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UNCHECKED and UNBALANCED

Presidential Power in a Time of Terror

Frederick A.O. Schwarz Jr. and Aziz Z. Huq

WITH A NEW POSTSCRIPT BY THE AUTHORS



trasts with laws, which require congressional involvement to alter.²⁸ The Committee's concerns proved prescient. Beginning in 1981, the executive branch began to slip back into old habits, sometimes secretly and sometimes by publicly rolling back restrictions contained in the executive orders or attorney general guidelines.

Rolling Back Reform

President Ronald Reagan and his Attorney General William French Smith publicly weakened the Carter executive order and the Levi guidelines to a degree.²⁹ But the most serious executive expansion of power and loosening of constraints, known as the Iran-Contra scandal, unspooled during the two terms of the Reagan Administration. Iran-Contra was concealed from Congress and the public, just as the abuses revealed by the Church Committee had been. In response to disclosures, Congress yet again embarked on a major after-the-fact investigation of the executive branch. In 1986, both the Senate and the House created committees that came together to hold joint hearings and then issue a joint report.³⁰

Beginning in December 1981, the CIA—with President Reagan's passionate support—armed, trained, and advised the Nicaraguan Contras, a faction resisting the left-leaning Sandinista government of Nicaragua. The Contras' military campaign included attacks on undefended civilian targets, including farms, granaries, and small villages. Learning of this covert action, Representative Edward Boland of Massachusetts, the chair of the House Intelligence Committee, in 1982 proposed a budget amendment barring the CIA or the Defense Department from passing funds to the Nicaraguan rebels. Boland's amendment, which applied to fiscal year 1983, passed the House 411 to 0, and, after passing the Senate, became law. Congress and the public later learned that the CIA had used its contingency funds (which technically fell outside the Boland Amendment's scope) to circumvent the bar. And in January and February 1984, three months after the Boland Amendment expired in October 1983, the CIA mined three Nicaraguan harbors without informing Congress as the 1980 law required. Even Barry Goldwater, then the chair of the new Senate Intelligence Committee, declared himself "pissed off" that CIA chair William Casey failed to report the mining to the committee. Within months, Congress passed a second Boland Amendment barring expenditures "directly or indirectly" for "military or paramilitary operations in Nicaragua."³¹

In 1985, President Reagan also decided to override the opposition of his secretaries of state and defense and sell TOW antitank and HAWK anti-aircraft missiles to Iran—a country governed by a hard-line, theocratic Shia Muslim

regime—despite Reagan himself having student proxies, Iran had captured citizens in November 1979, holding Reagan hoped that providing arms American hostages in Lebanon.³²

Missiles moved into Iranian hands created by the White House's National tenant Colonel Oliver North. The vice, secure communications capacity 1986, the Lebanese weekly *Al-Shiraa* deals with Iran, some of which used

The Contra funds and the Iran sale as "Iran-Contra." Pursuant to instruction, the National Security Council, supposedly a purely advisory body, funneled to the Contras millions of dollars from Iran, allowing the executive to evade the Boland Amendment.³⁴

Congress was not informed about the use of those funds to pay the Contras. A law enacted in 1980 that gave the committee specific oversight responsibilities, as well as the executive order, which mandated executive branch oversight, Congress under the 1980 oversight provisions. The committee concluded, secrecy was a necessary evil, but as a weapon against our

Other executive branch pathologies. The Boland Committee were evident in the Iran-Contra scandal. After the President's National Security Council, the President Reagan about the diversion of funds to the Iran-Contra Committee concluded it was necessary to deny knowledge of covert actions to the United States Government itself." Aggravated by the Iran-Contra Committee concluded that the Iran-Contra policies were secrecy, deception, and cover, "time and again we have learned lessons about national security. As well as the Boland Committee (and as is the case again at the administration claimed matters labeled as foreign policy decisions alone. But as the Iran-Contra Co-

