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ORIGINAL ARTICLE

"Above the Written Law": Iran-Contra and the Mirage of the Rule of Law

Alan McPherson

Department of History, Temple University, Philadelphia, PA, USA
Email: alan.mcpherson@temple.edu

Abstract

Why have scandalous sprees of lawbreaking by U.S. government officials proven so seductive yet so difficult to prosecute? This article takes the Iran-Contra scandal of the Reagan–Bush era as an instructive case study and red flag in the attitudinal erosion of the belief in the rule of law among American conservatives. Before the scandal broke, officials and legal counsels willfully mis-interpreted a clear prohibition to fund counter-revolutionaries and fabricated a post-facto presidential permission in order to sell weapons to Iran without congressional oversight. Congress's assumption that government officials would obey its statutes resulted in neither wrongdoing being punishable by criminal sanctions. Conservatives therefore argued that ends justified neglecting certain laws while also denying they had broken any laws. Prosecutors found themselves compelled to prosecute Iran-Contra's defendants over more prosaic crimes such as lying and stealing rather than more abstract and damaging ones. President George H. W. Bush's pardon of Iran-Contra defendants contributed to an impunity that further eroded the American rule of law to this day.

In June 1987, when Iran-Contra congressional investigators asked Lieutenant Colonel Oliver North's secretary, Fawn Hall, whether she grasped that altering classified materials was a "violation of the responsibility" of government officials, her answer was instructive: "I felt uneasy but … I believed in Colonel North and there was a very solid and very valid reason he must have been doing this and sometimes you have to go above the written law."[1] Hall tried to walk back her downgrading of "the written law," but it was clear that she had articulated a belief shared by many of the scandal's conspirators: when the ends seemed to justify the means, officials could disregard statutes.

[1] *Testimony of Elliott Abrams, Albert Hakim, David M. Lewis, Bretton G. Sciaroni, and Fawn Hall: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: June 2, 3, 4, 5, 8, and 9, 1987*, 100th Congress, 1st Session, vol. 100-5 (Washington, D.C.: USGPO, 1988), 552.

By late 1992, the Office of Independent Counsel (OIC) headed by Lawrence Walsh had investigated dozens of potential defendants yet filed only fourteen indictments in total.[2] To be sure, juries had acquitted no one and instead convicted defendants in eleven cases—a high rate of success for Walsh. (One other indictment was dismissed because the Justice Department would not release classified documents; the other two awaited trial.) But only one spent any time in prison. Such failure laid bare a second dangerous American belief about the rule of law—that statutes required no enforcement mechanisms because government officials should obey them out of patriotism.

Such fraught attitudes toward the rule of law—the first held mostly by conservatives and the second, mostly by liberals—help explain why scandalous sprees of lawbreaking by government officials such as Iran-Contra have proved so seductive. Iran-Contra defendants—mostly part of a Republican administration—often regarded statutes as loose guidelines rather than strict regulations. This was partly because the very brittleness of the rule of law had created legislation that carried no criminal penalties or other kinds of enforcement. Those making laws—in this instance, largely Democrats—had naively expected those handling government secrets and resources to behave irreproachably even with next to no legal cost for failing to do so. The scandal and its aftermath demonstrated—and furthered—the erosion of the rule of law in the United States.

Re-examining Iran-Contra through the lens of the rule of law helps to clarify the stakes of the scandal and its relevance to the decades that followed. To be sure, journalists and politicians at the time, and scholars since, noted how the Ronald Reagan administration violated countless statutes. Yet they tended to utter platitudes such as "no man is above the law" or include lawbreaking in lengthy enumerations of Iran-Contra sins without analysis or elaboration. They failed to see the scandal's disregard for the rule of law as part of a larger disrespect for democratic norms.[3] When they did address norms, they tended to focus on one admittedly central to the scandal—the separation of powers,

[2] Among those investigated but not charged were Vice President George H. W. Bush; Attorney General Ed Meese; White House Chief of Staff Donald Regan; U.S. Ambassador to Costa Rica Lewis Tambs; Assistant Secretary of Defense for International Security Affairs Richard Armitage; CIA Deputy Director Robert Gates; Colin Powell, Weinberger's senior military assistant; Donald Gregg, national security adviser to Bush; an anonymous senior CIA field officer in Central America; James Adkins, chief of a CIA facility in Central America; Army Colonel James Steele, the military group commander at the U.S. embassy in El Salvador; Fawn Hall; Ambassador to El Salvador Edwin Corr; William Zucker, the Enterprise's Swiss financial manager; and various officers and employees of the National Endowment for the Preservation of Liberty. See Lawrence E. Walsh, *Iran-Contra: The Final Report* (New York: Times Books, 1994).

[3] Jonathan Marshall, Peter Dale Scott and Jane Hunter, *The Iran Contra Connection: Secret Teams and Covert Operations in the Reagan Era* (Boston, MA: South End Press, 1987); Jane Mayer and Doyle McManus, *Landslide: The Unmaking of the President, 1984–1988* (Boston, MA: Houghton Mifflin Company, 1988); Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven, CT: Yale University Press, 1990); Theodore Draper, *A Very Thin Line: The Iran-Contra Affairs* (New York: Hill and Wang, 1991); Ann Wroe, *Lives, Lies and the Iran-Contra Affair* (London: I. B. Tauris & Co Ltd, 1992); and Michael Lynch and David Bogen, *The Spectacle of History: Speech, Text, and Memory at the Iran-Contra Hearings* (Durham, NC: Duke University Press, 1996).

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violated by resisting congressional oversight of covert operations—and relegate the rule of law to secondary status.[4]

Contempt for Congress's legislation ipso facto meant contempt for the rule of law, but few scholars have looked either at attitudes toward Iran-Contra law that may have helped cause the scandal or at the impact of the scandal on those attitudes. Chester Newland does include Iran-Contra in a series of scandals—the Bay of Pigs, Vietnam, Watergate—that have "shaken" public trust in American leaders, but his evidence on Iran-Contra is limited and his analysis is structural rather than constructivist or ideological.[5] Edwin Timbers presents a similar structural analysis, laying out the numerous laws violated during Iran-Contra and explaining "where the system malfunctioned," suggesting that the solution lay in institutional change.[6] Other scholars studying Iran-Contra and the law mostly observe what statutes were endangered or in need of modification to prevent the scandal's abuses.[7] One problem with a

[4] Malcolm Byrne, *Iran-Contra: Reagan's Scandal and the Unchecked Abuse of Presidential Power* (Lawrence: University of Kansas Press, 2014).

[5] Chester A. Newland, "Faithful Execution of the Law and Empowering Public Confidence," *Presidential Studies Quarterly* 21, no. 4 (Fall 1991): 673.

[6] Edwin Timbers, "Legal and Institutional Aspects of the Iran-Contra Affair,"*Presidential Studies Quarterly* 20, no. 1 (Winter 1990): 36.

