

# THE RULE OF LAW AND "PERFECT SECURITY"\*

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Among the many issues generated by the Iran-Contra Affair, one in particular has produced concrete legislation. It flows directly from the Select Committee's finding that the Reagan administration, in pursuing its policy objectives, ignored existing key statutes governing covert action.<sup>1</sup> By the committee's account, the Administration in some decisive respects followed a "lawless process."<sup>2</sup> Congress' response has been to write new legislation enlarging its oversight role.<sup>3</sup>

The question is whether this change is warranted. The answer is not obvious. The letter of the law then governing covert action was not nearly as clear as has been claimed. Ambiguities exist, particularly with regard to the Boland amendment and the basic Intelligence Oversight Act of 1980.<sup>4</sup> If we are to ascertain whether these ambiguities were used in a manner consonant with "the law," we need to understand more about what "the law" requires.

The first point is: "the law" is not simply the sum of Acts passed by the Congress. As every schoolboy knows, it includes those statutes set forth by Congress and the basic underlying law, the Constitution. It does little good to speak of the "rule of law" unless one appreciates the fact that the Presidency itself is an office established by the Constitution, with powers and duties that bind the Executive prior to the passage of any specific piece of legislation.

The rub, of course, is that no agreement exists as to what exactly the framers intended while establishing that office. The current debate about covert action reporting procedures is a debate precisely because there is

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\* This paper represents the personal views of the author and does not necessarily represent those of any institution or agency with which he is or has been associated.

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1. REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 17, 411, 414-17 (1987) [hereinafter IRAN-CONTRA REPORT].

2. *Id.* at 411. In this connection, it should be noted that the penultimate chapter of the majority's report was entitled "Rule of Law." *Id.*

3. See generally SENATE SELECT COMM. ON INTELLIGENCE, INTELLIGENCE OVERSIGHT ACT OF 1988, S. REP. NO. 276, 100th Cong., 2d Sess. (1988) [hereinafter SELECT COMM. REPORT]; Report to accompany S. 1721.

4. See IRAN-CONTRA REPORT, *supra* note 1, at 489-500, 539-47.

no consensus about the extent and nature of the President's power in the area of national security. Until there is more clarity over the constitutionally correct roles for each of the branches, it is difficult to see how judgments regarding the effectiveness of the present system of intelligence oversight may be reached—if what is meant by “effectiveness” is “doing one's job” as intended by the Constitution.

One model for congressional-executive relations that has had some currency views the Constitution as having established supremacy in the first branch.<sup>5</sup> Congress was created to set the nation's foreign policy in place, leaving the President with the task of strictly executing the policy. The President's mandate was to be no more than what Congress stipulated. Under this paradigm, Presidential discretion and initiative become highly suspect and are more than likely illegitimate.

This Whig model is open to a number of challenges. For example, the model cannot explain the care the framers exercised to ensure that the President did not come under Congress' thumb by its control of his powers, election, salary and tenure.<sup>6</sup> He was to be as independent of Congress as was practically possible. The idea that they “considered [the Presidency] ‘as nothing more than an institution for carrying the will of the Legislature into effect’ ” has no historical foundation.<sup>7</sup> Indeed, to the contrary, when this proposition was raised at the Constitutional Convention, it was decisively rejected.<sup>8</sup>

A more widely accepted view of how the American system was meant to operate is captured by Corwin's famous line that the constitutional order is “an invitation to struggle for the privilege of directing American foreign policy.”<sup>9</sup> The underlying theory is that the framers' chief objective was to frustrate a dangerous accumulation of power in the hands of any one branch.<sup>10</sup> In *The Federalist* No. 51's famous formula, ambition countering ambition, precludes autocracy, even at the expense of effective government.<sup>11</sup>

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5. See L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 32-35 (1972); Henkin, *Foreign Affairs and the Constitution*, FOREIGN AFF., Winter 1987-88, at 290; Berger, *Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

6. See C. THACH, JR., THE CREATION OF THE PRESIDENCY: 1775-1789 84-90, 105-39 (1922) [hereinafter CREATION OF THE PRESIDENCY].

7. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 59 (ed. 1974) (quoting a proposition put forward by Roger Sherman in the Constitutional Convention on June 1, 1787).

8. 1 THE RECORD OF THE FEDERAL CONSTITUTION OF 1787 65 (M. Farrand ed. 1966).

9. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 171 (1957).

10. See A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 9 (1973); W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54-57 (ed. 1961); *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

11. THE FEDERALIST No. 51 (A. Hamilton) [hereinafter FEDERALIST 51].

Again, history points us in another direction. The Articles of Confederation were deemed a failure in part for want of an energetic and independent Executive.<sup>12</sup> Among the founding generation, there was a renewed appreciation of the need for an Executive not only to check legislative encroachments but also to carry out those governmental functions that a single, unitary and independent office might perform.<sup>13</sup> By the time of the Convention, there was a clear consensus among the Constitution's principal architects that the national government required an Executive who possessed a capacity for decision, dispatch and "perfect secrecy."<sup>14</sup> As for the idea that ambition would check ambition, it is important to remember that *The Federalist's* claim was part of a larger argument that the system of checks and balances was a necessary "expedient" for keeping the three branches, in fact, functionally separate.<sup>15</sup>

Understanding the doctrine of separation of powers as the exercise of different functions of government by distinct branches, appropriately configured, has led some observers to advance a third model of the correct constitutional relationship between the Congress and the President. Partisans of this paradigm argue that the Chief Executive should retain plenipotentiary control over foreign policy.<sup>16</sup> They typically cite Justice Sutherland's opinion in *United States v. Curtiss-Wright* noting that, in "the field of international relations" the President retains "plenary and exclusive power" as the nation's "sole organ" in these matters.<sup>17</sup> Congressional forays into foreign affairs under this scheme are dubious constitutional excursions.

The "sole organ" theory, however, typically understates the powers delegated to Congress to influence foreign affairs. Congress does have significant prerogatives under the Constitution, such as raising and supporting armies, providing and maintaining a navy, regulating foreign commerce, that give it no small say in what tools may be provided for

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12. Under the Articles of Confederation, Congress retained both executive and legislative duties. According to John Jay, Secretary of Foreign Affairs,

Congress is unequal to the first . . . but very fit for the second . . . and so much time is spent in deliberation that the season for action often passes by before they decide on what should be done; nor is there much more secrecy than expedition in their measures. These inconveniences arise not from personal disqualifications but from the nature and construction of government.

3 J. JAY, CORRESPONDENCE AND PUBLIC PAPERS 223 (J. Johnston ed. 1890).

13. See CREATION OF THE PRESIDENCY, *supra* note 6, at 74; Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511-36 (1925).

14. See Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 113-31 (1971). The expression "perfect secrecy" is found in THE FEDERALIST No. 64 (J. Jay).

15. FEDERALIST 51, *supra* note 11; see also THE FEDERALIST No. 48 (J. Madison).

16. See McDougal & Lans, *Treaties and Congressional Executive or Presidential Agreement: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 534 (1945).

17. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

executing the national security policies of the United States. While the argument of *The Federalist* No. 51 regarding the American system of checks and balances must be considered in its proper context, nevertheless, a system of checks and balances does exist.

The constitutionally correct relationship between the Congress and the President in these matters lies somewhere between the second and third models outlined above. The Constitution can be seen, and reasonably so at times, as an invitation to struggle. For example, there is little controversy regarding Congress' implied right to demand information from the executive branch in order to accomplish its own legislative responsibilities. On the other hand, the President retains the privilege of withholding information as he deems necessary in order to fulfill his own constitutionally prescribed duties. Both powers are equally legitimate. There is no simple formula for resolving this tension. The tension flows naturally from a constitutional order designed to sustain, to the degree possible, both the deliberate capacity of its Legislature and the discretionary tools of its Chief Executive.<sup>18</sup>

But it is equally important to note that the tension between the two branches does not result solely because it is in some way inherently desirable. Rather, it is a product of the inevitable fact that a government requires unique and varied capacities in order to fulfill its varied responsibilities.

