ROOM FOR "MANEUVER": SOME POLICY ISSUES IN THE IRAN-CONTRA AFFAIR

*Paul Schott Stevens**

It is generally agreed that issues posed by the Iran-Contra Affair are important to our political life. There are differences of opinion, and certainly of emphasis, as to what these are and what lesson we draw. My own views of the Iran-Contra Affair are decisively influenced by the part I have taken, while legal advisor, and subsequently executive secretary, at the National Security Council (NSC), in preparing and implementing a series of directives issued by the President[1] in the wake of his Special Review Board's February 1987 report.[2] As the President observed, the Special Review Board report was "well-stocked with criticisms,"[3] but it contained no findings on which he hesitated to act. And act he did—redeeming his pledge to go beyond the board's recommendation "so as to put the house in even better order."[4] From where I sit, the results of the President's initiatives are particularly satisfying. Permit me, at the outset, briefly to review the record.

First, the model of the NSC system recommended by the Special Review Board is now solidly in place and serving the President well. The council has resumed its intended role as the principal forum for consideration of all national security policy issues requiring Presidential decision. The model has reaffirmed the dual capacities in which the council's senior officials serve the President: as principal advisors within their respective policy areas, *and* as department and agency heads responsible for implementing Presidential decisions. It also has underscored the

* Special Assistant to the President for National Security Affairs, and Executive Secretary of the National Security Council.

1. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE PRESIDENT'S SPECIAL REVIEW BOARD, NATIONAL SECURITY DECISION DIRECTIVE 266 (Mar. 31, 1987); NATIONAL SECURITY COUNCIL INTERAGENCY PROCESS, NATIONAL SECURITY DECISION DIRECTIVE 276 (June 9, 1987); NATIONAL SECURITY DECISION DIRECTIVE 286 (title and date not publicly available). The President's message to Congress on Mar. 31, 1987 transmitted the text of National Security Decision Directive [hereinafter NSDD] 266. 133 CONG. REC. S4287 (daily ed. Mar. 31, 1987) (message from the President). The text of NSDD 276 has been declassified and made available to the public by the National Security Council [hereinafter NSC], as has part of the text of NSDD 286.

2. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD V-7 (Feb. 26, 1987).

3. President's Address to the Nation, 23 WEEKLY COMP. PRES. DOC. 219, 220 (Mar. 4, 1987).

4. *Id.* at 221.

unique combination of responsibilities that fall on the President's National Security Advisor. As manager of the NSC process, he must ensure the essential integrity of a system for coordinating policy; and as the President's staff advisor, he must provide his own judgments while representing faithfully the views of those senior officials on the council.

Second, the President installed a new structure of layered policy review under NSC auspices, thus creating an interagency process better designed to solicit views, clarify objectives, develop options, facilitate agreement, and frame recommendations. For these purposes, the Policy Review Group—a senior subcabinet forum, chaired by the Deputy National Security Advisor—meets regularly to address important policy questions. It has knit the major departments and agencies into a framework that responds well, both day-to-day and in times of crisis. This new structure has earned the confidence of executive branch players, as has a new counterpart group devoted exclusively to consideration of covert action programs. The passion for secrecy, cited by the Special Review Board, has given way to a habit of interagency consultations. In practice, this has proved altogether consistent with the tightly restricted consideration that the most sensitive intelligence programs require.

Third, the NSC staff is rededicated to the important role of assisting the National Security Advisor in his responsibilities. The President has flatly prohibited the staff from conducting covert operations, and he has committed the execution and implementation of policy generally to the departments and agencies. Under National Security Advisors Frank Carlucci and Colin Powell, the staff has been organized to impose clear vertical lines of authority and accountability, and to ensure it performs well within its own province—as a staff, not an action arm. The President has charted a legal advisor's office as an important new component of the NSC staff. The counsel that office provides to the National Security Advisor, the insight it is accorded into the process of policy deliberations, and the relationship it maintains with the interagency legal community—all these have helped to ensure, as the President intended, "greater sensitivity to matters of law" in the workings of the NSC.[5]

Finally, proper attention is focused on the need to maintain the objectivity of intelligence estimates—to differentiate carefully between policy advocacy and foreign intelligence analysis. Procedures for interagency review, Presidential approval, and congressional notification of covert action programs have been thoroughly revamped. Also, at the President's direction, the NSC has initiated periodically a formal, comprehensive review of all such programs.