[7] See, for instance, Saul B. Shapiro, "Citizen Trust and Government Cover-Up: Refining the Doctrine of Fraudulent Concealment," *Yale Law Journal* 95, no. 7 (June 1986): 1477–99; Morris J. Blachman and Kenneth Sharp, "De-Democratising American Foreign Policy: Dismantling the Post-Vietnam Formula," *Third World Quarterly* 8, no. 4 (October 1986): 1271–308; James M. McCormick and Steven S. Smith, "The Iran Arms Sale and the Intelligence Oversight Act of 1980," *PS* 20, no. 1 (Winter 1987): 29–37; Robert F. Turner, "The Constitution and the Iran-Contra Affair: Was Congress the Real Lawbreaker?" *Houston Journal of International Law* 11 (1988): 83–127; Jules Lobel, "Emergency Power and the Decline of Liberalism," *The Yale Law Journal* 98, no. 7 (May 1989): 1385–433; Marshall Silverberg, "Separation of Powers and Control of the CIA's Covert Operations," *Texas Law Review* 68, no. 3 (February 1990): 575–622; William Shendow, "An Analysis of Foreign Affairs Powers: A Perspective for the Public Administrator on the Iran-Contra Affair," *Public Administration Quarterly* 15, no. 2 (Summer 1991): 171–87; Sandra Jordan, "Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice after Iran-Contra," *Columbia Law Review* 91, no. 7 (November 1991): 1651–98; John Canham-Clyne, "Business as Usual: Iran-Contra and the National Security State," *World Policy Journal* 9, no. 4 (Fall–Winter 1992): 617–37; Rob S. Ghio, "The Iran-Contra Prosecutions and the Failure of Use Immunity," *Stanford Law Review* 45, no. 1 (November 1992): 229–61; Brian C. Kalt, "Pardon Me? The Constitutional Case Against Presidential Self-Pardons," *Yale Law Journal* 106, no. 3 (December 1996): 779–809; Mark J. Rozell, "Executive Privilege in the Reagan Administration: Diluting a Constitutional Doctrine," *Presidential Studies Quarterly* 27, no. 4 (Fall 1997): 760–72; Stephen G. Dormer, "The Not-So Independent Counsel: How Congressional Investigations Undermine Accountability Under the Independent Counsel Act," *Georgetown Law Journal* 86, no. 6 (July 1998): 2392–419; Herbert J. Miller, Jr. and John P. Elwood, "The Independent Counsel Statute: An Idea Whose Time Has Passed," *Law and Contemporary Problems* 62, no. 1 (Winter 1999): 111–29; Loch K. Johnson, "The Contemporary Presidency: Presidents, Lawmakers, and Spies: Intelligence Accountability in the United States," *Presidential Studies Quarterly* 34, no. 4 (December 2004): 828–37; Laura A. Dickinson, "Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law," *William and Mary Law Review* 47, no. 135 (2005): 135–237; Stuart P. Green, "Uncovering the Cover-Up Crimes," *American Criminal Law Review* 42, no. 1 (Winter 2005): 9–44; Philip J. Meitl, "The Perjury Paradox: The Amazing Under-Enforcement of

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structural analysis is that it assumes that all sides in the scandal shared beliefs—in this instance, that all laws should be obeyed—and that, therefore, all that was needed was a systemic fix. However, an examination of words and actions during Iran-Contra's scheming and prosecution reveals Democrats to be overly trusting of Americans' democratic instincts while Republicans, more seriously, evaded the rule of law when convenient. There existed some bipartisan overlap in both attitudes, but the overall partisan split laid bare an attitudinal contrast between liberals and conservatives that boded ill for American democracy.

The Boland Amendment and the Funding of the Contras

In both schemes that would make up Iran-Contra, Reagan administration officials knew they were at best skirting the edge of the law. Never did they explicitly declare their intent to break the law. Instead, they criticized congressional statutes as vacillating and murky, declared their bureaucracies beyond the scope of Congress's intent, and entreated legal counsels to interpret legal obstacles in ways that sanctioned their policies. All their words and actions skewed in the direction of disregarding the rule of law.

To those wanting to fund the "Contras" fighting the leftist Sandinista regime in Nicaragua, the most formidable legal barrier lay with the so-called Boland Amendment. Named after Representative Edward Boland (D-MA), what was in fact a series of amendments from 1982 to 1986 restricted the aid that Washington could provide to the Contras. Opponents dismissed the Boland Amendments as "each more opaque than the last."[8] Yet on October 12, 1984, the clearest and most sweeping of the amendments passed as part of an appropriations bill that Reagan felt compelled to sign. It decreed that "no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual."[9] Responses to this Boland Amendment offer the most comprehensive example of the Reagan administration's dismissive attitude toward the law.

At the time of its passage, the amendment's meaning was plain among many in both the legislative and executive branches. "Let me make very clear that this prohibition applies to all funds available for fiscal year 1985 regardless of any accounting procedure at any agency," Boland himself explained. "It clearly prohibits any expenditure, including those from accounts for salaries and all support costs. The prohibition is so strictly written that it also prohibits transfers of equipment acquired at no cost. To repeat, the compromise

the Laws regarding Lying to Congress," *Quinnipiac Law Review* 25, no. 3 (2007): 547–72; Laura Dickinson, "Outsourcing Covert Activities," *Journal of National Security Law & Policy* 5 (2012): 521–37.

[8] Elliott Abrams, *Undue Process: A Story of How Political Differences Are Turned into Crimes* (New York: Free Press, 1993), 6.

[9] Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98–473, §8066(a), 98. Stat. 1837, 1935 (1984).

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provision clearly ends U.S. support for the war in Nicaragua."[10] Boland's Republican colleague Henry Hyde (R-IL), a strong supporter of the Contras, agreed that Boland forbade "any assistance to the freedom fighters in Nicaragua … . No food, no medicine, no ammunition, not even moral support" (Boland did not ban moral support).[11] Another Republican House member, Bob Livingston of Louisiana, asked, "Are there no exceptions to this prohibition?" "There are no exceptions to the prohibition," Boland reiterated. Dick Cheney (R-WY), then also in the House, called Boland a "killer amendment," intended to compel the Contras "to lay down their arms."[12] Congressional opponents of the amendment were certainly bitter about the aid cutoff but also clear about its intent.

Some executive branch members did get the message. The Office of General Counsel at the Central Intelligence Agency (CIA) understood that not even "staff salaries" could be used "in any activities which would have the effect of supporting paramilitary operations in Nicaragua by anyone." No employee of the U.S. government, therefore, could in any way advance the Contras' military aims. In addition, the Boland language meant that the CIA had to know the "effect" of any aid. Medical supplies to the Contras, for instance, "arguably has the 'effect' of 'indirectly' supporting their paramilitary activities."[13] "We are going to be under very close scrutiny on this question," predicted the agency's lawyers, "and we must take every precaution to ensure that we are not in violation of congressional prohibition either in fact or in spirit."[14]

Reflecting their ardent anti-communism and general disdain for a Democratic-led Congress, Reagan and his administration expressed exasperation with the Boland Amendments. White House Chief of Staff Donald Regan called the statutes an annoying "constantly micromanaging affair" on the part of Congress.[15] Reagan lobbied members of Congress, and when he lost aide votes, the disappointment stung. He wrote in his diary that a cutoff "will bring joy to the Soviets & Cubans."[16]

The president's response was to place his administration in a fateful legal vice. As former National Security Advisor Robert "Bud" McFarlane told Congress, Reagan instructed aides to keep the Contras alive "body and soul."[17] Meanwhile, he recalled that "whatever we did in trying to maintain

[10] "Representative Boland," CIA, cable, October 19, 1984, *Digital National Security Archive [hereafter DNSA] Collection: Iran-Contra Affair*.

[11] "H.R. 5399," CIA, memo, August 23, 1984, *DNSA Collection: Iran-Contra Affair*.

[12] Cited in Draper, *A Very Thin Line*, 24.

[13] "H.R. 5399," CIA, memo, August 23, 1984, *DNSA Collection: Iran-Contra Affair*.

[14] "Representative Boland," CIA, cable, October 19, 1984, *DNSA Collection: Iran-Contra Affair*.

[15] *Testimony of Donald T. Regan and Caspar W. Weinberger: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: July 30, 31, and August 3, 1987*, 100th Congress, 1st Session, vol. 100-10 (Washington, D.C.: USGPO, 1988), 79.

[16] Ronald Reagan, *The Reagan Diaries*, ed. Douglas Brinkley (New York: Harper Perennial, 2007), 231.

[17] *Testimony of Robert C. McFarlane, Gaston L. Sigur, Jr. and Robert W. Owen: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House*

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the existence of the contras" had to be done within the law, a point he "always" stressed to aides.[18] Reagan never explained how the executive could maintain a massive guerrilla fighting force "body and soul" without giving it military aid, even advice.

Following Reagan's lead, some executive branch lawyers came up with legal justifications to circumvent Boland. Most were exercises in splitting hairs. One, for instance, differentiated between the purpose of the CIA and Department of Defense in providing funds to the Contras—outwardly, to interdict gun running to Nicaragua's neighbor El Salvador—versus the purpose of the Contras themselves, which was regime change. The first could not be barred, said the president's Intelligence Oversight Board (IOB), while the second could.[19] Some legal scholars argued that Congress could certainly "withhold" funds from the executive but not "condition" them, which would be taking away from the president constitutional prerogatives over how to spend foreign policy funds.[20]

With Congress unwilling to let the CIA directly fund the Contras, CIA Director William "Bill" Casey identified Oliver North as the instrument of his will at the National Security Council (NSC). Both Casey and North were keen to interpret Boland as not covering the NSC at all. Some assumed the law did not apply to the president—even though he could count as an "entity" involved in intelligence—and inferred that the NSC was a personal agency of the president's and therefore also not covered.[21] Others argued that anyone, including the NSC staff, should have the First Amendment right to *talk* to the Contras, even about military matters.[22]

Most consequentially, lawyer Bretton Sciaroni, who researched and wrote the IOB memo, wrote to McFarlane that the NSC was "not considered part of the intelligence community by law or executive order" and did "not function as a member of the intelligence community" because it coordinated rather than implemented policy. Since the NSC did not appear on the enumeration of ten federal agencies making up the intelligence community in the legislation to which the amendment was attached, Sciaroni reasoned, Boland did not apply to it. He also found no congressional statement explicitly forbidding the NSC's actions. "If the intent [of Boland] was to include the NSC [in its prohibited agencies], that could have been easily done."[23] Sciaroni's own intent was suspect. He elaborated this rationale in September 1985 only after press reports

Select Committee to Investigate Covert Arms Transactions with Iran: May 11, 12, 13, 14, and 19, 1987, 100th Congress, 1st Session, vol. 100-2 (Washington, D.C.: USGPO, 1987), 5.

