IF THE NEWS OFFENDS YOU, KILL THE MESSENGER: A COMMENT ON THE U.H. LAW CENTER/A.B.A. IRAN-CONTRA SYMPOSIUM

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INTRODUCTION

Texas was an appropriate venue for the symposium on "Legal and Policy Issues in the Iran-Contra Affair: Intelligence Oversight in a Democracy."[1] The general theme running through the presentations, enunciated on behalf of those charged with—or charging themselves with—carrying out covert operations, is DON'T FENCE ME IN. The theme is played alternately in a scholarly (Van Cleve), querulous (Fein), aggressive (Gray), vitriolic (Turner), conciliatory (Rindskopf) and mellowly reminiscing (Pforzheimer) mode, but the message throughout is loud and clear: These are dangerous times; "special activities" are a risky business; Congress can neither be trusted to keep secrets nor to "micromanage" foreign affairs. Ergo, while going through the motions of oversight may be a necessary concession to popular concern and congressional pride, the mechanics of oversight should be kept to a bare minimum.

This comment will argue that oversight, particularly as to advance authorization and legality, is essential to meet constitutional and world-order requirements and that, properly implemented, it can benefit not only the people but the intelligence community as well.

At the outset, a word of clarification: This will not be a brief for the superior wisdom or integrity of the Congress. Indeed, there have been few candidates for a new edition of "Profiles in Courage" since Senator Gruening's lone opposition to the Vietnam War in its earliest stages. But the founders, in their practical wisdom, never sought to place reliance on one branch as opposed to the other two. The intrinsic beauty and utility of the constitutional scheme is that it seeks to create the greatest good and the most secure peace for the greatest number out of a mechanism

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

based on the recognition that human beings are fallible, idealistic, ambitious, gentle, unkind, prudent and irrational, all at the same time.[2]

Indeed, it is not unfair to suggest that some members of Congress were more upset at not having been informed of the Contragate doings than at the enormity of what was being done. Nor is it inaccurate to say that the Boland amendment was not as crystal clear in its mandate to the Executive as it might have been, although such lack of clarity may have been attributable more to the politics of compromise than to any desire by a majority of Congress to leave the field open for covert action while appearing to the public to have done the contrary.

The question, as Judge Coffin said in the context of a challenge to the legality of the Vietnam War, is "[w]hen the Executive and Congress disagree not as to the advisability of fighting war but as to the appropriate level of fighting, how shall the Constitution be served?"[3] The answer, in that case, was that Congress could not appropriate money for the conduct of a war and at the same time claim that the war was being fought illegally. In other words, Congress has been known to waffle, and may do so again.

But that is not the point. The point is whether, even in the light of Congress' propensity to waffle, the interests of peace and democracy are better served by making Congress, or at least some portion of Congress, a party to "special activities" contemplated by the Executive, than by conducting those operations in "perfect secrecy," a phrase some of the authors of the Houston symposium seem ready to elevate to the status of holy writ.

In one of the more measured contributions to the Houston symposium, Britt Snider, a former Assistant Undersecretary of Defense for Intelligence and Counterintelligence, quotes Justice Brandeis' dissent in *Myers v. United States* to the effect that "the doctrine of separation of powers was adopted . . . not to promote efficiency but to preclude the arbitrary exercise of power" and "to save the people from autocracy."[4] He then goes on to make the following intriguing observation: "[T]he current oversight framework has . . . produced many positive benefits for

2. By an intriguing coincidence, the following appeared in Barbara Tuchman's obituary one day after this comment was submitted: "[Mrs. Tuchman said that] she had arrived at 'a sense of history as accidental and perhaps cyclical, of human conduct as a steady stream running through endless fields of changing circumstances, of good and bad always coexisting and inextricably mixed in periods as in people.' " N.Y. Times, Feb. 7, 1989, at B7. Mrs. Tuchman's last book was THE FIRST SALUTE, a book about the American Revolution placed in international perspective.

3. Massachusetts v. Laird, 451 F.2d 26, 34 (2d Cir. 1971).

4. 272 U.S. 52, 293 (1926).

our form of democracy. Unfortunately, however, the specifics which underlie this judgment have not been, nor can they be, fully made public."[5]

Could Mr. Snider be telling us obliquely that some of the more harebrained schemes thought up by Lt. Col. North and his predecessors were actually stopped dead in their tracks by a functioning oversight system? Or that the disastrous Bay of Pigs venture might never have occurred had such a system been in place at the time?