It is also important to note that such tension is far from normal. If history is a guide at all, rarely do the two branches decide to invoke their powers and dramatically faceoff. Admittedly, each branch has the means to influence policy decisions. But this normally happens indirectly, involving powers unique to each branch and consonant with its respective institutional capacities. The American system of separation of powers is not principally one of "separate institutions sharing powers," understood as concurrent authorities.<sup>19</sup> Separation of powers is more adequately described as a "division of labor."<sup>20</sup> Applying that reasoning, it is no surprise that Secretary of State Thomas Jefferson could say the following about foreign affairs in general and a "shared" power in particular: "The transaction of business with foreign nations is Executive altogether. . . . *Exceptions* are to be construed narrowly."<sup>21</sup>

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18. See Schmitt, *Executive Privilege: Presidential Power to Withhold Information from Congress*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 154-94 (J. Bessette & J. Tulis eds. 1981) [hereinafter PRESIDENCY IN THE CONSTITUTIONAL ORDER].

19. See R. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 101 (1976); Bestor, *Separation of Powers in the Domain of Foreign Affairs*, 5 SETON HALL L. REV. 527, 533 (1974).

20. See Schultz, *The Separation of Powers and Foreign Affairs*, in SEPARATION OF POWERS—DOES IT STILL WORK? 121 (R. Goldwin & A. Kaufman eds. 1986).

21. 5 T. JEFFERSON, WRITINGS 161 (Ford ed. 1895).

In fact, that is precisely how the Constitution was understood by Washington's administration and the First Congress to define the relationship between the Congress and the President. While no one denied Congress' power to shape and moderate the national security policy of the young country, the clear premise of the actions taken by Washington and the legislation passed by Congress was that in this area the Presidency was first among equals.<sup>22</sup>

Given this view of the Presidency in the constitutional order, it is not nearly so clear, as some would argue, that the Administration violated either the Intelligence Oversight Act or the Boland amendment. To the extent that these laws can be read to leave room for Presidential assertions of power, the resulting exercise of that discretion should not simply be described as having "subverted" the governmental process. After all, it is the Constitution that created an office whose unique institutional characteristics allow for, and perhaps encourage, Presidential initiative.<sup>23</sup> While most people can agree that many elements of the Iran-Contra Affair were questionable as a matter of policy, it is another matter to depict the power exercised to implement that policy as overturning the law.

Still believing that to be the case, Senate and House Intelligence Committee members have sponsored legislation that tightens oversight procedures for covert action. In particular, the Senate has passed, and the House might pass, a bill that requires the President to notify Congress of all covert action findings within two days of their commencement: no exceptions.

The proposed legislation should be compared with the present Oversight Act, which, while not perfect, nevertheless recognizes that the President retains certain constitutional prerogatives. While the Oversight Act effectively makes a President's decision to withhold information from Congress a politically risky course, it nevertheless does not absolutely foreclose his doing so.

Supporters for the new procedure argue that if the executive branch wants to be free to undertake covert programs by drawing on a contingency fund made available by the Congress, then it is Congress' right and duty to know how that money is to be used.<sup>24</sup> If the President is not willing to accept that condition, then Congress might legitimately eliminate the fund altogether and mandate project-by-project

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22. See A. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 127-29 (1976).

23. See Bessette & Tulis, *The Constitution, Politics and the Presidency*, in *PRESIDENCY IN THE CONSTITUTIONAL ORDER*, *supra* note 18, at 16-25.

24. SELECT COMM. REPORT, *supra* note 3, at 20-21.

appropriations.<sup>25</sup>

In essence, Congress is telling the President that the money is his, but there are strings attached. However, Congress' power of the purse is not unlimited. The Hill cannot constitutionally impose just any condition at all on the use of public funds. In particular, it cannot make the money conditional in a manner that undermines the constitutional powers or duties imposed on another branch.<sup>26</sup> If the Constitution's architects expected the President to carry out legitimate executive tasks, whether diplomatic or intelligence-related, with "perfect secrecy" when required, then Congress' decision to totally abolish the President's discretion is unconstitutional.

