REVIEW ESSAY

How to Avoid Iran-Contras


Reviewed by Louis Fisher*

Several years before the Iran-Contra affair focused national attention on the failures of executive-legislative relations in foreign policy matters, the Association of Former Members of Congress and the Atlantic Council initiated a joint study to discover ways to improve working relations between Congress and the President. Former President Gerald Ford took an interest in the project, hosting a series of discussions on foreign policy at the Ford Library in Ann Arbor. Beginning in 1983, a working group cochaired by Edmund S. Muskie and Kenneth Rush, and consisting of leading academics and former members of Congress and the executive branch, convened to discuss ten background papers prepared by experts in the field (p. vii). *The President, the Congress and Foreign Policy* is a collection of these ten papers, and also includes a policy paper and a conclusion prepared by the rapporteur, Kenneth W. Thompson. The ten essays cover the constitutional framework; the roles of Congress and the executive branch; the application of foreign policy to Mexico, Central America, Western Europe, the Middle East, and China; and studies on trade relations, foreign assistance, and human rights.

The working group’s insights into executive-legislative relations are particularly important in light of details about the Iran-Contra affair that became public the year the book was released. The group’s effort provides a primer on what Oliver North, John Poindexter, Robert McFar-
lane, and the rest of the cast of characters never seemed to understand: to be successful, foreign policy must be based on the collective efforts of both the President and Congress. The working group demonstrated uncanny prescience in observing that there is great danger in allowing foreign policy to drift into the camp of the National Security Advisor (pp. viii-ix, 21-22). Foreign policy should be kept in the hands of officials accountable to the public, in particular the President, Congress, and the Secretary of State.

In this Review I will examine some of the working group's recommendations in the context of the Iran-Contra affair. I will also analyze several recent attempts to remedy the policymaking process to prevent future debacles like Iran-Contra.

I

BASIC THEMES AND RECOMMENDATIONS

The recommendations of the working group are sound and constructive. It concludes that major changes are not needed in the structure of government. Despite the concerns of those who complain about deadlocks and delay, or those who would like to move toward a parliamentary system or an executive-oriented system, the present institutions of government generally work. Any attempt to constitutionally restructure the federal government would meet bitter opposition (p. vii). The entire system of checks and balances requires Congress and the executive to work together as equals, and we should not expect this interaction to be free of friction and disagreements (p. vii).

A. The Role of Congress

The working group recognizes that Congress plays a substantial role in foreign policy. Rejecting the extreme schools of executive supremacy and congressional supremacy, this study concludes that the drafters of the Constitution envisioned that the President and Congress would share responsibility for foreign policy and their roles would overlap. “Congress was to have ultimate authority but a vigorous and independent executive was essential for a balanced and effective foreign policy” (p. 10). In response to those who would distinguish external from internal affairs and allow the President the dominant voice in external affairs, the


Consistent with these views, the working group believes that post-Vietnam efforts by Congress to restore its place in foreign policy have been "in harmony with the Constitution" (p. 12). Although the War Powers Resolution of 1973\(^3\) has caused conflict between Congress and the President, the working group believes that further efforts to clarify the field of war powers would not be useful at this time (p. 5). That is sensible advice. No statute can force cooperation between the branches. The War Powers Resolution provides the President with adequate flexibility to respond to emergencies. It is doubtful that the two branches could agree on a better statutory framework.

Congress' role in foreign affairs reflects not only the constitutional balance of powers, but also the reality of national politics: Congress can contribute to stability and continuity in foreign policy. Because Congress is accountable to local constituencies, it is "well-placed to assist in the formulation of the broad outlines of foreign and security policies with some assurance of continuing popular support" (p. 24). The working group therefore urges the executive to recognize that Congress can be an asset, rather than an obstacle, in developing effective foreign policy (p. 24).

The working group notes that the President rarely consults Congress except in crisis situations, when "there is very little time for an exchange of views or for members of Congress to participate constructively in the decisionmaking process" (p. viii). Instead, it recommends that leaders of Congress meet regularly with the President to exchange views on foreign policy matters and consider alternative courses of action. In fact, the working group suggests that the President consult congressional leaders every four or five weeks (p. 29).

Had such a relationship existed early in the Reagan years, the President might have explored the pros and cons of sending arms to Iran, and might have received enough negative feedback to convince him to scrub the venture in its infancy. Soliciting congressional advice, however, requires at least a minimum level of trust and respect, and those qualities were in short supply.

It is evident that the leading figures in the Iran-Contra affair held Congress in contempt. In order to send arms to Iran and supply weapons to the Contras, executive officials resorted to outright deception. This attitude toward Congress was presented most starkly by Colonel North when he testified before the congressional committees investigat-

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ing the Iran-Contra affair. Colonel North admitted to participating in preparation of documents for the Congress that were "erroneous, misleading, evasive and wrong," and making misleading statements to the House Intelligence Committee.\(^4\) Although he stated that he did not find lying easy, he justified his behavior on the ground that "we all had to weigh in the balance the difference between lives and lies."\(^5\)

The lies were not directed merely to enemies. They were dispensed freely to officials of the United States government, both legislative and executive. Congress was misled about the mining of the Nicaraguan harbors, the government's involvement in the Hasenfus supply operations, Colonel North's assistance to the Contras, and administration efforts to solicit funds from other nations. Executive officials, called upon by Congress to explain their activities, repeatedly responded with evasion and deceit.\(^6\)

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5. Id. at 234.

