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Recommended Citation

Lawrence E. Walsh, *Political Oversight, the Rule of Law, and Iran-Contra*, 42 Clev. St. L. Rev. 587 (1994)
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POLITICAL OVERSIGHT, THE RULE OF LAW, AND IRAN-CONTRA¹

LAWRENCE E. WALSH²

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I. INTRODUCTION

What I would like to talk about today, and I will use Iran-Contra as an illustration for much of it, is what I believe to be the conflict between two protective systems: (1) the rule of law as it is enforced by courts and lawyers; and (2) political oversight as set up by our Constitution and as it is carried out by political forces in Congress, particularly in it's oversight of the President. It is my conclusion that in some ways they are like having two alarm systems on your house: A silent system that communicates with police headquarters if there is a burglar on the premises and second alarm which blows a noisy whistle that scares the burglar off.

From my point of view, Congress is sometimes the noisy whistle, while the Independent Counsel parallels the police responding to a silent alarm. I would like to show how the two systems have a significant degree of incompatibility. I must say, however, that I do not have a recommendation for fixing the problem, so I apologize for coming here to talk about a problem without a ready solution.

II. POLITICAL OVERSIGHT AND THE RULE OF LAW

Let me begin by examining the two systems. Rule of law as we know it, and as lawyers know it, is the concept that law is the supreme force in government. Everyone is subject to it and if carried out properly, there is equality before the

¹The Honorable Lawrence E. Walsh made this presentation at the Cleveland-Marshall College of Law on September 22, 1994, then again at the City Club in Cleveland, Ohio, on September 23, 1994. All Rights Reserved. Copyright 1994 by Lawrence E. Walsh.

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law. The highest public officials and the lowest civil servants receive equal treatment.

The concept that law is the supreme force in government goes back in history long before the United States Constitution. The rule of law concept goes back at least to Bracton in the 13th century, who argued that the King was beneath no man but was beneath God and the law—for the law maketh the King. The rule of law concept sometimes resulted in bloody conflict as Lord Chancellors were executed because of their strong beliefs in it. The Lord Chief Justice of England confronted the King in person and was called a traitor because of this. King Charles I was executed because he failed to accept his subordination to the law.

But this was not achieved by lawyers alone, it was a development of our democratic government and the political forces behind it to control autocratic rulers. The Magna Carta was the result of powerful Barons, not lawyers. Parliament was formed by political forces, not lawyers.

When the United States Constitution was drafted, our founding fathers did not entrust control of potentially autocratic presidents to lawyers; rather, they set up a political system with structural safeguards. The three branches of government were formed as a check on each other. In particular, the President was subject to oversight by Congress, and Congress had control over revenues and appropriations. It was this political system in which the founding fathers laid their trust.

But the two systems—the much older system of the rule of law and the younger system, 200 years old now, of congressional oversight—should be compatible. After all, they should serve the same purpose. But as I will relate, there are times when they come into serious conflict.

III. THE IRAN-CONTRA EXAMPLE

I am going to give a cursory summary of Iran-Contra as an example of how political oversight and the rule of law can come into conflict.³ The essence of Iran-Contra was that we had a very popular and strong willed President who flouted congressional restraints. Incidentally, these problems do not usually arise with unpopular presidents; instead, it is the popular Presidents who are tempted to be the most assertive. In President Ronald Reagan we had a very popular president who was convinced that the spread of communism from Cuba to Nicaragua threatened the North American continent. His Cabinet supported his strong belief.

For a while, he even had congressional support for these views, and Congress authorized the CIA to assist and support the Contras. The CIA overstepped when it led the Contras to mine the harbors of Nicaragua, which damaged neutral shipping. This drew the United States into a World Court controversy. It also caused Congress to withdraw its support and

³For a complete description of the Iran-Contra Affair, see generally LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (1993).

appropriations, and to forbid the CIA or any other intelligence agency or entity from supplying assistance to the Contras.

