CIA agent Phillip Agee's passport allegedly exceeded the authority granted by the Passport Act of 1926, which provided that the secretary of state could "grant and issue passports ... under such rules as the President shall designate and prescribe" (453 U.S., 294). Even though the statute did not specifically address it, the executive branch for years interpreted the Passport Act to allow revocation of a passport if the holder engaged in activities which caused or were likely to cause serious damage to U.S. foreign policy and national security interests. Agee had revealed the identities of agents and intelligence sources, activities which the administration believed to represent a threat to national security. His passport was revoked, and the Court upheld the revocation. Because Congress had not specifically addressed this situation in the statute, it allowed the president to step in and take action. In so ruling, the Court intensified the Youngstown message that if Congress wants to play a role, then it should aggressively play it. Congress would not be out of line to read Haig as a clarion call to enact thorough, comprehensive legislation, since its silence in effect invites presidential action.

Congressional silence was also vital to the Court's decision in Dames and Moore v. Regan (1981). In January 1981 President Carter entered into an executive agreement

with Iran. In exchange for the release of 52 American hostages, the President agreed to nullify attachments on Iranian property, to transfer back to Iran all Iranian assets held by American banks, and to suspend all legal proceedings against Iran in U.S. courts, which would instead be submitted to binding arbitration. The Court, in a decision which cited extensively Justice Jackson's concurrence in Youngstown, upheld the President's agreement. Justice Rehnquist considered the nullification of attachments and the order to transfer Iranian assets to be justified by the International Emergency Economic Powers Act (IEEPA), and thus "supported by the strongest of presumptions and the widest latitude of judicial interpretation" (453 U.S., 674).

The suspension of all U.S. claims against Iran presented a different problem. This suspension was not authorized by the IEEPA or any other statute, and thus seemingly fell within Jackson's category two, "the zone of twilight" (343 U.S., 637) in which either branch may have the power to act. In what some commentators have branded a masterpiece of legal manipulation (Koh, 1988, p. 1311), Rehnquist transformed congressional silence into implicit congressional approval, and transferred the President's action from the twilight zone of category two to the realm of category one, where presidential action enjoys the

"strongest of presumptions" (343 U.S., 637). Even though no legislation expressly authorized the suspension of claims, Rehnquist cited the IEEPA, the Hostage Act, and the International Claims Settlement Act as indicative of "congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case" (453 U.S., 677). Rehnquist wrote, "crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement" (453 U.S., 680).

While the Court in Haig v. Agee concluded that congressional silence did not necessarily mean disapproval, the Court in Dames and Moore took it a step beyond and concluded that congressional silence could be read as providing implicit approval of presidential actions. Rehnquist's opinion, while upholding the President's action, reinforced the message sent by Haig v. Agee to Congress: involve yourself in foreign affairs in great detail and legislate with great specificity. If you do not, your silence may be interpreted as acquiescence.

To argue that the Supreme Court, in a series of decisions from the early nineteenth century through the early 1980's, would urge Congress to exercise its power and legislate in the realm of foreign affairs while allowing the president to disregard that legislation, is to implicate the

Court in an effort to undermine the separation of powers. When the Court instructed Congress to legislate, its implicit message was that these laws would be faithfully executed by the president. Actually, this implicit message could have been made explicit, since numerous decisions have given credence to this principle. United States v. Smith (1806) held that "the President of the United States cannot control the Neutrality Act, nor dispense with its execution, and still less can he authorize a person to do what the law forbids" (27 F. Cas., 1245). In United States v. Kendall (1838) Chief Justice Taney wrote, "to contend that the obligation imposed on the president to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible" (37 U.S., 613). Not even Curtiss-Wright can justify such a claim of absolute presidential power. As Justice Jackson pointed out in his Youngstown concurrence, in Curtiss-Wright "it was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress" (343 U.S., 635f). With these kinds of decisions the Court strengthened the precedent of faithful execution of the law and created an expectation on the part of the Congress of the 1980's that the Reagan Administration would honor its commitment to the law.

II.

A Vigorous and Independent President

The Reagan Administration believed it would not be bound by legislation which it considered an unconstitutional encroachment upon the presidential prerogative over foreign policy. Such a contention would seem to be an argument straight from the pages of Lewis Carroll or George Orwell. Yet, there is considerable precedent within our constitutional system in support of such an argument. This section will examine the philosophical, historical, and judicial justification for the idea that in the realm of foreign affairs, the president may not be strictly bound to enforce legislation passed by Congress.

There is much in the Federalist Papers to suggest that the framers wanted a vigorous and independent president, one who would find a way to fight off the intrusions of an overzealous Congress. While it is undeniable that Congress was given considerable power in the realm of foreign affairs, as John Jay noted in Federalist 64, "it surely does not follow that because they have given the power of making laws to the legislature that therefore they should likewise give them power to do every other act of sovereignty" (Rossiter, 1961, p. 394). Congressional power was to have its limits. However, the framers anticipated that Congress

would attempt to transcend these limitations. Hamilton in Federalist 71 referred to "the tendency of the legislative authority to absorb every other" (Rossiter, 1961, p. 433). Even Madison noted that Congress, with its "constitutional powers being at once more extensive, and less susceptible of precise limits ... can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments" (Rossiter, 1961, p. 310).

When the president encountered these encroachments, the framers anticipated that he would "dare to act his own opinion with vigor and decision" (Rossiter, 1961, p. 433). If Congress attempted to absorb the presidential power to conduct foreign policy, the framers expected the president to "avail himself of his constitutional means of defense" (Rossiter, 1961, p. 445). And while the veto was an option, it was only one option. The president was also given the power to enforce the law, a power which would likewise offer the opportunity to act on his own opinion with vigor and decision. Hamilton wrote that a "ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representative of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy" (Rossiter, 1961, p. 452). Such a role could only

be played by a president with the power to resist the encroachments of Congress, a president with the power to transcend the status of a mere "ministerial servant."

Enforcement in Practice: The Art of Nonexecution

Clinton Rossiter once wrote that if a president "is not widely and persistently accused in his own time of subverting the Constitution, he may as well forget about being judged a truly eminent man by future generations" (1956, p. 130). Some of our most highly regarded presidents engaged in this kind of subversion by regarding the obligation to faithfully execute the law as something less than absolute. Reflecting the Lockean principle of prerogative, Jefferson wrote that "laws of self preservation, of saving the country when in danger, are of a higher obligation" than a "strict observance of the written laws" (Glennon, 1990, pp. 284-85). Certainly this was not a power to be employed frequently or carelessly. Jefferson spoke of self preservation and of saving the country, implying that the refusal to faithfully enforce the law was to be reserved for the most dire situations. Nonetheless Jefferson planted the seeds for a precedent of nonenforcement, a precedent strengthened by a growing tendency to allow the president considerable latitude in deciding what is required in the name of self preservation.

Andrew Jackson furthered the precedent with his position that the president maintained a "duty to protect ... the integrity of the Constitution against the Senate, or the House of Representatives, or both together" (Rossiter, 1956, p. 73). If the president believes that by protecting his foreign policy prerogative against encroachment by Congress, he is protecting "the integrity of the Constitution," then Jackson's position would seem to justify the president's refusal to enforce legislation which he regards as intrusive and unconstitutional.

This question assumed a new intensity as the United States became increasingly involved in world affairs, and as Congress sought an important role in defining foreign policy. Two of the most active periods of congressional involvement in the twentieth century were the 1930's and the 1970's. The actions taken by presidents to evade, or even violate this legislation revealed much about the president's obligation to faithfully execute the law.

In the 1930's Congress, reflecting public uncertainty about American involvement in another European war, enacted a series of neutrality acts. In his effort to assist Great Britain as it stood alone against Hitler, Franklin Roosevelt repeatedly violated the letter and spirit of these laws (see Langer and Gleason). Roosevelt authorized the sale of military equipment to American individuals and corporations,

who would then sell it to the British. To avoid potential congressional opposition, Roosevelt concluded an executive agreement in which fifty U.S. destroyers would be exchanged for ninety nine year leases on English naval bases. Even when FDR obtained congressional cooperation, as in the case of the Lend-Lease Act, he took liberties with the execution of the law (see Fisher, 1985, p. 281). To ensure that Lend-Lease materials made it through the dangerous waters of the north Atlantic, Roosevelt dispatched convoys of warships as escorts and ultimately stationed U.S. troops in Greenland and Iceland. Today Roosevelt's actions are hailed as imaginative and brilliant (see Koenig, p. 215; Merli, p. 480). The simple fact is that Roosevelt circumvented the law. It is also true that his actions were both wise and necessary. However, in taking these actions Roosevelt was strengthening a precedent for future presidents to provide something less than faithful execution of the law.

Perhaps the greatest onslaught of legislation in the realm of foreign affairs came in the 1970's, and the response of the executive branch was highly instructive as to the obligation to faithfully execute the law. This executive perspective was articulated by Abraham Sofaer, former State Department legal adviser, who argued that Congress cannot "as a matter of constitutional law, impose statutory restrictions that impede the president's ability"

to carry out his foreign policy responsibilities (Katzmann, p. 53).

Gerald Ford was the first president to encounter the post-Vietnam, post-Watergate resurgence of Congress. In the spring of 1975 Ford ran headlong into the War Powers Act. As Southeast Asia fell to the Communists, the President employed the armed forces to evacuate Americans from Danang, Phnom Penh, and Saigon (see Franck, 1988, p. 190; Haley). Under the War Powers Act, Ford was required to consult with Congress beforehand in every possible instance, to report to Congress within 48 hours, and to have the troops out within 60 days unless Congress authorized their continued presence. Ford, who questioned the act's "practicality and constitutionality" (Ford, p. 252), proceeded with the rescue with little or no regard for the requirements of the law.

Ford's justification for his failure to comply with the law sought the best of both worlds. On one hand Ford believed the act to be an unconstitutional limitation on the president's foreign policy power, and thus to be disregarded. At the same time, Ford claimed that even if he wanted to, circumstances rendered compliance a virtual impossibility. Ford wrote that in the case of Danang, with members of Congress scattered literally throughout the world, "the consultation called for by the Act was impossible. Although we went to incredible lengths to reach

them and explain the situation, we did not succeed. There was simply no way that I could have drawn Congress into the decision making process when the crisis was at hand, and I was not about to withhold the help of our forces in a humanitarian evacuation. Yet when Congress reconvened after its recess, several members accused me of violating the law" (p. 252).

Within weeks of the evacuations, yet another crisis developed in Southeast Asia. The Mayaguez, an American merchant vessel, was seized by the Cambodian government in international waters (see Rowan). The President was obviously concerned about American lives. In addition, the seizure of the Mayaguez offered an opportunity to bolster sagging American credibility after Vietnam. When initial diplomatic efforts yielded no results, Ford ordered an attack on the island on which the crew of the Mayaguez was believed to be held. Once again the War Powers Act was applicable, and once again Ford chose not to bother with it. Ford subsequently stated that he did not feel obligated to adhere to the War Powers Act in the case of the Mayaguez because "I did not concede that the resolution itself was legally binding on the president on constitutional grounds" (Cummings and Wise, p. 419).

The mission was a success, in the sense that the Mayaguez and its crew were recovered. The mission was something short of a success in the sense that it was fraught with mistakes and cost the lives of 41 Marines. As the operation was winding down, Ford provided a report to Congress in which he "took note" (Sundquist, p. 262) of the War Powers Act, but never acknowledged the fact that he was bound by it. Representative Zablocki criticized the Mayaguez operation, contending that in the Ford Administration, the "proclivity is toward evasive and selective interpretation of the War Powers Resolution" (Sundquist, p. 263). In addition, Ford's actions violated the Cooper-Church Amendment, restricting American involvement in Cambodia.

And what was Congress' response to this blatant disregard of the law? One could reasonably assume that the resurgent Congress which had slammed the door on U.S. involvement in Southeast Asia and forced Richard Nixon from office would rise like a great beast and unleash a bloody attack on Ford. However, Congress did nothing of the kind. In fact, Congress loudly applauded the president's decisive action (see Time, May 26, 1975, p. 18). The rescue of the Mayaguez struck a responsive chord with an American public which was demoralized by our failure in Vietnam. Despite the fact that it was flawed, despite the fact that it was a

violation of the law, Ford's mission proved to be extraordinarily popular. Thus, Congress not only had to swallow the president's disregard for the law, Congress had to like it. Ford's actions, and congressional acquiescence to those actions, would provide an interesting precedent for future presidents who would also encounter the obstacle of legislation.