6. For example, when Robert McFarlane was National Security Advisor, he sent a letter to the Chair of the House Intelligence Committee denying that anyone in the National Security Council (NSC) had violated the letter or spirit of the Boland Amendment, which prohibited the use of certain federal funds to support covert military operations in Nicaragua. See Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982); Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1935 (1984). Part of McFarlane's letter read: "At no time did we encourage military activities. Our emphasis on a political rather than a military solution to the situation was as close as we ever came to influencing the military aspect of their struggle." Letter from Robert McFarlane to Lee H. Hamilton, Chair of the House Select Committee on Intelligence 2 (Sept. 5, 1985) (identified as Exhibit OLN-118 by the Iran-Contra Committees). During the Iran-Contra hearings, committee counsel John Nields asked Colonel North about the veracity of the letter:

Mr. NIEfelds. . . . Is that statement true, sir?

Mr. North. Well, it is partially true. I am not saying that all of the rest of it is true. . . .

. . .

Mr. NIEfelds. The part of it which is untrue is the part that says this was as close as we ever came to influencing the military aspect of their struggle, isn't that true, sir?

Mr. North. With using appropriated funds, no, but I am not going to nitpick this thing.

Mr. NIEfelds. That is a false statement, isn't it? You were conducting, as you have testified here most of the afternoon, a full service covert operation to support the military efforts of the resistance.

Mr. North. Yes, that is true.

Mr. NIEfelds. And this statement that emphasizing a political rather than a military solution was as close as we ever came to influencing the military aspect of their struggle is just false, isn't it?

Mr. North. It is not entirely false, but it is false, and I admit that there are other parts of this thing that are false.

Mr. NIEfelds. The next paragraph says, "It is equally important to stress what we did not do. We did not solicit funds or other support for military or paramilitary activities, either from Americans or third parties."

That is just plain false, isn't it?

Mr. North. Right.
Even when questions were clear and direct, executive officials believed it appropriate to withhold information from Congress and offer incomplete answers. Senator William Cohen of Maine summarized for Admiral Poindexter the various techniques used to conceal executive branch operations:

I must tell you, I find it troubling when you say that I [Admiral Poindexter] withheld information from Congress but I did not mislead it, or that the administration support for the contras was secret activity but not covert action, or that the United States acquiesced in the initial shipment of TOW weapons but did not authorize it, or that the transfers of funds for the sale of weapons was a technical implementation, not a substantive decision, and that we did not trade arms for hostages even though Mr. Hakim and General Secord arrived at a formula of one-and-a-half hostages for 500 TOWs.7

A CIA witness at the hearings was asked whether he had answered honestly when he told a congressional committee that he did not know about the resupply operation to the Contras. He replied: “That was an honest answer. It was not a complete answer.”8 As Senator Cohen remarked, “half the truth is also half a lie. . . . When you tell only part of the truth in order to conceal the other part you are in fact engaging in a misleading of the people you are talking to.”9 It is painful to think that members of Congress have to instruct executive officials on such elementary points of ethics.

The government officials and private citizens who conducted the Iran-Contra affair without congressional knowledge or participation never seemed to realize that, as the working group notes, a reasonable amount of friction “can be a constructive and creative factor” (p. viii). By excluding Congress, these executive branch officials embarked on a series of adventures that inflicted serious damage to the United States and the Presidency. This damage could have been prevented if the two branches had relied on cooperation and coordination (p. viii).

B. The Executive Branch

Some of the working group’s most insightful observations concern the contemporary operations of the executive branch. The group does not harbor naive beliefs in executive expertise and unity. “The executive no less than Congress is fractured and divided with respect to the manner in which foreign policy matters are handled” (p. 14). Although Congress is frequently singled out as the branch that makes continuity and coher-

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9. Id. at 133 (statement of Sen. William Cohen).
ence in foreign policy impossible, the working group presents a much more complex and accurate picture. It sees the executive branch divided between two distinct cultures: the presidential and the bureaucratic. “[T]he political group around the President is essentially action-oriented, concerned with future elections, and less secure in tenure than bureaucrats. By contrast, in the [career or permanent] executive the stress is on continuity, survival, and institutional loyalty” (p. 15).

The Iran-Contra hearings exposed a remarkable level of distrust within the executive branch. Responsible officials were excluded from participation because they had opposed policy initiatives or were insufficiently enthusiastic. After Secretary Weinberger had expressed opposition to the sale of arms to Iran, there were efforts to keep intelligence reports from him, including even those generated from within the Defense Department. He said he received an intelligence report in the fall of 1985 that described negotiations between high U.S. officials and Iranian representatives. Although the report was “inuddled and puzzling,” as he put it, the effort seemed to involve arms sales to Iran.10 When he inquired into the source of this information, he discovered that the White House had instructed his intelligence agency “that we were not to be on the distribution list.”11 He assumed that the instructions came from someone in the National Security Council (NSC).12 This conclusion seems consistent with the NSC staff’s attitude toward Cabinet officials, which was revealed in a note from North to McFarlane: “My part in this was easy compared to [Poindexter’s]. I only had to deal with our enemies. He has to deal with the cabinet.”13

Institutional rivalries within the executive branch were conspicuous in the Iran-Contra affair. Congressional investigation revealed major deficiencies within the executive branch: distrust among agency officials, deliberate exclusion of advice and information, excessive dependence on foreign sources for intelligence, a pattern of lying and deception, and destruction of documents that should have remained part of the permanent records. The penchant to compartmentalize led to the exclusion of the Secretary of State,14 the Secretary of Defense, the Joint Chiefs of Staff,15 the Director of Central Intelligence,16 the White House Chief of

11. Id. at 218; see also id. at 93.
12. Id. at 225.
13. Note from Oliver L. North to Robert McFarlane (Feb. 27, 1986) (identified as Exhibit JMP-32 by the Iran-Contra Committees).
15. IRAN-CONTRA REPORT, supra note 2, at 247.
Staff, and even the President himself, if we are to believe the testimony before the Iran-Contra Committees.