By denying the President the power to withhold knowledge of a special activity from Congress, the bill's sponsors wanted "to insure that decisions to undertake covert actions are not left solely to a handful of single-minded executive officials."<sup>27</sup> But this is for all intents and purposes a demand that Congress participate in executive branch determinations. As the committee report to the legislation states, what is sought is an "effective voice" in the process.<sup>28</sup> Yet, in granting Congress this say, what is impaired as a practical matter is the unity of the executive office. And it is precisely this unity from which the founders expected the government to reap the functional benefits not only of secrecy, but of decision, dispatch and energy.

As a matter of common sense, there is a lot to be said for consulting with the members of the oversight committees. However, what is politically prudent is one thing, what is constitutionally required is another.

A commitment to the rule of law is to be commended. But that commitment is far from salutary when informed by a rhetoric that portrays secrecy, in particular, and the exercise of executive discretion, in general, as standing in opposition to the norms of that rule as defined by the Constitution. What is lost is the historical perspective that the framers consciously adopted a system of separated powers to retain for the government the advantages of *both* deliberation and energy, openness and secrecy. They wanted *both* safe and effective government.

They were not, of course, naive. They recognized the difficulty in creating such a regime. They were fully aware that secrecy might be used to cover malfeasance. On the other hand, they were clear-minded

25. *Id.*

26. See IRAN-CONTRA REPORT, *supra* note 1, at 476.

27. SELECT COMM. REPORT, *supra* note 3, at 22. "The Constitution provides for the *shared* exercise of governmental powers in order to prevent arbitrary or ill-considered actions that harm the national interest." *Id.* (emphasis added).

28. *Id.* at 24.

about its benefits. Having only recently pounded out the most magnificent of documents, the Constitution, behind closed doors, they knew first-hand the positive advantages that might accrue to a government which maintained a capacity for "perfect secrecy."

Although it may have been obvious then, the logic of secrecy in the service of popular government has been undermined, over time, by the ethic of popular government itself. As the American system of government has evolved to become more democratic, the argument that the President may withhold information from the people, let alone their representatives, has become increasingly difficult to sustain politically. On the whole, secrecy is seen as a vice, openness as a virtue. Rather than the framers' trilogy of "secrecy, decision and dispatch," one finds the pejorative triplet of "secrecy, deception and disdain for the law."<sup>29</sup> At best, secrecy is something to be tolerated, a necessary evil that must be minimized and, now, legislatively guarded against.

Unfortunately, this sentiment cannot be afforded. Its growth has not been matched by any slack in the demands placed upon the country with regard to foreign affairs. In some key respects, the relative decline of the power of the United States, combined with little diminution in its obligations around the world, suggest an even greater need for relying on the unique capacities of the Oval Office.

It has been a century and a half since Tocqueville commented that the difference between the executive power residing with the American President and the King of France had less to do with their respective formal authorities than France's being a major player in world events, while the United States was not.<sup>30</sup> As America's role in the world increased, the relative importance of the Presidency would legitimately expand as well.<sup>31</sup> It is no small irony of history that France's chief executive still retains that relative institutional advantage. He retains it despite the obvious reversal of the fortunes of the two nations and the Fifth French Republic's architects' extensive reliance on the American Presidency as a model for establishing their own executive. Something is clearly amiss.

What is amiss is that for more than a decade Congress—with some exceptions—has chipped away at the discretionary power available to the President to conduct foreign affairs.<sup>32</sup> This trend is reinforced by the

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29. See IRAN-CONTRA REPORT, *supra* note 1, at 11.

30. DEMOCRACY IN AMERICA 125-26 (Mayer ed. 1945).

31. See Schmitt, *Separation of Powers*, 27 AM. J. JURIS. 114, 135-38 (1982); Schmitt, *Jefferson and Executive Power: Revision and the "Revolution of 1800,"* 17 PUBLIUS: THE J. OF FEDERALISM 23 n.59 (1987).

32. See Schick, *Politics Through Law: Congressional Limitations on Executive Discretion*, in BOTH ENDS OF THE AVENUE 154-84 (A. King ed. 1983).

new, more stringent oversight procedures proposed in the wake of the Iran-Contra Affair. It is a trend that, at times, seems inevitable. Nevertheless, it is a trend not mandated by the Constitution, and certainly not justified by rhetoric about the rule of law.