Oversight of covert action is not merely a matter of assuaging congressional sensitivities. In these days of hairtrigger responses to actual or perceived security threats, it may be a matter of preventing a nuclear holocaust or an occurrence of lesser, but still incalculable, consequences. (*E.g.*, we make a move, *they* make a countermove, we push the button or send in the Marines.)

One of the more fanciful contributions, in this regard, is Boyden Gray's statement that "[t]he situation today is much the same as it was 200 years ago, and the people who wrote the *Federalist Papers* certainly would not find much change."[6] Original intent may have its place in legal analysis, but isn't disregarding the invention of the airplane, the guided missile, the atom bomb, the telephone and the microchip, and the reduction of intercontinental response time from six weeks to six seconds carrying things a bit too far?

Useful though it may be as a corrective to Northomania and other forms of Rogue Elephantiasis, congressional oversight has its limits. At one point in his remarkable career, I.F. Stone, perhaps the last of a breed of truly independent investigative journalists, stopped attending off-the-record Washington press conferences, as a matter of principle. He had come to believe that the off-the-record, or deep backgrounder, press conference was being used to conceal information from the public by sealing the lips of reporters who, but for their attendance at such conferences, might have gained access to the same information by other means.

Congressional oversight of "special" intelligence activities no doubt operates in a similar fashion to muzzle those members of Congress who, but for their privileged position as a majority or minority leader or member of an intelligence committee, might not have to trade information for silence. Most of the time, one might speculate[7] that the sharing of information about a particular operation does result in the operation being carried out in secrecy. At times, presumably, the operation is aborted by strong opposition from congressional recipients of information, even

5. Snider, *Remarks of L. Britt Snider*, 11 HOUS. J. INT'L L. 47, 51 (1988).
6. Gray, *Remarks of C. Boyden Gray*, 11 HOUS. J. INT'L L. 263, 264 (1988).
7. Without top security clearance people can't really *know* about these things, can they?

though there is no formal veto procedure in the various oversight statutes. At other times yet, one learns from, *inter alia*, Richard Willard, a single member of Congress may give effect to his or her view that a particular operation should not be undertaken by leaking information about it to the media or to non-privileged fellow members.[8]

Be all that as it may, there are a number of reasons, prudential as well as constitutional, for continuing, indeed for strengthening, congressional oversight procedures.

THE NEW NATURE OF INTELLIGENCE

Much is made, in the various symposium contributions, of the Executive's unique access to intelligence and the corresponding inability of the legislature to make informed judgments about the special activities based on such intelligence. Nothing is made of the internecine warfare of the various intelligence agencies concerning the reliability of the data collected and the evaluation of such data. One need only think of such well known examples as the conflict between the CIA and various military intelligence agencies concerning North Vietnamese troop strength[9] or between the CIA and the State Department's Bureau of Intelligence and Research concerning the Contras' performance in Nicaragua.[10]

The collection of intelligence today, Boyden Gray to the contrary notwithstanding, is nothing like it was 200 years ago. Not only are there a multiplicity of intelligence agencies within the executive branch itself, often going after the same information with differing results, but the ability of the media to pursue the same information through aggressive, worldwide investigative reporting is of a wholly different order of magnitude. The phrase which comes to mind in connection with this information overload phenomenon is one made famous by our immediate past President: TRUST BUT VERIFY.

To whom should such verification be entrusted? To a President who would be less than human if he did not select, out of a welter of conflicting information, that which best serves his policy, or to a Congress,

8. Not everyone shares Mr. Willard's distaste for leaks. *See, Framing Leakers as Spies After* Morison, 13 FIRST PRINCIPLES 3 (1988). FIRST PRINCIPLES is a publication of the Center for National Security Studies in Washington; the *Morison* reference is to a case in which a former Naval Intelligence analyst was convicted of espionage and theft of government property for providing classified information to Jane's Defense Weekly. United States v. Morison, 844 F.2d 1054 (4th Cir. 1988).

9. Westmoreland v. CBS. There are eight reported decisions dealing with pre-trial matters, but none expounding the facts. The case was settled before it went to the jury.