The President signed the appropriations act with that prohibition in it. But despite Congress's prohibition, President Reagan decided that he was going to continue with his Contra support policy. So the Reagan administration replaced United States appropriations with funds from Saudi Arabia. In other words, he used Saudi funds to carry out an American foreign policy.

President Reagan replaced the CIA with his own personal staff—that is, the staff of the National Security Council. The President's National Security Advisors, Robert McFarlane and his successor Admiral John Poindexter, and their assistant, Lieutenant Colonel Oliver North, set up a relatively successful system for replacing the CIA in supplying the Contras. Their success led to rumors, and the rumors led to a congressional investigation. It became necessary for some of the President's subordinates to lie to Congress.

The climax came when one of the Colonel North's airplanes was shot down over Nicaragua. The one survivor said he was working for the CIA. Congress then started congressional hearings and called in people from the CIA, the State Department, and other departments that had been helping Colonel North.

At this time, Congress had again turned around to support the President's Contra policy, and the Senate and the House of Representatives had passed bills with \$100 million in appropriations. Unfortunately, the two appropriation bills had slight differences, and the bills were still in Congress awaiting reconciliation when the plane was shot down.

So the President's men faced a dilemma when they were called in to testify: If they told the truth, they would have exposed two years of deceit and jeopardized the \$100 million appropriation for the Contras. If they refused to answer, they would be defying Congress and the appropriations would again be in jeopardy and they would be inviting further congressional scrutiny. So they lied and in doing so, they committed a crime. Lying to Congress when Congress is making a formal inquiry is similar to the crime of perjury, and it has been a crime for decades.

Turning quickly now to Iran, President Reagan was determined to obtain the release of eight Americans who were being held hostage in Lebanon by a radical Islamic group. One of the hostages was the Chief of the CIA Station in Lebanon who was being tortured. President Reagan's concern and his sympathy for the hostages is understandable.

On the other hand, it was our national policy not to deal with hostage takers.⁴ President Reagan made speech after speech in which he firmly announced that as our position. It was the position which Congress accepted, and it was a position the State Department tried to press on our allies. It was a reasonable position because if you deal with hostage takers you may release one hostage but you invite the taking of two more because it has become profitable. So the official policy was not to deal with them.

⁴See, e.g., 22 U.S.C. § 2780 (1988).

Nevertheless, President Reagan was invited by Israel to participate in a scheme where Israel would transfer American supplied arms to Iran (who needed arms because of its war with Iraq) and the radical Islamic leaders of Iran would urge the radical Islamic hostage takers to release the hostages. The Reagan administration went along with this arms-for-hostages scheme.

There were two 1985 shipments of arms and one hostage was released. Then the Israelis made a mistake, and they sent the wrong kind of weapons and weapons that had Israeli markings on them. This angered the Islamic leaders. Consequently, President Reagan decided that he would take over the operation and have the United States ship the arms directly to Iran.

The dealings through the Israelis were in violation of the Arms Export Control Act.⁵ The Arms Export Control Act was an effort by Congress to expand its area of control of United States foreign policy. There is a constant stress between the President and Congress over control of our foreign policy, and controlling arms was one of the ways Congress could have a check upon one aspect of our foreign policy. Congress had enacted the law, and it was signed by the President, that no arms were to be shipped to a foreign country above a certain amount without the President's personal approval and notice to Congress.⁶ Additionally, the law stated that arms could not be shipped from one recipient country to another without Presidential approval and congressional notification.⁷ Well this law was clearly violated.

When the President eliminated the Israeli intermediary, a different statute came into play—the National Security Act.⁸ The CIA was authorized by the President to obtain the arms from the Defense Department and to sell them to the Iranian leaders. Colonel North was picked by Admiral Poindexter to recruit and supervise a private intermediary to carry out this operation. This required a Presidential finding and notice to Congress but Attorney General Meese gave his opinion that notice could be delayed.