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5. *Id.* at 222.

To some, this will be familiar ground. I review it to emphasize the remarkable capacity of our system for self-criticism and correction, and to give credit where credit is due. Unlike the Select Committees of Congress that investigated only the Iran-Contra Affair, the Special Review Board's work was not so limited. The Board also studied the evolution of the NSC system over its entire forty-year history, and solicited the views of almost every former and current senior official involved in national security affairs. Its recommendations were intimately related to the way Presidents manage some of the most important and difficult responsibilities of their office. The President initiated the Board's study and accepted *all* of its recommendations, with salutary results.

It is also helpful to bear these points in mind by way of narrowing the field for discussion. The Board exposed what it termed "major policy mistakes" in the Iran-Contra Affair. It believed these mistakes could have been avoided had the policymaking apparatus been managed better.[6] Like the Select Committees of Congress that investigated the Affair, the Board concluded that these mistakes resulted from the failure of individuals, not from deficiencies in existing law or in our system of government.[7] This is, I believe, no mere *obiter dictum*. It is a finding that the evidence supports, and one that places a particularly heavy burden of persuasion on those who would offer, if you will, more radical critiques.

Such critiques, of course, have not been in short supply. Adducing the facts of the Watergate scandal, of the Church and Pike committees' investigations in the mid-1970's, and of Iran-Contra, some have concluded that the nation should eschew covert action as a tool of policy not only incompatible with, but a positive danger to, our democratic system. On the same basis, others have argued that the President's existing authority for initiating and conducting covert action programs must be substantially abridged, in favor of an enlarged statutory oversight role for congressional committees. Let me be candid: I believe the record supports neither proposition.

Regrettably, it is true that the term "covert action" has come to connote to the popular mind something inherently unsavory. The language of the law—which refers to "special activities"—is less charged and, to that extent, more apt. By Executive order, special activities are defined as ones "conducted in support of national foreign policy objectives abroad" and "planned and executed so that the role of the United

6. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD V-5 (Feb. 26, 1987).

7. REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. No. 433, 100th Cong., 1st Sess. (1987); S. REP. No. 216, 100th Cong., 1st Sess. 423 (1987); REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD I-2, V-5 (1987).

States Government is not apparent or acknowledged publicly."[8] By definition, such activities do not include the conduct of diplomacy or "the collection and production of intelligence or related support functions."[9]

Secret diplomacy and intelligence collection involve, so to speak, our national capabilities for talking quietly, and for seeing and listening unobserved. By contrast, covert action involves a capacity for maneuver—that is, working by sleight of hand more actively to influence the course of events abroad. As such, it occupies part of the large middle ground between the extremes of mere diplomatic persuasion and out-and-out military coercion. And it is but one among a number of tools available to the President as principal craftsman of our foreign policy.

That tool is, and should be, wielded sparingly. In actuality, the United States engages in special activities as a relatively small but sometimes significant implement of its foreign policy. Inevitably, however, our Presidents face circumstances under which policy objectives important to the national security cannot be pursued or attained solely by means that are openly attributable to the United States Government. Foreign nations, for example, may accurately perceive great political risks in collaborating openly with the United States. They nonetheless may welcome discreet cooperation with us in pursuing mutual policy objectives, such as countering internal subversion or aggression in neighboring countries, or meeting threats posed by terrorist organizations or powerful drug cartels. These cooperative relationships may prove absolutely indispensable to the United States in circumstances where we cannot hope to go it alone. The cloak of plausible denial may also prove of substantial benefit as a way of minimizing the risk of confrontation—and where defending our most vital interests is concerned, precisely of avoiding the prospect of widening conflict. During World War I, Winston Churchill made the point in typically graphic fashion: "Battles are won by slaughter and maneuver. The greater the general the more he contributes in maneuver, the less he demands in slaughter."[10] Repudiating covert action as an implement of foreign policy is one sure way of reducing what our Commander in Chief "contributes in maneuver." Another way is by so tying his hands as effectively to deny him the capacity to conduct such activities.