[18] Cited in Wroe, *Lives, Lies and the Iran-Contra*, 185.

[19] "The Boland Amendment," Executive Office of the President President's Intelligence Oversight Board, report, April 6, 1983, *DNSA Collection: Iran-Contra Affair*.

[20] Dewey Wallace Jr. and A. Gerson, "The Dubious Boland Amendments," *Washington Post*, June 5, 1987.

[21] Louis Gordon Crovitz, "Crime, Constitution, and the Iran-Contra Affair," *Commentary* 84, no. 4 (October 1987), 25.

[22] Berry to North and Cannistraro, August 8, 1985, *DNSA Collection: Iran-Contra Affair*.

[23] Bretton Sciaroni to Robert McFarlane, President's Intelligence Oversight Board, memo, September 12, 1985, *DNSA Collection: Iran-Contra Affair*.

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of North's activities prompted Representative Michael Barnes (D-MA) to complain to McFarlane.[24]

Trouble was, common sense indicated that an organization that analyzed, disseminated, and directed intelligence was, in the language of Boland, "involved in intelligence activities." Some Republicans allowed this plain logic.[25] The amendment itself did not list agencies "involved in intelligence activities" and therefore did not exclude the NSC from any such list. In fact, Executive Order 12333 stated that the "NSC shall act as the highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence, and special activities, and attendant policies and programs."[26]

Lee Hamilton (D-IN), chair of the House intelligence committee, recalled Congress's intent on the scope of coverage. "We drafted the Boland Amendment broadly for precisely the reason that we wanted to cover the National Security Council. And we briefed in the Committee and the intent of the Committee was to cover the National Security Council because it was involved in intelligence activities."[27] "It would be stretching the integrity of the law to suggest that this prohibition was not intended to cover the NSC," wrote another member of Congress.[28] Legislators excluded the NSC from Boland's enumeration of prohibited agencies only because, on paper, it remained an advisory body, not an operational one. Sciaroni's memo tackled neither why coordinating intelligence did not "involve" the NSC in intelligence activities nor the fact that funding the Contras was very much an operation. There was also the matter that both North and his superior, National Security Advisor John Poindexter, were at the NSC on loan from the Pentagon, therefore uniformed members of the Department of Defense and very much subject to Boland.[29] If NSC salaries were not covered by Boland, Pentagon salaries were.[30]

McFarlane, whom Poindexter succeeded, understood that the Boland Amendment applied to his outfit, and he told his staff so.[31] North himself

[24] *Testimony of Elliott Abrams, Albert Hakim, David M. Lewis, Bretton G. Sciaroni, and Fawn Hall*, 390. See also the "Intelligence Authorization Act," Congressional Record, transcript, October 11, 1984, *DNSA Collection: Iran-Contra Affair*.

[25] Steven Berry to Henry Hyde, August 8, 1986, in *Appendixes to Parts I and II: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: July 7, 8, 9, 10, 13, and 14, 1987*, 100th Congress, 1st Session, vol. 100-7, Part 3 (Washington, D.C.: USGPO, 1988), 488. On Reagan, see Michael Barnes to Robert McFarlane, August 16, 1985, *Appendixes to Parts I and II*, 493.

[26] EO 12333 §1.2(a).

[27] Cited in Draper, *A Very Thin Line*, 24–25.

[28] Michael Barnes to Robert McFarlane, August 16, 1985, *Appendixes to Parts I and II*, 493.

[29] Timbers, "Legal and Institutional Aspects," 32.

[30] *Continued Testimony of Oliver North and Robert C. McFarlane: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: July 10, 13, and 14, 1987*, 100th Congress, 1st Session, vol. 100-7, Part 2 (Washington, D.C.: USGPO, 1988), 124.

[31] Robert McFarlane, United States House of Representatives Permanent Select Committee on Intelligence, testimony, December 10, 1986, *DNSA Collection: Iran-Contra Affair*.

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wrote in a memo, along with another NSC official, that "notwithstanding our own interpretation" of Boland, "it is very clear from the colloquy during the [congressional] debate … that the legislative intent was to deny *any* direct or indirect support for military/paramilitary operations in Nicaragua."[32]

North therefore knew that Congress would disagree with his interpretation and thus kept his operations from legislators and legal analysts. He feared "unhelpful speculation" among lawyers.[33] In later testimony, he admitted withholding facts from the IOB and relying only on its favorable opinions.[34] His relief was palpable when Sciaroni's IOB memo landed on his desk because it "reinforced" his opinion that Boland did not cover the NSC. "Was there any consideration of the fact that you didn't want to go outside for an opinion because you might get an answer you didn't like?" he was asked. "I don't think that crossed my mind," North responded.[35]

As for the rest of the White House, many wondered how the Contras kept fighting despite Boland prohibitions, but they looked the other way. Chief of Staff Donald Regan admitted he asked no one at the NSC about the void left by the CIA's abandonment and was not aware its two successive leaders, McFarlane and Poindexter, differed on whether Boland covered their agency. "I never looked into the legalities of the Boland Amendment … . I left that up to the NSC." He did ask—twice—that Reagan's lawyers look at the matter. The NSC's answer: "That is not necessary, we have our own legal opinion."[36]

For all its ineffectiveness, Boland did cut off millions in funds to the Contras, so another strategy for replacing that shortfall was to elicit donations from third countries. Again some circumlocution of the law was necessary, and it occurred at the highest levels of the Reagan administration—even before Boland became law.

On June 25, 1984, Reagan gathered his National Security Planning Group (NSPG) to discuss Central America. Casey of the CIA was there, along with Secretary of State George Shultz, Secretary of Defense Caspar Weinberger, Counselor to the President Ed Meese III, then-National Security Adviser McFarlane, Vice President George H. W. Bush, and various aides.

The CIA, began Casey, was authorized "to cooperate and seek support from third countries" for the Contra effort. "If we notify the oversight committees" of Congress, he added, "we can provide direct assistance to help the FDN [a Contra organization] get the money they need from third countries." Shultz

[32] Cited in Walter Pincus and Joe Pichirallo, "Memo on Honduran Deal Cites Bush," *Washington Post*, April 12, 1989, A1.

[33] Oliver North to John Poindexter, August 19, 1985, *Appendixes to Parts I and II*, 495.

[34] *Testimony of Oliver L. North: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: July 7, 8, 9, and 10, 1987*, 100th Congress, 1st Session, vol. 100-7, Part 1 (Washington, D.C.: USGPO, 1988), 278.

[35] *Testimony of John M. Poindexter: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: July 15, 16, 17, 20, and 21, 1987*, 100th Congress, 1st Session, vol. 100-8 (Washington, D.C.: USGPO, 1988), 205.

[36] *Testimony of Regan and Weinberger*, 7, 78.

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warned that James Baker, a lawyer and White House chief of staff opposed to funding the Contras, "said that if we go out and try to get money from third countries, it is an impeachable offense." Not if we notify House and Senate intelligence committees, Casey countered. But Shultz was categorical: "Jim Baker's argument is that the US Government may raise and spend funds only through an appropriation of the Congress."[37] (Baker would later confirm to investigators that he advised taking "a very close look at the question of legality" in third-country solicitations: "We could not do indirectly what we couldn't do directly.")[38] Weinberger took Casey's side, arguing that the U.S. government would not be spending its own money, only that of other countries.