At about the time that Colonel North started the direct sales to Iran, the Contras ran out of money again. The Saudi Arabian funds had run out. So, Colonel North had this very simple idea which Admiral Poindexter and others approved: Mark-up the prices of the arms to the Iranians 370 percent and use the excess payments from Iran to support the Contras. And they even carried it further. They planned on building up private Swiss accounts, and with this secret cache of funds they could support other secret activities that the President and Congress might not have considered.

There were a series of arms transactions and no hostages released. The Iranians actually became hostile when they discovered the 370 percent price mark-up. But the President kept up the flow of arms. It seems doubtful that President Reagan would accept affront after affront, in not having hostages

⁵22 U.S.C. §§ 2751-2796 (1988).

⁶22 U.S.C. § 2776 (1988).

⁷*Id.*

⁸50 U.S.C. §§ 401-432 (1988).

released, if he did not think it was helping some other policy of his, such as the support of the Contras. Admiral Poindexter said he never told the President that he was permitting the use of American arms proceeds to support the Contras. He said he did not have to tell him because he knew the President would have approved it if he told him. Now this was a simple embezzlement of funds from the sale of government property that are supposed to go to the United States treasury.

The Lebanese hostage takers disclosed the arms shipments three weeks after the Hasenfus plane was shot down. A Lebanese newspaper published an article about the arms shipments as a result of the disclosure. So both secret operations were disclosed at about the same time. The press and the media in the United States went wild. This also caused Congress to become gravely concerned and its committees started another series of hearings.

First, the President argued that he could not provide any information because it would jeopardize the hostages. That approach only lasted 48 hours, but broke down because Congress and the media began pounding on the White House door. Then the Reagan administration decided to tell Congress about the 1986 transactions, which were direct from the CIA to Iran, because they were pursuant to a presidential finding and were arguably legal even though Congress had not been notified as the law required.⁹ But they decided to continue to conceal the 1985 transactions to Israel because they clearly violated the Arms Export Control Act.

Because of conflicting recollections and positions of Cabinet members, the President called in his personal friend, Attorney General Edwin Meese, to develop a coherent administration position reconciling the Iranian arms deals with the President's policy of not dealing with hostage takers. The Secretary of State, the Secretary of Defense, and CIA officials all knew about the 1985 transactions, so it was difficult to devise a coherent position that would not embarrass the President.

But Attorney General Meese's concerns were sidelined when one of his assistants found a document that Colonel North had failed to destroy. The document described the diversion of Iranian arms sales proceeds to the resupply effort for the Contras. At this point impeachment became an issue in the minds of the administration leaders. Attorney General Meese, being a close friend and top advisor to the President, was obviously in no position to assume responsibility for further investigation or prosecution. Thus, Attorney General Meese invited the court to appoint an Independent Counsel.

Being Independent Counsel sounded like an invitation to just step into a prosecutorial slot. The Attorney General could not do it, the U.S. Attorney could not do it, so I was to do it. Well, I went to Washington but there was no prosecutorial slot to step into. I was sworn in in a great ceremonial courtroom, with nobody there but the press. Then I was taken up to an empty set of

⁹Attorney General Edwin Meese advised President Reagan that there could be a "reasonable" delay in notifying the congressional leaders to protect the hostages. Actually, no notice was ever given until after exposure ten months later.

chambers and the court clerk said, "Well here's the key, here's some pads and a pencil—go ahead."

The first thing an independent lawyer has to do is get staff, and I tried to quickly assemble a staff. It took a month or so to get ten good lawyers for a staff, but then I found out that my staff of lawyers could not read most of the documents or talk to many witnesses because everything was classified. It took almost another month to have them cleared. Everything in Iran-Contra was classified top secret or higher.

We started working. We send out document requests. We were going to have to interview about a 1,000 witnesses, but they were all hostile, non-friendly. You cannot usefully interview them without having records to confront them with.

This was the beginning of the war of attrition because it was perfectly clear that the administration was going to do everything on the surface to be friendly, but that they were going to hold out for the passage of time and increase our expense. It costs well over \$10,000 a day to keep an Independent Counsel's office going, and as that expense builds, sooner or later the Independent Counsel is going to endanger what public support he might have.