The Iran-Contra participants did not consult experts in the administration because they did not trust them. As a result, they initiated defective policy based on ignorance. For example, North sent the wrong missiles to Iran because, as General Secord testified, a "group of civilians who didn't have any expertise in air defense" erroneously concluded that the I-HAWK missile would be effective in defending against high altitude reconnaissance aircraft originating from Russia and Iraq.

Experts were ignored on even more fundamental policy issues. In a cover memo to the January 17, 1986 finding, which authorized arms shipments to Iran, Poindexter advised President Reagan that the Israelis were very concerned about "Iran's deteriorating position in the war with Iraq." Nevertheless, the notion that Iran was losing the Gulf War contradicted every reputable analysis within the administration. As Defense Secretary Weinberger testified at the hearings, neither he nor anyone he talked to believed that Iran's position in the war was deteriorating. He said that he never saw nor responded to Poindexter's memo to the President, but that he "certainly did not have the view that Iraq was winning or anything of that kind. Quite the contrary."

1. Preeminence of the State Department

The working group expresses concern that the National Security Council has diluted the State Department's leadership role in foreign affairs (p. viii). Secretaries of State Dean Acheson and John Foster Dulles were clearly the premier officials in the foreign policy field during the Truman and Eisenhower administrations. The increasing complexity of foreign relations in the 1960s, however, enhanced the importance of the NSC staff, causing friction with the State Department. The emergence

17. Message from National Security Advisor John Poindexter to Oliver North (May 17, 1986) (identified as Exhibit JMP-47).
19. Hearings Transcript, supra note 4, at 84 (testimony of Richard V. Secord).
22. The working group appears to rely on Dean Newsom's analysis:

While the creation of a more powerful NSC staff in the Kennedy period may have reflected the views of President Kennedy and his immediate advisors, it also reflected the greater complexity of U.S. foreign relations by the early 1960s. This was brought on by the
of the National Security Advisor as a high-profile figure in the Nixon and Carter administrations exacerbated this friction (pp. 16-17).

The working group notes that American foreign policy cannot be coherent so long as no one person speaks for the President on foreign policy matters (p. 21). During the Carter administration, for example, "critics would point to contradictions in President Carter's Annapolis Speech organized in conflicting paragraphs drafted respectively by Secretary of State Cyrus Vance and National Security Advisor Zbigniew Brzezinski" (p. 21). The working group concludes that the Secretary of State must clearly act as the President's principal spokesperson in foreign policy (pp. ix, 21).

The contrast to the conduct of the Iran-Contra Affair is striking. One of the most extraordinary moments in the Iran-Contra hearings was the following line of questioning between Mark A. Belnick, counsel for the Senate, and Secretary Shultz:

Mr. BELNICK. . . Mr. Secretary, as the Secretary of State, you are the President's chief foreign policy adviser and foreign policy spokesman; is that correct?

Secretary SHULTZ. That is correct.

Mr. BELNICK. . . . [Y]ou are responsible to the President for the conduct of the foreign relations of the United States; is that correct?

Secretary SHULTZ. That is correct.

Mr. BELNICK. With these points in mind, Mr. Secretary, I would like to begin this morning by reviewing certain key events that the panel has been considering in order to establish when the Secretary of State was first informed of those events.

... Mr. Secretary, when were you first informed that the President of the United States had signed a covert action finding authorizing the sale of U.S. arms to Iran?

Secretary SHULTZ. On November 10, 1986, at a meeting in the Oval Office with the President's principal adviser during a briefing by [National Security Advisor] Admiral Poindexter on what had transpired over the past year or so.

Mr. BELNICK. Mr. Secretary, when were you informed that there was more than one such covert finding signed by the President?

Secretary SHULTZ. When I was testifying before the Senate Select Committee on Intelligence, I believe it was Senator Cohen, during the question period, asked me about a January 6th finding. And I said to

resurgence of Europe, the new problems in confrontations with the Soviet Union, the emergence of new nations, and the growing importance of trade and financial issues. It can be argued that any President would ultimately realize the need to centralize the coordination of foreign and security policy within the National Security Council staff (p. 106).
him, "Senator, I think you must be thinking of the January 17th finding."

... And [he] said, "No, January 6th." I said, "Well, that is the first I've heard of a January 6th finding." So that is when I heard about it.

Mr. BELNICK. When were you first informed, Mr. Secretary, that the President had signed also a third finding on December 5, 1985?

Secretary SHULTZ. When it emerged in the course of these hearings.

Mr. BELNICK. Mr. Secretary, when were you first informed that this nation had sold weapons directly to Iran?

Secretary SHULTZ. Well, it depends upon what you consider being informed; but when this all started to break in very early November, 1986, there were press reports of arms sales that seemed authoritative; and so that was my information literally on an arms sale from the U.S. to Iran.