Jimmy Carter has the reputation of being a weak president who was dominated by Congress. However, when Carter believed the foreign policy prerogative of the presidency to be threatened by Congress, he responded. Carter's Attorney General, Benjamin Civiletti, instructed Congress that the President had the power to "disregard" (Glennon, 1990, p. 97) any law which he believed to be unconstitutional. One of the most popular and frequently used instruments of congressional control over foreign policy was the legislative veto, which was incorporated into hundreds of statutes. In a letter to Congress, President Carter wrote, "it is my view, and that of the Attorney General, that these legislative veto provisions are unconstitutional" (Pious, p. 226). Carter went on to note that "if Congress subsequently adopts a resolution to veto an Executive action, we will give it serious consideration, but we will not, under our reading of the Constitution, consider it legally binding" (Pious, p. 226). The

legislative veto would in fact be declared unconstitutional in INS v. Chadha (1983) a few years after Carter left office. However, Carter's willingness, prior to Chadha, to disregard statutes which he believed to be unconstitutional further strengthened the precedent of presidential nonenforcement of intrusive legislation.

Like Ford, Carter chose to finesse the War Powers Act when it interfered with his foreign policy objectives. In 1978, Angola, seeking to spread the Communist revolution, sent troops into Zaire. While Carter was unable to provide the kind of support he wanted to, he authorized the use of Air Force planes to transport Belgian and French troops and supplies to assist in the defense of Zaire. Even though the War Powers Act was applicable, Carter refused to report to Congress (see Abshire, p. 59). A more dramatic example was Carter's plan to rescue the American hostages held in Tehran. The mission would thrust U.S. military personnel into a situation in which hostilities would be imminent, a scenario which would be covered by the War Powers Resolution. Carter limited his involvement with Congress to an ambiguous conversation with Senate Majority Leader Robert Byrd, an encounter which hardly constituted the consultation required by the Act. Carter later wrote, "I had planned to let him know about the impending rescue mission at the end of this conversation, but now I decided to brief him and the

others during the following night, after our team was actually in place and ready to enter Tehran. I therefore told him that such an operation was imminent, but not when it would be launched" (p. 514).

Unlike Ford's Mayaguez action, Carter's mission was a sad failure. Still, even with the lack of success and the absence of popular approval, Congress responded with only "a mild outcry" (Sundquist, p. 264) to Carter's failure to comply with the War Powers Act. Senator Barry Goldwater provided an interesting commentary on the obligation to enforce the law, when he noted that "President Carter ignored the statute just as any other president will have to do" (Sundquist, p. 264).

The War Powers Act was hardly the only piece of legislation which was evaded or disregarded in the 1970's. The Case Act was enacted to ensure that executive agreements would be reported to Congress within 60 days. A 1976 GAO study revealed that despite the requirements of the law, many executive agreements were never disclosed (see Shaw, p. 278). In 1976, the Ford Administration entered into 440 executive agreements, but refused to submit 171 within the requisite 60 days (see Fisher, 1985, p. 278). The Carter Administration came up with a device by which the Case Act could be circumvented. By issuing parallel unilateral policy declarations with other nations, the administration

entered into arrangements which were neither executive agreements nor treaties, and which removed the obstacle of Congress (see Barilleaux). With the passage of Hughes-Ryan, Congress sought to limit executive secrecy. Yet, Ford and Carter continued to act secretly and withhold information from Congress when it suited their needs. Ford believed the defeat of Soviet aggression in Africa to be important enough to keep secret U.S. assistance to anticommunist factions in Angola (see Orman, pp. 152-54). Carter employed secrecy to obtain the freedom of American diplomats hiding in the Canadian embassy in Tehran during the hostage crisis.

The presidents of the 1970's did not believe they could ignore all, or even most of the legislation which was enacted by Congress. They were perceptive to the national mood. In the wake of Vietnam and Watergate, and in the shadow of the imperial presidency, the occupants of the Oval Office knew it would be political suicide to claim the full extent of the power enjoyed by the presidents of the 1940's, 1950's, and 1960's. However, even in this anti-presidency atmosphere, when Ford and Carter believed that American lives, American interests, and the power and prestige of the presidency were jeopardized by a strict adherence to the law, they disregarded the law. Certainly the actions of Ford and Carter would serve as a precedent when Reagan encountered a similar situation.

The Court and "Faithful" Execution

The Supreme Court has never sanctioned the idea that the president may decline to enforce the law. On the other hand, the Court has hinted that the issue of faithful execution of the law is not as simple as some have suggested. The roots of this position can be found in In re Neagle (1890). The Court in Neagle pointed out that the presidential obligation to enforce the law transcended a mechanical application of a statute. In executing the law the president must also give effect to "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution" (135 U.S., 64). Thus, the law must be enforced, but not at the expense of the proper constitutional allocation of foreign policy power.

In a number of decisions handed down during Reagan's first term, the Court indicated that it would give the president considerable discretion in determining how the law will be enforced. In Haig v. Agee (1981) the Court upheld the Reagan Administration's revocation of Agee's passport. In doing so, the Court endorsed the administration's interpretation of the Passport Act, noting that "a consistent administrative construction of a statute must be followed by the Court unless there are compelling

indications that it is wrong. This is especially so in the areas of foreign policy and national security, where congressional silence is not to be equated with congressional disapproval" (453 U.S., 291). The implicit message of the Court in cases like Haig and Dames and Moore was that in executing the law, the president may search for loopholes and exploit congressional silence to justify the action he desires to take.

Regan v. Wald (1984) involved a Reagan Administration ban on travel to Cuba. The Court upheld the ban, as well as an administration interpretation of the International Emergency Economic Powers Act which was contradictory to the intent of the Congress which drafted the act. Justice Rehnquist's majority opinion focused on a grandfather clause in the IEEPA, which stipulated that any applicable regulations in force as of July 1, 1977 would remain valid. Among these grandfathered regulations was an embargo on transactions with Cuba, made pursuant to the Trading With the Enemy Act (TWEA). This regulation was hardly all-encompassing, however, and "most travel related transactions with Cuba and Cuban nationals were permitted" (468 U.S., 234-35). Despite this fact, the Court ruled that the grandfather clause of the IEEPA and the TWEA justified Reagan's ban. Rehnquist, taking note of the fact that Cuba was a Soviet client, a sponsor of violence and terrorism in

the Western Hemisphere, and actively involved in Africa and the Middle East "in support of objectives inimical to United States foreign policy interests," stressed the need for executive action (468 U.S., 243). "Given the traditional deference to executive judgment in this vast external realm," Rehnquist wrote, "we ... sustain the President's decision to curtail the flow of hard currency to Cuba - currency that could then be used in support of Cuban adventurism - by restricting travel" (468 U.S., 243).

The Court's decision in Regan went beyond the implication of Haig v. Agee that congressional silence does not mean disapproval, and even beyond Dames and Moore's ruling that congressional silence could be interpreted as implicit approval. Rehnquist's opinion suggested that in executing the law, the president may engage in his own interpretation of acts of Congress, and that interpretation will be accorded great weight by the Court, "given the traditional deference to executive judgment" on matters of foreign policy. Regan was handed down as Ronald Reagan searched for ways to assist the contras and obtain freedom for the hostages, and would seem to open the door for a liberal interpretation of legislation such as Boland, the Intelligence Oversight Act, and the Arms Export Control Act.

What is the president's obligation to enforce the law? Our constitutional system provides contradictory guidance,

even on this seemingly obvious question. On one hand, there is precedent to suggest that the Reagan Administration would be required to faithfully execute the laws passed by Congress. Any administration efforts to assist the contras would be terminated by Boland, any covert operations would be reported to Congress pursuant to the Intelligence Oversight Act, and Congress would be notified of any arms sales to a nation which sponsored terrorism. At the same time, the system created an environment in which the Reagan Administration could believe that it would have substantial leeway in enforcing these statutes. Haig invited the president to exploit loopholes in this legislation. Regan allowed the president to interpret these statutes in a manner conducive to his policy goals. And, as the examples of Jefferson, FDR, and Ford indicate, if American lives and interests are at stake, the law may be disregarded. Our constitutional system perpetuated the myth that no person, not even the president, is above the law, while simultaneously giving the president the power necessary to circumvent the law. The system encouraged Congress to enact legislation, while allowing the president to evade that legislation. Should we be surprised that the Reagan Administration and Congress took advantage of the opportunities afforded by a system which fails to set the rules, a system which perpetuates a legacy of uncertainty?

CHAPTER V

OPPORTUNITY LOST

The previous chapters have established that the Iran-Contra Affair was not a totally unprecedented constitutional anomaly. However, this point raises an additional question. Was the Iran-Contra Affair an inevitability, the natural outgrowth of the development of the constitutional system? The answer is no. The system placed Congress and the Reagan Administration in competition, but they did not have to clash to the point of stalemate. Either or both could have backed down, or they could have even ascended to the heights of cooperation and compromise. But they didn't. The peculiar political forces of the 1980's - intense partisan differences, conflicting visions of foreign policy, an uncertain American public - made compromise virtually impossible. Having made the decision to clash, both Congress and the Reagan Administration sought to use the constitutional system to defeat each other. How they used, misused, and abused precedent provided the necessary ingredient, when combined with the uncertain guidance of the system, for the emergence of the Iran-Contra Affair.

I.

It has been said that ours is a government of laws, not men. Precedent dictates that the law should extend even into the realm of foreign policy, and that it is incumbent upon the president to faithfully execute the law. However, a second line of precedent gives a president who encounters legislation which he deems unconstitutional the power to refuse to enforce that law. Congress took the position that precedent justified the use of its lawmaking power to restrict administration efforts to assist the contras. The administration took the position that precedent justified disregarding unconstitutional legislation such as the Boland Amendments. Both were correct in theory. The problem was the manner in which they attempted to carry out these precedents.

"I've Got It, I've Got It - No You Take It"

In Opening Arguments, Jeffrey Toobin recounts his experiences as an attorney for the Office of the Independent Counsel (OIC), which was responsible for prosecuting crimes associated with the Iran-Contra Affair. Toobin tells of the debate over whether Oliver North should be charged with violating the Boland Amendment. One of the main problems was that the OIC attorneys couldn't quite determine what Boland prohibited, and what would constitute a violation of

Boland. He writes of an OIC attorney named Berman who had the misfortune of being designated staff expert on Boland, who researched long and hard, and was still unable to put his finger on what Congress was going for. Toobin gives an example of the kind of conversation which occurred with Berman: "Did the Boland amendment apply to NSC employees? Yes, said Berman, <u>almost</u> certainly. So did North's activities violate Boland? Yes again, Berman answered, I'm <u>virtually</u> certain" (p. 37). Special prosecutor Lawrence Walsh once asked an OIC attorney named Yannett about his feelings on charging North, to which Yannett replied he had been "wavering wildly on Boland for months." Walsh responded, "You have a lot of company" (p. 133). Yannett, Berman, and the OIC can hardly be blamed for their confusion. The Reagan Administration, the press, scholars, and sometimes even Congress itself would share in the confusion about what Boland really meant.

The 1970's saw the reemergence of a precedent which remained dormant for much of the postwar period. The president would be required to conduct foreign policy pursuant to the rule of law. The revival of this precedent was not only a limitation on the power of the president, but an opportunity for Congress to use its lawmaking power to involve itself in the making of foreign policy. Successful implementation of the precedent hinged on Congress enacting

legislation which provided clear policy guidance to the executive branch. In the Iran-Contra Affair, such guidance was not always present. In passing the Boland Amendments, Congress failed to live up to the precedent.

The failure of Congress to provide any real guidance was demonstrated by its inability to achieve any consistency on the contras. The first Boland Amendment, applicable from December 1982 - December 1983, authorized military assistance to the contras, provided its purpose was not the overthrow of the Sandinistas or to provoke a military exchange between Nicaragua and Honduras. The second Boland Amendment, applicable from December 1983 - October 1984, represented a significant change, as Congress approved $24 million for military or paramilitary operations in Nicaragua. By dropping the condition that the objective not be the overthrow of the Nicaraguan government, Congress implicitly accepted the goal of forcing the Sandinistas out of power. A year later, the pendulum swung completely in the opposite direction. For fiscal year 1985, Congress enacted the third Boland Amendment, prohibiting the expenditure of funds to support, directly or indirectly, military or paramilitary operations in Nicaragua. The next year would see the pendulum begin to swing back. The fourth Boland Amendment, applicable from August 1985 - March 1986, provided the contras with humanitarian aid and some

intelligence. The fifth and final Boland Amendment, applicable from December 1985 - October 1986, allowed a classified amount of military aid to the contras and called on the State Department to solicit third country humanitarian aid. Congress also authorized the administration to provide the contras with intelligence advice and training, while somehow refraining from participating in "logistics activities integral to" military or paramilitary operations in Nicaragua. In 1986, the pendulum completed its swing when Congress voted $100 million in aid for the contras.

