THE IRAN-CONTRA AFFAIR— A SYMPTOM OF A MALADY?

*Ved P. Nanda**

I. INTRODUCTION

The symposium on the Iran-Contra Affair[1] sponsored by the 1988 ABA Standing Committee on Law and National Security and the University of Houston Law Center raises important legal, political, and ethical questions, especially pertaining to intelligence oversight. Of course, such a symposium does not purport to resolve the intricate and often emotional issues it presents; rather, the purpose is to encourage the exchange of views which may ultimately lead to an understanding of the vital concerns addressed. It is in this spirit that I make the following comments.

One of the most important and fundamental issues raised in the symposium relates to the nature of the constitutional separation of powers pertaining to intelligence activities.[2] This remains a particularly difficult issue because rarely have such activities been adequately defined[3] and because certain of these activities could not have been reasonably anticipated by the framers of the constitution. This raises a related issue as to whether the "modern" demands of foreign policy are such that a congressional role in intelligence activities has been rendered impractical or undesirable.

Another issue which has emerged is whether intelligence oversight requirements, which by their nature are statutory, cause undue interference with the constitutional grant of power to the executive.[4] Finally, the ambiguity in the existing schemes of legislative oversight and in the

* Ved P. Nanda, Thompson G. Marsh Professor of Law; Director, International Legal Studies Program, University of Denver College of Law.

1. 11 HOUS. J. INT'L L. 1-270 (1988).

2. *See* Rivkin, *Intelligence Oversight and Congress: Practical and Constitutional Imperatives,* 11 HOUS. J. INT'L L. 31-45 (1988); Fein, *The Constitutional Imperatives,* 11 HOUS. J. INT'L L. 53-68 (1988); Van Cleve, *The Constitutionality of the Solicitation or Control of Third-Country Funds for Foreign Policy Purposes by United States Officials Without Congressional Approval,* 11 HOUS. J. INT'L L. 69-82 (1988).

3. *See* Silver, *The Uses and Misuses of Intelligence Oversight,* 11 HOUS. J. INT'L L. 7-19 (1988).

4. Toensing, *Congressional Oversight: Inspecting the Executive Branch and Abusing the Individual,* 11 HOUS. J. INT'L L. 169-76 (1988).

methods to correct the existing deficiencies in these schemes was discussed.[5] In the aftermath of the Iran-Contra Affair and the resulting congressional investigations, other issues have been raised. These include the possibility of denial of individual rights[6] and of political opportunism.[7]

This brief comment will focus on selected aspects of the subject discussed in the symposium. Section II will discuss the constitutional separation of executive and legislative powers and the possible impact upon this separation created by "national security," "secrecy," and "expediency" concerns. It will also discuss intelligence oversight issues which relate to these concerns. The third section of this comment will explore the issues in the context of policy and ethical considerations.

II. CONSTITUTIONAL SEPARATION OF POWERS AND INTELLIGENCE ACTIVITY

It is clear that the Constitution assigns certain powers relating to foreign policy to the executive branch and others to the legislative branch.[8] For example, the Framers granted exclusively to Congress the power to declare war,[9] while the President was responsible for the conduct of war, once Congress had so decided.[10] The Constitution does not specifically mention the authority to conduct intelligence operations. It is equally clear that trying to establish precisely which branch has supremacy, particularly with regard to covert action or the intelligence process, is unlikely to engender consensus among the proponents of legislative or executive superiority.[11] Thus, it is more useful to view this as an area of shared responsibility[12] with the executive branch playing a primary role in administering the day-to-day operations within legislatively-mandated restraints.[13]

What follows is that the Constitution, as a part of its system of

5. *See* Elliff, *Two Models of Congressional Oversight,* 11 HOUS. J. INT'L L. 149-58 (1988).

6. *See* Toensing, *supra* note 4; Turner, *The Constitution and the Iran-Contra Affair: Was* Congress *the Real Lawbreaker?,* 11 HOUS. J. INT'L L. 83-127 (1988).

7. *See* Turner, *supra* note 6.

8. *See* the discussion in Cinquegrana, *Dancing in the Dark: Accepting the Invitation to Struggle in the Context of "Covert Action," the Iran-Contra Affair and the Intelligence Oversight Process,* 11 HOUS. J. INT'L L. 177-80 (1988).

9. *See* U.S. CONST. art. I, § 8. The only exception would be for the President to take action to defend the country, if a foreign nation attacked the country. *See, e.g.,* WORKS OF ALEXANDER HAMILTON 249-50 (H.C. Lodge ed. 1903), *cited in* A.V. THOMAS & A.J. THOMAS, THE WAR-MAKING POWERS OF THE PRESIDENT 37 (1982).

10. *See generally* A.V. THOMAS & A.J. THOMAS, *supra* note 9, at 36-90.

11. *See* Cinquegrana, *supra* note 8.

12. *Cf.* Larschan, *The War Powers Resolution: Conflicting Constitutional Powers, the War Powers and U.S. Foreign Policy,* 16 DEN. J. INT'L L. & POL'Y 33 (1987).