Mr. BELNICK. Prior to then, prior to those reports in the press, had any member of the United States Government informed you that the United States had sold weapons directly from the United States to Iran?

Secretary SHULTZ. No.

Mr. BELNICK. Mr. Secretary, when were you first informed of the McFarlane mission to Tehran?

Secretary SHULTZ. It was after the mission, but I think shortly after it was completed.

Mr. BELNICK. And were you given the details of the mission at that time?

Secretary SHULTZ. I was told that it had fizzled and that with those events in mind, the fizzling of that initiative, that the whole project had been told to stand down.

Mr. BELNICK. Were you told at that time that Mr. McFarlane had brought U.S. weapons with him to Tehran?

Secretary SHULTZ. No.

Mr. BELNICK. Mr. Secretary of State, when were you first informed that country number 2, a major Middle Eastern Nation, had provided $31 million to the Nicaraguan Democratic Resistance, which I shall refer to as the contras, between 1984 and 1985?

Secretary SHULTZ. In June—I think it was June 16th, according to my records, I received a telephone call, a secure phone call, from Mr. McFarlane, who gave me that information.

Mr. BELNICK. June 16 of what year, sir?

Secretary SHULTZ. 1986.

Mr. BELNICK. When were you first informed that country number 3 had contributed $2 million to the contras in 1985?

. . .

Secretary SHULTZ. I was—this has emerged here during the course of the hearings, and that is [when] I learned it.
Mr. BELNICK. You never were informed of that fact prior to these hearings?

Secretary SHULTZ. No.

Mr. BELNICK. Mr. Secretary, when were you first informed that country number 4 had been solicited by the NSC staff to provide lethal assistance to the contras in 1984?

Secretary SHULTZ. I—these things have all emerged during the hearings. That is when I learned of them.23

The committee transcripts reveal the level of distrust even within the executive branch. The Secretary of State, who “should be the central figure on the stage” (p. ix) in foreign policy, was deliberately kept off-stage by executive officials who had no direct responsibility for the formulation and implementation of foreign policy.

The fracturing of the proper line of foreign-policy making authority is underscored by the activities of Lewis A. Tambs, who served as Ambassador to Costa Rica from July 1985 through December 1986. The State Department provided him with explicit guidelines to ensure that operations would implement official policy: “[T]he line of authority runs from the President through [the Secretary of State] to Assistant Secretary Abrams. . . . [I]n the final analysis your decisions and actions should be guided by that direct line from the President.”24 Nevertheless, Ambassador Tambs testified that Colonel North personally asked him “to go down and open up the southern front,”25 which meant to encourage the Contra groups in Costa Rica to engage in military actions in southern Nicaragua, to distract the Sandinista army fighting in the north near the Honduran border. Tambs assumed that North had authority to give the instructions but never checked that assumption with President Reagan, Secretary Shultz, or National Security Advisor McFarlane.26 National Security Advisor Poindexter was aware that Tambs was helping North on the southern front,27 but Secretary Shultz was not notified.

The complete exclusion of Secretary of State Shultz in the Tambs incident is a far cry from the working group’s view of the State Department’s proper role in the formulation and implementation of foreign policy. Had the Secretary of State functioned as the President’s principal

26. Id. at 140.
advisor and spokesperson on foreign policy, as the group recommends (p. 4), the Iran-Contra affair might have been prevented.

2. The National Security Council Staff

The working group recommends a somewhat limited role for the National Security Advisor, noting that the office is not even specifically named in the National Security Act of 1947, which created the National Security Council (p. 22). The President should not make the National Security Advisor a "second Secretary of State" (p. 22); the Advisor should not be a public figure or the President’s primary foreign policy spokesperson. Instead, the Advisor should have "a passion for anonymity" and play a coordinating role among the various executive departments contending for control (p. 22). The group favors separating the functions of advisor to the President and coordinator, returning to the practice of the Truman and Eisenhower administrations (p. 22).

The Iran-Contra affair demonstrates the extent to which the NSC has aggrandized its control over foreign policy. During the hearings, Senator George Mitchell pointed out to Colonel North that President Reagan’s Executive Order 12,333 and National Security Decision Directive (NSDD) 159 assigned covert operations exclusively to the Central Intelligence Agency unless the President specifically designated another agency to conduct the operations. Although the President had not specifically designated the NSC staff to conduct any covert operations, North denied that any Executive Order or NSDD could restrict the President’s use of his staff:

I believe the President has the authority to do what he wants with his own staff, that I was a member of his staff, that Mr. McFarlane was and that Admiral Poindexter was, and that in pursuing the President’s foreign policy goals of support for the Nicaraguan resistance he was fully within his rights to send us off to talk to foreign heads of state, to seek the assistance of those foreign heads of state to use other than U.S. Government monies, and to do so without a finding.

Although the NSC was created by Congress and is funded each year by Congress, North testified that the NSC staff is answerable exclusively to the President. He claimed that the President alone has authority to

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28. 50 U.S.C. §§ 401-412 (1982). The Act established the National Security Council “to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the . . . departments and agencies of the Government to cooperate more effectively.” Id. § 402(a).


make changes in the NSC staff's order, structure, and activities. This reasoning allowed North to tell Congress that the NSC did not violate the letter or spirit of the Boland Amendment on the theory that Boland did not apply to the NSC.