The Independent Counsel has no constituents; by law he is the proponent of the government, but the whole government regards him as antagonist. The Independent Counsel may think he is a government officer and that he has government power, but the rest of the government, that usually supports prosecutions, does not look at him as being one of them.

It is like investigating an enormous corporation, but worse. Assume that you have been retained as an individual in private practice to start a legal action against an immense corporation with a legal staff of hundreds. We, however, were not dealing with a corporation—we were dealing with the United States government with all of its protections. We were dealing with very powerful people, people right at the top. We were dealing with the President, those closest to him, and the agencies that handle national security. The national security agencies—the State Department, the Defense Department, the CIA—are all effectively protected from public inquiry. Everything they do is classified, so you have to deal with classified information. To try cases, you are dependent on them to release classified information.

As I was getting the Independent Counsel's office going, Congress decided that it had been affronted—that the President had circumvented its control of appropriations and had deceived its committees in a pretty outrageous way. Congress decided to use its power of oversight, and there was no way I could stop it. It had large staffs already in place; its committees knew the CIA in a way that an outside lawyer from Oklahoma City could never know it.

Congress also decided to move quickly for political reasons because 1988 was going to be a presidential election year. The last thing the Republicans wanted was to have a problem like this kicking around during an election year. Both parties had agreed to set up a committee which was equally Republican and Democratic. The Democrats did not take advantage of their control of Congress. In order to get a report that would not be split along party lines, they had to hold the support of some of the Republicans.

The Committee set up a four month schedule. There were three major government departments involved, plus the staff of the President, both the

President's national security staff and his domestic affairs staff—all of these people were to somehow be investigated within three months and then the results were going to be exposed to the public in a month of hearings.

The Committees then decided that the American people had to see and hear Colonel North. President Reagan has been trying from the very beginning to get Congress to give immunity to Admiral Poindexter and Colonel North in the hopes that they would exculpate him and take the fall. Congress decided to go after the scapegoats, and Colonel North and Admiral Poindexter were terrific as scapegoats. They admitted much of their own activity. The higher ups in the White House might know in general what they were doing but they denied informing the President of the diversion of the proceeds of the arms sales.

I warned the Committee members that I did not think I could successfully prosecute Admiral Poindexter and Colonel North if Congress gave them testimonial immunity and required them to testify publicly. The Committee's counsel said, "All you have to do is don't look and don't listen." We responded that we would try to do that, but the chance of us prevailing was going to be seriously hurt by the Committee testimony. I had no way to prevent the grants of immunity.

So immunity was given by the congressional committee to Colonel North and Admiral Poindexter. When it came time to give Admiral Poindexter and Colonel North immunity, instead of doing what I suggested which was to find out what they were going to say before giving them immunity, the Committees declined to compel the disclosure. North refused to give private testimony. Congress failed to compel it. Congress did not have time for that. So they put Colonel North on live television without knowing what he was going to say.

Immunity is a statutory device, whereby to get a person to talk about crimes which he has committed with others, you promise that whatever he says won't be used against him. The grant of immunity is one of the most important powers of a prosecutor. You can use this power with the lower level members in the conspiracy to get to the upper level members. Thus, you try to get people who are incriminated to cooperate with you by giving them immunity and promising not use what they say against them. But if you are smart, you don't do that unless you know what you are going to get in the bargain —through the witness's lawyer or through the witness if he is willing to talk. A good prosecutor will want to know the facts that the person being given immunity is going to testify. Ordinarily, you do not want to give immunity to somebody who simply testifies against himself and who is just going to exculpate everybody else.