At the risk of yielding to oversimplification and cynicism, the first Boland Amendment can be seen as an acceptance of the administration's covert action, but a rejection of the objective of ousting the Sandinistas. With the second Boland Amendment Congress accepted this objective, but refused to provide enough money to do the job right. The third Boland Amendment said don't do the job at all. Congress seemed to reject the use of covert operations and the idea of overthrowing the Sandinistas. With the fourth Boland Amendment Congress indicated that maybe it went too far the previous year, and gave the contras a little support. In the fifth Boland Amendment Congress gave the contras more money and intelligence, as long as they didn't make effective use of that intelligence. In 1986

came the congressional equivalent of "the hell with it, do what you want, here's $100 million." It is difficult to imagine that the application of the rule of law to foreign policy was meant to eliminate the idea of policy coherence. It is equally hard to believe that the precedent of congressional involvement was meant to be implemented in this inconsistent and slipshod manner.

Inconsistency was only the beginning. When Congress was capable of determining the general direction in which it wanted to go, its actions were fraught with uncertainty. Even the third Boland Amendment, which was characterized as the most restrictive of them all, raised more questions than it answered. Congress seemed uncertain about what activities were forbidden. The amendment prohibited expenditure of funds "for the purpose or which would have the effect of supporting, directly or indirectly, military operations in Nicaragua." At first glance, it seems clear enough. However, a closer look reveals the potential for gaping loopholes. Would Boland prohibit so-called humanitarian assistance? Would it allow efforts to keep the contras alive until the next vote? Would it prohibit Reagan from asking allies to assist the contras? Congress simply failed to provide effective guidance to the administration.

Boland's shortcomings are all the more apparent when compared to the Clark Amendment of 1976, which prohibited

U.S. involvement in the Angolan civil war. The Clark Amendment stated "Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose, or which would have the effect, of promoting or augmenting, directly or indirectly, the capacity of any nation, group, organization, movement or individual to conduct military or paramilitary operations in Angola." Michael Malbin points out "the Clark amendment prohibited any assistance, anywhere, that would have augmented the capacities of the Angolan resistance, but the Boland amendment prohibited only assistance that would have had the direct or indirect effect of supporting military or paramilitary operations inside Nicaragua" (p. 277). Congress could have done with Nicaragua what it did with Angola. It chose instead the safe haven of ambiguity.

To whom was Boland applicable? Once again, Congress left a vital question only partially answered. The amendment identified specifically "the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities." How extensive was this list? Senator George Mitchell argued convincingly that any agency of the government which sought to assist the contras in a covert manner would be covered. Senator Mitchell, as well as a majority of Congress, may have believed this. However, by

using the language it did, Congress left itself open to the argument that the NSC was not covered by Boland. Technically, the NSC was an advisory group, not an entity involved in intelligence activities. In addition, the third Boland Amendment was attached to the Intelligence Authorization Act, which identified those agencies to which it was applicable. The NSC was not one of them. Finally, the fact that the president was not covered led Gordon Crovitz to ask, "if Boland Three did not apply to the President, how could it apply to his closest foreign-policy aides" (Commentary, p. 25)? Some of these points are strained, perhaps even disingenuous. Yet, to an extent Congress asked for it. Congress could have removed any doubt as to whom Boland was applicable. Once again, the Congress of the early 1980's failed in comparison to the Congress which passed the Clark Amendment. As Malbin notes, "the Clark amendment clearly and unequivocally applied to the entire U.S. government" (p. 277). With Boland, Congress was neither clear nor equivocal.

How authoritative was this most restrictive Boland Amendment? What did it mean? Even on this question, Congress sent mixed signals. Edward Boland characterized his rather ambiguous amendment as the means by which Congress "clearly ends U.S. support for the war in Nicaragua" (Arnson, p. 167). Boland was, to say the very

least, overly optimistic. The wording of Boland Three suggests an intent to be vague. Richard Perle contends that "It was a conscious and deliberate decision by the Democrats in the House to leave those loopholes" (Crovitz, 1989, p. 113). Crovitz argues that Congress pulled back from an absolute ban to allow Reagan "the option of keeping the Contras alive by means other than overt U.S. funding" (Wall Street Journal, p. 30). This point is supported by Richard Neustadt, who contends that congressional knowledge that Reagan would find a way to assist the contras "may have eased the consciences of some among the congressmen who voted to ban arms" (1990, p. 284). Thus, it is not altogether clear that Ed Boland was speaking for the entire Congress when he referred to the end of U.S. support for the war in Nicaragua. If he was correct, why did Boland Three specifically call for reconsideration of the contra question a few months later? And, if eliminating the contras was really what Congress wanted to accomplish, why didn't it pursue its objective more effectively, as it had done with the Clark Amendment? The legacy of the Boland Amendments was confusion; confusion as to the intent of Congress, and confusion as to the message conveyed to the Reagan Administration.

The Boland Amendments reveal much about how Congress viewed the precedent that the rule of law would bind the

president in his conduct of foreign policy. Its wild fluctuations and its willingness to enact legislation brimming with uncertainty, combined with its knowledge that the administration would interpret this legislation in the manner most conducive to its own policy objectives, indicate Congress had neither the desire nor the stomach to effectively participate in the making of policy. Congress seems to have merely wanted to go through the motions, to publicly assert its lawmaking power without accepting responsibility for the coherence of foreign policy, or for the fate of a group of rebels who had come to depend upon the United States. By enacting legislation along the lines of Clark, Congress could have removed any doubt about its policy preferences, the guidance it meant to provide to the executive branch, and its expectation that the administration would adhere to the rule of law. Instead, it settled for the mediocrity of the Boland Amendments. No president, especially one as popular as Reagan, could be expected to roll over and play dead in the face of this kind of shoddy legislation. The half-hearted manner in which Congress carried out the precedent which justified its involvement invited a strong response by Ronald Reagan.

Damn the Torpedoes...

The response of the Reagan Administration to the Boland Amendments, as well as any number of laws enacted in the 1970's, was evasion and violation. Fawn Hall, faithful secretary to Oliver North, testified that "sometimes you have to go above the written law" (Congressional Quarterly, 1987, p. C-63). This attitude was not confined to the clerical staff, but also shared by Ronald Reagan. When both Secretary of State Shultz and Secretary of Defense Weinberger raised questions about the legality of the sale of arms to Iran, Reagan told them "the American people will never forgive me if I fail to get these hostages out over this legal question" (Congressional Quarterly, 1987, p. C-114). As indicated previously, this position is not without foundation. However, the Reagan Administration used the precedent of nonenforcement of the law as a license to do whatever it wanted, in total disregard of the role of Congress, the will of the American people, and the requirements of a constitutional democracy. The administration took a weapon intended to challenge unconstitutional congressional intrusions upon the power of the president, and used it to transcend laws which were beyond constitutional reproach. And, when it did encounter legislation which was arguably unconstitutional, the administration abused the precedent, using it not as an instrument of principle, but as a means of deceit.

Reagan's Iranian initiative not only contradicted his own policy, it ran headlong into the obstacle of the Arms Export Control Act (AECA). The AECA imposed restrictions on the ability of a nation which purchased weapons from the United States, such as Israel, to transfer those weapons to a third country, for example Iran. Under the AECA, Congress was to be notified of any transfer of arms valued at $14 million or more. This provision was easy to get around. The administration simply engaged in a number of small transactions, staying well below the $14 million limit. The AECA also required that the U.S. be capable of legally selling weapons directly to the third country. This was a problem. Pursuant to the Export Administration Act, Iran had been designated by the administration as a sponsor of terrorism, and therefore ineligible to receive weapons from the United States. This provision could be waived by the president, but he would be required to provide notice of such a waiver to Congress. However, once notified of Reagan's intention to sell arms to Iran, Congress would most likely object to and even expose the plan, thus blowing the deal.

Since the AECA presented a seemingly insurmountable barrier to the realization of Reagan's objectives, the administration disregarded the AECA. Attorney General William French Smith provided the answer, pointing out that

Reagan could sell arms "outside the context" of the AECA (Iran-Contra Report, p. 380). The arms could be transferred from the Department of Defense to the CIA under the Economy Act, and then the CIA could dispose of them under the National Security Act. It was a legal maneuver which harkened back to the days of Franklin Roosevelt and Attorney General Robert Jackson. William Casey dismissed the obstacle posed by the AECA to the arms sale, arguing "if the President determines it's his policy, then under the National Security Act, he can do it legally" (Persico, p. 452). For Casey, it was almost as if the President could wave a wand, recite the magic words, and all the other laws would simply disappear.

But then again, maybe the administration had been too clever. By involving the CIA and the National Security Act, it had stumbled into another, even bigger legal minefield. Prior to Reagan's assumption of power, the CIA had become a veritable lightning rod for congressional regulation. The Hughes-Ryan Amendment required the president to issue a finding that any CIA operation was in fact important to the national security of the United States. Reagan's preference had been to ignore this kind of technicality. When high level officials of the CIA objected, Reagan responded with a retroactive finding, authorizing actions which had already taken place. Since Hughes-Ryan envisioned a finding prior

to the initiation of CIA action, a retroactive finding was legally dubious at best. However, the retroactivity aspect was not nearly as questionable as a second feature of this and subsequent findings, a requirement that notice be withheld from Congress. "The purpose of a Finding" as Fagelson points out "was to subject covert actions to the constitutional accountability of congressional oversight. To make a Finding which itself excludes a covert action from congressional oversight turns the entire principle of Hughes-Ryan on its head" (p. 329).

The arms sale also ran afoul of the Intelligence Oversight Act. The Oversight Act required the president to provide timely notification to the intelligence committees of all covert operations. When Ash-Shirra exposed the arms for hostages deal, the CIA had been involved for almost a year, and Reagan had demonstrated no inclination to inform the committees. Even though it is not specifically defined by the act, many in Congress believed the opportunity for timely notification had long since passed by November 1986. In addition, even though notification to the intelligence committees could be delayed and made in a timely fashion, the Oversight Act required that the president always provide prior notice of covert operations to the so-called gang of eight: the Speaker and House Minority Leader, the Senate Majority and Minority Leaders, and the chairmen and ranking

minority members of the House and Senate Intelligence Committees. Reagan apparently forgot about this provision, or chose to ignore it.

The Iranian initiative demonstrates that the Reagan Administration was not interested in working within the confines of the law. It regarded the law as a troublesome distraction. When certain individuals from Defense, State, and the CIA insisted upon compliance, the administration resorted to disingenuous distortions of the law. Gregory Treverton quotes William Miller, staff director of the Church Committee and the Senate Intelligence Committee, as saying that the people calling the shots on intelligence in the late 1970's were "so immersed in the constitutional questions that they could recite chapter and verse. Questions of law and balance occurred naturally to them" (1990, p. 81). Reagan, on the other hand, surrounded himself with "advocates, people who were always trying to get around the roadblocks, who were looking for a way to get it done" (1990, p. 81). William Casey spoke for many in the administration when he instructed CIA counsel Stanley Sporkin, "Don't tell me it can't be done legally - find me a legal way to do it" (Persico, p. 405).

The legislation which would prompt the Reagan Administration to court disaster was the Boland Amendment, in all of its various incarnations. These amendments should

have offered the perfect opportunity for the administration to assert the precedent of nonenforcement. Boland was arguably all that its critics alleged it to be, and even more. Yet, there was a right way to handle it. The administration failed to grasp this. Instead, it twisted precedent and pursued a course of action every bit as dubious as the poorly drafted Boland Amendments.

History teaches us that the president may, when he encounters legislation which he regards as unconstitutional, refuse to enforce that legislation. However, Ronald Reagan gave little or no indication that he deemed Boland unconstitutional. If he did believe this, Reagan could have wielded his veto pen, as the framers contemplated the president would in the face of unconstitutional action by Congress. Instead, Reagan affixed his signature to every piece of legislation which included a Boland Amendment. By refusing to veto, Reagan not only allowed these amendments to become law, he provided prima facie evidence of his belief in their constitutionality. His reluctance to take a stand early would cast a shadow across his subsequent efforts to evade the law.