10. MCNEIL, WAR AND PEACE IN CENTRAL AMERICA (1988). For an example of significant intelligence failure, the CIA's reliance on polygraph tests to set up a network of *trusted* Cuban agents, most of whom turned out to be double agents, *see* Safire, *The Polygraph Virus*, N. Y. Times, Feb. 2, 1989, at A25.

whose shared power in the field of foreign affairs places upon it a special responsibility to undertake such verification?

SPECIAL ACTIVITIES AS WAR BY PROXY

Robert Turner, in his indictment of Congress as "the real lawbreaker," takes as his starting point the antiquated proposition that "[t]he Founding Fathers — in vesting 'the executive Power' in the President through article II, section 1 — intended to grant the President exclusive control over foreign affairs."[11] But, even accepting, *arguendo*, this highly disputed proposition, are the "foreign affairs" of which he speaks the kind of "affairs" involved in Contragate? It would be difficult to arrive at this conclusion from the authorities Turner cites.

Jefferson is quoted to the effect that "the transaction of business with foreign nations is executive altogether."[12] Does the solicitation of funds from third countries, not to mention the diversion of funds belonging to the United States, for the purpose of overthrowing a foreign government, come under the heading of "transacting business"?

Hamilton and Madison are trotted out for the proposition that "the Executive Power of the Nation is vested in the President."[13] Well and good, but that does not define the content of the executive power.

John Jay, Professor Turner tells us, wrote in *The Federalist* No. 64 that perfect secrecy and immediate dispatch are sometimes requisite in the negotiation of treaties.[14] Indeed, but what has that to do with secretly trading arms for hostages while professing publicly never to have any truck with terrorists?

Against these less than convincing witnesses, let us posit the testimony of the venerable John Bassett Moore:

> There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his notion of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace.[15]

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11. Turner, *The Constitution and the Iran-Contra Affair: Was* Congress *the Real Lawbreaker?*, 11 HOUS. J. INT'L L. 83, 93 (1988).
12. *Id.* at 95.
13. *Id.* at 97.
14. *Id.* at 102.
15. J.B. MOORE, 11 COLLECTED PAPERS, V 195-6 (1944).

Moore died in 1947, just about the time covert action was invented,[16] and well before the United States began to recruit and finance foreign armies to fight its wars "all over the world."[17] Had Moore lived through the last four decades, is there any doubt that he would have expanded his warning against undeclared Presidential wars to include those fought in the guise of "special activities"?

That the congressional role in initiating war is not restricted to military operations by the armed forces of the United States is confirmed by the constitutional allocation to Congress of the power "to define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations,"[18] and the power to "grant Letters of Marque and Reprisal."[19] In the words of Professor Firmage, one of the leading scholars of the War Powers clause: "Congress exclusively possesses the constitutional power to initiate war, whether declared or undeclared, public or private, perfect or imperfect, de jure or de facto. The only exception is the power in the President to respond self defensively to sudden attack upon the United States."[20] Another indication of congressional authority and policy as concerns covert war is the Neutrality Act, 18 U.S.C. 960, a measure unfortunately more honored in the breach than in the observance.[21]

Turner's theory of complete Executive sovereignty, of Congress as "the real lawbreaker" for daring to pass the Boland amendment, does find some support in Justice Sutherland's *Curtiss-Wright* opinion, but precious little support elsewhere (except among some of his fellow panelists at the Houston symposium). It ignores the checks and balances scheme of the Constitution; it tramples underfoot Justice Jackson's classic convergence theory in the post-*Curtiss-Wright* Steel Seizure case;[22] it turns the separation of powers doctrine into the precise opposite of what

16. *See* Pforzheimer, *Remarks of Dr. Walter Pforzheimer*, 11 HOUS. J. INT'L L. 53, 54 (1988).

17. *See, e.g.*, MERCENARIES: BUYING 'ALLIES' FOR AMERICA'S STORY 138 (1970); STOCKWELL, IN SEARCH OF ENEMIES (1978) (dealing with Angola); HALPERIN, BERMAN, BOROSAGE, AND MARWICK, THE LAWLESS STATE 41 (1976) (dealing with secret wars financed and organized by the CIA in Iraq, China, Guatemala, Indonesia, Indochina, and Cuba); MCGEHEE, DEADLY DECEITS — MY 25 YEARS IN THE CIA 25 (1983) (dealing with paramilitary operations in, *inter alia*, Korea and Thailand); PETERZELL, REAGAN'S SECRET WARS, CENTER FOR NATIONAL SECURITY STUDIES (1983) (Afghanistan, Cambodia, Libya, Iran, Nicaragua); KORNBLUH, NICARAGUA — THE PRICE OF INTERVENTION (1987).