Shultz suggested they obtain the attorney general's opinion. Meese—who would soon occupy that post—suggested that his outfit could produce any legal opinion that his president wanted. "It's important to tell the Department of Justice that we want them to find the proper and legal basis which will permit the United States to assist in obtaining third party resources for the anti-Sandinistas." He failed to add *or not*. He did add, "You have to give lawyers guidance when asking them a question." Casey understood the subtext: "We need the legal opinion which makes clear that the US has the authority to facilitate third country funding for the anti-Sandinistas." He also left no door open for an opinion that would bar such aid. Groupthink was congealing too fast, sensed McFarlane, who proposed "that there be no authority for anyone to seek third party support for the anti-Sandinistas until we have the information we need."[39] Shultz never got a legal opinion from the attorney general. "The subject seemed to die down."[40]

Not at the CIA. The day after the NSPG meeting, Stanley Sporkin, the agency's top lawyer, confirmed that Casey was looking for a legal way of getting money to the Contras, possibly through third countries. That might happen, said Sporkin, but only absent "any monetary promises or inducements from the United States Government."[41] In August, Sporkin repeated the proviso and added that Boland "is not limited by its language to *appropriated* funds. The broadness of the wording of this section appears to prohibit the use of funds made 'available' to the Agency by other nations, groups or individuals."[42] Yet Casey got Attorney General William French Smith to give him oral

[37] "National Security Planning Group Meeting June 25, 1984: 2:00–3:00 p.m. Situation Room—Subject: Central America," NSC, minutes, June 25, 1984, *DNSA Collection: Iran-Contra Affair*.

[38] Cited in Peter Baker and Susan Glasser, *The Man Who Ran Washington: The Life and Times of James A. Baker III* (New York: Doubleday, 2020), 229.

[39] "National Security Planning Group Meeting June 25, 1984," *DNSA Collection: Iran-Contra Affair*; Lawrence Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-Up* (New York: Norton, 1997), 2.

[40] *Testimony of George P. Shultz and Edwin Meese, III: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: July 23, 24, 28, and 29, 1987*, 100th Congress, 1st Session, vol. 100-9 (Washington, D.C.: USGPO, 1988), 17.

[41] Stanley Sporkin, CIA, memo, June 26, 1984, *DNSA Collection: Iran-Contra Affair*.

[42] "H.R. 5399—Section 107, Prohibition on Covert Assistance for Military Operations in Nicaragua," to Stanley Sporkin, CIA, memo, August 23, 1984, *DNSA Collection: Iran-Contra Affair*.

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assurances that there was "no legal concern" so long as contributing governments "could not look to the United States to repay that commitment in the future."[43] And so the Reagan administration and its private partners raised tens of millions of dollars not only from Saudi Arabia but also from Taiwan and other countries to fund the Contras. Third-country funding may not have infringed a criminal statute, but the administration downplayed its implicit banning in the Boland Amendment.

Private Americans added a few million more dollars, again with the collaboration of the administration, and the illegalities here were more glaring. While he was national security adviser, McFarlane had stressed to staffers "not to solicit, encourage, coerce or otherwise broker financial contributions to the contras."[44] He followed U.S. government regulations, which forbade soliciting contributions on U.S. government property or for use by the U.S. government. Yet Reagan himself recalled telling White House staff, "There has to be a way to help these private citizens who otherwise wouldn't know how to get help to the Contras or buy the supplies they need." As with keeping the Contras alive "body and soul," he coupled his policy direction with a contradictory directive to stay "within the law."[45] It was no surprise that, after the scandal broke in late 1986, the presidential Tower Commission judged the Contra initiative marked by "uncertainty as to legal authority and insensitivity to legal issues."[46]

The Arms Control Export Act

Besides supporting the Contras, the Reagan administration aimed to free hostages held by terrorists under the revolutionary Iranian regime's influence and possibly moderate Tehran away from Moscow.[47] The carrot to Iran came in the form of thousands of missiles and missile parts that might give it an edge in its 1980–88 war against Iraq. As with the Contras, the Tower Commission found that, toward Iran, "significant questions of law do not appear to have been adequately addressed."[48]

Besides being contrary to stated U.S. policy and possibly counterproductive, this opening toward Iran tiptoed amid legal landmines. Israel was the conduit of the initial missile sales, which disregarded several statutes on the books. Most important of these, the Arms Export Control Act[49] (AECA) stated that

[43] Cited in Byrne, *Iran-Contra: Reagan's Scandal*, 83.

[44] *Testimony of Robert C. McFarlane*, 6.

[45] Ronald Reagan, *An American Life* (New York: Threshold Editions, 1990), 485.

[46] John G. Tower, Edmund S. Muskie and Brent Scowcroft, *The Tower Commission Report: The Full Text of the President's Special Review Board* (New York: Bantam Books, 1987), 78.

[47] Draft National Security Decision Directive, "U.S. Policy toward Iran," ca. June 11, 1985, with cover note by Robert McFarlane, June 17, 1985, and Robert McFarlane, memo for George Shultz, "Israeli–Iranian Contact," July 13, 1985, both in Peter Kornbluh and Malcolm Byrne, eds., *The Iran-Contra Scandal: The Declassified History* (New York: The New Press, 1993), respectively 220 and 225.

[48] Tower, Muskie, and Scowcroft, *The Tower Commission Report*, 78.

[49] 22 U.S.C. §§2751–2796c (1982 and Supp. III 1985, as amended by an Act to require that congressional vetoes of certain arms export proposals be enacted into law, Pub. L. No. 99–247, 100 Stat. 9

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arms sales to foreign countries could occur only if the president "found"—in a document known as a "finding"—that they would strengthen the security of the United States and promote world peace. Moreover, any sale of $7 million or more had to be reported to Congress, which could veto the sale. The AECA also banned weapons exports to countries supporting terrorism even through a third country. Finally, the weapons sold could only be used for self-defense.[50] The recently passed Intelligence Authorization Act[51] also required reports to Congress for any weapons transfers of over $1 million. Secretary Shultz called the Israel gambit a "bad idea"; Weinberger, "a terrible idea. Awful."[52] "Shultz was outraged and heatedly opposed this enterprise," one former diplomat recalled. "[He] said it was crazy, stupid, illegal."[53]

The administration's response, however, was not to back off but, as with the Contras, to design paper-thin legal rationalizations and, in this case, to fabricate whatever document would lend the arms sales a veneer of legality. For instance, Section 501 of the National Security Act[54] at the time required the executive to inform the House and Senate intelligence committees of any planned covert operation *before* any such operation and *in writing*. In response, State's lawyers wrote that the president was not circumventing the act because the primary aim of the sale was intelligence collection. "The President has the discretionary authority to proceed with the proposed activity," the lawyers at State, Defense, and the CIA agreed, even if "to do so would present legal risks, chiefly that Congress might challenge his decision."[55] Attorney General Smith followed up by suggesting that, at least, "the House and Senate Intelligence Committees should be informed of this proposal and the President's determinations."[56]

The matter of the "finding" opened another Pandora's box, as the CIA went ahead with the sale through Israel and had the president sign off on it later. On December 5, 1985, National Security Advisor Poindexter presented a one-page draft finding for the president's signature. In it, Reagan directed Director Casey "not to brief the Congress."[57] This December 5 document would become known

(1986); by the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99–399, 100 Stat. 853 (1986); by the Continuing Appropriations Act, 1987, Pub. L. No. 99–591, 100 Stat. 3341 (1986); by the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99–661, 100 Stat. 3816 (1986)).

[50] David J. Scheffer, "U.S. Law and the Iran-Contra Affair," *The American Journal of International Law* 81, no. 3 (July 1987): 699–705.

[51] Pub. L. No. 98–618, §801, 98 Stat. 3298, 3304 (1984).

[52] Cited in Robert C. McFarlane and Zofia Smardz, *Special Trust* (New York: Cadell and Davies, 1994), 35.

[53] John J. (Jay) Taylor, interview by Charles Stuart Kennedy, April 25, 2000, transcript, Association for Diplomatic Studies and Training.

[54] 50 U.S.C. §413.

[55] Davis Robinson, Department of State Office of the Legal Advisor, memo, October 2, 1981, *DNSA Collection: Iran-Contra Affair*.

[56] William Smith to William Casey, Department of Justice, letter, October 5, 1981, *DNSA Collection: Iran-Contra Affair*.