Why didn't Reagan use his veto power? Crovitz attempts to explain Reagan's decision by pointing out that "each Boland amendment was attached to an authorization or appropriation bill ... he would have had to risk closing

down the defense and intelligence agencies until Congress tried to override" (Wall Street Journal, p. 30). While this may or may not have been a compelling justification for not brandishing the veto pen, it did not foreclose other options for expressing his reservations about the constitutionality of the congressional action.

Ronald Reagan was not usually shy about articulating his view of presidential power. When Reagan signed the resolution in 1983 authorizing American troops to remain in Lebanon for eighteen months, he stated "Nor should my signing be viewed as any acknowledgment that the president's constitutional authority can be impermissibly infringed by statute" (Congressional Quarterly, 1988, p. 6). His remarks upon signing the Boland Amendment in the fall of 1984 were positively lukewarm in comparison: "I am signing this act with every expectation that shortly after the next Congress convenes it will provide adequate support for programs to assist the development of democracy in Central America" (Iran-Contra Report, p. 45). Reagan mentioned nothing about the president's constitutional authority to conduct foreign policy, nothing about impermissible congressional infringement of that power. His statement in 1983 indicates that Reagan would express reservations about the constitutionality of a statute when he believed a problem existed. His unwillingness, or inability, to do so with

Boland indicates an acceptance of its constitutionality and undermines the subsequent administration claim that it was unconstitutional.

Nevertheless, many in the Reagan Administration would question the constitutionality of Boland. One of the most vocal was United Nations Ambassador Jeane Kirkpatrick, who regarded congressional passage of the Boland Amendments as "manifestly unconstitutional encroachments on executive power" (Crovitz, 1989, p. 45). The system offered yet another means of channeling this kind of opposition. The administration could have taken its case to the courts and challenged the constitutionality of Boland. Eugene Rostow suggests that at a time in which Congress regularly intrudes upon presidential power, the judiciary is instrumental to restore "the boundary between the legislative power and the executive power under the Constitution" (Crovitz, 1989, p. 45). Kirkpatrick sided with those in the administration who wanted to pursue a double barreled strategy of using the forum of public opinion and the courts in "a head-on fight against congressional efforts to micromanage foreign policy" (Crovitz, 1989, p. 45). While there traditionally exists a reluctance on the part of the courts to get involved in "political questions" (see Henkin, 1976), the latter half of the twentieth century witnessed a growing judicial willingness to resolve foreign policy disputes between the

president and Congress. In addition, the Supreme Court has demonstrated a tendency to rule in favor of presidential power in these disputes. This, combined with the fact that the Court was becoming increasingly conservative, created a perfect opportunity for Reagan to challenge the constitutionality of Boland. Once again, he did nothing.

In and of itself, this decision reveals little. It is only natural for a president to be hesitant about placing such an important issue in the hands of nine unpredictable judges. However, the decision not to challenge Boland in the courts, in addition to the reluctance to employ the veto, or to even express public reservations about its propriety or legitimacy, is indicative of an acceptance of the constitutionality of Boland. Central to the argument that the administration could disregard the law is the contention that such a law violates the Constitution in some manner. While some of his advisers made that argument, Reagan's curious lack of action raises the question of whether he believed Boland to be unconstitutional, or simply a legitimate obstacle which stood in the way of what he wanted to accomplish.

The administration's belief regarding the constitutionality of Boland was a threshold consideration. Of equal importance was the manner in which the administration declined to enforce the law. The president's

refusal to execute the law placed him in very dangerous territory, treading on the sacred ground of separation of powers and the rule of law. If it is to be done, it must be done correctly. The precedent of nonenforcement was established by presidents taking principled stands. When these men encountered legislation which they could not in good conscience enforce, they made their actions public and explained their position to Congress and the American people. It's not that the Reagan Administration didn't understand this precedent. Presidential counselor Fred Fielding acknowledged "There are times when the Administration has been accused of ignoring the law. But remember that the President is sworn to uphold both the Constitution and the laws. We seek to resolve the conflicts" (New York Times, Nov. 13, 1985, p. 24). It is a pity that Fielding was not allowed to orchestrate a public battle against congressional infringement upon the president's foreign policy prerogatives. Instead the Reagan Administration pursued a two-pronged strategy in dealing with Boland. The first featured a public commitment to compliance with the law. The second involved a surreptitious violation of the law.

The charade of enforcement was exemplified in Robert McFarlane's assurance to Congress that "at no time did I or any member of the National Security Council staff violate

the letter or spirit" of Boland (Bradlee, p. 284). At least McFarlane subsequently admitted the deception. Ronald Reagan would continue to pay lip service to the law even after he left office. In his memoirs, Reagan writes that the president "should be permitted to lead the nation and make decisions based upon what he knows and the trust placed in him by the voters - although I never felt these views should justify overriding or ignoring validly enacted laws" (p. 484). Reagan continues, "I repeatedly insisted that whatever we did had to be within the law, and I always assumed that my instructions were followed" (p. 485). Finally, Reagan writes, "Let me be clear. I wanted the Contras maintained as a force, to the fullest extent that was legal, until I could convince Congress to appropriate new funds for the freedom fighters" (p. 485).

Unfortunately Reagan did not always exhibit this concern for the law while he was in office. Behind closed doors it almost seemed there existed a second Ronald Reagan. John Poindexter quoted this Reagan as saying in May 1986, "If we can't move the Contra package before June 9, I want to figure out a way to take action unilaterally to provide assistance" (Bradlee, p. 359). Reagan's memoirs are also contradicted by his remarks to the National Security Planning Group: "I don't want to pull our support for the Contras for any reason. This would be an unacceptable

option" (Persico, p. 411). McFarlane testified that Reagan ordered him "to keep the Contras alive body and soul" (Congressional Quarterly, 1987, p. C-24). As McFarlane tells it, and as the instructions were relayed to Oliver North, the order was not to keep the contras alive in a manner strictly consistent with the law. Rather, it was: Keep the contras alive - period. The order was to pursue an objective which was seemingly in contradiction to the will of Congress and the law. The dual nature of Reagan's remarks demonstrates his understanding of the presidential obligation to execute the law: publicly, embrace it; privately, disregard it.

Thus, the administration embarked upon a secret violation of the law. It didn't have to be that way. Oliver North secured from Bretton Sciaroni, counselor to the president's Intelligence Oversight Board, an opinion that since the NSC staff was not an intelligence agency, it was not covered by the Boland Amendment. This was precisely the kind of manipulation Congress left itself open to, by virtue of its sloppy draftsmanship. The administration had been given an opportunity to put its own spin on a very ambiguous piece of legislation. It had gotten away with this kind of interpretation before, and had even been upheld by the Court in Regan v. Wald. Certainly precedent existed for this sort of imaginative construction of the law. However, that

precedent required a public articulation and explanation of the interpretation. While North and Poindexter repeatedly claimed that Boland was inapplicable to the NSC during their testimony before the Iran-Contra committees, at the time they were assisting the contras they stopped at nothing to keep this interpretation from Congress.

Why wouldn't the Reagan Administration go before Congress and the American people and express its position that this law did not apply to the NSC staff? Given the uncertain nature of Boland, it was hardly an outrageous interpretation. The danger of making such a claim to Congress was, according to Malbin, the risk of "a tighter, loophole-free statute" (p. 288). This is probably true. Yet, if the administration really believed in the power of the presidency, it would have looked upon such legislation with anticipation, not fear. A Boland Amendment which actually did what Congress in the summer of 1987 said it did would offer Reagan the opportunity to challenge once and for all the legislative intrusion upon his power to conduct foreign policy. Instead, this administration cowered in the shadows with its secret interpretation, all the while giving public assurances of compliance. It was this hesitancy to employ the full power of the presidency, in combination with the deception, which doomed the Reagan Administration. As Morton Halperin notes, "What brought on Iran-contra was that

the administration assured Congress that the law covered the NSC and then secretly violated those assurances" (Crovitz, 1989, p. 118).

Precedent existed for a strong willed president to disregard laws which he believed to be unconstitutional. The Reagan Administration failed to live up to that precedent. Reagan chose not to challenge the constitutionality of Boland. Then he violated the law on the sly, like a thief in the night. The irony of the Iran-Contra Affair was that Reagan had the constitutional power and personal popularity to confront the Boland Amendments and the Congress which enacted them. The man who once thundered in a New Hampshire debate hall, "I paid for this microphone Mr. Green," could have told the American people, "I will not enforce Boland and allow this intrusion upon the power of the president." Instead, he took his policy underground, transforming what should have been a position of principle into something sleazy and Nixonian. Reagan would claim in his memoirs that he always sought to comply with the law. However, at the meeting with his advisers in which alternative sources of funding for the contras were discussed, Reagan predicted "we'll all be hanging by our thumbs in front of the White House" if the public found out. Reagan wasn't a lawyer. He wasn't even a detail man. Yet, he certainly knew enough to realize that hanging by the thumbs on the White House lawn was not the fate of those in the right.

In this section I have dealt with the arguably close calls, those laws which left the administration some room to maneuver. Other administration actions did not involve these close calls. For example, the use of profits from the sale of U.S. weapons which belonged in the Treasury was a clear violation of a totally valid law. This kind of illegal action represented something of a snowball effect. An overly imaginative, disingenuous interpretation of the law led to the disregard of troublesome provisions of the law. This in turn created an atmosphere in which members of the administration felt free to violate even the most legitimate of laws. As the individual who created this environment, Ronald Reagan must bear responsibility for this kind of wretched excess and blatant lawlessness. What he allowed far exceeded what precedent authorized.

II.

Our constitutional system has never quite been able to reconcile the presidential accountability that democracy requires and the presidential secrecy necessary to exist in a dangerous world. Thus, one line of precedent dictates that the president be held accountable by allowing Congress to engage in oversight of the executive branch. At the same time, a second line of precedent gives the president the power to act secretly and to withhold information from

Congress. The manner in which Congress and the Reagan Administration used these conflicting precedents transformed an environment of uncertainty into the Iran-Contra Affair.

Underachieving at Oversight

At one of his press conferences, President Reagan was asked why he didn't just go ahead and openly assist the contras, despite the Boland Amendments. Reagan responded, "we want to keep on obeying the laws of the country" (Frontline). His response was met with uncontrolled laughter from the press corps. Why were they laughing? Reagan was a pretty funny fellow, maybe they thought he was joking. Perhaps they were laughing because the response was so disingenuous. Then again, the laughter may have been ultimately at the expense of Congress. After all, Congress had enacted a series of Boland Amendments to restrict assistance to the contras, yet it was unable or unwilling to monitor the administration's compliance with the law. Maybe they were laughing at the joke that oversight had become.

Historically, one of the most important tools available to Congress is the power to oversee the actions of the executive branch. Unfortunately, in its encounters with the Reagan Administration, Congress chose not to make full use of this power. Michael Glennon points out "that legislative committees responsible for intelligence oversight will

normally be only as vigorous as the popular will allows" (1990, p. 301). If Glennon is correct, then Congress entered into the relationship with the Reagan Administration at a distinct disadvantage. At this time, the American people believed that the nation's intelligence capability had been hamstrung by excessive congressional interference. Moreover, Ronald Reagan was an extraordinarily popular president. Thus, rather than take advantage of the line of precedent which encouraged the idea of vigorous oversight, Congress would merely go through the motions.

Perhaps the failure to fully exercise the power of oversight can be attributed to the very nature of Congress. Congress is a diverse institution, and everybody does not agree on the intensity with which power should be exercised. Some members of Congress simply did not believe in extensive oversight of intelligence activities. Ironically this view was held by the chairman of the Senate Intelligence Committee, Barry Goldwater. Echoing the infamous comments of Leverett Saltonstall, Goldwater once remarked "I don't believe in the Congress knowing too much intelligence. There's no way you can keep the secrets. There's no way you can get these congressmen to keep their mouths shut when they learn something hot" (Persico, p. 231). Others have the desire to engage in oversight, but due to their extensive workload, don't have the time to do it

effectively. As a former staffer put it, "Senators tend to see things in shorthand. They don't have time for the details. They are preoccupied with the larger issues" (Arnson, p. 156). The details are left to the staff, which presents yet another problem. Bernard McMahon, former staff director of the Senate Intelligence Committee, observes that "a lot of our staff people liked to play little Senator" (Persico, p. 434). With what McMahon called "a bunch of horses' asses" (Persico, p. 434) telling Casey how to run the CIA, relations between the branches became strained. As the willingness of the administration to be forthcoming waned, the ability of Congress to obtain information and the opportunity to engage in effective oversight further declined.