18. U.S. CONST. art. I § 8, cl. 10.

19. *Id.* at cl. 11.

20. Firmage, *To Chain the Dog of War* (paper presented before the Annual Convention of the American Society of International Law) (1987).

21. Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1 (1983); *see also* Cole, *Challenging Covert War: The Politics of the Political Questions Doctrine*, 26 HARV. INT'L L.J. 155, 171 n.87 (1985).

22. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1972).

the founders intended: a prescription for a Presidency more imperial than old King George could ever have imagined.

CONGRESS, THE POLITICAL QUESTION DOCTRINE AND INTERNATIONAL LAW

Since the Iran-Contra Affair concerns almost exclusively the foreign relations of the United States, it is somewhat puzzling to observe the paucity of references to international law in the symposium papers. Only somewhat, however, since, in disregarding the relevance of international law to covert action, the panelists were in the mainstream of official opinion. Note, for instance, the following exchange between a member of the press corps and President Ford, a graduate of Yale Law School, at the President's press conference on September 16, 1974:

> Q. Under what international law do we have a right to attempt to destabilize the constitutionally elected government of another country? And, does the Soviet Union have a similar right to destabilize the Government of Canada, or the United States?
> A. I'm not going to pass judgment on whether it's permitted under international law. It's a recognized fact that historically, as well as presently, such actions are taken in the best interests of the countries involved.[23]

Two of the panelists, Bruce Fein and Robert Turner, do take some cognizance of international law, but only for the purpose of turning it on its head.

Fein would have us believe that "[t]he CIA and other intelligence agencies perform a role in the execution of national security and foreign policy, or in the enforcement of international law, that mirrors the role of the Department of Justice in the administration of civil and criminal laws."[24] This is a theory of such stunning originality that, at first glance, it is difficult for a person of ordinary mental capacity and legal training to comprehend. Upon closer consideration, however, the secret will be found to reside in the conjunctive "or," which equates "national security and foreign policy" with "the enforcement of international law." In other words, "*le droit international, c'est moi*," the "*moi*" being not even

23. *Quoted by* Richard Falk, PROCEEDINGS OF THE 69TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 195 (1975). It must be said in fairness, and with sadness, that, while both the Tower Commission Report and the "Iran-Contra Report" deal with the legal violations which occurred, and make recommendations intended to prevent a recurrence, they do so in a strictly domestic context. REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess., at 411, 421 and 424-26 (1987) [hereinafter REPORT].

24. Fein, *The Constitution and Covert Action*, 11 HOUS. J. INT'L L. 53, 54 (1988).

the President, but the Director of Central Intelligence. (The Attorney General, after all, does not normally consult with the President on the enforcement of domestic law.) Once this simple proposition is accepted, everything else follows, including the fact that international law can be *enforced* by bribing politicians, undermining governments, invading countries with secret armies, conducting medical experiments on unsuspecting persons, building stocks of poison, sabotaging factories, contaminating foodstuffs and engaging in a myriad other forms of "special activities."[25]

Professor Turner, for his part, asserts that the Boland amendment is an unconstitutional interference with the President's obligation, under international law, to "deter Nicaraguan aggression against its neighbors."[26] Again, the concept here is that of enforcing *our* international law, not *the* international law. Granted that the application of international law principles to particular facts can lead to divergent conclusions, perhaps to an even greater extent than in the domestic arena, one would think that some respect would be due to the judgment of the highest tribunal empowered to decide questions of international law. In this case, the International Court of Justice has spoken clearly and at great length and has held, by 12 votes to 3, that, despite the collective self-defense arguments advanced by Professor Turner, among others, "the United States of America, by training, arming, equipping, financing and supplying the *contra* forces . . . has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State."[27]

What has all this to do with the role of Congress? Only this: That, in addition to Congress' shared power in foreign affairs, a discussion of which the limited scope of this comment does not permit, there is a very good additional reason for congressional oversight of, and policy participation in, covert action decisions, having to do with the interplay of all *three* branches as concerns questions of international law. The principle may be stated as follows: The United States (the *government* of the United States, not just the executive branch), has an obligation, as a member of the community of nations, to comply with international law. But the Executive takes, at most, a highly cavalier attitude toward international law,[28] while the judiciary almost uniformly treats international

25. This particular recital is taken from POWERS, THE MAN WHO KEPT THE SECRETS: RICHARD HELMS AND THE CIA 6 (1979).

26. Turner, *supra* note 11, at 117.

27. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14.