The testimony of members of the Cabinet and National Security Council staff discloses a fundamental breakdown in executive-legislative relations. The Iran-Contra affair was not an aberration. Iran-Contra is what one would expect to happen when activists within the White House have contempt for Congress, for responsible cabinet officials, for constitutional principles, and for the rule of law.

II

IRAN-CONTRA REFORMS

The disclosure of the Iran-Contra affair sparked a number of reforms. Some have already been adopted by administrative regulation; others, requiring statutory action, are pending before Congress. These reforms are consistent with the general approach advocated by the working group: reducing the scope of NSC operations and strengthening the role of Congress.

A. The Tower Board

After the November 1986 revelations of arms shipments to Iran, President Reagan established a Special Review Board on December 1, 1986 to examine the proper role of the NSC in national security operations. The Board was chaired by John Tower, former Senator from Texas. The two other members of the board were Edmund Muskie, former Senator from Maine and Secretary of State during the Carter administration, and Brent Scowcroft, who served as National Security Advisor under President Ford.

31. _Id._ at 146.


33. Hearings Transcript, _supra_ note 4, at 48 (July 9, 1987) (testimony of Oliver L. North, former National Security Council staff member). This point was clarified during the following exchange between Senate counsel Arthur Liman and Colonel North:

Mr. LIMAN. Now, is what you are telling us today that when you helped in the participation of the letter [from National Security Advisor McFarlane] saying that we are complying with the letter and spirit of Boland, what we are saying is that Boland doesn't apply to us and so we are complying with its letter and spirit?

Mr. NORTH. Exactly.

Mr. LIMAN. And that is what you think is a fair reading of that letter?

Mr. NORTH. Well, I have not denied, Counsel, I have admitted that the letter was misleading, evasive, and wrong.

_Id._ at 223.
The Board's report, released February 26, 1987, is extraordinary for having completed within a brief period a comprehensive examination and analysis of a complex set of operations. Using blunt language, the report chronicles the collapse of orderly and accountable government. The secret arms transfers to Iran contradicted several clearly articulated U.S. policies: neutrality in the Iran-Iraq War; the embargo on arms sales to Iran; isolation of Iran and other countries that aid terrorists; and the policy of not paying ransom to hostage-takers. It found that the decisionmaking process was marked by confusion and disorder, with the NSC staff rather than the CIA running the operation and the President apparently "unaware of key elements of the operation."

Although the report is hard-hitting on deficiencies within the executive branch, its authors conclude that corrective remedies could be instituted entirely by the administration, without congressional action. This recommendation reflects a bias toward presidential power. While the Board notes that the Constitution gives both the President and the Congress important roles in national security policy, it stresses that the President is the decisionmaker in the development and execution of national security policy. The Board concludes that the National Security Council system should not be revamped, and that it "is properly the President's creature."

One of the most constructive sections in the Tower Board's report is its criticism of NSC involvement in operations. Once the NSC is allowed to stray from its coordinating function to one of advocacy and implementation problems are inevitable. If the National Security Advisor strongly advocates specific policies and then implements them, the Advisor loses credibility as an "honest broker" between the various departments that have responsibility for national security affairs. Further, since the NSC staff has no statutory responsibility for operations, it cannot conduct them without causing confusion about U.S. policies. The Board there-

34. TOWER BOARD REPORT, supra note 2, pt. I, at 1.
35. Id.
39. Id.
40. The Tower Board developed these ideas more fully in Part II of its report:

* As the "honest broker" of the NSC process, the National Security Advisor must ensure that the different and often conflicting views of the NSC principals are presented fairly to the President. But as an independent advisor to the President, he must provide his own judgment. To the extent that the National Security Advisor becomes a strong advocate for a particular point of view, his role as "honest broker" may be compromised and the President's access to the unedited views of the NSC principals may be impaired.

The Secretaries of State and Defense, and the Director of Central Intelligence, head agencies of government that have specific statutory responsibilities and are subject to
fore recommends that the National Security Advisor “focus on advice and management, not implementation and execution. Implementation is the responsibility and the strength of the departments and agencies. The National Security Advisor and the NSC staff generally do not have the depth of resources for the conduct of operations.”

Nevertheless, the Tower Board could not bring itself to recommend a flat ban on NSC involvement in operations. The best it could do is the following: “As a general matter, the NSC Staff should not engage in the implementation of policy or the conduct of operations.” The Board argues that any statutory proscriptions would be too inflexible: “Terms such as ‘operation’ and ‘implementation’ are difficult to define, and a legislative proscription might preclude some future President from making a very constructive use of the NSC Staff.”

The Tower Report’s reasoning is curious. The terms “operation” and “implementation” are clear enough for a report to the President but not for inclusion in a statute. Evidently the words have sufficient meaning to be used, without recourse to elaborate efforts at definition. Nevertheless, the Board is more comfortable with presidential, not congressional, constraints on the NSC.

Other recommendations by the Tower Board are rather modest in scope: Congress should not require Senate confirmation of the National Security Advisor; the National Security Advisor should chair the senior-level committees of the NSC system; each administration should formulate “precise procedures” for consideration of covert actions; the objectivity of the intelligence assessment process must be maintained; the position of legal advisor to the NSC should be enhanced; Congress should consider replacing the House and Senate Intelligence Committees with a new joint committee with a restricted staff; and the use of private parties or foreign nationals in conducting foreign policy should be

Congressional oversight for the implementation of U.S. national security policy. To the extent that the National Security Advisor assumes operational responsibilities, whether by negotiating with foreign governments or becoming heavily involved in military or intelligence operations, the legitimacy of that role and his authority to perform it may be challenged.