It's not that Congress didn't put on a good show. Hearings were convened, testimony was solicited, brows were furrowed. Frequently, however, Congress just failed to follow through, as in the case of the mining of the Nicaraguan harbors. When the CIA's role in the mining was made public, members of the Senate Intelligence Committee howled in fury, claiming they had not been informed. After the smoke cleared it was uncertain whether the problem was a lack of candor on the part of Casey or a lack of diligence on the part of Congress. It turned out that Casey had informed the committee about the mining, albeit in his

"inimitable mumble" (Treverton, 1990, p. 83) and as only one aspect of a large barrage of information. Senator Daniel Patrick Moynihan had a good point when he complained that "In no event was the briefing full, current, or prior as required by the Intelligence Oversight Act" (Arnson, p. 157). Others were not so quick to lay the blame solely on the shoulders of William Casey. No matter how fleetingly it was mentioned, the placing of mines in Nicaraguan harbors should have raised red flags and prompted some pretty intense questioning and further investigation. Instead, nothing happened. As Senator Patrick Leahy points out, many members knew of the mining, but raised objections only when the media alerted the nation (Iran-Contra Report, p. 489). Senator Joseph Biden characterized the lack of congressional action as a failure of oversight, claiming "There was not enough due diligence. We have lost the resolve to make the system work ... it would be nice to have an infusion of backbone, myself included" (Arnson, p. 157).

Of course, the mining incident contributed to the atmosphere that produced the Boland Amendments, which would inspire even more half-hearted oversight by Congress. In August 1985 the New York Times, Washington Post, and Washington Times reported on executive violations of Boland. These stories prompted Representatives Lee Hamilton and Michael Barnes to write letters to Robert McFarlane

regarding administration compliance with the law. McFarlane wrote back, "I can state with deep personal conviction that at no time did I or any member of the National Security Council violate the letter or spirit" of Boland (Bradlee, p. 284). McFarlane would repeat the lie five more times throughout the fall of 1985.

Barnes followed up with a visit to McFarlane in October. The national security adviser invited Barnes to have a look at a large stack of documents, under the conditions that he remain in the office while he examined them, and that he not allow staff to see the material. McFarlane's bluff was successful. Barnes refused, objecting that staff participation was essential and that McFarlane's suggestion "was not an adequate way to ascertain the truth of the allegations" (Iran-Contra Report, p. 129). While this may be true, Barnes should have rolled up his sleeves and had a look. The likelihood of McFarlane providing access to incriminating documents was admittedly slight. Nonetheless, Barnes' job was oversight, and he failed to take advantage of an opportunity. Although he would send subsequent letters asking again that documents be turned over to the House Intelligence Committee, his efforts dwindled. Barnes had encountered a stone wall, and rather than go around it, or over it, he merely stopped.

Actually, Barnes should not be judged too harshly, since his vigilance in the pursuit of the truth was greater than that of almost any other member of Congress. His actions stand in marked contrast to those of Lee Hamilton. In November of 1985, Hamilton wrote to Fred Wertheimer that "the Committee was impressed by Mr. McFarlane's willingness to discuss this matter and his response to our questions ... I judge the Committee is willing to accept those responses barring new evidence that might contradict them" (Arnson, p. 261). It is puzzling why Hamilton and the committee would speak of the need for new evidence. Contradictory evidence already existed. It is difficult to believe that reporters from these different newspapers were all on wild goose chases. Perhaps Hamilton was guided by the old adage that "you can't believe everything you read in the newspapers." On the other hand, maybe Hamilton would have been better served recalling the one which says "Where there's smoke, there's fire." The press accounts, combined with the fact that the contras continued to exist despite Boland, should have inspired greater curiosity. Although hindsight is 20/20, it does not seem unreasonable to suggest a more intensive investigation was in order.

In the summer of 1986 the contras continued to thrive, and a new round of stories in the press about administration involvement prompted another spurt of congressional

investigation. In June 1986, Representative Ron Coleman introduced a resolution which called upon the administration to produce documents and information concerning its efforts to assist the contras (Iran-Contra Report, pp. 139-140). National Security Adviser John Poindexter repeated his predecessor's assurances of compliance with "the letter and spirit of the law" (Iran-Contra Report, p. 140), but refused to provide any additional information to Congress. Instead, he gave them Oliver North. In a meeting in the White House Situation Room on August 6, 1986 North told eleven members of the House Intelligence Committee that he "did not in any way, nor at any time violate the spirit, principles or legal requirements of the Boland Amendment" (Bradlee, p. 432). Once again, Hamilton and company bought it. Hamilton thanked Poindexter for his "good-faith effort" (Iran-Contra Report, p. 141), and ended the intelligence committee's investigation. He wrote to Representative Coleman, "it is my belief that the published press allegations cannot be proven" (Iran-Contra Report p. 141).

At his trial, Oliver North would characterize the August 6 meeting as "not billed as testimony or anything like that. It would be an informal, off-the-record meeting in the White House Situation Room" (Toobin, p. 292). Obviously, the informality of the encounter was no excuse for North's deception. However, perhaps the committee

should accept part of the blame for its failure to arrive at the truth. It simply did not try hard enough. In this instance, oversight meant a small group trudging over to the White House to conduct an informal session in which the witness was neither placed under oath nor warned of the consequences of lying. The committee allowed North to believe he was only fibbing, rather than engaging in illegal activity. The argument can be made that placing North under oath would be useless, that North was a habitual liar who turned deceiving Congress into an art. However, when it was made clear to North in 1987 that he could face jail, he sang like the proverbial bird, coming before Congress to tell the truth, "the good, the bad, and the ugly" (Congressional Quarterly, 1987, p. C-76).

Hamilton has spoken eloquently of the need for the administration to be candid with Congress and for Congress to be able to trust the administration. With regard to the assurances of administration compliance with Boland, he seemed to be engaged in wishful thinking. At the Iran-Contra hearings Hamilton asked, "Must we put every Executive Branch official under oath who comes before us? Must we regard every claim of executive privilege and every statement of explanation with great skepticism" (Congressional Quarterly, 1987, p. C-28)? In general, the answer is no. A good working relationship between the

branches is essential, and Congress shouldn't muddy the creek by unnecessarily antagonizing the executive. However, in the particular case of Oliver North, given the disparity between the statements of McFarlane and Poindexter and the continued viability of the contras, and given the widespread accounts of North's activities, the answer to Hamilton's question is yes. At the very least, North should have been placed under oath and forced to provide sworn testimony. And, the case can be made that Congress should have held the kind of high-visibility, high-impact hearings in 1986 which it would embark upon in 1987 only after public opinion had shifted and the administration was on the defensive. It seems Congress lacked a William Fulbright or a Sam Ervin, someone with a thirst for the truth and an awareness of the obligation of Congress to monitor the executive branch.

Admittedly, Hamilton, his intelligence committee, and the entire Congress were in a tough situation. Traditionally, the national security adviser can't be forced to testify, thus it would have been difficult to put any real pressure on McFarlane or Poindexter. Getting North to testify could have been hindered by a possible claim of executive privilege. This did not mean Congress had to accept everything they said as absolute truth, especially when what they said flew in the face of reality. These statements should not have signaled the end of the inquiry,

but rather should have served as a starting point for further investigation. Perhaps the most damning explanation of why Hamilton swallowed the administration line came from Gerhard Gesell, the presiding judge in the Oliver North trial. Jeffrey Toobin writes that in bench conferences "Gesell said candidly he thought the CIA and the State Department, as well as the NSC, had lied to Congress about Nicaragua throughout the period in question, and, what was more, he thought that Hamilton knew these agencies were not telling the truth. But, according to Gesell, the congressman lacked the political will to protest, so he just accepted the false information" (Toobin, p. 229).

The manner in which administration compliance with the law was monitored leads to the disturbing conclusion that Congress viewed the precedent of congressional oversight of the executive as authority to ask questions only when the press and public demanded it. Unfortunately, Congress did not understand the precedent as authorization to engage in tough, serious inquiry, nor to pursue inconsistencies in testimony, and certainly not to push the administration for information. This is disappointing enough. What makes it all the more troubling is that Congress found itself in the same trap into which it had fallen so many times before. It was almost as if the members of Congress had forgotten about the deception practiced by the executive branch throughout

much of the postwar period. Or, they naively believed this administration would never lie to them. Either way, Congress failed to learn the lessons of the past.

After a decade in which Congress reasserted its claim to information, the attempts by Congress to oversee the activities of and obtain information from the Reagan Administration were pathetic. Congress was confronting an executive branch whose capacity to engage in secret operations and ability to withhold information were formidable. Only a savvy, calculated, and persistent use of its own considerable power would result in Congress gaining access to information. Whether it was because it lacked the political will to confront a popular president, or whether it was because it was a fragmented and overworked institution, Congress was not up to such an effort. Congress never pushed hard enough to really learn anything, just enough to worry the administration, which would then engage in its own slate of questionable actions.

Lives or Lies, Truth or Consequences

In August 1984, twenty years after the imaginary events in the Gulf of Tonkin, Robert McFarlane sent Oliver North to a meeting with contra leaders with the instruction to maintain "absolute stealth" (Frontline). This phrase, absolute stealth, perfectly captured the Reagan

Administration's understanding of the idea of presidential secrecy, and its disdain for the concept of congressional oversight. Absolute stealth meant using the precedent of presidential secrecy to create a world in which private agents covertly carried out policies formulated by a few unaccountable individuals in hotel rooms in Miami and London. Absolute stealth also meant using the precedent of withholding certain national security information to justify a pattern of deception not seen since the days of Watergate. A precedent which was intended to safeguard the security of the nation in a dangerous world was transformed into a device to shield the sometimes illegal, arguably unconstitutional, and always dangerous activities of a handful of men.

While the precedent for covert operations remained sound as Reagan assumed power, it was not as strong as it had been in the postwar years. Certain changes had been made in a quest to reconcile secrecy and democracy. Laws had been enacted to insure congressional involvement and presidential accountability. However, the Reagan Administration regarded the precedent of presidential secrecy as justification to pick and choose the rules with which it would comply. Indicative of administration impatience with the new rules of the game was the grousing of William Casey: "Here's the trouble. We're too timid.

The attitude is don't stick your neck out. Play it safe. This kind of crap is smothering us. You practically have to take a lawyer with you on a mission" (Persico, p. 290). Thus, the Reagan Administration sought to employ the precedent for covert operations as if the changes of the 1970's had never occurred, as if the hands of time had been turned back to 1957. Even if it was true that in the early 1980's we needed a little more Allen Dulles and a little less Stansfield Turner, the actions this attitude produced would prove disastrous.

Traditionally covert operations were used as an instrument to implement an established policy. The Reagan Administration saw the precedent for covert action as freedom to construct a covert policy. As Robert McFarlane noted in his testimony before the Iran-Contra committees, covert operations were meant to serve "as an adjunct of policy, not as its foundation, and surely not as a vehicle for waging war with a Soviet proxy" (Congressional Quarterly, 1987, p. C-23). McFarlane contended that members of the Reagan Administration "turned to covert actions because they thought they could not get Congressional support for more overt activities" (Congressional Quarterly, 1987, p. C-23). If anything, McFarlane understated this point. The administration policy of providing arms to Iran was an outrageous affront to sound diplomacy and good sense.

The policy of securing support for the contras demonstrated disregard for the law and the preferences of the American people. Therefore, these policies were adopted and pursued secretly. The administration interpreted a line of precedent which sanctioned the use of covert action as justification for circumventing the democratic process for the consideration and development of foreign policy.

It didn't stop there. The administration looked upon the precedent of presidential secrecy as offering the freedom not only to formulate a covert policy, but also to devise a covert mechanism for the implementation of that policy. If Oliver North is to be believed, "The Director (Casey) was interested in the ability to go to an existing, as he put it, off-the-shelf, sustaining, stand-alone entity that could perform certain activities on behalf of the United States" (Congressional Quarterly, 1987, p. C-91). Some, including Casey biographer Joseph Persico, have dismissed this as just another of Oliver North's fantasies. But then again, North's testimony accurately described The Enterprise, which was an off-the-shelf, stand-alone entity, run by mercenaries and supervised by a few government officials, funded by profits from secret weapons deals and free from congressional restraint, performing activities on behalf of the United States such as making arms deliveries to Iran and Central America. Casey had been instrumental in

the creation of The Enterprise, providing North with essential advice on its structure, its funding, operational logistics, and the hiring of Richard Secord (see Woodward, p. 466). People like Casey and North saw the CIA as awash in a sea of laws and regulations, and thus, practically speaking, useless. They wanted something more. By creating a secret government totally beyond the safeguards of oversight and accountability, the administration took the precedent of presidential secrecy to a level unknown even at the height of the Cold War.