[57] Draft of finding, November 25, 1985, in *Testimony of Glenn A. Robinette, Noel C. Koch, Henry H. Gaffney, Jr., Stanley Sporkin, and Charles J. Cooper and Presentation by W. Neil Eggleston: Joint*

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as the first retroactive and secret finding covering the Iran deals. Poindexter declined to share it with not only Congress but also State.

Two days later, on December 7, Reagan held an NSC meeting that proved a showdown on the finding: Shultz and Weinberger were against, while arrayed in favor were Casey (represented by Deputy Director John McMahon), Poindexter (replacing the also-present McFarlane), and Chief of Staff Donald Regan. It was a ludicrous meeting, meant to certify an arms-for-hostages practice that had already flourished for half a year. It took place in the president's family quarters, and no record was kept. Also, no one discussed shipments that had taken place the previous September and November.[58] "There are legal problems here, Mr. President, in addition to all of the policy problems," warned Weinberger.[59] Reagan retorted that "he could answer charges of illegality but he couldn't answer charge that 'big strong President Reagan passed up a chance to free hostages.'" Shultz confirmed that Reagan said that Americans would not understand if hostages perished because "I wouldn't break the law." "They can impeach me if they want," said Reagan. "Visiting days are Wednesday," he joked.[60]

The meeting ended without a directive from the president—not uncommon for the nonconfrontational former actor. As a result, Weinberger told his military assistant, Colin Powell, that "this baby has been strangled in its cradle," meaning that Reagan had killed the policy.[61] McFarlane tended to agree but sensed that the president "was not pleased by it." McMahon and Regan, meanwhile, thought the president leaned toward more arms sales.[62]

One month later, on January 7, 1986, Reagan called a meeting of his NSPG that included Shultz, Weinberger, Regan, Casey, Poindexter, and this time, now-Attorney General Meese and Vice President Bush. Faced with the AECA, Casey came armed with a workaround: the Economy Act. Under its authority, the CIA would buy arms from the Pentagon and resell them, somehow without having to report. Meese and Casey also recommended not telling Congress, not even its intelligence committees. Meese consulted no experts at Justice.[63] Shultz again declared his opposition, but Poindexter was winning the argument with Reagan. Since the law required "timely" notification to Congress, the weapons would be at their destination in thirty to sixty days, and only then would Congress be notified.[64] Ten days after the meeting, Poindexter wrote

Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: June 23, 24, and 25 1987, 100th Congress, 1st Session, vol. 100-6 (Washington, D.C.: USGPO, 1988), 424.

[58] Meese testimony to Tower Commission, January 20, 1987, folder EM III testimony (redacted) January 20, 1987, box 568, Edwin Meese Papers, Hoover Institution, Stanford University, Stanford, CA.

[59] Cited in *Testimony of George P. Shultz and Edwin Meese*, 31, 32.

[60] Cited in Byrne, *Iran-Contra: Reagan's Scandal*, 106, 107.

[61] *Testimony of Regan and Weinberger*, 140.

[62] Cited in Draper, *A Very Thin Line*, 229.

[63] Byrne, *Iran-Contra: Reagan's Scandal*, 156.

[64] Cited in Joseph E. Persico, *Casey: The Lives and Secrets of William J. Casey: from the OSS to the CIA* (New York: Viking, 1990), 491.

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to Reagan that Smith, when attorney general, had argued that the president could, "under an appropriate finding," let the CIA sell arms to foreign countries "outside of the provisions of the laws and reporting requirements."[65]

Meanwhile, the policy had shifted to selling U.S. missiles directly to Iran, and North knew he needed another presidential finding. He called Sporkin at the CIA. Normally considered a legal stickler, Sporkin's attitude when it came to Reagan was, "You can't straitjacket the president … . Someone can go out and do it and later on you can do the paperwork."[66] Sporkin suggested what his boss Casey wanted to hear—"not to report the activity until after it has been successfully concluded and to brief only the chairman and ranking minority members of the two Oversight Committees."[67] This lined up with Poindexter's thinking.

Poindexter admitted that the finding that emerged on January 17 was "prepared essentially by the CIA as a—what we call a CYA [cover your ass] effort." Casey told Reagan to sign it. Poindexter briefed the president verbally, and under the word "OK," Reagan wrote "RR." The president thus signed the infamous second finding on January 17, 1986, that tied him to selling missiles directly to Iran.[68] "Well," he said, "if we get all of the hostages out, we'll be heroes. If we don't, we'll have a problem." On January 19, Meese approved the sale without telling Congress, just as Sporkin had advised Casey.[69] Since the executive had to inform the intelligence committees in a "timely fashion," Sporkin interpreted "timely" to mean not "beforehand" but rather "after it has been successfully concluded."[70] There was no time limit on the so-called successful conclusion. "If you can delay a written Finding for 3 weeks, then there is no reason you can't delay it for 3 months," inferred Senator Sam Nunn (D-GA) later. He called this "legal gymnastics."[71]

The Scope of Illegality

In addition to circumventing the Boland Amendment, the AECA, and the National Security Act, Iran-Contra plotters violated a host of other laws by diverting funds from Iran to the Contras, destroying documents, and lying to Congress:

- Funding the Contras evaded not only "the letter and the spirit" of Boland but also Executive Order 12333, which banned agencies other than the CIA from conducting covert operations;

[65] John Poindexter, Memorandum for the President, "Covert Action Finding Regarding Iran," with Signed Finding Attached, January 17, 1986, in Kornbluh and Byrne, eds., *The Iran-Contra Scandal: The Declassified History*, 233.

[66] Cited in Mary McGrory, "The Takeover of Stanley Sporkin," *Washington Post*, June 25, 1987.

[67] Stanley Sporkin to William Casey, CIA, memo, January 15, 1986, *DNSA Collection: Iran-Contra Affair*.

[68] *Testimony of John M. Poindexter*, 17. The finding itself is Exhibit SS-19, *Testimony of Richard V. Secord*, 465.

[69] Cited in Mayer and McManus, *Landslide: The Unmaking*, 185–86.

[70] Cited in Draper, *A Very Thin Line*, 255–56.

[71] See also *Testimony of Glenn A. Robinette*, 195–96, 198, 204.

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- sending exports to nations, such as Iran, that supported terrorism were restricted under the Export Administration Act of 1979[72];
- failing to notify Congress of covert operations also violated the Intelligence Oversight Act of 1980[73];
- involving private individuals in public foreign policy violated the Neutrality Act,[74] which prohibited private involvement in public foreign policy;
- diverting profits from arms sales to Iran toward the Contras took money from the sale of U.S. government property, intended for the U.S. Treasury, and unilaterally re-appropriated it. Besides violating the Boland Amendment, the diversion violated the Appropriations Clause of the Constitution *and* the Anti-Deficiency Act,[75] which prohibited a U.S. officer from spending funds not appropriated by Congress. As Clair George of the CIA explained, "You do not sell U.S. Government equipment to make a profit, to engage in international activities that are neither authorized nor appropriated by the U.S. Congress." "You cannot take U.S. weapons and just go out and sell them for a profit and use the profits as you see fit."[76] Top Republicans, including Henry Kissinger and George Shultz, agreed[77];
- lying to Congress, even if not under oath, was a felony according to the false statement statute[78];
- destroying or altering documents or otherwise impeding a congressional inquiry was also a felony[79]; it also violated the Presidential Records Act of 1978[80].

There were additional laws, both national and international. Some legal experts found that "at least 14 different areas of law, from civil statutes governing executive branch covert operations to criminal law against fraud, perjury and diversion of government funds," might apply to Iran-Contra.[81] Representative Jack Brooks (D-TX) summarized the injuries to the "rules of law": "We have been supplying lethal weapons to terrorist nations, trading

[72] 50 U.S.C. §§2401–2420 (1982 and Supp. III 1985, as amended by the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99–399, 100 Stat. 853 (1986); by the Export Administration Act of 1979, Authorization, Pub. L. No. 99–633, 100 Stat. 3522 (1986)).

[73] Pub. L. No. 96–450, Sec. 407 (October 14, 1980).

[74] 18 U.S.C. §960.

[75] 31 U.S.C. §1341.

[76] *Testimony of Dewey R. Clarridge, C/CATF, and Clair George: Joint Hearings in Executive Session as Declassified Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: August 4, 5, and 6, 1987*, 100th Congress, 1st Session, vol. 100-11 (Washington, D.C.: USGPO, 1988), 222, 223.