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regime—despite Reagan himself having labeled Iran a “terrorist” state. (Through student proxies, Iran had captured fifty-two American diplomats and other citizens in November 1979, holding them hostage for 444 days.) Nonetheless, Reagan hoped that providing arms to Iran would lead to the release of other American hostages in Lebanon.³² *Arms to Iran*

Missiles moved into Iranian hands via the “Enterprise,” an offshore entity created by the White House’s National Security Council staff, led by Lieutenant Colonel Oliver North. The Enterprise had its own airplanes, ship service, secure communications capacities, and secret Swiss bank accounts. But in 1986, the Lebanese weekly *Al-Shiraa* published details of the Enterprise’s arms deals with Iran, some of which used Israel as an intermediary.³³

The Contra funds and the Iran sales converged into the affair now known as “Iran-Contra.” Pursuant to instructions from the president’s National Security Council, supposedly a purely advisory body, the Enterprise secretly funneled to the Contras millions of dollars realized from the sale of missiles to Iran, allowing the executive to evade legal restrictions such as the Boland Amendment.³⁴

Congress was not informed about either the sale of missiles to Iran or the use of those funds to pay the Contras. Those deliberate omissions violated a law enacted in 1980 that gave the congressional intelligence committees specific oversight responsibilities, as well as President Reagan’s December 1981 executive order, which mandated executive branch cooperation with Congress under the 1980 oversight provisions.³⁵ As Congress’s Iran-Contra Joint Committee concluded, secrecy was used “not as a shield against our adversaries, but as a weapon against our own democratic institutions.”³⁶

Other executive branch pathologies similar to those revealed by the Church Committee were evident in the Iran-Contra affair.³⁷ Admiral John Poindexter, the President’s National Security Advisor, explained that he did not tell President Reagan about the diversion of proceeds from the missile sales to ensure the President had “deniability.” Echoing the Church Committee, the Iran-Contra Committee concluded it was a perversion of plausible deniability to deny knowledge of covert actions to the “highest elected officials of the United States Government itself.” Again echoing the earlier investigation, the Iran-Contra Committee concluded that “the common ingredients of the Iran and Contra policies were secrecy, deception and disdain for the law.” Moreover, “time and again we have learned that a flawed process leads to bad” decisions about national security. As was the case at the time of the Church Committee (and as is the case again after 9/11), those defending the Administration claimed matters labeled as foreign policy should be left to the president alone. But as the Iran-Contra Committee responded, “the theory of our

X Constitution is the opposite: policies formed through consultation and the democratic process are better and wiser than those formed without it.³⁸

Oliver North not only masterminded the Enterprise scheme, he also lied to

- ✓ Congress about the Administration's aid to the Contras in a 1986 briefing. Subsequently, on the first day of the Iran-Contra Committee's hearings, the telegenic North appeared dressed in a bemedaled Marine dress uniform. He and his counsel managed to turn the tables on the investigative committee by making North's patriotism the issue rather than the Administration's wrongdoing. He assailed Congress for leaks, and condemned elected officials who opposed aid to Contra "freedom fighters."³⁹ Thanks to his defiant violation of the law, Oliver North became a national hero in many circles. In 1994, he ran for a United States Senate seat in Virginia—and only barely lost.⁴⁰ North may have left another lesson for the post-9/11 future: if you're going to break the law and if it is uncovered, don't apologize. Instead, proclaim it loud and long, touting your "patriotic" motives.

In response to Iran-Contra, Congress again amended the law requiring disclosure obligations for covert actions. Henceforth, presidents themselves had to find in writing that covert actions were necessary and important. The new law flatly stated that presidents could not authorize any action "that would violate the Constitution or any statute of the United States."⁴¹

X Iran-Contra's political fallout was limited. Embarrassed by the Iran-Contra revelations, President Reagan apologized to the nation, saw his popularity drop, and changed his White House staff, bringing in former Church Committee member Howard Baker as chief of staff. The President's popularity recovered before he left office. Although Admiral Poindexter and Oliver North were both convicted of criminal offenses, their convictions were reversed on technical grounds, with the government declining to press fresh charges.⁴²

Iran-Contra involved a deliberate decision by the executive branch to reject Congress's foreign policy choices and to conduct its own illegal policy. While the Church Committee documented a far greater volume of rights violations during the Cold War, these Reagan Administration foreign policy decisions evinced the same disdain for the role of Congress that past presidents had shown in letting loose intelligence agencies at home.