Ronald Reagan seemed to love covert operations more than any president since Kennedy. Therefore it is ironic that the actions of his administration may have ultimately jeopardized the ability of the president to pursue the covert option in the future. What makes it all the more unpalatable was the opportunity Reagan was given. After the dark days of the mid 1970's, when America was so skeptical of government secrecy, events involving Carter, Iran, and Afghanistan prompted a reconsideration of the need for covert action. Reagan could have taken this new attitude and rebuilt out of the ashes a new covert capability, accepted and respected by Congress and the American people. Instead, he blatantly abused the trust which America had placed in him, and reinforced the old stereotype that covert action is the last refuge of stupid policies. The

administration's dubious initiatives eroded the "public's confidence in its intelligence organizations," which according to former DCI Turner "is absolutely essential to their success" (S. Turner, p. 172). In addition, the administration's actions revived the congressional skepticism of the 1970's. In the wake of Iran-Contra, legislation was proposed which would require either notification of Congress prior to the start of a covert operation, or within 48 hours (see Cheney, p. 208; Fagelson, p. 344; Koh, 1988, p. 1272; Malbin, pp. 283-286). Although ultimately defeated, this kind of legislation indicated a renewed congressional interest in challenging the president on questions of covert action. As Ronald Reagan became bogged down in the fate of a small group of hostages in Lebanon and a small band of "freedom fighters" in Central America, he failed to see the impact his actions would have on the precedent of presidential secrecy.

In addition to sanctioning the use of covert operations, the precedent of presidential secrecy allowed the executive to withhold information, if such an action was vital to national security. The Reagan Administration would stretch this precedent to the very limits of, and even beyond the boundaries of acceptability. Oliver North testified "By their very nature, covert operations or special activities are a lie" (Congressional Quarterly,

1987, p. C-75). To protect that which it had created, a key segment of the administration would view the ability to withhold information as justification to lie. In other words, a long line of lies were necessary to protect the big lie.

In the hands of the Reagan Administration, legitimate notions of presidential secrecy degenerated into deception. And even though it is a fine line which separates secrecy and deception, it is clear that the administration crossed that line. North assisted McFarlane in drafting a number of letters to Congress which professed compliance with Boland. McFarlane and North would perpetuate the lie in meetings with members of the House Intelligence Committee. After the arms sales to Iran had been revealed, North, McFarlane, and Poindexter collaborated on the preparation of a false chronology which obscured the nature and extent of administration involvement in providing weapons to the Ayatollah. North sought to falsify a statement to be presented to the House and Senate Intelligence Committees on the arms sales. Both Casey and Poindexter would lie about these transactions in testimony before the intelligence committees. Their last days in office found North and Poindexter working diligently at preventing the truth about administration actions from ever becoming public. Poindexter destroyed a finding signed by Reagan which

revealed the transaction with Iran as a straight arms for hostages swap. North engaged in a frenzied shredding of documents which detailed his efforts to provide ransom for the hostages and assistance to the contras.

The Supreme Court held in United States v. Nixon that information might be withheld based on a claim of protecting national security secrets. The rationale for the administration's deception failed to satisfy this standard. Oliver North testified that "if I had divulged what I was doing, if Mr. McFarlane had divulged what I was doing, many, many lives were at stake" (Congressional Quarterly, 1987, p. C-87). When North was forced "to make judgments over lives or lies" (Congressional Quarterly, 1987, p. C-87), he chose lies. North's testimony was compelling, and the case could be made that it was this kind of information which the precedent was intended to protect. However, if the surface of North's bravado is scratched away, other, less admirable reasons are exposed. A memo written by North to McFarlane revealed his belief that his actions might be in violation of Boland. This kind of admission indicates that North's deception was just as likely aimed at covering up what he realized was improper activity. If this was North's motivation, his actions cannot be condoned. Withholding information to hide potentially illegal behavior had been specifically rejected by the Court in Nixon. If a president

could not get away with it, logic and justice dictate that neither could a lieutenant colonel.

Poindexter's basis for withholding information was that "I simply didn't want any outside interference" (Congressional Quarterly, 1987, p. C-105). If by outside interference, he was referring to the Soviets, or the Cubans, or even the Sandinistas, he might have had some justification for his decision. In fact, by outside interference Poindexter meant Congress. Poindexter testified that "we didn't want more restrictive legislation introduced in some new form of the Boland Amendment" (Congressional Quarterly, 1987, p. C-105). Thus, Poindexter withheld information to prevent Congress from doing its job, hardly a persuasive reason. As indicated previously, there is a substantial body of precedent based on the idea that national security policy is not the exclusive domain of the executive. Congress is to play a role in the formulation of policy. To play that role, Congress must have access to information, precisely the kind of information which Poindexter withheld.

Another reason for withholding information given by Poindexter was his desire "to return to a covert implementation of the policy" (Congressional Quarterly, 1987, p. C-105). By reciting the mantra of national security, Poindexter not only made a prima facie case for

his actions, he demonstrated his understanding of how the information game is played. Poindexter's mistake was his inaccurate characterization of what he was doing. Poindexter wasn't merely protecting covert implementation of the policy. He was lying about the existence of the policy. Precedent dictates that once a policy has been formulated according to democratic processes, the executive may withhold information to keep the means of implementing that policy secret. It does not mean, as many in the administration believed, that lies can be told about the very existence of a policy.

While North and Poindexter often cried national security, it is clear that their actions were frequently motivated by simple politics. Just as North was unable to deny that he shredded documents to avoid "political embarrassment" (Congressional Quarterly, 1987, p. C-89), Poindexter admitted he withheld information because assistance to the contras was "a very hot political issue" (Congressional Quarterly, 1987, p. C-109). Echoing North's remarks, Poindexter testified he destroyed Reagan's finding authorizing arms for hostages "because I thought it was a significant political embarrassment to the President, and I wanted to protect him from possible disclosure of this" (Congressional Quarterly, 1987, p. C-98). To say the very least, the quest to avoid political embarrassment hardly

satisfies the constitutional requirement for withholding information. In addition to being unjustifiable, Poindexter's actions raise another point. The power to withhold information belongs to the president, not members of the staff, even one as important as the national security adviser. By making these kinds of decisions for the President, Poindexter was not protecting Reagan from political embarrassment. He was subjecting Ronald Reagan to the ultimate embarrassment - being forced to admit that he was unaware of things taking place right under his nose.

Of course, not everyone in the Reagan Administration was a party to this deception. In his testimony at North's trial, CIA counsel Stanley Sporkin vigorously distanced himself from the lies, saying "I've been around a long time and I'm not going to start now and I wasn't going to start then. You tell it straight" (Toobin, p. 282). When State Department legal adviser Abraham Sofaer learned of the false story being prepared for Casey to give to the intelligence committees, he alerted George Shultz and threatened to resign if Casey went through with the lie (see Mayer and McManus, pp. 319-321). Chief of Staff Donald T. Regan testified before the Iran-Contra committees, "There are times when I have regretted having to tell Congress some things. There are other times when I have bitten my tongue for not telling Congress some things, or maybe even where to

go. But there is never an excuse for lying to the Congress, never" (Congressional Quarterly, 1987, p. C-129). Regan once boasted that a sparrow couldn't fly through the White House without his knowledge. If that had been true, if Regan had been as powerful as he claimed to be, perhaps he could have imposed his standard of honesty upon the NSC staff and saved his president from the political embarrassment which people like North and Poindexter brought upon him.

Ultimately the deception practiced by members of his administration threatened not only Ronald Reagan's credibility, but also the fragile trust which America had in its leaders. Presidential deception was the source of much of the public cynicism about government in the 1960's and 1970's. From Johnson's distortions about events in the Gulf of Tonkin to Nixon's promise that peace is at hand, the American people had been subjected to lies about Vietnam for almost a decade. Watergate was not so much about a burglary as it was about Nixon's attempt to cover it up. Ford and Carter healed some of the wounds, and Reagan had the opportunity to complete the healing process. One of the goals of Ronald Reagan's presidency had been the restoration of the American public's faith in their country and their leadership. How tragic it is that he allowed his administration to engage in the same kind of deception which sparked that mistrust and cynicism in the first place.

III.

Virtually every issue dealt with in this chapter comes down to the basic precedents of congressional coequality and presidential preeminence. If Congress is a coequal, then it will have the ability to limit the president with its lawmaking power and to gain access to information held by the executive branch to monitor compliance with the law. And, the presidential ability to refuse to enforce the law, to engage in secret operations, and to withhold information hinges on the idea of presidential preeminence. This section will examine how each branch ultimately failed to live up to the great expectations created by these precedents.

A Congress Worthy of Coequality?

As indicated in chapter Two, the Constitution, the courts, and the actions of past Congresses created a precedent of congressional coequality in the making of foreign policy. The Congress which confronted the Reagan Administration saw the precedent of coequality as authority to publicly assert the tremendous power it had at its disposal. Unfortunately, Congress failed to understand that the precedent involved a thorough execution of this power. It is not enough for Congress to say it is a coequal, it must also follow through. The events which transpired

throughout much of the 1980's demonstrated the enormous gap between what Congress could have done and what it actually did. In the case of both lawmaking and oversight, Congress went through the motions of involvement, while creating situations in which its assertions of power could be easily trumped by the considerable power of the presidency. While the actions of Congress were borne of a desire to be a coequal, ironically they served to intensify the old stereotype of Congress as incapable of playing an effective foreign policy role.

The failure of Congress to live up to the precedent of congressional coequality is illustrated by the saga of the Boland Amendments. Precedent dictated that Congress arrive at and adhere to a policy on the contras. As we have seen, Congress would neither develop a consistent policy of its own nor provide an outright rejection of the administration's plan to assist the contras. An important reason for this indecision was that congressional diversity gave way to fragmentation. The question of assistance to the contras produced any number of constantly evolving coalitions on Capital Hill, which made a consistent policy practically impossible. On the whole, Republicans favored contra aid, while Democrats registered their opposition. Generally, the Senate supported aid and the House of Representatives opposed. However, these institutional and partisan generalities didn't always hold up.

The toll the contra question took on partisan stability was indicated by a House divided, literally. It went far beyond Democrats versus Republicans. Liberal Democrats squared off against more moderate and conservative members of their party. With the foul stench of the Mondale landslide defeat in the air, some Democrats voted in favor of contra aid to try and rehabilitate the party's image on national security issues. It happened on the other side of the aisle as well. Some conservative Republicans, assuming an all or nothing position, refused to support a compromise backed by the party leadership, which provided the contras with what they saw as inadequate assistance. Instead, these Republicans voted in favor of a Democratic proposal to terminate aid to the contras completely (see Arnson, p. 195). Admittedly Congress has no control over its own diversity. However, it must learn to live with it, because diversity in Congress is not the exception, but the rule. If Congress is incapable of preventing this diversity from degenerating into fragmentation and policy paralysis, perhaps it should rethink its aspiration of coequality in the making of foreign policy.

On the other hand, maybe the congressional failure with Boland is attributable, not to forces beyond its control, but due to a lack of institutional intestinal fortitude. Perhaps Congress failed to put up its own program or reject

that of the administration simply because it lacked the courage to rise above indecision and mediocrity. Richard Perle contends "the various Boland Amendments always left open enough ways in which assistance could be given to the contras so that Congress would not have to face up to the responsibilities of a disastrous, calamitous defeat of the contras" (Crovitz, 1989, p. 113). Similarly, Gordon Crovitz argues that inconsistency resulted because "Congress did not want to be saddled with the responsibility for permanently losing Nicaragua to Communism, with the horrific strategic dangers this would bring" (Commentary, p. 23). Perle, an assistant secretary of defense in the Reagan Administration, and Crovitz, assistant editor of the Wall Street Journal editorial page, are well-known conservatives, and their criticism of Congress is hardly unexpected. The most compelling indictment of Congress comes from Cynthia Arnson, a former foreign policy aide to Democratic Representative George Miller. Arnson writes that "the constant search for congressional alternatives (was) as much to provide political cover to Reagan opponents as to contribute to successful policy" (p. 23). "Repeated infusions of what Congress called humanitarian aid," Arnson notes, "had less to do with a coherent policy than with the political imperative not to get blamed for abandoning the contras" (p. 215). Like its reluctance to monitor administration

compliance with the law, the failure of Congress to take a consistent stand on the contras may have been the result of a lack of political courage. Whether it was unable to do so because of fragmentation, or whether it simply lacked the political will, the failure of Congress to play a useful role on the contra issue did little to advance the cause of congressional coequality.