Colonel North turned out to be very impressive on television; he gave a rousing presentation. He was not effectively cross-examined. My staff and I would see people getting their picture taken with cardboard cutouts of Oliver North. A friend of my wife said someone in the next hairdresser's booth asked

for a Betsy North¹⁰ hairdo. Congress began getting telephone calls and letters supportive of Colonel North. Colonel North ran away with the show and the committee ran into retreat. The committee quickly finished up its work. They hurriedly questioned the Secretary of State and the Secretary of Defense, but they get nowhere. They never questioned President Reagan or Vice-President Bush. They wrote a report saying this was just a runaway conspiracy led by North and Poindexter.

After the fiasco on Capital Hill we considered closing down the Independent Counsel's office, but we went ahead. We prosecuted and convicted Colonel North and Admiral Poindexter of felonies.

By giving them immunity, the congressional committees made our job much more difficult. Colonel North and Admiral Poindexter were important both as defendants and as sources of information. Hopefully, if they were convicted and confronted with prison sentences as in the case of many Watergate defendants, they would reflect on whether they wanted to tell the truth. The *North* trial judge gave him a very light sentence. Although expressing no doubt of guilt, he may have been hesitant to impose a heavy sentence knowing that the congressional immunity would be hanging over the conviction in the court of appeals.

Admiral Poindexter and Colonel North's convictions were reversed on appeal because of the immunity Congress had granted.¹¹ The court of appeals found that the I had insulated myself and my staff, but that there was no way to insulate the witnesses. We had tried to cope with that problem by giving an instruction to witnesses that no one was to tell us anything learned for the first time from the hearing. If a witness could not separate his own recollection from what he had heard, then we did not question him. At trial, the court imposed the same rule, but the court of appeals said that was not enough. We had to probe each witness for some more subtle impact on his testimony. As a result of the reversed convictions, we lost Admiral Poindexter and Colonel North as effective witnesses because they had no inducement to supply full information to us.

We, by then, had scoured the CIA cables and prolix Iran-Contra records, and we had put together a case to go after the higher ups. In our investigation we discovered that Secretary of State George Shultz and Secretary of Defense Casper Weinberger had memoranda of all of their Iran-Contra meetings. It turned out that Secretary Shultz dictated notes after every meeting, after every conference, after every interview, and even after some phone calls. He dictated them to a man named Charles Hill who was his executive assistant. Mr. Hill wrote all of these notes almost verbatim, and they show that Secretary Schultz knew more about the arms transaction than he told Congress. Only the notes that conformed with Secretary Schultz's testimony had been turned over to

¹⁰Betsy North is Mrs. Oliver North.

¹¹*United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992); *United States v. North*, 910 F.2d 843 (D.C. Cir.), *opinion withdrawn and superseded in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

Congress and to us. We were never able to prove beyond a reasonable doubt who was to blame for this selectivity.

Secretary Weinberger had told congressional investigators that he did not remember anything and that he had not taken any notes. He told them this as they sat across from him at his desk which turned out to be full of Iran-Contra notes. After the congressional investigators left, he made a note of the meeting and put it with his other notes.

Secretary Weinberger also told us that he did not have any notes, but we searched files in the Library of Congress. We caught him red-handed. There were hundreds of pages of notes on Iran-Contra. The notes showed his knowledge and the President's knowledge of Iran-Contra. Then we had to indict Secretary Weinberger. We had indicted eleven other people who had done essentially the same thing—lying to Congress and lying to us.

This invited a second form of congressional oversight, which I call spurious oversight. We were denounced by Senator Robert Dole and by a number of Republican congressmen. Senator Dole announced the night of the indictment that it was the work of hired assassins. Then seventy-five congressmen asked the Attorney General to have me removed. All of this came up at a time when we had government cases pending and one actually on trial.

My Deputy was attacked by Senator Dole and other Republican congressmen while he was trying Clair George, the third highest man in the CIA. The front row of the courtroom was filled during the trial with ex-CIA officials who were helping Mr. George with his documents. They all came in with *The Washington Times* the morning after the denunciation, and they tipped the banner headlines down so that the jurors could see it. The trial judge had to tell the jurors to disregard the newspaper story.