[77] Mayer and McManus, *Landslide: The Unmaking*, 191.

[78] 18 U.S.C. §1001.

[79] 18 U.S.C. §1505.

[80] Pub. L. No. 95–591. See also McCormick and Smith, "The Iran Arms Sale," 29; William Weld to Edwin Meese, Department of Justice, memo, November 14, 1986, *DNSA Collection: Iran-Contra Affair*.

[81] Jane Mayer and Andy Pasztor, "Deciding What Laws Apply to Iran-Contra May Be as Difficult as Finding Who Broke Them," *Wall Street Journal*, December 15, 1986, 60.

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arms for hostages, involving the U.S. government in military activities in direct contravention of the law, diverting public funds into private pockets and secret unofficial activities, selling access to the President for thousands of dollars, dispensing cash and foreign money orders out of a White House safe, accepting gifts and falsifying papers to cover it up, altering and shredding national security documents, [and] lying to the Congress. Now I believe," he concluded, "that the American people understand that democracy cannot survive that kind of abuse."[82]

Attitudes under Scrutiny

When the scandal broke, Republicans offered an obvious target for Democrats. As conservatives typically stood on the principles of law and order, it became too tempting to hammer home the legal failings of Iran-Contra. Democrats milked the scandal for political gain, but doing so did not infringe upon the rule of law. A more serious affront to it was Democrats' decision to give immunity to several witnesses. Republicans, meanwhile, spent much of the scandal-laden year of 1986–87 largely failing to even own up to any hypocrisy. Debates over the rule of law punctuated the 1987 televised testimony before Congress, which evidenced a sharp contrast between the political parties.

Before the public congressional testimony began in spring 1987, the Democrats who dominated both chambers made a fateful decision to grant "use immunity" to key witnesses. To get a witness such as North to testify without invoking the Fifth Amendment, a 1970 law allowed Congress to confer upon that witness immunity from any prosecution that would use their congressional testimony as evidence. In other words, nothing they said in the Senate Caucus Room could be used against them in a trial.[83] In 1972, the Supreme Court had ruled in favor of use immunity in its *Kastigar* case. The advantage of the law was that Congress and the American people would be better informed.

The disadvantage was the damage done to the justice system. Independent Counsel Lawrence Walsh saw Congress as "a rival operation that could undo my work before it produced any results."[84] Not only did use immunity rob Walsh's own cases of evidence, but it also forced all his legal team members, potential witnesses, and jurors to abstain, monk-like, from absorbing any of the testimony given to Congress—testimony that seven out of ten Americans watched. Only evidence obtained outside the hearings would be admissible. The case heightened the conflict between what one legal scholar called "two concepts in our American tradition": on the one hand, the checks and balances enhanced by legislative hearings; on the other, the rule of law championed by the OIC.[85]

Walsh's negotiations with leaders of Congress took him aback. For instance, they wanted information presented to a grand jury, yet "disclosing such

[82] *Continued Testimony of North and McFarlane*, 122–23.
[83] Ghio, "The Iran-Contra Prosecutions," 229.
[84] Walsh, *Iran-Contra: The Final Report*, 31.
[85] Dormer, "The Not-So Independent Counsel," 2391.

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evidence before trial could amount to prosecutorial misconduct." He also refused to share Swiss bank information to anyone not "prosecutorial." Cheney of the House committee "acidly characterized our position," wrote Walsh, "as a desire for a 'one-way street,' in which they would share information with us and get nothing in return."[86] Watergate prosecutor Archibald Cox, whom Nixon had fired during the so-called Saturday Night Massacre, wrote to Congress in support of Walsh. "A grant of immunity at this time," he argued, would "undermine the rule of law."[87] Yet members of the congressional committees had their own agenda and their own timetable. "The public would be ill-served," said Senator Warren Rudman (R-NH), "if we wait 12 to 18 months while Walsh investigates before we hear from [witnesses]."[88] It was not clear why. Senator Paul Trible (R-VA) made the equally spurious argument that "if Lawrence Walsh had a case of conspiracy or obstruction of justice against Poindexter and North, it exists now, and it will not be jeopardized by their testimony."[89] In March, the committees gave Walsh only a few more months.[90] Ultimately, the decision to grant immunity to witnesses proved "fatal to the prosecutions of North and Poindexter," Walsh wrote.[91] His letters to Congress on immunity demonstrated that congressional leaders knew exactly what roadblocks they created for prosecutors. "It ought to be clear where [the immunity] problem lies. It does not lie with the independent counsel," the judge at the North trial would conclude.[92]

Once the testimony began, there emerged from the Democrats, to be sure, much self-satisfied lecturing. Senator George Mitchell (D-ME), for instance, saw in the rule of law a democratic norm defining America: "Most nations derive from a single tribe, a single race; they practice a single religion… . The United States is different; … The glue of nationhood for us is the American ideal of individual liberty and equal justice. The rule of law is critical in our society. It's the great equalizer." Countering the emerging rationale of the Republican Party, he added, "We must never allow the end to justify the means where the law is concerned."[93] Senator David Boren (D-OK) brought up the president's special responsibility: "The Constitution says that the President, under Article II, shall see to it that the laws shall be faithfully executed. It doesn't just say that he won't break the law, or that he will avoid

[86] Walsh, *Iran-Contra: The Final Report*, 49, 50; "Excerpts from Committee Hearing," March 11, 1987, folder Iran-Contra Affair Miscellany (3 of 3), box 415, George Lardner Papers, Manuscripts Division, Library of Congress, Washington, D.C.

[87] Cited in David Rosenbaum, "Delay on Immunity for North is Seen," *New York Times*, March 11, 1987, A21.

[88] Walter Pincus and Dan Morgan, "Immunity Vote Likely for Poindexter, North," *Washington Post*, March 7, 1987, A1.

[89] Paul Trible, "Grant Immunity to North and Poindexter-Now," *Washington Post*, March 11, 1987, A19.

[90] David Rosenbaum, "Panels in Senate and House Differ on Immunity Tactic," *New York Times*, March 10, 1987, A17.

[91] Walsh, *Iran-Contra: The Final Report*, 555.

[92] Cited in Joe Pichirallo and George Lardner, Jr., "Justice Aide Tried to Provide Prohibited Data, Walsh Says; Iran Prober's Assistant Cut Reynolds Off," *Washington Post*, April 28, 1988, A1.

[93] *Continued Testimony of North and McFarlane*, 45.

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technically getting around the law." He specifically warned against a Machiavellian, ends-over-means approach to the rule of law: "If we embark on a course in this country where everyone can do what they think is right without regard to the law, ... it is a dangerous course."[94]

In response, North and others certainly stated their adherence to the rule of law. "I do not believe in rising above the law at all," the fully uniformed lieutenant colonel swore to Congress. "We are not suggesting that Colonel North is above the law," reiterated his lawyer.[95] Yet North himself had, by then, settled into an interpretation in which neither Reagan's policy conundrum nor any of North's actions were illegal.[96]

So what if they were? Many Republican backers of the administration seemed to wonder. Witnesses and Republican House and Senate members minimized the damage done to the rule of law and excused lawbreaking and contempt for Congress as means to an end. When asked if he believed that "if the President wanted it, that was enough?" Oliver North answered in the affirmative, with the caveat that it be "within the limits of the law." "As you saw it?" asked Congress's lawyer. "Yes," said North.[97] No Democrat argued for disregarding a law when circumstances warranted it. Republicans, meanwhile, insisted on re-stating the service records and anti-communist bona fides of witnesses who might have committed crimes. Representative Jim Courter (R-NJ) argued that "motive" should count less when it came to profiteering and more when it came to "principle." Representative Henry Hyde (R-IL) agreed: "There is a zeal among some to confine this inquiry to who did what, and ignore why."[98] He considered the aims of Reagan's policies "far more important than even adhering to every jot and tittle of the law."[99]

After the testimony, Democrats and Republicans drew largely opposite conclusions about the rule of law, especially in the House. The majority report—signed by all Democrats on the committees, accompanied by three Republican senators—stated that "disdain for the law" was a "common ingredient" in the scandal. "There is no place in Government for law breakers," it declared.[100] Yet the entirely Republican minority report found "no systematic disrespect for 'the rule of law'": "We emphatically reject the idea that through

[94] *Testimony of Robert C. McFarlane*, 276, 375, 377, 390.