13. It can be argued in the context of the Iran-Contra Affair that the executive branch, as discussed below, ignored these restraints.

checks and balances, seems to have left this area open to conflict between the executive and legislative branches: the text of the Constitution, the intent of the Framers, and customary practices provide the necessary guidelines to resolve each conflict. However, such a view is not necessarily compelled. It would be equally plausible to maintain that this field must be one of executive and legislative cooperation. In fact, it could be argued that the "intent" of the Founding Fathers was to permit a certain amount of flexibility in this field to allow the executive and legislative branches to come to a working accommodation.

The nature of such an accommodation necessarily changes over time, but not necessarily in each case, and especially not by means of unilateral action by one branch. When change occurs, it requires consultation between the competing branches. Such accommodation may take the form of informal understandings between the branches, or may be codified in executive orders, congressional resolutions, or in legislation. If such an understanding achieves the status of legislation, it must be taken as the most persuasive evidence of a definitive constitutional interpretation of the separation of powers between executive and legislative branches. This is especially true since courts will be reluctant to intervene in what they may classify as a "political question."

This understanding is relevant to the claim of the importance of "secrecy" in the Iran-Contra Affair. From time to time, Congress has asserted its oversight role in regulating intelligence activities, especially covert action. The most visible manifestation of such an assertion occurred in the Church committee investigations in 1975 and in its 1976 report.[14] The amendments to the National Security Act of 1967,[15] as well as other procedural[16] and substantive[17] provisions, represent both the constitutional parameters within which policy is to be defined, and the procedure for pursuing that policy. While it is arguable precisely how these laws apply to specific facts,[18] it cannot be denied that these laws envision a role for Congress in both the substantive making of foreign policy and in the procedural oversight of the intelligence process.

14. For a recent analysis, *see* Bentley, *Keeping Secrets: The Church Committee, Covert Action, and Nicaragua,* 25 COLUM. J. TRANSNAT'L L. 601 (1987).

15. *See* Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, § 403, 99 Stat. 1002, 1006 (1985), (codified as amended at 50 U.S.C. § 415 (1982 & Supp. 1987)).

16. *See* the Boland Amendment, 22 U.S.C. § 2422 (1982); National Security Act, §§ 501-503, 50 U.S.C. §§ 413-415 (1982 & Supp. 1987).

17. Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (1982 & 1985 Supp. III); Arms Export Control Act, 22 U.S.C. §§ 2751-2796c (1982). Many other provisions also are relevant. *See generally* Bentley, *supra* note 14.

18. *See generally* Scheffer, *U.S. Law and the Iran-Contra Affair,* 81 AM. J. INT'L L. 696 (1987).

Therefore, the needs of secrecy cannot be asserted as an independent basis for denying Congress a role in intelligence oversight. This oversight role was formulated by both Congress and the Executive, and is supposedly consistent with their respective interpretations of the Constitution.

III. POLICY AND ETHICAL QUESTIONS WITH RESPECT TO INTELLIGENCE OVERSIGHT

Important policy and ethical questions are raised by the circumvention of congressional oversight procedures in the Iran-Contra Affair. These questions, viewed in relation to the constitutional issues raised earlier, can be framed in terms of their policy implications for a democracy when legally mandated procedures are subverted in the interest of perceived "national security" objectives.

Any attempt to isolate such concerns as relating only to the peculiar sphere of foreign policy must fail with even cursory analysis. The authors of a recent report contend that the Iran-Contra Affair also involved "a covert domestic operation designed to manipulate the Congress and the American public."[19] They argue that "[an] unusual use of executive power . . . set the boundaries for the Central American debate by delegitimizing opponents and suppressing the voices of criticism—be they politicians, journalists, or public affairs or citizens groups."[20] As demonstrated in the symposium, foreign policy often involves implications for individual rights.[21]

In effect, certain members of the administration have sought to justify the withholding of information from Congress on two grounds. First, that the requirement to report was unconstitutional as a violation of the separation of powers, the doubtful validity of which is discussed above. Second, that the policy was somehow justified (by a "higher" law) and therefore allowed subversion of procedures that would have prevented its implementation. This justification effectively separates ends and means. It is the importance of pursuing ends through appropriate means that is discussed in this section.

The focus on means is justified constitutionally in that the Constitution itself is essentially a procedural document.[22] As Professor Edwin Firmage recently demonstrated, sound procedures, more than anything

19. *See* Parry and Kornblub, *Iran-Contra's Untold Story*, FOREIGN POL'Y 3, 4 (Fall 1988).

20. *Id.* at 22-23.

21. *See supra* note 6.