Bureau intruded repeatedly on the Americans, like the college student vocally opposed U.S. military aid to

Despite the FBI's threshold conc suggest CISPES was under foreign tivity, the Bureau in October 1983 location, leadership, and activities agents "not to investigate the exerc CISPES did little outside the shelter tions, FBI agents repeatedly found t In Wichita, agents tore down flyers puzzled agents found themselves gat order of Catholic nuns. The net res on the freedoms of Americans preci foreign policy decision of the feder

In another sad retread of earlier m based on loose or nonexistent affilia the sanctuary movement were place tended CISPES-sponsored films, atte professor who invited a suspicious question—found themselves under of CISPES-affiliated organizations ica, the Southern Christian Leader Conference.⁴⁵ It was mission creep

The 9/11 Commission

Lessons from the Church Committee greatest intelligence disaster of the National Commission on Terrorist monly known as the 9/11 Commis tween its recommendations and tho 9/11 Commission's inquiry into eve September 2001 attacks revealed n intelligence agencies that recalled t Most important among these were such as failure to translate details of ary 2001, and an FBI analyst's refus understood" the rules governing th and intelligence investigations. High capacity, the 9/11 Commission arg

It was the Iran-Contra scandal that crystallized the most aggressive version of unitary executive theory in national security and foreign affairs. Ironically, the most vigorous arguments on behalf of broad executive power came from Capitol Hill, not the White House.

Iran-Contra led to a congressional investigation and a voluminous committee report about the illegal and deceptive acts of Oliver North and his colleagues. Unlike the Church Committee, however, the Iran-Contra Committee split sharply on partisan grounds, and issued both a majority and a minority report, with the minority report endorsed by all six House Republicans on the Committee. Leading the charge for the minority report was a Wyoming representative by the name of Dick Cheney. In 1978, Cheney had won a seat in the Wyoming delegation to the House of Representatives. His move along Pennsylvania Avenue, however, did not alter the views he had developed in the Ford White House.

The Iran-Contra minority report proved a pivotal point in the development of unchecked executive power. It was both a reaction to the Church Committee and a harbinger of the post-9/11 world. The link to the past is evident from the report's opening pages. It began by conjuring up and condemning an "all but unlimited Congressional power" that "began to take hold in the 1970s in the wake of the Vietnam War." The minority report cited the Church Committee as a prime offender. Elaborating these themes, Cheney in 1989 condemned the "congressional aggrandizement" of the 1970s, and warned that the "legislative branch is ill-equipped to handle the foreign policy tasks it has taken upon itself."²² When Cheney spoke in December 2005 of "the president's prerogatives with respect to the conduct of especially foreign policy and national security matters," he was indeed reiterating a long-held vision already fully formed and articulated in 1986. In addition to Cheney, the minority

committee also had on staff a young lawyer named David Addington who later became legal counsel and chief of staff to Vice President Cheney. A "hard-edged and bureaucratic infighter," Addington, who had worked in the office of the CIA general counsel and the Defense Department, went on to help Vice President Cheney wield influence "throughout the government in his bid to expand executive power."²³ Twenty years later, 1986's minority was in charge.

The minority report's analysis rejected the lessons of the Church Committee and ignored the decades of documented misconduct by intelligence agencies to press an expansive version of unitary executive theory in the national security context. According to the minority report, the White House was victim of an overreaching and power-hungry Congress. Discussing Iran-Contra, the minority report overlooked clear evidence that officials serially violated the law and then lied to Congress. The minority report downplayed these criminal acts as "mistakes" to be overlooked since no one acted "out of corrupt motives."²⁴ When the executive branch violates the law, it seems, its good faith redeems the act. But when Congress exercises oversight, the White House is victimized. This reversal of reality, building on the rhetoric of victimization in conservative political culture,²⁵ deflected attention from the harms inflicted by the absence of oversight.