[95] *Testimony of Oliver L. North*, North on 276, Brendan Sullivan on 4.

[96] *Continued Testimony of North and McFarlane*, 31–32.

[97] *Testimony of Oliver L. North*, 278.

[98] *Testimony of Adolfo P. Calero, John K. Singlaub, Ellen C. Garwood, William B. O'Boyle, Joseph Coors, Robert C. Dutton, Felix I. Rodríguez, and Lewis A. Tambs: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran: May 20, 21, 27, and 28, 1987*, 100th Congress, 1st Session, vol. 100-3 (Washington, D.C.: USGPO, 1988), 350, 353.

[99] *Testimony of Elliott Abrams*, 557.

[100] *Report of the Congressional Committees Investigating the Iran-Contra Affair, with Supplemental, Minority, and Additional Views, U.S. House of Representatives Select Committee to Investigate Covert Arms Transactions with Iran and U.S. Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Congress, 1st Session, S. Rep. 100–216 (Washington, D.C.: USGPO, 1987), 11, 19.

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these mistakes, the executive branch subverted the law, undermined the Constitution, or threatened democracy."[101]

After Congress published its conclusions, Walsh and his OIC were left with the task of ferreting out any prosecutable lawbreaking associated with Iran-Contra. The administration's cavalier attitude toward the rule of law made this task more challenging. As early as November 10, 1986, mere days after the Contra and Iran scandals erupted, the White House's press statement claimed that "no U.S. laws have been or will be violated."[102] Two days later, Reagan gathered congressional leaders and swore to them that "we have not broken any laws."[103] As more facts spilled out, CIA lawyers defended the legality of its director's keeping the Iran matter from Congress's intelligence committees.[104] Justice's lawyers, under Meese, also seemed unable to identify any crimes within the Iran-Contra array of operations. One wrote that arms deals with Iran were "probably" not criminal since the statues they violated carried no criminal penalties. Also, "we have no information that any *false* information was conveyed to Congress (as opposed to failure to report at all)." So breaking laws and keeping facts from Congress were legitimate because they had no "criminal implications."[105] Reagan's takeaway from Meese was simple: "I'm in the clear legally."[106]

Only when the diversion of Iranian funds to the Contras became known, on November 24, 1986, did Reagan admit some illegality. "This was a violation of the law against giving the Contras money without an authorization by Congress," he wrote in his diary. He blamed it on others. "North didn't tell me about this. Worst of all John Poindexter found out about it and didn't tell me. This may call for resignations."[107]

One significant problem for the OIC was choosing which crimes to prosecute. Legal experts perceived broad impediments. First was that neither the Boland Amendment nor the Constitution clearly prohibited what North and others had done as a crime—the spirit, yes, but not necessarily the letter, and criminal law required violating both. And, as North and others had figured out, Boland contained no criminal sanctions. It might have been an exaggeration to claim, as one defender of the administration did, that "no prosecutions were envisioned in the wildest congressional imagination," but it remained that dragging Boland into a court of law proved challenging.[108] Were one found guilty of violating it, how would a judge determine a proper sentence? Walsh's chief Federal Bureau of Investigation (FBI) agent once lamented,

[101] *Report of the Congressional Committees*, 437, 449.
[102] Cited in Walsh, *Iran-Contra: The Final Report*, 23.
[103] Cited in Mayer and McManus, *Landslide: The Unmaking*, 300, 301.
[104] Kathleen Watson to George Clarke, CIA Office of the General Counsel, memo, November 19, 1986, *DNSA Collection: Iran-Contra Affair*.
[105] Jo Ann Farrington to Gerald McDowell, Department of Justice, memo, November 22, 1986, *DNSA Collection: Iran-Contra Affair*.
[106] Reagan, *The Reagan Diaries*, 453.
[107] Reagan, *The Reagan Diaries*, 453.
[108] Crovitz, "Crime, Constitution," 23.

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"The Boland amendment? The *Boland* amendment? What the hell kind of crime is that?"[109]

Legislation such as Boland, though passed in a highly partisan atmosphere, contained the assumption that government officials would obey statutes without the negative incentive of criminal liability. Senator Boland recalled the legislative history from 1980, when he helped pass the Intelligence Oversight Act that updated the 1947 National Security Act[110] and lifted the need for prior notification of Congress for covert operations but retained a requirement to notify soon after. "When the timely fashion provision was drafted, we assumed, I think rightfully so, a degree of comity would exist between any administration and any Congress such that notice would be forthcoming in a very, very short period of time."[111]

Because such comity was not forthcoming from the Reagan White House, Walsh found himself in "terrible legal troubles." Rather than pursue Iran-Contra wrongdoers under Boland or the AECA, he tried instead to prove a conspiracy to defraud the government under a broad federal statute that covered a systematic abuse of power.[112] Other possible charges included "spending unappropriated funds, theft of government property (the Iran arms profits), mail fraud, personal enrichment, and obstruction—destroying records and providing false testimony."[113] Walsh gave up on larger abstract criminality to, in its place, prosecute more prosaic offenses such as lying and stealing.

He also capitulated on prosecuting President Reagan himself. Arthur Liman, Congress's Iran-Contra lawyer, faulted the chief executive for bearing "the responsibility for creating a climate in the White House in which a disdain for law had flourished."[114] When Walsh released his report in early 1994, he reserved his harshest words for a president against whom impeachment "certainly should have been considered" by Congress. A Walsh team's internal memo concluded that Reagan "knowingly disregarded statutory restraints" in selling weapons and not telling Congress and "knowingly condoned the systematic evasion" of the Boland Amendment. This misbehavior "may have invited congressional retaliation or impeachment," it added, "but it did not present the willful disobedience to a statute carrying criminal sanctions that would be necessary to support a prosecution."[115]

In the lame-duck months of his presidency, on Christmas Eve 1992, President George H. W. Bush pardoned all those in the administration who, at the time, stood convicted or indicted in Iran-Contra crimes. There was some Democratic support for ending the scandal in this way, but to many

[109] Cited in Jeffrey Toobin, *Opening Arguments* (New York: Viking, 1991), 35.

[110] 50 U.S.C.A. §§401–432 (Supp. 1987).

[111] See also *Testimony of Glenn A. Robinette*, 214.

[112] Aaron Epstein, "Criminal Case Likely, Perilous," *Miami Herald*, July 17, 1987, 1A.

[113] Byrne, *Iran-Contra: Reagan's Scandal*, 309.

[114] Arthur L. Liman with Peter Israel, *Lawyer: A Life of Counsel and Controversy* (New York: Public Affairs, 1998), 349, 350.

[115] C. J. Mixter, "New Draft of Final Report," September 14, 1992, folder General Investigative Reagan: CJM 3/91 Memo re Criminal Liability 1, box 41 General Investigative Files, Records of John Q. Barrett Attorney Files, RG 449, National Archives II, College Park, MD.

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Democrats, the pardon itself dripped of disdain for the rule of law. Senator Mitchell, for instance, warned against setting "the precedent that any future president's advisers may act outside the law, that they may break the law with impunity and that if they are caught, they need not even stand trial and be judged for their actions." A pardon would set a "dual standard of justice": "one for the powerful, another for all other citizens."[116] President-elect Bill Clinton worried that the pardon "sends a signal that if you work for the Government, you're beyond the law, or that not telling the truth to Congress under oath is somehow less serious than not telling the truth to some other body under oath."[117] Angriest of all was Walsh: "President Bush's pardon of Caspar Weinberger and other Iran-contra defendants undermines the principle that no man is above the law."[118]

At that point, after years of trials, Republicans had been portraying Walsh as cruelly persecuting high-ranking patriots such as Poindexter and Weinberger for minor infractions. The conservative attitude toward the rule of the rule of law was a self-fulfilling prophecy: it ridiculed the punishment of misdemeanors because it had made impossible the prosecution of high crimes.[119]

Failure to Reform

Some reforms did follow from Iran-Contra. Reagan shook up his staff, replacing so-called loose cannons and turf warriors with more collaborative leaders.[120] Diplomats, meanwhile, pushed for—and won—a Presidential Decision Memorandum that required, for every covert action, that the State Department spell out U.S. interests and objectives, do a cost–benefit analysis, and declare them legal and constitutional. State would also sign off on renewals of each operation.[121] In summer 1987, Reagan also reorganized the interagency review process under the NSC. Yet National Security Decision Directive (NSDD) 276 only added levels of bureaucracy and would likely not prevent another Iran-Contra-like cabal.[122] On his next to last day of congressional testimony in July 1987, Shultz wrote to Reagan, "this NSDD 276 worsens the situation by further aggrandizing the NSC staff rather than cutting it back."[123]

[116] Henry Hyde and George Mitchell, "Pardoning Ollie North: Was Reagan Wrong Not to Grant a Pretrial Pardon?," *ABA Journal* 75, no. 2 (February 1989): 42–43.