22. *See* Firmage, *Ends and Means in Conflict*, 1988 UTAH L. REV. 1, 9.

else, ensure that sound ends are pursued.[23] Further, the modern demands of foreign policy are even more consistent with the existence of procedural safeguards designed to protect against capricious use of governmental power. This is shown by the devastating implication of nuclear weapons and other instruments of mass destruction.[24]

It must also be noted that procedures serve many purposes. For example, the provision on information of intelligence activities may not only serve the congressional purpose of overseeing intelligence gathering, but it may also serve Congress in its other foreign policy functions. In addition, providing this information serves Congress in its role as provider of funds for all governmental actions. To subvert a process for some narrow policy objective is surely to interfere with a whole system of constitutional governance. It does not merely elevate ends above means; it elevates a single end above all means and all other ends. As Firmage notes:

> Fidelity to our own process is a compromise that humans who lead make with each other and with those they lead as an institutional reflection of our common fallibility. Government itself is a recognition of such fallibility. Those who break this bond demonstrate an arrogance that makes them unsuitable for governmental responsibility.[25]

Thus, subversion of means signals a breakdown in the entire system of governance.

It should be further noted that such subversion of means, in practical terms, rarely accomplishes what it sets out to achieve. For example, by covertly providing arms to Iran while simultaneously pursuing a policy to isolate Iran from our European allies, the Reagan Administration damaged American credibility and its claim to the high moral ground on which it sought to justify its nondisclosure to Congress. In the future, allies are likely to be hesitant to trust U.S. initiatives, particularly those related to covert action, and they may be uncertain as to whether such initiatives are U.S. government policy or merely the initiative of an isolated group of renegades within the government.[26]

It could be argued that this subversion of means could ultimately lead to congressional and public reaction which would limit the amount of aid to the Contras (the objective of the initiative), as well as further

23. *See id.*
24. *See id.* at 12.
25. *Id.* at 21-22.
26. *See* McCormick & Smith, *The Iran Arms Sale and the Intelligence Oversight Act of 1980,* 20 PS 29, 36-37 (1987).

congressional initiatives designed to limit future covert actions.[27] These developments also bode ill for further consensus on the role of the executive and legislative branches in the foreign policy process, as discussed above.

The lesson of these events is that the means and the end cannot and should not be separated in the present context. As Firmage has appropriately argued:

> There is purpose in open debate in Congress, before us all, as we develop and implement foreign policy. To expect bipartisan support in foreign policy conducted by conspirators in clandestine coups abroad or within our own government is not realistic. Collegial dialogue between the President and Congress is the means by which we can conduct foreign policy with amity and success. If a mandate for a particular act cannot be achieved by such means, we should not proceed. Lack of a mandate in the democratic process may just mean that the goal is incorrect.[28]

It should be added that not only may such a goal be incorrect, but it will almost certainly not be achieved.

IV. CONCLUSION

A primary lesson of the Iran-Contra Affair is that a cooperative effort between Congress and the President is essential for an effective U.S. foreign policy. The apparent role of the National Security Council under President Reagan in foreign policy-making[29] raises serious questions about the likely adverse effects of unilateral efforts which are usually self-defeating. The adverse effects of non-cooperation between the legislative and the executive branches and the inevitable tussle between them are suffered by the electorate and the democratic process.

It is important to recall that following the House and Senate investigations of intelligence activities in the mid-1970's, the Church committee observed that because "checks and balances designed by the framers of the Constitution to assure accountability" were not applied, "intelligence activities [had] undermined the constitutional rights of citizens."[30]

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27. *See* Jameson, *The "Iran-Affair", Presidential Authority and Covert Operations*, 15 STRATEGIC REV. 24, 29 (1987).

28. Firmage, *supra* note 22, at 23, 24.

29. *See, e.g.*, Donnelly, *Reagan's Iran-Contra Crisis Raises Questions About the National Security Council and Its Role in Foreign Policy-Making*, Editorial Res. Rep., Jan. 16, 1987, at 17-27.

30. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS ON FOREIGN AND MILITARY INTELLIGENCE OPERATIONS (FINAL REPORT OF THE CHURCH COMM.), S. REP. NO. 755, 94th Cong., 2d Sess. pt. 1, at 289 (1976).

These investigations led to the adoption of the Foreign Intelligence Surveillance Act in 1978,[31] which established regulatory procedures for certain intelligence activities. Subsequently, Congress established reporting procedures for selected intelligence activities.[32] These procedures are useful and necessary. If their adequacy is in question, effective mechanisms should be devised to appraise and modify them, after consultation between the two branches. However, once they have been agreed upon, it is imperative that they be respected and not subverted for short-term policy preferences and perceived gains.

There is no doubt that Congress has a proper place in the oversight of covert actions. The debate over the parameters of such a role is not going to end with the Iran-Contra Affair. While the 100th Congress failed to agree upon such parameters,[33] the next Congress will undoubtedly attempt to define them. The only workable solution lies in executive-legislative branch cooperation.

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31. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-11 (1988)).

32. Under the Intelligence Oversight Act of 1980, Pub. L. No. 96-450, § 501, 94 Stat. 1975, 1981 (1980) (codified at 50 U.S.C. § 413 (1988)), and subsequent acts of Congress. *See generally* Scheffer, *supra* note 18.

33. *See Intelligence Oversight Act of 1988: Report to Accompany S. Bill 1721, as amended by S. Rep. No. 276,* 100th Cong., 2nd Sess. (1988); *Report of Permanent House Select Comm. on Intelligence to Accompany H.R. 3822,* H. Rep. No. 705, 100th Cong., 2d Sess., pts. 1, 2 (1988).