It would be comforting to conclude that Congress has learned its lesson. To be truly coequal, Congress must vigorously assert itself and make extensive use of the power granted by the Constitution. Unfortunately, Congress should have learned this lesson after Vietnam. Congress claimed it had learned its lesson, and with its new found wisdom enacted a barrage of legislation in the 1970's. The experts wrote that Congress had learned its lesson, and would be a force to be reckoned with in the making of national security and foreign policy. However, its behavior in the Iran-Contra Affair demonstrates that Congress had learned neither how to assert itself, nor the consequences of its failure to do so. It all comes back to Justice Jackson's Youngstown admonition that "only Congress itself can prevent power from slipping through its fingers" (343 U.S., 654). This was the fate of the Congress which faced off against the Reagan Administration. A future Congress which aspires to coequality would do well to remember this point and maintain a tighter grip on its power.

A President Worthy of Preeminence?

While Congress flinched in its use of power, the Reagan Administration looked upon the precedent of presidential preeminence as authority to take action. Its mistake was in believing that no action was beyond the power of the president. John Poindexter put a benign spin on the administration view of presidential preeminence when he testified, "the President is the chief architect of the foreign policy and the people when they vote for a President recognize the foreign policy position that he represents and that the President ought to be given an opportunity to carry out that foreign policy" (Congressional Quarterly, 1987, p. C-110). Harold Koh took a much darker view of the administration's idea of preeminence, writing that "the cadre's members read the Constitution as giving the Executive Branch unfettered discretion to make national security decisions and denied that such decisions need be shared with Congress" (1990, p. 12). Regardless of which characterization is more accurate, one conclusion is beyond dispute: the Reagan Administration believed in the idea of presidential preeminence in foreign policy making with a vengeance.

It is ironic indeed then that Reagan's actions undermined the principle of presidential preeminence. Reagan's refusal to use his power to veto or even publicly

challenge the Boland Amendments was a failure to assert his preeminence. Behind closed doors, his behavior was even worse. While he was frequently applauded for his strategy of extensive delegation, in the Iran-Contra Affair Reagan delegated away his power. Reagan turned over his power to unelected, unaccountable staffers such as McFarlane, Poindexter, and North, who turned it over to private citizens like Secord and Hakim. This was no longer presidential preeminence. The preeminent actors were North and Secord, not Reagan. And, if Reagan is to be believed, he further undercut the idea of presidential preeminence by failing to monitor what these people were doing in his name. Thus, Reagan not only gave away power, he bestowed free reign. The Iran-Contra Affair was an example, not of presidential preeminence, but rather of presidential negligence.

Ronald Reagan didn't seem to grasp that the precedent of presidential preeminence was more than a means of satisfying his own particular policy objectives. Inherent in the precedent is an obligation each president owes to the institution of the presidency. Truman understood this obligation, and it influenced the most significant decisions he made in the White House. Reagan's counselor Fred Fielding understood this obligation. Echoing Truman, Fielding once remarked, "Strong Presidents especially are

mindful of their responsibility to those who come after them" (New York Times, Nov. 13, 1985, p. 24). Unfortunately, Fielding's advice seems to have been ignored by Ronald Reagan. If Reagan would have combined his personal popularity with a proper and effective use of the power granted by the precedent of presidential preeminence, he could have further advanced the precedent and strengthened the power of the presidency to an extent unknown since the days of Franklin Roosevelt. While it is questionable whether Reagan did any significant, lasting damage, his actions in the Iran-Contra Affair represent an opportunity lost, and a failure to live up to the example set by his predecessors.

In addition, Reagan didn't seem to understand that while the president may be the preeminent foreign policy actor, he is also part of an intricate constitutional system. The precedent of presidential preeminence had been carved out by people who went before the American public and Congress and explained what should be done, and through hard work, persuasion, and sheer force of will, determined the course of foreign policy. Reagan caved in on the issue of the contras, and then secretly violated the compromise he reached with Congress. With regard to Iran, Reagan put forth a strong anti-terrorist policy and then ignored it as he sold arms to a nation which was a major sponsor of

terrorism. One of the Reagan Administration's worst mistakes was confusing the idea that the president is the preeminent foreign policy actor with the delusion that he is the only actor. Preeminence lies not in ignoring the constitutional power of Congress, but in getting Congress to exercise its power in a manner supportive of the president. The trick is not to drag the American people in a given direction, but to persuade them to go willingly. Admittedly, Reagan would have faced tough odds in convincing Congress and the nation on the wisdom of his initiatives in Central America and the Middle East. However, if they were truly important, he should have worked at selling them. If they couldn't be sold, then they should have been abandoned. As Richard Cheney points out, regardless of how much power the constitutional system has bestowed upon the president, "no foreign policy can be effective for long without the whole hearted support of the Congress and the American people" (Congressional Quarterly, 1987, p. C-135).

Advocates of a dominant president claim that the power to conduct foreign policy is the power to conduct foreign policy effectively. If we are going to place that much trust in the president, a corollary should be added: The power to act as the preeminent force in the making and implementation of foreign policy includes the obligation to act responsibly. For our purposes, responsibility means

that in dealing with the executive branch, the president should take care of his own house. All initiatives carried out in his name should have his approval and should be monitored to insure proper implementation. In dealing with Congress, the president should operate within the boundaries established by the constitutional system. Considering the power our system gives the president, this is hardly an unreasonable demand. Where the guidelines which Congress establishes are legitimate, the president must follow them. When he feels the guidelines are not legitimate, he must use the procedures established by the system to challenge them. In his relations with the nation, the president should remember that he is a servant of the people. He should articulate to the American people his fundamental beliefs, and his policies should comport with them. When necessity dictates that he diverge from what the American people reasonably expect, he should go before them and provide an explanation.

Our constitutional system allows the president to do so much. However, the system also demands that the president ultimately stand before the nation and account for his actions. Nowhere in the Constitution does it specifically require the president to act responsibly. Yet, that is precisely the obligation the president must bear when he assumes the role of preeminent actor in the making and

execution of foreign policy. If this is the standard by which Ronald Reagan should be judged, his actions in the Iran-Contra Affair brand him a failure.

IV.

A common thread weaves its way through the actions of both Congress and the Reagan Administration in the Iran-Contra Affair. Both failed to take full advantage of the opportunities afforded by the constitutional system. Precedent existed for Congress to assert its coequality, to use its lawmaking power to bind the administration, and to use its oversight power to insure compliance. Instead of taking advantage of this opportunity, Congress carried out its power in a half-hearted and inconsistent manner. At the same time, precedent existed for the Reagan Administration to assert its preeminence, to refuse to enforce legislation which it regarded as unconstitutional, and to employ covert operations for the sake of national security. Rather than take advantage of this opportunity, the administration resorted to secret policies, carried out by a secret government, and covered up with lies. In their implementation of precedent, Congress was guilty of nonfeasance and the administration was guilty of malfeasance, but they both failed to capitalize on what the Constitution offered.

In the wake of the Iran-Contra Affair, Congress and its supporters in the press and in academia branded the administration a bunch of cowboys with no regard for the system of checks and balances and the rule of law. The administration and its supporters lambasted Congress for being a gutless wonder, too fragmented and indecisive to play an effective foreign policy role. Their performance in the Iran-Contra Affair indicates that both sides may be right. In their failure to properly exercise power and live up to the actions of their predecessors, Congress and the Reagan Administration represented two sides of the same bad coin. It was this mutual failure to capitalize on the opportunities presented by the Constitution which led Richard Perle to characterize the entire fiasco as "a shared responsibility between the President, who lacked the courage of his convictions, and the Congress, which lacked the courage of its convictions" (Crovitz, 1989, p. 113).

CONCLUSION

The goal of this dissertation was to offer a constitutional explanation for the Iran-Contra Affair. As this journey reaches its conclusion, it is apparent that a constitutional exploration involves much more than an examination of the document itself and a reading of the cases. Notions of constitutionality are inevitably shaped by the actions of policy makers, past and present, and linked to the views of the American people. With that in mind, this concluding chapter will attempt to provide a constitutional explanation of why the Iran-Contra Affair occurred, and how a future Iran-Contra Affair might be avoided.

I.

In essence, the Iran-Contra Affair was a product of a contradictory constitutional system, as misused by Congress and the Reagan Administration, in a political environment created by an ambivalent American public.

To a great extent, the Iran-Contra Affair was the culmination of an uncertain, overly ambiguous, even contradictory constitutional system. At the center of the Iran-Contra Affair was a conflict between the Reagan

Administration and Congress over whether the United States should assist the contras. This conflict raised a basic constitutional question: Under our system, who is to dictate the course of U.S. foreign policy? Our constitutional system provides a line of precedent which strongly suggests the principle of congressional coequality. This line of precedent would lead Congress to conclude that it, as holder of the purse strings and the branch responsible for matters of war and peace, would decide whether the United States would become involved in a paramilitary operation against the government of Nicaragua. However, the constitutional system gives us a second, very different line of precedent which suggests the idea of presidential preeminence. This line of precedent would lead Ronald Reagan to conclude that, as chief diplomat, as commander in chief, and as the sole organ of the federal government in the area of international relations, he would decide whether the United States would assist the contras. Who is to dictate the course of foreign policy? Our constitutional system gives us no clear answers, only contradictory precedents that created an environment of uncertainty in which both Congress and the Reagan Administration could reasonably believe they would ultimately dictate contra policy.

In addition to assisting the contras, Reagan sought to obtain freedom for a number of Americans held hostage in the

Middle East. His desire to accomplish both objectives secretly raised a second question. Under our constitutional system, which is to prevail: presidential secrecy or presidential accountability? Our system gives us a line of precedent which demands presidential accountability, best insured by allowing Congress access to information held by the executive branch. This line of precedent would lead Congress to conclude that it would be privy to any information held by the Reagan Administration regarding its efforts to assist the contras and to gain the release of the hostages. At the same time, our system provides a line of precedent which sanctions the idea of presidential secrecy. This line of precedent would lead the Reagan Administration to believe that it could pursue its objectives through the use of covert operations, and that it could withhold information about these operations from Congress and the American people.

A bizarre and complex situation had been created. The system gives the president the power to conduct covert operations, which will require secrecy for their success. However, Congress is given the power to obtain information about these operations. But, the president is given the power to withhold information from Congress. This goes beyond a healthy ambiguity. With this kind of uncertainty, our constitutional system transformed the struggle over

information into a virtual game with no rules, and created an environment which opened the door for the Iran-Contra Affair.

Ronald Reagan's objectives were frustrated by the existence of a number of laws. The Boland Amendments imposed various prohibitions on assistance to the contras. The Arms Export Control Act placed limits on the president's ability to engage in arms sales. The Hughes-Ryan Amendment and the Intelligence Oversight Act set restrictions on the president's ability to conduct covert operations. Article II charges the president with the responsibility of seeing that the laws are faithfully executed. This dilemma raised a final question. What is the president's obligation to enforce the law in the realm of foreign policy? On one hand, our constitutional system gives us a line of precedent which demands an absolute and unquestioned presidential commitment to the law. The president will not be allowed to enforce only those laws of which he approves, or with which he agrees. The president will be required to enforce the law - period. This line of precedent would lead Congress to conclude that when the foreign policy objectives of the Reagan Administration came into conflict with the law, the administration would honor its commitment to the Constitution and enforce the law.

At the same time, our constitutional system gives us a second, very different line of precedent, one which suggests that the president may not necessarily be bound by laws which he regards as unconstitutional. This line of precedent would lead Reagan to believe that when he encountered this kind of legislation, he could exploit gaps, silences, and loopholes to justify the action he sought to take. This line of precedent would lead Reagan to believe that he could interpret this kind of legislation in the manner most conducive to his policy objectives. And, if American lives and interests were at stake, this line of precedent would lead Reagan to believe that he could disregard the law. What is the president's obligation to faithfully execute the law? Even on what should be an easy question, our constitutional system gives no real answer. Instead, it added to the environment of uncertainty in which the Iran-Contra Affair would eventually take place.

Ironically, the Iran-Contra Affair may have been the product of our own pragmatism and good sense. It is the ambiguity of the Constitution which has allowed it to survive for over two centuries, and we have consistently sought to preserve its flexibility. We have not used the Constitution to provide definitive answers to questions involving the allocation of foreign policy power. In doing so, the Constitution has retained its basic flexibility. As

a result, the Constitution has been responsive to the demands imposed by an uncertain world. When we needed a strong president, the Constitution allowed it. When we wanted an assertive Congress, the Constitution provided one. Throughout history, the Constitution has adjusted to crises and emergencies, and has reflected what the nation required.