Further, we learned that the congressional denunciation was apparently done at the instigation of Weinberger's counsel, Robert Bennett. Senator Dole didn't do it as a spontaneous emotional reaction; rather, he apparently did it at the request of Mr. Weinberger's counsel. Mr. Robert Bennett was ruthless. He and his co-counsel told me that if we dropped the investigation of Casper Weinberger he would get support for us on both sides of the congressional aisle, but that if we indicted Mr. Weinberger, it was going to be nuclear war. I thought they meant they were going to give me a hard time in court, but they stopped the case from even getting to court. They used Congress to vilify us, and they orchestrated the pardon of Mr. Weinberger. Mr. Bennett recently boasted about this in the *ABA Journal*.¹² Mr. Bennett claims his means were justified because that is the way law is practiced in Washington. The congressional attack set the climate for President George Bush's pre-trial pardon of Mr. Weinberger.

Never in the history of the United States had a President granted a pardon to block a trial of an indicted person. An ordinary person has to wait seven years after a conviction before he can even apply for a pardon. President Bush's pardon of Casper Weinberger was granted ten days before his trial. President

¹²Nina Burleigh, *The Man to See*, *ABA J.*, Sept. 1994, at 50, 50-53.

Grant didn't grant pardons when scandal hit his administration; President Harding avoided it too, but President Bush did it. The reason he gave was that the prosecution was a criminalization of a political dispute. In fact, the criminal law had been broken. The prosecutions were for flagrant crimes, not a political dispute. President Bush's pardon not only prevented punishment, but it prevented a trial which would have exposed more of the truth about Iran-Contra.

Further, if President Bush regarded prosecution for lies to Congress as simply the criminalization of a political dispute, why did we wait during the intervening years until Weinberger was coming up for trial before exercising the pardon power? All the other Iran-Contra figures had to go through the expense of trial and suffer felony convictions or plead guilty. President Bush stood by while other people, career officers like Clair George and others, had been forced to go to trial and had been convicted of felonies. For these others, he did not lift a finger; it was only when the political upper crust was reached that this extraordinary act of clemency was taken. Now, this to me, is a denial of equal treatment under law. The former Secretary of Defense should be subject to the law requiring honesty to Congress just like everybody else.

IV. FINE-TUNING OUR DEMOCRATIC SYSTEM

What can be done in the future to prevent a President from using a pardon to block an Independent Counsel's investigation and the trial of an indicted person. The presidential pardon was never intended to be used this way. The founding fathers almost limited it to post-trial use, but they left it open so that a prosecutor could get a presidential pardon for a witness in exchange for his testimony. That use of the presidential pardon became unnecessary after the immunity statutes were passed. The only solution that I can think of is that the presidential candidates might be asked to commit themselves prior to election to not use the presidential pardon in this way.

As to Senator Dole's gratuitous denunciations of the Independent Counsel, I do not know what the answer is to that problem. We have extended a certain amount of tolerance to our political figures. The floor of Congress is a protected arena which is vital to our democratic system. However, the denunciations of the Independent Counsel by the Republicans in Congress was not in furtherance of any congressional proceeding. They served no purpose except the private effort to prevent Weinberger's trial. I think the only answer in the future is for there to be some pre-election commitment not to use a congressional office for private attacks on government prosecutions actually pending in court. There could be some commitment by candidates for Congress to support a rule that would at least keep them from intruding as individuals to try to harass investigations and lawsuits being prosecuted for the government.

What can be done to prevent the clash of the two systems in the future? Congress has investigative powers, and it should have those powers. But the Whitewater hearings at least showed that Congress had learned a lesson from Iran-Contra. No immunity was granted to any Whitewater witness and the congressional committee hearings were delayed to give the Independent Counsel a chance to get off the ground.

In any event, an Independent Counsel cannot permit himself to be deterred by political denunciations. The Independent Counsel is vital to our maintaining the rule of law with respect to high government officials. Under the Independent Counsel statute, he must pursue his investigations to the end, and he should not stop prematurely unless he is stopped by the court which appointed and oversees him.