* The more the National Security Advisor becomes an “operator” in implementing policy, the less will he be able objectively to review that implementation—and whether the underlying policy continues to serve the interests of the President and the nation.

The Secretary of State has traditionally been the President’s spokesman on matters of national security and foreign affairs. To the extent that the National Security Advisor speaks publicly on these matters or meets with representatives of foreign governments, the result may be confusion as to what is the President’s policy.

Id., pt. II, at 3.
43. Id.
carefully limited. 44

B. President Reagan’s Directives

To implement the recommendations of the Tower Board, President Reagan issued National Security Decision Directive (NSDD) 266 on March 31, 1987. 45 He endorsed the Board’s recommendation that Congress not overhaul the structure and procedures of the NSC system. 46 However, apparently anticipating that the Board’s weak proscription on NSC involvement in operations might invite statutory action, NSDD 266 states plainly: “the NSC staff itself will not undertake the conduct of covert activities.” 47 In fact, on January 12, 1987, National Security Advisor Frank Carlucci had already barred the NSC from conducting covert operations. 48

The remainder of the NSDD is consistent with the Tower Board report: the National Security Advisor should not be subject to Senate confirmation and Congress should replace the two Intelligence Committees with a joint committee. 49 Moreover, the NSDD upgrades the position of legal advisor in the NSC, 50 and promises “close observation and supervision” of the use of private parties in covert operations. 51

On the key question of notifying Congress of covert operations, NSDD 266 merely states: “all requirements of law concerning covert activities, including those requirements relating to presidential authorization and congressional notification, will be addressed in a timely manner and complied with fully.” 52 NSDD 286 supplements NSDD 266 by offering additional guidelines on covert operations. Congress shall be notified “unless the President otherwise directs in writing pursuant to his constitutional authorities and duties.” 53 Furthermore, in “extraordinary circumstances” the President could delay notification to Congress until after the initiation of a special activity, and could extend the delay every

44. Id., pt. I, at 5-7.
45. President’s Message to Congress Transmitting Directive Implementing Board’s Recommendations, 23 WEEKLY COMP. PRES. DOC. 326-27 (Mar. 31, 1987) [hereinafter President’s Message to Congress].
46. Id. at 326.
49. NSDD 266, supra note 47, at 1.
50. Id. at 5.
51. Id. at 7.
52. Id.
ten days after a reevaluation.⁴

In his message to Congress accompanying NSDD 266, President Reagan acknowledged the need for executive-legislative cooperation in foreign affairs:

The President and the Congress share a significant responsibility for safeguarding and advancing the interests of the United States in the world at large. When our two branches of government are at odds, we weaken ourselves as a force for international peace and freedom; when our two branches work in harmony, there is little our Nation cannot accomplish. Each branch is jealous of its constitutional prerogatives; yet, each must also respect the prerogatives of the other.⁵

Although President Reagan stressed the need for interbranch cooperation, he warned Congress, “I will strongly oppose legislation that would attempt to encroach further on what I regard as the President’s independent constitutional authority in the intelligence field.”⁶ No doubt he had in mind pending bills to require the President to notify Congress, within a specified number of days, of any covert operation.⁷ In light of the complete failure of the executive branch to notify Congress of any of the actions associated with the Iran-Contra affair, the President’s general and open-ended formulation is unacceptable.

C. The Iran-Contra Report

The House and Senate Iran-Contra Committees’ joint report, released in November 1987, stresses that Congress as well as the President has important powers in the areas of foreign policy and national security.⁸ Moreover, it notes that no foreign policy can be successful in the long run unless it has bipartisan congressional support.⁹ The “misrepresentations, half-truths, and concealment” employed by executive officials in the Iran-Contra affair reflected an attitude “based on a view of Congress’ role in foreign policy that is without historical or legal foundation.”¹⁰

The report criticizes the NSC staff for bypassing the regular channels of government and for falsifying intelligence assessments to fit preconceived policies.¹¹ The Committees also reject the claim of some administration officials that the Boland Amendment did not apply to the

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54. Id. at 6.
55. President’s Message to Congress, supra note 45, at 326.
56. Id. at 327.
58. IRAN-CONTRA REPORT, supra note 2, at 19.
59. Id. at 20.
60. Id. at 387.
61. Id. at 18.
NSC staff. They note that such an assertion was never made publicly before the congressional investigation, and dismiss it as a post hoc argument.

The Iran-Contra Committees recommend that NSC members and staff not engage in covert actions. They also recommend legislation requiring the President to report to Congress periodically on the organization, size, function, and procedures of the NSC staff. These reports would list the duties of each NSC staff member, including the National Security Advisor, and would state whether staff members have been detailed from government agencies. The Committees express particular concern about the number and tenure of uniformed military personnel assigned to the NSC.