It bears emphasizing that covert action is but a *tool* of policy, a means to an end and not an end in itself. This distinction often has been

8. Exec. Order No. 12,333, § 3.4(h), 3 C.F.R. 200, 215 (1982), *reprinted in* 50 U.S.C. § 401 (Cum. Supp. 1987).

9. *Id.*

10. *See* W. CASEY, THE SECRET WAR AGAINST HITLER xiii (1988).

lost sight of, as disagreements about how we should achieve our objectives have obscured more fundamental questions about what our objectives are or should be. The potential for real or apparent conflict between publicly announced policies and secret intelligence ventures always is great. Indeed, such conflict may well be part of the nature of activities intended to be neither apparent nor acknowledged, and undertaken precisely because the normal ways of doing business do not suffice. The Iran-Contra experience teaches that managing this conflict is critically important to achieving bipartisan consensus in support of any covert action program. In this spirit, the President in March 1987 laid down a set of principles that have guided the NSC's review of all covert action programs and that future Administrations would do well to bear in mind: "I have . . . directed that any covert activity be in support of clear policy objectives and in compliance with American values. I expect a covert policy that if Americans saw it on the front page of their newspaper, they'd say, 'That makes sense.' "[11]

If this is the right yardstick, and I believe it is, the question remains what organization and procedures are required to ensure that that yardstick is applied consistently and well. Historically, Presidents have relied for such purposes on the NSC system. Both the Special Review Board and the President devoted continued and extensive attention to the proper functioning of that system, with the results I already have detailed. Many in Congress, including the majority of the Select Committees, however, have advocated going further and substantially changing the legal framework under which covert action programs are initiated and conducted.[12] These advocates stake their case on inferences drawn from the committee's elaborate study of the Iran-Contra episode—inferences that are hard to reconcile with the majority's "conclusion" that the affair did not result "from deficiencies in existing law," or with the corollary proposition that "Congress cannot legislate good judgment, honesty or fidelity to law."[13] That case does not derive from any perceived deficiencies in the President's own efforts to clean house, or from any historical study of the Presidency such as that undertaken by the Special Review Board, or even from a survey of current law as applied to covert programs outside the context of this affair.

Much of the current legal framework, of course, is of recent vintage. It dates from the last decade, over which Congress's involvement with

11. President's Address to the Nation, *supra* note 3, at 219.

12. REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, *supra* note 7, at 423-26.

13. *Id.* at 423.

intelligence issues has expanded dramatically. During this period, Congress has appropriated funds necessary to ensure that the nation has the benefit of the finest intelligence capability in the world. At the same time, it has insisted on an ever growing share of influence and authority over how our intelligence services are utilized. Members and staff of the Intelligence Committees have demonstrated remarkable activism in what is commonly called an "oversight" role, pitting the Executive's sometime "obsession with secrecy" against Congress' equal and opposite passion for detailed disclosure. As a result, politics in the intelligence field can become exceedingly heated when Congress is disappointed in its expectations about who among its members are informed, what they are told, and when they find out. From Iran-Contra, one might conclude that this happens routinely. The opposite is the case. As CIA's general counsel testified in June 1987:

> The record of the past six years—and of the notifications, reports, briefings, and testimony on covert action provided by the CIA for the benefit of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence—is evidence of the President's commitment to "make the congressional oversight process work." By its very nature, that record cannot—in any detailed way—be made public . . . . [But] [t]he chronology of the Administration's consultations with Congress point up the abundant successes of the current statutory scheme.[14]