[117] David Johnston, "Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up,'" *New York Times*, December 25, 1992, A1.

[118] "Independent Counsel's Statement on the Pardons," *New York Times*, December 25, 1992, A22.

[119] Crovitz, "Crime, Constitution," 26.

[120] Koh, *The National Security Constitution*, 21.

[121] Taylor, interview by Kennedy, Association for Diplomatic Studies and Training.

[122] See the National Security Decision Directive 276 at https://irp.fas.org/offdocs/nsdd/nsdd-276.htm.

[123] Draft of memo?, Shultz to Reagan, July 28, 1987, folder Speeches and writings 1987 Geo. Shultz to Ronald Reagan on Iran/Contra, box 35, Charles Hill Papers, Hoover Institution, Stanford University, Stanford, CA.

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Congress, meanwhile, recommended only minor adjustments in conducting and reporting covert operations.[124] Against the wishes of the White House, the 1988 Intelligence Oversight Act incorporated some of these recommendations: that Congress be notified within forty-eight hours after a covert action finding; that there be no retroactive covert findings; and that all findings be in writing. It passed the Senate 71-19, but the House took no action and the bill died. In 1990, President Bush killed the forty-eight-hour rule by pocket veto. Bush also opposed Congress's suggestion that the executive informs Congress when it planned to use private citizens or third parties in covert operations. Only when Congress agreed that notification be merely "timely" and that Congress would know only "whether" third parties might be involved did the president sign the bill. This would have been a full return to the *status quo ante* Iran-Contra, save for making findings written and not retroactive. "A spirit of comity ... must exist if the Legislative and Executive branches of the government are to work together in this complex area," one staff director of the House intelligence committee explained. "Iran-contra destroyed this spirit of comity."[125]

Conclusion

Iran-Contra reflected a broader disregard for law in the Reagan administration. In 1988, one subcommittee counted over 225 of the president's appointees who had faced allegations of criminal wrongdoing.[126] No wonder Lawrence Walsh said the administration had "no feeling for the rule of law."[127]

One result of the scandal was a further erosion of the rule of law in American political culture. The Watergate scandal, at the center of which was the president's cover-up of White House-directed lawbreaking, helped set the context for Iran-Contra. Many Republicans in the 1980s noted not only their desire for a winnable Vietnam War in Central America no matter the cost but also their frustration at a Democrat-controlled Congress that had passed restriction upon restriction on the power of the executive in the wake of Nixon's fall. Yet Iran-Contra was more serious in one respect, wrote Journalist Carl Bernstein of Watergate fame: the legacy of the Reagan–Bush years was the "unchecked constitutional violence that has been more damaging to the rule of law than Watergate ever was. It will surely haunt future generations. The official response to Watergate was characterized by responsible leadership in both Republican and Democratic Parties," wrote Bernstein. "This has not happened on the Reagan–Bush watch."[128] Democratic operative Sidney Blumenthal added that placing "extreme anticommunism ... above the

[124] Koh, *The National Security Constitution*, 21.

[125] Cited in James T. Currie, "Iran-Contra and Congressional Oversight of the CIA," *International Journal of Intelligence and Counter-Intelligence* 11, no. 2 (1998): 199–200, 202, citation on 203.

[126] Robert Busby, *Reagan and the Iran-Contra Affair: The Politics of Presidential Recovery* (London: Macmillan Press, 1999), 17.

[127] Scott Spencer, "Walsh's Last Battle," *New York Times Magazine*, July 4, 1993, 11, 28–30, 33, 30.

[128] Carl Bernstein, "Conspiracy Without End: The Legacy of Watergate," *Los Angeles Times*, January 10, 1993.

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rule of law" ironically "violated the fundamental tenets of classical conservatism."[129] While Watergate led to a host of new laws to promote accountability, Iran-Contra produced next to zero.[130] Its schemers were never indicted for their most important criminal acts—selling weapons to terrorists, violating Boland, and diverting funds.

Future administrations would continue to defy the rule of law. To be sure, Democrats, too, were guilty. The House impeached Bill Clinton on the grounds of perjury to a grand jury, for instance. The otherwise scandal-free administration of Barack Obama dealt with enemy prisoners through illegal kidnapping and torture, and he ordered countless assassinations of foreigners with drone strikes—all crimes under U.S. law. "I don't believe that anybody is above the law," the president rationalized. "On the other hand, I also have a belief that we need to look forward as opposed to looking backwards." All the while, the detention center at Guantánamo Bay, Cuba, remained populated by de-territorialized "enemy combatants" often denied trials or even kept there when acquitted. "It is difficult to imagine a greater contempt for the rule of law than this refusal to abide by the judgment of a court," wrote one legal scholar.[131]

Yet Republicans were most brazen in their rejection of the rule of law. George W. Bush's preferred tool to circumvent statutes was the signing statement, by which he issued more than 1,000 constitutional challenges to parts of more than 150 laws. In foreign policy—to name just one area—these challenges helped him hide his administration's actions from Congress, torture terrorist suspects, gather intelligence, and prosecute whistleblowers.[132] Donald Trump's presidency ridiculed even the idea of the rule of law, at least as it applied to his administration. "Blah, blah, blah," answered White House Counselor Kellyanne Conway when asked if she had violated the Hatch Act,[133] which forbade government employees from campaigning in their official capacity.[134] When the Office of Special Counsel found nine senior Trump aides violating the law, the president refused to ask them to resign.[135] He himself pressured and cajoled foreign governments to help his reelection campaign. He urged the Postal Office to discourage voting against him. He even suggested to the FBI director that he drop an investigation against him. On many issues, the Trump administration was dismissive: whistleblower protections, the emoluments clause, protections for minority religions, and the treatment of migrant families to name but a few. More explicitly than George H. W. Bush, Trump abused his pardon power to encourage lawbreaking. In a

[129] Sidney Blumenthal, "The Conservative Crackup," *Foreign Policy* 69 (Winter 1987–1988): 166.

[130] For example, Byrne, *Iran-Contra: Reagan's Scandal*, 337.

[131] Cited in Christopher H. Pyle, "The Law: Barack Obama and Civil Liberties," *Presidential Studies Quarterly* 42, no. 4 (December 2012): 868, 876.

[132] James P. Pfiffner, "The Constitutional Legacy of George W. Bush," *Presidential Studies Quarterly* 45, no. 4 (December 2015): 727–41.

[133] Pub. L. 76–252.

[134] Michael Gerson, "Public Integrity? Blah, Blah, Blah," *Washington Post*, November 8, 2019, A21.

[135] David Frum, "Last Exit from Autocracy," *The Atlantic*, October 14, 2020, https://medium.com/the-atlantic/last-exit-from-autocracy-664a5b437f79.

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meeting where he said he wanted to "take the land" at the Mexican border to build his wall, he was told it was illegal. His response: "Don't worry, I'll pardon you."[136]

The defense of the rule of law has long been associated with a conservative "law and order" outlook. Liberals long treated it with suspicion because it oppressed the most marginalized. "But we now face something worse," wrote author Rebecca Solnit in 2019: "the corruption and decay of rule of law in the service of billionaires and misogynistic white supremacists, a system in which the most powerful gain power and shed accountability."[137] The Iran-Contra Scandal should be remembered as an underacknowledged red flag warning against that decay.

Competing interests. None.

Alan McPherson is Freaney Professor of History and Wachman Director of the Center for the Study of Force and Diplomacy at Temple University. He is the author of eleven books, most recently *Ghosts of Sheridan Circle: How a Washington Assassination Brought Pinochet's Terror State to Justice*. His next book will be about Iran-Contra <alan.mcpherson@temple.edu>.

[136] James P. Pfiffner, "Donald Trump and the Norms of the Presidency," *Presidential Studies Quarterly* 51, no. 1 (March 2021): 110.

[137] Rebecca Solnit, "President Trump is at War with the Rule of Law. This Won't End Well," *The Guardian*, October 9, 2019.

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