

AMERICAN CONSTITUTIONALISM  
VOLUME I: STRUCTURES OF GOVERNMENT  
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

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**Final Report of the Independent Counsel for Iran/Contra Matters (1993)**

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*The 1980 election produced a conservative White House under President Ronald Reagan and a Republican-controlled Senate (which included several newly elected ideological allies of Reagan) but left the House of Representatives in the hands of the Democratic Party. Especially after the midterm election of 1982, which saw Democratic gains in Congress, the president and Congress were frequently at loggerheads. Among the sources of tension were the administration's policies in Central America, particularly its support for the insurgent group known as the Contras that battled the Communist government of Nicaragua. Congress frequently refused to supply funds to support the rebel group, and three times Massachusetts Democratic Representative Edward Boland managed to include a rider to appropriations bills prohibiting the expenditure of federal funds to aid the Contras. Administration officials led an extended campaign to raise both public and private funds for the Contras.*

*In 1985, National Security Advisor Robert McFarlane initiated an effort to covertly sell anti-tank weapons to Iran, in an effort to aid Iran in its war with Iraq and strengthen a moderate faction within the Iranian government. Among other goals, the administration hoped that winning influence within the Iranian government would help free American hostages held by Iranian-allied groups in Lebanon. When McFarlane was replaced by Admiral John Poindexter at the end of that year, Oliver North (a military aide to the National Security Council) proposed redirecting part of the revenue from the arms sales to support the Contras. In late 1986, an Iranian security official leaked the news of these sales and an arms smuggler captured by the Nicaraguan government exposed ongoing Central Intelligence Agency support for the Contras. As administration officials destroyed evidence of these transactions, the affair was investigated first by a presidential commission led by former Texas senator John Tower, then by Congress and then by independent counsel Lawrence Walsh. As part of its investigation, Congress granted immunity to several major players in exchange for their testimony, and key Democratic congressmen quickly resolved not to pursue impeachment inquiries against the president. Walsh won a number of indictments and convictions but thought that the immunity deals undercut his prosecution efforts, and some of those convicted later received presidential pardons from George H. W. Bush.*

*What options were available to executive branch officials for aiding the Contras after the passage of the Boland Amendment? Was it appropriate for Congress to limit covert operations through the appropriations process? Are there any circumstances in which it would be appropriate for a president to ignore such a statutory rider? Could Congress specify that no federal funds could be spent on drone strikes in Pakistan? What is the appropriate role for Congress in investigating executive actions? Should Congress defer to prosecutors when dual investigations are under way? Is Congress obliged to pursue an impeachment inquiry when plausible charges are raised? What factors might be relevant in determining whether to impeach a president?*

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The underlying facts of Iran/contra are that, regardless of criminality, President Reagan, the secretary of state, the secretary of defense, and the director of central intelligence and their necessary assistants committed themselves, however reluctantly, to two programs contrary to congressional policy and contrary to national policy. They skirted the law, some of them broke the law, and almost all of them tried to cover up the President's willful activities.

What protection do the people of the United States have against such a concerted action by such powerful officers? The Constitution provides for congressional oversight and congressional control of appropriations, but if false information is given to Congress, these checks and balances are of lessened value. Further, in the give and take of the political community, congressional oversight is often overtaken and subordinated by the need to keep Government functioning, by the need to anticipate the future, and by the ever-present requirement of maintaining consensus among the elected officials who are the Government.

The disrespect for Congress by a popular and powerful President and his appointees was obscured when Congress accepted the tendered concept of a runaway conspiracy of subordinate officers and avoided the unpleasant confrontation with a powerful President and his Cabinet. In haste to display and conclude its investigation of this unwelcome issue, Congress destroyed the most effective lines of inquiry by giving immunity to Oliver L. North and John M. Poindexter so that they could exculpate and eliminate the need for the testimony of President Reagan and Vice President Bush.

Immunity is ordinarily given by a prosecutor to a witness who will incriminate someone more important than himself. Congress gave immunity to North and Poindexter, who incriminated only themselves and who largely exculpated those responsible for the initiation, supervision and support of their activities. This delayed and infinitely complicated the effort to prosecute North and Poindexter, and it largely destroyed the likelihood that their prompt conviction and appropriate sentence would induce meaningful cooperation.

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The investigation into Iran/contra nevertheless demonstrates that the rule of law upon which our democratic system of government depends can be applied to the highest officials even when they are operating in the secret areas of diplomacy and national security.

Despite extraordinary difficulties imposed by the destruction and withholding of records, the need to protect classified information, and the congressional grants of immunity to some of the principals involved, Independent Counsel was able to bring criminal charges against nine government officers and five private citizens involved in illegal activities growing out of the Iran/contra affair.