In keeping the Constitution responsive to the demands of the times, however, we created precedents which were frequently contradictory, and even irreconcilable. As we have seen, precedents have been established for both presidential domination of and congressional coequality in the formulation of foreign policy, for both presidential secrecy and presidential accountability, and for both presidential execution and presidential nonenforcement of the law. Certainly this situation can be characterized as advantageous, inasmuch as it allows us to keep our options open in dealing with an uncertain and ever changing world. However, this situation also creates the opportunity for the executive branch and Congress, if controlled by different parties and guided by competing policy preferences, to take advantage of these conflicting precedents and lapse into stalemate. In our effort to keep the Constitution flexible, we have stretched it to the point that virtually any assertion of power can be justified. By attempting to encompass so many contradictory principles, the

constitutional system failed to provide any real answers to the questions raised by the conflict between Congress and the Reagan Administration. Instead, they were provided with a legacy of uncertainty, which offered the perfect environment for the confrontation which would degenerate into the Iran-Contra Affair.

However, it wasn't merely a contradictory constitutional system that gave rise to the Iran-Contra Affair. Congress and the Reagan Administration had to accept the Constitution's invitation to struggle. How they carried out the struggle provided the catalyst for the Iran-Contra Affair. They simply refused to do battle in the manner defined by precedent. The constitutional system created a tension between the supremacy of the rule of law and the idea of presidential nonenforcement of the law. As played out by Congress and the Reagan Administration, this competition became an exercise in futility and deception. Congress failed to follow the example set by the isolationist Congress of the 1930's and the resurgent Congress of the 1970's. Instead, it passed legislation like Boland which practically begged for circumvention. For his part, Reagan refused to follow in the footsteps of his predecessors and publicly challenge legislation which many in his administration regarded as unconstitutional. Reagan chose a strategy of public compliance, combined with a surreptitious violation of the law.

A similar scenario was played out in the conflict between secrecy and democracy. Congress failed to continue the vigorous oversight of the 1970's, merely going through the motions while rarely making a serious attempt to monitor the activities of the administration. Rather than responding to this half-hearted attempt at oversight by taking advantage of its enormous power over information, the administration resorted to secret policies and lies. Ultimately, the system created a conflict between the principles of congressional coequality and presidential preeminence. While both Congress and the Reagan Administration claimed the power these precedents granted, they not only failed to live up to the examples set by their predecessors, they raised serious doubt about whether they deserved to have such responsibility bestowed upon them.

Congress and the Reagan Administration didn't really engage in an implementation of precedent as much as they embarked upon a distortion of what the system allowed. There was a pattern to their distortion. Congress consistently took action which was not effective enough for it to prevail, but was adequate to provoke an administration response. The administration responded, not in accordance with precedent, but by resorting to stupid, constitutionally suspect actions. Congress was throwing batting practice fastballs, but Reagan, instead of knocking them into the

center field bleachers, struck out using a corked bat. The behavior of Congress and the Reagan Administration was a virtual parody of how the complex constitutional system was supposed to work. Both failed to take advantage of the opportunities presented by the system and instead resorted to a wide array of questionable measures. It was this dubious course of action, combined with the contradictory nature of the constitutional system, which resulted in the Iran-Contra Affair.

Ironically, these misguided actions may have been motivated by what is theoretically an admirable aspiration: the desire to exercise power in a manner consistent with public opinion. However, the Iran-Contra Affair offers a case study in the improper use of public opinion as an influence on the exercise of power. Congressional ineptitude and impotence can be seen as a reaction to public concern about the spread of Communism throughout Central America, and the product of a fear of taking on a very popular president. Similarly, Ronald Reagan's extensive reliance on secrecy and his unwillingness to assert the power of the presidency might very well have been motivated by a fear of resurrecting the ghost of Vietnam and reawakening the public's trepidation about yet another third world quagmire. Public opinion should not be regarded as an excuse to engage in a distortion of precedent. This is not

to suggest that public opinion should not influence the way power is carried out. However, if the public was concerned about the threat posed by the Sandinistas, Congress should have cooperated with the Reagan Administration to prevent the spread of Communism, instead of enacting legislation like Boland and forgoing its oversight responsibility. And public fear of another Vietnam should have prompted the administration to scrap its plans for a paramilitary operation in Central America, not to pursue a secret war. Perhaps a higher caliber of leadership would have realized this.

In addressing public opinion, I am dealing once again with an idea which has permeated this entire work. If my dissertation is an indictment of the development of the constitutional system and of the manner in which it was distorted by Congress and the Reagan Administration, there is an additional conspirator who must be identified. That guilty party is the American public. Much has been made of the role of presidents and their advisers, members of Congress, justices of the Supreme Court, and even the Founding Fathers. However, this list is incomplete without the American people.

The American people have had a profound impact on the development of constitutional doctrine and the manner in which that doctrine is carried out. Ultimately, our

constitutional system goes in the direction the people want it to. It is comforting to believe the people will always take it in the direction of what is right. However, in the atmosphere of the Cold War, our notion of right became confused, and of secondary importance to what was necessary. Yet, even as the nation sank into the morass created by expedient notions of necessity, we publicly clung to the idea of doing the right thing, of remaining true to those ideals embraced by the framers. The American people wanted it both ways. We wanted the nation to become a global power, and we seemed willing to accept the occasional excursion into the dark which this role involved. At the same time, we wanted to continue to function as a constitutional democracy, with its bedrock principles of separation of powers and the rule of law. The Iran-Contra Affair was a manifestation of this clash between what is right and what is necessary. By helping to create the environment of uncertainty in which the Iran-Contra Affair took place, the American people must share in the blame.

This dissertation has been highly critical of Congress and Ronald Reagan. However, they did not magically assume their positions of power. They were elected by the American people. The inconsistency demonstrated by the electorate produced the leadership which would plunge the nation into the Iran-Contra Affair. The people repeatedly elected a

Democratic House of Representatives which made no secret of its opposition to the contras, while twice selecting a president who made aid to the contras a centerpiece of his foreign policy. The American people also had an impact on the way its leaders made use of the system. It is a fact of life in the late twentieth century that policy makers will rely extensively upon public opinion polls. What they encountered in the early 1980's must have left them baffled (see Arnson, pp. 219-20). The public didn't want another Vietnam, but neither did it want Communism spreading throughout Central America. And while the people didn't want to get involved militarily, they were also dubious of spending money on the foreign aid necessary to counter the threat posed by Communism.

One of the most astute observations of the Iran-Contra hearings came in Senator Warren Rudman's admonition to Oliver North that "the American people have the constitutional right to be wrong" (Congressional Quarterly, 1987, p. C-94). While the American people undoubtedly possess this right, they must accept responsibility for their actions, past and present. It was a very dangerous, but potentially brilliant constitutional system which Americans helped to create. To work properly, it would have to be placed in the hands of wise and prudent individuals. Instead, in the 1980's the American people turned it over to

fools. And to top it off, they provided uncertain and contradictory guidance to their leaders. By no stretch of the imagination can blame for the Iran-Contra Affair be placed solely with the American people. On the other hand, it must be noted that the Iran-Contra Affair was to an extent the consequence of the American people exercising their right to be wrong.

II.

Answering how the Iran-Contra Affair happened raises a final question. How can we prevent it from happening again? The Iran-Contra Affair arguably offered an example of our constitutional system at its worst. Therefore, the temptation is great to change the system, to eliminate the ambiguity, to alleviate the uncertainty, to resolve the contradictions described earlier. To some extent, this could be done. For example, laws could be enacted which impose even greater restrictions on the president in the conduct of foreign policy and national security affairs. Perhaps then the assault on the very foundations of our constitutional democracy perpetrated by the Reagan Administration would be rendered less likely. Or, the Supreme Court could hand down a decision which ruled unconstitutional legislative intrusions upon presidential prerogatives in the realm of national security and foreign

policy, thus opening the door for the emergence of a president whose power is unquestioned and virtually absolute. With this kind of decisive guidance, foolhardy and counterproductive legislation like the Boland Amendments would become a relic of the past.

This is one temptation that must be resisted. Ironically, maybe it is best that the legacy of uncertainty be perpetuated. While it offered fertile ground for the emergence of Iran-Contra, to sacrifice the ambiguity of the constitutional system would be to create a situation far more dangerous than the Iran-Contra Affair. In our quest to prevent another John Poindexter or Oliver North, we could ultimately tie the hands of some future Abraham Lincoln or Franklin Roosevelt. By the same token, limiting the power of Congress in order to prevent a reoccurence of the Boland Amendments could preclude a future Congress from responding to a Vietnam or enacting a Clark Amendment. The desire for clarity is understandable, especially when the lack of it can be partially blamed for something as outrageous as the Iran-Contra Affair. However, this may be an instance in which the evil associated with the cure far exceeds that of the disease.

Thus, changing the system is not necessarily the answer. The Constitution is only as good as the people who interpret and implement it, those individuals who give it

meaning and life. Perhaps a better way of avoiding another Iran-Contra Affair would be to place power in the hands of responsible parties. This brings us once again to the role of the American people. At the Iran-Contra hearings, Senator Daniel Inouye expressed his belief that the people "have the right to demand that it never happen again" (Congressional Quarterly, 1987, p. C-115). This is undeniably true. However, inherent in Inouye's statement is the idea that the American people are merely spectators in a colossal constitutional competition between the president and Congress. Ideally, the people are far more than spectators. They are participants. The people can not only demand that it never happen again, they can take steps to assure it. Since the American people will determine who will be given the reins of power, to a great extent they will determine whether another Iran-Contra Affair occurs.

The American electorate can prevent another Iran-Contra Affair by selecting people who will respect the system and play by the rules. Corwin's observation that the Constitution creates an invitation to struggle between the executive and legislative branches for the privilege of directing foreign policy is more accurate today than ever. In fact, given the events of the past half century, Corwin's characterization can be seen as understatement. Conflict is encouraged by the system, and sometimes compromise will be

impossible. Quite simply, there will be confrontation. But then, the Iran-Contra Affair wasn't merely about confrontation, it was about the manner in which the confrontation took place.

To avoid another Iran-Contra Affair, the nature of the confrontation must be transformed. Conflicts over national security and foreign policy must take place between parties who will act in the manner dictated by the constitutional system, and who will have the guts to make full use of the power at their disposal. Most important, the confrontation must be carried out in public, in full view of the American people, who will then get involved in the resolution of these conflicts. Not only will this kind of confrontation prevent another Iran-Contra, in the long run it will be healthy for the system. The Iran-Contra Affair exposed the American people to yet another administration guilty of lies and deception and a Congress engaged in a postmortem on a scandal which it helped to create. The effect of this all too familiar spectacle was an intensification of public cynicism and an undermining of public faith in the constitutional system. Instead, governmental actors should confront each other in the open, where the people can be exposed to the competing points of view, contemplate which branch should prevail, and register their opinion with decision makers. By participating in this kind of conflict,

their sense of efficacy will be enhanced and their faith in the constitutional system will be strengthened. The Iran-Contra Affair demonstrates that it is far better to have the president and Congress assert the full extent of their powers and clash in the open, than to have them compromise publicly and then seek to evade and undo that compromise secretly.

The question is not merely how to prevent another Iran-Contra Affair. If that is the only consideration, the answer could be found in shifting the vast majority of power to either the executive or the legislative branch. With all of this power resting solidly with one branch, the element of conflict at the heart of the Iran-Contra Affair would be eliminated. The trick is figuring out how to prevent another Iran-Contra, while still retaining the flexibility and utility of the constitutional system. However, since that which is advantageous about the system is inextricably linked to that which is uncertain and contradictory, the answer cannot involve sweeping systemic changes. At the risk of sounding like a civics textbook, the answer is in placing the best America has to offer in positions of power, those with the capacity and courage to take an ambiguous constitutional system and make it work, not on behalf of the institutional interests of a single branch, or the policy preferences of a small group of people, but in the best

interest of the entire nation. And, the responsibility for electing these individuals, as well as monitoring their use of the system, rests with the American people. Ultimately, the prevention of another Iran-Contra will be accomplished, not with a landmark decision of the Supreme Court, nor with a piece of legislation passed by Congress and signed by the president, but through the vigilance of the American people. If they are not equal to the task, the future will witness additional Iran-Contra Affairs.

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APPENDIX

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