28. *See supra* note 20 and accompanying text. *Cf.* Weston, *The Reagan Administration Versus International Law*, 19 CASE W. RES. J. INT'L L. 295 (1987); Paust, *Is the President*

law challenges to Executive action as non-justiciable "political questions."[29] The duty of compliance with international law therefore devolves, by default, upon the legislature.

Congress is, of course, the branch least equipped to deal with questions of international law, at least in a structural sense. The President has available to him the Legal Advisor to the State Department and the latter's entire staff of international lawyers; the courts, while not always interested or competent in matters of international law, are nevertheless supposed to ascertain and administer international law "as often as questions of right depending upon it are duly presented for their determination."[30] Congress has no formal international law resource available to it. But it does have a sizeable complement of lawyers in its membership, some of whom know something about international law and some of whom, whether lawyers or not, care about the honor of their country, and believe that compliance with international law has something to do with national honor.[31]

CONCLUSION

What went wrong in the Iran-Contra Affair has been described in considerable detail in the Tower Commission Report and the Joint Report of the two Select Committees. The Houston symposium papers, by and large, focus not on what went wrong, but on Congress' temerity in exposing executive malfeasance and in its prior attempt to prevent some of what did happen.

To repeat the initial message of this comment: The effort to assign heroes to one branch of the American government and villains to another is doomed to failure. Two centuries of history have amply demonstrated that each branch is capable of producing its share of either, or for that

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Bound by the Supreme Law of the Land — Foreign Affairs and National Security Reexamined, 9 HASTINGS CONST. L.Q. 719 (1982); *Agora: May the President Violate Customary International Law?*, 80 AJIL 913 (1986) (essays by Professors Charney, Glennon, and Henkin); *Agora: May the President Violate Customary International Law?*, 81 AJIL 371 (1987) (essays by Professors Kirgis, D'Amato, and Paust).

29. Gordon, *American Courts, International Law and "Political Questions" Which Touch Foreign Relations*, 14 THE INT'L LAW. 297 (1980); Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 HARV. INT'L L.J. 155 (1985). One of the most egregious examples is Chaser Shipping Corp. v. United States, 649 F.2d 736 (S.D.N.Y. 1986), *aff'd* 819 F.2d 1129 (2d Cir. 1987), *cert. den.* 98 L. Ed. 2d 647 (1988), *reh'g denied* 101 L. Ed. 2d 952 (1988) (holding that a damage claim for injury sustained by a Norwegian ship as a result of the CIA's mining of the waters off Nicaragua was non-justiciable as a political question, despite the fact that the International Court of Justice had held [with the concurrence of Judge Schwebel of the United States] that such mining, without notice to neutral shipping, was a violation of international law).

30. The Paquete Habana, 175 U.S. 677, 700 (1900).

31. Senator Goldwater, for instance, was indignant about the CIA's mining of the Nicaraguan waters in violation of international law.

matter, that today's hero may be tomorrow's villain. If there is a lesson to be learned from the Iran-Contra Affair, it is that the search for absolute "efficiency" in foreign affairs, particularly of the covert kind, can lead to the most monstrous kind of inefficiency;[32] that nothing is apt to make a democratic nation less secure than the glorification of "national security" to the exclusion of other values;[33] and that lawlessness in international affairs leads to lawlessness at home.[34] It is a lesson which seems to have escaped most of the Houston panelists.

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32. *Cf. supra* note 4 and accompanying text; *see also* Justice Warren's statement that "[t]his 'separation of powers' was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny." United States v. Brown, 381 U.S. 437, 443 (1965).

33. For a history of the national security doctrine and its vicissitudes, *see* LANDAU, THE DANGEROUS DOCTRINE (1988).

34. The REPORT'S inspired citation from "A Man for All Seasons" bears repeating here:

> SIR THOMAS MORE:. . . What would you do? Cut a great road through the law to get after the Devil?
> ROPER: I'd cut down every law in England to do that!
> MORE: Oh? And when the last law was down, and the Devil turned round on you — where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast — Man's law, not God's — and if you cut them down — and you're just the man to do it — d'you really think you could stand upright in the winds that would blow you down?

REPORT, *supra* note 23, at 411.