The report details a number of other recommendations concerning covert operations. The most important is a proposed revision of the National Security Act to require that Congress be notified prior to the commencement of a covert action "except in certain rare instances and in no event later than 48 hours after a Finding is approved." The Committees also recommend legislation requiring that all covert action findings be in writing and personally signed by the President; they rejected suggestions by administration officials that "oral findings" or "mental findings" were sufficient. The report recommends that legislation prohibit retroactive findings, which had been used by President Reagan in an effort to authorize the CIA's involvement in sending arms to Iran. The report states that the legal concept of ratification "is inconsistent with the rationale of Findings, which is to require Presidential approval before any covert action is initiated." Other recommendations would tighten existing controls of findings. The Committees recommend legislation requiring covert action findings for all agencies, regardless of source of funds; identification of specific participants in covert actions; that the Attorney General receive copies of all proposed findings for purposes of legal review; that the House and Senate Intelligence Committees receive copies of all signed written findings; that the obligation to report covert action findings be placed solely on the President; and that each finding

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62. Id. at 399.
63. Id. Although Colonel North claimed he had received an opinion from Professor John Norton Moore of the University of Virginia stating that the Boland Amendment did not apply to the NSC, Professor Moore "denied that he had ever been asked for or given an opinion" on the applicability of Boland. Id.
64. Id. at 425.
65. Id.
66. Id. at 423.
67. Id. McFarlane had suggested that the arms sales to Iran were approved by a "mental finding," and some actions had allegedly been approved orally by the President. Id.
68. Id. at 197.
69. Id.
shall cease to be operative after one year unless the President certifies that the finding is still in the national interest.\footnote{70}

\section*{D. Pending Legislation}

The President's power to engage in covert operations is currently regulated by the Intelligence Oversight Act of 1980.\footnote{71} This Act provides that the Director of Central Intelligence and the head of all other agencies or entities of the United States involved in intelligence activities must keep the Intelligence Committees "fully and currently informed" of all intelligence activities.\footnote{72} If the President determines that it is essential to limit prior notice to meet "extraordinary circumstances affecting vital interests of the United States," the President can limit notice to eight members of Congress: the chair and ranking minority members of the Intelligence Committees, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate.\footnote{73} This so-called "Gang of Eight" was never notified of the Iran-Contra operations. Under the 1980 statute, if notice is not given to Congress, the President must "fully inform" the Intelligence Committees "in a timely fashion" and explain the failure to provide notice.\footnote{74} In the case of Iran-Contra, timely fashion for Congress meant never being informed until the facts appeared ten months later in Lebanese and U.S. newspapers.

The effectiveness of the 1980 statute evidently depends on the President's good faith in notifying Congress. It is equally evident that good faith did not exist in the Reagan administration. This lack of good faith is the impetus behind current efforts to strengthen the 1980 law. The basic thrust of these reforms is to eliminate such phrases as "timely fashion" and adopt the specific requirement that the President notify Congress of a covert operation no later than forty-eight hours after its initiation.

The bills now being considered are H.R. 3822 and S. 1721, both introduced in the first session of the 100th Congress. The bills, as proposed,\footnote{75} provide that each finding shall be in writing, unless immediate action is required and time does not permit preparation of a written finding. In such emergency cases, "a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after its initiation.

\footnotesize{70. \textit{Id.} at 424.\footnote{71. 50 U.S.C. § 413 (1982).\footnote{72. \textit{Id.} § 413(a).\footnote{73. \textit{Id.}\footnote{74. \textit{Id.} § 413(b).\footnote{75. Unless otherwise indicated, all quotations and discussion of H.R. 3822 and S. 1721 refer to the text of the bills as originally introduced.}}}}}
after the decision is made.

The bills also prohibit retroactive findings. Each finding must specify the departments, agencies, or entities authorized “to fund or otherwise participate” in a covert operation, and must state if a “third party” (not an element or contractor of the U.S. government) is involved. Finally, no finding may authorize “any action that would violate any statute of the United States.”

In “extraordinary circumstances affecting vital interests of the United States,” the bills, as introduced, allow the President to limit distribution of a finding to the Gang of Eight. The President must provide a statement of the reasons for such restrictions. When “time is of the essence” and the President determines that national security interests require initiating a covert operation before notifying the Gang of Eight, the bills permit executive initiatives. However, the President must notify the Intelligence Committees or the Gang of Eight of this covert activity “as soon as possible, but in no event later than forty-eight hours” after the special activity has been authorized. The House’s bill requires the President to explain why national security interests required proceeding before notifying Congress.

Both bills rely on the power of the purse to reinforce congressional control: “No funds appropriated for, or otherwise available to, any department, agency, or entity of the United States Government, may be expended, or may be directed to be expended, for any special activity... unless and until a Presidential finding... has been signed or otherwise issued...”

The Reagan administration has voiced constitutional objections to the forty-eight-hour reporting requirement:

This Administration, like prior Administrations, believes it is important to work with Congress in this area. Moreover, the President recently has reaffirmed his commitment to the current statutory scheme of prior notification and has made clear his desire and intention to cooperate with Congress in the area of foreign affairs. While cooperation is

77. H.R. 3822 § 503(a)(2); S. 1721 § 503(a)(2).
78. H.R. 3822 § 503(a)(3); S. 1721 § 503(a)(3).
79. H.R. 3822 § 503(a)(4); S. 1721 § 503(a)(4).
80. H.R. 3822 § 503(a)(5); see S. 1721 § 503(a)(5) (“any action that would be inconsistent with or contrary to any statute”).
81. H.R. 3822 § 503(c)(1); S. 1721 § 503(c).
82. The Senate bill was amended on March 15, 1988, to permit notification of only four members of Congress. See 134 CONG. REC. S2209 (statement of Sen. William Cohen); infra notes 90-92 and accompanying text.
83. H.R. 3822 § 503(c)(1); S. 1721 § 503(c).
84. H.R. 3822 § 503(c)(3); S. 1721 § 503(c).
85. H.R. 3822 § 503(c)(3). The Senate version does not contain a similar provision.
86. H.R. 3822 § 4; S. 1721 § 3.
the rule, the Department [of Justice] believes that there may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this presidential authority is protected by the Constitution, and that by purporting to oblige the President, under any and all circumstances, to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this constitutional prerogative of the President.87