In short, at several levels, the covert arms transfers to Iran are the exception that proves the rule. During the 100th Congress, legislation nonetheless was adopted by the Senate, and considered in the House of Representatives, that would impose significant new legal requirements on the President concerning what, when, and how he must report to Congress in connection with covert activities.[15] The legislation was intended to respond to the majority recommendations of the Iran-Contra Select Committees on numerous "changes in law . . . that would make our [oversight] processes function better in the future."[16] To this end, the legislation would:

> —prevent the President from authorizing any covert intelligence programs except by documents (so-called findings), the

14. *H.R. 1013, H.R. 1371, and Other Proposals which Address the Issue of Affording Prior Notice of Covert Actions to the Congress: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence,* 100th Cong., 1st Sess. 179 (1987) (statement of David P. Doherty, General Counsel, CIA).

15. *See, e.g.*, S. 1721, 100th Cong., 2d Sess. (1988); H.R. 3822, 100th Cong., 1st Sess. (1987).

16. REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, *supra* note 7, at 423.

form, detailed contents, legal effect, and timetable for preparation and signature of which would be prescribed by statute;
—require that the President normally provide copies of such documents for the benefit of some 36 members (as well as staff) of the Intelligence Committees "prior to the initiation" of all covert action programs, and that he do so "in no event later than forty-eight hours" after he authorizes such programs;
—permit the President in "extraordinary circumstance" to report within forty-eight hours only to eight members of the congressional leadership, and in cases involving our "most vital interests" to four members, so long as he explains his reasons for doing so; and
—require that executive departments and agencies provide the Intelligence Committees any and all other information they may request on U.S. intelligence activities.

Supporters of these measures have extolled them as necessary to establishing a regime of "shared responsibility" in the intelligence field, and to securing the benefits of executive-legislative "consultation" and "partnership."[17] "If we really believe in oversight," one leader of the Senate Intelligence Committee has said, reform legislation of this kind is a must.[18]

At one level, these purposes are entirely laudable and reflect importantly on the nature of our constitutional system. If the Constitution accords the executive and legislative branches autonomous powers, it follows that actions of the President with respect to foreign relations—commencement of covert action programs, for example—cannot be constitutionally binding upon Congress. Congress retains the right not to fund such programs, or to limit them substantially. As a practical matter, however, prior actions by the President may restrict Congress' options. Covert programs once begun may be hard to walk away from. For such reason, as a distinguished Representative from Virginia argued early in the nineteenth century, promoting a "correspondence of views . . . between these two branches of the Government" is desirable; to this end, "frankness and candor, and a free and unreserved communication of the feelings and opinions of each by the other" can have "the happiest influence" upon the councils of government.[19] Professor Corwin observed in his landmark treatise: "It is thus borne in upon one that the principle of departmental autonomy does not necessarily spell departmental conflict, but that mutual consultation and collaboration are quite

17. 134 CONG. REC. S2225 (daily ed. Mar. 15, 1988) (statement of Sen. Boren).
18. *Id.*
19. 6 T. BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856 168 (1858). The statement was made by Henry Tucker in the debate on Henry Clay's proposal for dipolmatic recognition of two newly-independent South American nations.

as logical deductions from it."[20] This insight inspired the current statutory regime for intelligence activities; and the classified record of "notifications, reports, briefings, and testimony" cited by the CIA's general counsel evince the Administration's commitment to live within that regime and promote a correspondence of views with Congress on even the most sensitive programs.

The way in which pending legislation would implement these purposes, however, is highly questionable. "Oversight," while it may have passed into the language as a popular description of Congress' legitimate functions, is a term that substitutes for careful analysis of the respective legislative and executive roles. The dictionary defines it as synonymous with "management" and "supervision," concepts that undoubtedly reflect the degree of authority some would assert—and that the legislation indeed would help secure—for Congress in this field. As a logical matter, it is hard to reconcile this "managerial" conception of Congress' role with any ability by the President to take the initiative. The proposed legislation, introduced in the name of expanded congressional oversight, is calculated to erode the President's ability to do just that.