More importantly, the investigation and the prosecutions arising out of it have provided a much more accurate picture of how two secret Administration policies -- keeping the contras alive "body and soul" during the Boland cut-off period and seeking the release of Americans held hostage by selling arms to Iran -- veered off into criminality.

Evidence obtained by Independent Counsel establishes that the Iran/contra affair was not an aberrational scheme carried out by a "cabal of zealots" on the National Security Council staff, as the congressional Select Committees concluded in their majority report. Instead, it was the product of two foreign policy directives by President Reagan which skirted the law and which were executed by the NSC staff with the knowledge and support of high officials in the CIA, State and Defense departments, and to a lesser extent, officials in other agencies.

Independent Counsel found no evidence of dissent among his Cabinet officers from the President's determination to support the contras after federal law banned the use of appropriated funds for that purpose in the Boland Amendment in October 1984. Even the two Cabinet officers who opposed the sale of arms to Iran on the grounds that it was illegal and bad policy -- Defense Secretary Caspar W. Weinberger and Secretary of State George P. Shultz -- either cooperated with the decision once made, as in the case of Weinberger, or stood aloof from it while being kept informed of its progress, as was the case of Shultz.

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Fundamentally, the Iran/contra affair was the first known criminal assault on the post-Watergate rules governing the activities of national security officials. Reagan Administration officials rendered these rules ineffective by creating private operations, supported with privately generated funds that successfully evaded executive and legislative oversight and control. Congress was defrauded. Its

appropriations restrictions having been circumvented, Congress was led to believe that the Administration was following the law. Numerous congressional inquiries were thwarted through false testimony and the destruction and concealment of government records.

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Given the enormous autonomous power of both the Legislative and Executive branches in the modern state, the rightly celebrated constitutional checks and balances are inadequate, alone, to preserve the rule of law upon which our democracy depends.

As Watergate demonstrated, the checks and balances reach their limits in the case of criminal wrongdoing by Executive branch officials. The combination of an aggressive press, simple crimes, the White House tapes, and principled defiance by Department of Justice-appointed counsel all combined to bring Watergate to its conclusion without an independent counsel statute. It was apparent then, however, as it should be now in light of Iran/contra, that the competing roles of the attorney general, as a member of the Cabinet and presidential adviser on the one hand and chief law enforcement officer on the other, create an irreconcilable conflict of interest.

As Iran/contra demonstrated, congressional oversight alone cannot make up for deficiencies that result when an attorney general abandons that law-enforcement role in cases of Executive branch wrongdoing. Well before Attorney General Meese sought an independent counsel in December 1986, he had already become, in effect, the President's defense lawyer, to the exclusion of his responsibilities as the nation's top law enforcement officer. By that time, crucial documents had already been destroyed and false testimony given.

Congress, with all the investigatory powers it wields in the oversight process, was not able to uncover many of these documents or disprove much of that false testimony. That inability is structural, and does not result from ill will, impatience, or character flaw on the part of any legislator. With good reason, Congress's interest in investigating Executive branch wrongdoing extends no farther than remedying perceived imbalances in its relations with the Executive branch. Except in the case of impeachment, Congress's interest does not, and should not, extend to the law-enforcement goals of deterrence, retribution and punishment.

In normal circumstances, these law-enforcement goals are the province of the Justice Department, under the direction of the attorney general. As the chief law enforcement officer of the United States, the attorney general represents the people of the United States -- not the President, the Cabinet or any political party. When the attorney general cannot so represent the people, the rule of law requires that another, independent institution assume that responsibility. That is the historic role of the independent counsel.

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The Iran/contra investigation will not end the kind of abuse of power that it addressed any more than the Watergate investigation did. The criminality in both affairs did not arise primarily out of ordinary venality or greed, although some of those charged were driven by both. Instead, the crimes committed in Iran/contra were motivated by the desire of persons in high office to pursue controversial policies and goals even when the pursuit of those policies and goals was inhibited or restricted by executive orders, statutes or the constitutional system of checks and balances.

The tone in Iran/contra was set by President Reagan. He directed that the contras be supported, despite a ban on contra aid imposed on him by Congress. And he was willing to trade arms to Iran for the release of Americans held hostage in the Middle East, even if doing so was contrary to the nation's stated policy and possibly in violation of the law.

The lesson of Iran/contra is that if our system of government is to function properly, the branches of government must deal with one another honestly and cooperatively. When disputes arise between the Executive and Legislative branches, as they surely will, the laws that emerge from such disputes must be obeyed. When a President, even with good motive and intent, chooses to skirt the laws or to circumvent them, it is incumbent upon his subordinates to resist, not join in. Their oath and fealty are to the Constitution and the rule of law, not to the man temporarily occupying the Oval Office. Congress has the duty and the power under our system of checks and balances to ensure that the President and his Cabinet officers are faithful to their oaths.