Senator William S. Cohen, Republican from Maine and Vice-Chair of the Intelligence Committee, rejected the administration’s position. To Senator Cohen, the administration’s argument implied that notice to Congress, even to the Gang of Eight, would lighten the risk that the operation would be disclosed and lives imperiled. Senator Cohen stated that “Congress has demonstrated that it can keep secrets at least as well as those in the executive branch and outside the government who are planning and executing covert actions.”88 Furthermore, he rejected the notion that the constitutional responsibilities of the Congress can be so easily overridden by executive branch concerns for security. Covert actions frequently raise serious foreign policy and defense concerns which are every bit as important to Congress in terms of its constitutional responsibilities to enact laws or appropriate funds as they may be to the satisfaction of executive branch responsibilities. These are not areas where the President exercises exclusive constitutional power.89

The Senate passed this bill on March 15, 1988, including the provision for notification within forty-eight hours.90 The bill was modified to permit the President to notify only four legislators: the two party leaders in each house.91 If the administration opposes the notification requirement, Congress can eliminate the contingency fund that presently allows the President to initiate a covert action without prior congressional approval. In the absence of a contingency fund, the President would have to solicit Congress for specific authorization and funding of each covert action.92

The Iran-Contra affair will probably trigger other reforms as well. New restrictions must be placed on the activities of private individuals who decide to take foreign policy and military adventures into their own hands.93 Civilian control of the NSC must be strengthened. Along these

88. Id. (testimony of Senator William Cohen).
89. Id. at 3.
91. See id. at S2209 (statement of Sen. William Cohen).
92. Id. at S2227 (statement of Sen. William Cohen).
93. The NSC staff solicited funds from private parties and foreign countries to aid the Contras
lines, the Iran-Contra Committees recommend limiting how long military officers may be assigned to the NSC staff. The Committees also recommend that the National Security Advisor not be an active military officer. Admiral William J. Crowe, Chairman of the Joint Chiefs of Staff, agreed with this recommendation, and a bill containing this proposal has been introduced by Senator Tom Harkin. Unfortunately, President Reagan ignored these proposals and replaced Frank Carlucci with a military officer, Lt. Col. Colin L. Powell, who had served as Carlucci's deputy.

CONCLUSIONS

Congress is expected to pass legislation to tighten the procedures for presidential findings and to strengthen the role of congressional oversight. In view of testimony from administration officials, it appears likely that President Reagan would veto any legislation that compels notification of covert actions within forty-eight hours. Even if Congress were to override the veto, and it may well have the votes to do that, the results are uncertain. No bill is self-executing, especially in the area of foreign affairs and national security—as the War Powers Resolution of 1973 attests.

Future Presidents may refuse to abide by procedures that strengthen the ability of Congress to oversee covert operations, just as Presidents have not complied fully with the War Powers Resolution. Still, it is important for Congress to express its sense of prerogatives and constitutional duties. Otherwise, executive officials are likely to interpret congressional inaction as evidence of uncertainty or acquiescence in the executive's unilateral assertion of power during the Iran-Contra affair.

Executive domination of foreign policy would not be good for Congress, the country, or even for the executive branch. We know from

and used private parties to conduct negotiations with Iran. IRAN-CONTRA REPORT, supra note 2, at 15-16. As the Report notes, solicitation of private funds violates constitutional principles by circumventing Congress' power of the purse. Id. Moreover, use of private parties instead of trained professionals to conduct covert operations can jeopardize U.S. foreign policy objectives. Id. at 16.

In light of these dangers, Representative Mel Levine introduced legislation to prohibit private assistance for military or paramilitary operations in a foreign country if Congress has prohibited the use of covert assistance for such operations. H.R. 2522, 100th Cong., 1st Sess. (1987), 133 CONG. REC. E2987-88 (daily ed. July 22, 1987) (statement of Rep. Mel Levine).

94. IRAN-CONTRA REPORT, supra note 2, at 426 (1987).
95. Id.
97. Id.
Watergate and Iran-Contra that executive officials have great capacity for self-inflicted injuries. Yet these lessons are rarely learned, or at least quickly forgotten. The loyalty of political appointees to the President gives them little stake in the long-term operations of government. They may be quick to bridle at the frustrations of orderly procedures. Shortcuts seem attractive; officials can circumvent laws with clever interpretations. Political appointees may be willing to initiate actions that come at great cost to Congress, the President, and the political system. They may be so eager for results, and so ignorant of constitutional processes, that they seek immediate results regardless of long-term damage. By the time the damage materializes, they are likely to be back in the private sector, if not in prison.

The task of cleaning up the debris is left to careerists and professionals in Congress and the executive branch. They have done it before and can do it again, but the political system sustains permanent damage. Inevitably, there is less good faith, trust, and confidence between the branches—qualities that are essential in a government of divided powers, general grants of constitutional authority, and statutes that require judgment and discretion.