Is this conception at odds with the constitutional design? Put another way, how strong and independent an executive role in the intelligence field does the Constitution contemplate, and do practical considerations urge? On both scores, I would say a greater role than the current reform legislation would accommodate.

Alexander Hamilton set forth the wise principle that "[t]he authorities essential to the common defense . . . ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety or the means which may be necessary to satisfy them.*"[21] The proposed reforms are an attempt to do exactly what he advised against: to legislate detailed procedures for contingencies that may (I would argue will) not always lend themselves to such advance specificity—and to do so at the expense of a flexibility that is essential if the President is to be able to fulfill the heavy responsibilities of his office. The powers bestowed by the Constitution on the President—as Commander in Chief, Chief Executive, and, in John Marshall's terms, the "sole organ of the nation in its external relations"[22]—were intended to be sufficient to his doing so under all circumstances, including occasions requiring a "perfect *secrecy* and immediate

20. E. CORWIN, THE PRESIDENT 218 (5th rev. ed. 1984).

21. THE FEDERALIST No. 23, at 142 (A. Hamilton) (Mod. Libr. ed. 1937) (emphasis in original).

22. 2 T. BENTON, *supra* note 19, at 466.

despatch"[23] of which no Legislature or group of legislators was always capable, nor wisely would it attempt.

This is not to say that the Constitution sanctions the exercise of unreviewable power by the President. Our history since 1975—and the Iran-Contra Affair most emphatically—demonstrates an abundance of mechanisms for ensuring public accountability in this field. It teaches, in part, that a President cannot sustain a covert intelligence program without congressional support. If he attempts to do so on his own responsibility, the political price can loom large indeed—and the possibility it could prove prohibitive should not be lost on future occupants of the Oval Office.

The lesson to be drawn, however, is not only that mechanisms of accountability will be found, but that every case is different. The circumstances with which a President is confronted, the degree of danger and national commitment to which he responds, the importance and clarity of the policy he has in view, and the breadth of public support that policy enjoys—some latitude for these and other factors must be permitted to inform how broad a political underpinning a President seeks for his actions at the outset. With respect to virtually all covert action initiatives, they may counsel the immediate enlistment of congressional views and support. But the variety of possible challenges that the nation faces is unlimited, and there is accordingly a margin at which the operation of such factors is not susceptible to legislative prescription. Nor does the Constitution, in my view, permit the Congress to impose one. As Representative Dick Cheney observed, "no legislative power . . . requires notification [of covert programs] under all conditions, with no exceptions, during any precisely specified time period."[24]

In short, there is an "intangible boundary between the legislative and executive aspects of the problem."[25] Chief Justice Marshall's celebrated comment in *Marbury v. Madison* helps to stake out the property at one end: "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[26] This was not meant as a formula for autocracy. It simply suggests that within the broad range of the President's permissible action he must be allowed some

23. THE FEDERALIST No. 64, at 419 (J. Jay) (Mod. Libr. ed. 1937) (emphasis in original).

24. Paper presented to the ABA Standing Comm. on Law and National Security by Rep. D. Cheney, *Clarifying Legislative and Executive Roles in Covert Operations* (Mar. 30, 1988), *reprinted in* 134 CONG. REC. E1189 (daily ed. Apr. 21, 1988).

25. Letter from Eugene V. Rostow to William G. Miller (Sept. 23, 1975), *reprinted in* Yale L. Rep., Spring 1976, at 12.

26. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803).

room, so to speak, for maneuver. To be sure, he must be called to account in one form or another. But holding him responsible does not require or justify crippling his authority. Denying a President his scope for independent action in this field is to sap powers that have been exercised consistently and energetically by his predecessors for two hundred years. And it is to put at risk that delicate balance of powers and restraints on which not only our liberty, but our security too, is wagered.