The minority report rejected congressional checks when the executive claims to act in the name of "national security," describing the long-accepted notion that the Constitution's structure was intended to check government power as a "fallacy." Instead, it argued that the "principles underlying separation had to do with increasing the Government's power as much as with checking it." Hence, the minority report reasoned that the Constitution allocated the powers of "deployment and use of force," as well as "negotiations, intelligence gathering, and other diplomatic communications" to the president alone. The report thus reasoned that "the President's inherent powers" historically had allowed the executive to act "when Congress was silent, and even, in some cases, where Congress had prohibited an action." Even the lies of Oliver North and his colleagues were lawful, explained the minority report, thanks to the president's "constitutionally protected power of withholding information from Congress." Rather, the minority report argued, the constitutional problem lay in President Reagan's "less-than-robust defense of his office's constitutional powers."²⁶

Cheney persevered in this vision of presidential power after leaving Congress. Back in the White House as President George H.W. Bush's Secretary of Defense, Cheney argued that in light of the president's "inherent power to initiate covert actions," the White House had constitutional authority to refuse to give notice of covert actions to Congress. Cheney hence rejected any

legislative limits on executive power. He found no "justification for further restrictions on the future presidents." Another part of the report, staff member Bruce Fein, echoed Cheney's view of the President's choice of how to exercise his legitimate constitutional objectives in foreign countries.²⁷

President Bill Clinton's stint in the White House was not a simple matter of aggrandizement. He issued guidelines for the use of military force, approval that, in the words of one critic, was a "circularity and from abdication of a president's powers, Clinton was as aggressive as any president in the White House. In March 1999, Clinton used military force against the Yugoslav Republic of Serbia, arguing it was necessary to end the war in Kosovo. Clinton also applied a guarantee of non-intervention to convene a hostile Congress. While Clinton's actions of Cheney and the minority report's view of executive unilateralism.²⁸

On September 10, 2001, leading to the 9/11 attacks, an aggressive vision of unchecked executive power remained for the most part untested.

The next day, everything changed.

The Counterrevolution Ascent

Unitary executive theory returned, to justify the executive branch's use of federal law. Executive branch theory. The president, they argued, has the power to "suspend" laws. The law is the power that could be used only in the subsequent meeting. Rather, executive authority to set aside legal checks in the executive branch.

Glimpses of the Bush Administration are discerned first in opinions on October 4, 2001, and early 2002. The Administration's position on the Geneva Conventions, upholding the treatment of terrorism suspects captured in Afghanistan, and authorizing the use of military force against terrorist combatants," and authorizing the use of military force against terrorist combatants."

legislative limits on executive power in national security matters, and could find no "justification for further restrictions on the power and flexibility of future presidents." Another participant in the Iran-Contra minority report, staff member Bruce Fein, echoed Cheney: "Congress cannot interfere with the President's choice of how to use intelligence agencies in furtherance of legitimate constitutional objectives," such as "detering aggression" by other countries.²⁷

President Bill Clinton's stint in the Oval Office proved that executive branch aggrandizement was not a simple partisan issue. Under Clinton, the OLC also issued guidelines for the use of military force in the absence of congressional approval that, in the words of one commentator, "suffered mightily from circularity and from abdication of all power to the president." In his use of war powers, Clinton was as aggressively unilateralist as previous occupants of the White House. In March 1999, Clinton approved the application of aerial military force against the Yugoslav Republic without clear congressional authorization, arguing it was necessary to prevent gross human rights violations in Kosovo. Clinton also applied a gamut of unilateral policy-making tools to circumvent a hostile Congress. While Clinton never took the absolutist position of Cheney and the minority report, his presidency did not step back from executive unilateralism.²⁸

On September 10, 2001, leading figures in the executive branch supported an aggressive vision of unchecked executive power. This power, however, remained for the most part untested.

The next day, everything changed.

