

Part XI

Concluding Observations

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

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

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

Immunity is ordinarily given by a prosecutor to a witness who will incriminate someone more

important than himself. Congress gave immunity to North and Poindexter, who incriminated only themselves and who largely exculpated those responsible for the initiation, supervision and support of their activities. This delayed and infinitely complicated the effort to prosecute North and Poindexter, and it largely destroyed the likelihood that their prompt conviction and appropriate sentence would induce meaningful cooperation.

These important political decisions were properly the responsibility of Congress. It was for the Committees to decide whether the welfare of the nation was served or endangered by a continuation of its investigation, a more deliberate effort to test the self-serving denials presented by Cabinet officers and to search for the full ramifications of the activities in question. Having made this decision, however, no one could gainsay the added difficulties thrust upon Independent Counsel. These difficulties could be dealt with only by the investment of large amounts of additional time and large amounts of expense.

The role of Independent Counsel is not well understood. Comparisons to United States attorneys, county district attorneys, or private law offices do not conceive the nature of Independent Counsel. Independent Counsel is not an individual put in charge of an ongoing agency as an acting U.S. attorney might be; he is a person taken from private practice and told to create a new agency, to carry out the mission assigned by the court. It is not as though he were told to step in and try a case on the calendar of an ongoing office with full support of the Government behind him, as it would be behind the United States attorney. He is told to create an office and to confront the Govern-

ment without any expectation of real cooperation, and, indeed, with the expectation of hostility, however veiled. That hostility will manifest itself in the failure to declassify information, in the suppression of documents, and in all of the evasive techniques of highly skilled and large, complex organizations.

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

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

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

Evidence obtained by Independent Counsel establishes that the Iran/contra affair was not an aberrational scheme carried out by a “cabal of zealots” on the National Security Council staff, as the congressional Select Committees concluded in their majority report.¹ Instead, it was the product of two foreign policy directives by President Reagan which skirted the law and which were executed by the NSC staff with the knowledge and support of high officials in the CIA, State and Defense departments, and to a lesser extent, officials in other agencies.

Independent Counsel found no evidence of dissent among his Cabinet officers from the President's determination to support the contras after federal law banned the use of appropriated funds for that purpose in the Boland Amendment in October 1984. Even the two Cabinet officers who opposed the sale of arms to Iran on the grounds that it was illegal and bad pol-

icy—Defense Secretary Caspar W. Weinberger and Secretary of State George P. Shultz—either cooperated with the decision once made, as in the case of Weinberger, or stood aloof from it while being kept informed of its progress, as was the case of Shultz.

In its report section titled “Who Was Responsible,” the Select Committees named CIA Director William Casey, National Security Advisers Robert C. McFarlane and John M. Poindexter, along with NSC staff member Oliver L. North, and private sector operatives Richard V. Secord and Albert Hakim. With the exception of Casey who died before he could be questioned by the OIC, Independent Counsel charged and obtained criminal convictions of each of the men named by Congress. There is little doubt that, operationally, these men were central players.

But the investigation and prosecutions have shown that these six were not out-of-control mavericks who acted alone without the knowledge or assistance of others. The evidence establishes that the central NSC operatives kept their superiors—including Reagan, Bush, Shultz, Weinberger and other high officials—informed of their efforts generally, if not in detail, and their superiors either condoned or turned a blind eye to them. When it was required, the NSC principals and their private sector operatives received the assistance of high-ranking officers in the CIA, the Defense Department, and the Department of State.

Of the 14 persons charged criminally during the investigation, four were convicted of felony charges after trial by jury, seven pleaded guilty either to felonies or misdemeanors, and one had his case dismissed because the Administration refused to declassify information deemed necessary to the defendant by the trial judge. Two cases that were awaiting trial were aborted by pardons granted by President Bush. As this report explained earlier, many persons who committed crimes were not charged. Some minor crimes were never investigated and some that were investigated were not solved. But Independent Counsel believes that to the extent possible, the central Iran/contra crimes were vigorously prosecuted and the significant acts of obstruction were fully charged.

¹ Majority Report, p. 22.

Fundamentally, the Iran/contra affair was the first known criminal assault on the post-Watergate rules governing the activities of national security officials. Reagan Administration officials rendered these rules ineffective by creating private operations, supported with privately generated funds that successfully evaded executive and legislative oversight and control. Congress was defrauded. Its appropriations restrictions having been circumvented, Congress was led to believe that the Administration was following the law. Numerous congressional inquiries were thwarted through false testimony and the destruction and concealment of government records.

The destruction and concealment of records and information, beginning at the twilight of Iran/contra and continuing throughout subsequent investigations, should be of particular concern. Oliver North's destruction of records in October and November 1986 caused an irretrievable loss of information to the executive agencies responsible for regulating clandestine activities, to Congress, and to Independent Counsel. John Poindexter's efforts to destroy NSC electronic mail nearly resulted in comparable damage. CIA Costa Rican Station Chief Joseph F. Fernandez attempted to hide phone records that would have revealed his contacts with Enterprise activities.

This sort of obstruction continued even after Independent Counsel's appointment. In the course of his work, Independent Counsel located large caches of handwritten notes and other documents maintained by high officials that were never relinquished to investigators. Major aspects of Iran/contra would never have been uncovered had all of the officials who attempted to destroy or withhold their records of the affair succeeded. Had these contemporaneous records been produced to investigators when they were initially requested, many of the troublesome conflicts between key witnesses would have been resolved, and timely legal steps taken toward those who feigned memory lapses or lied outright.

All of this conduct—the evasions of the Executive branch and the Congress, the lies, the conspiracies, the acts of obstruction—had to be addressed by the criminal justice system.

The path Independent Counsel embarked upon in late 1986 has been a long and arduous one. When he hired 10 attorneys in early 1987, Independent Counsel's conception of the operational conspiracy—with its array of Government officials and private contractors, its web of secret foreign accounts, and its world-wide breadth—was extremely hazy. Outlining an investigation of a runaway conspiracy disavowed by the President was quite different from the ultimate investigation of the President and three major agencies, each with the power to frustrate an investigation by persisting in the classification of non-secret but embarrassing information. Completing the factual mosaic required examining pieces spread worldwide in activities that occurred over a three-year period by officials from the largest agencies of government and a host of private operatives who, by necessity, design and training, worked secretly and deceptively.

The Role of Independent Counsel

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

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

As Iran/contra demonstrated, congressional oversight alone cannot make up for deficiencies that result when an attorney general abandons that law-enforcement role in cases of Executive branch wrongdoing. Well before Attorney General Meese sought an independent counsel in

December 1986, he had already become, in effect, the President's defense lawyer, to the exclusion of his responsibilities as the nation's top law enforcement officer. By that time, crucial documents had already been destroyed and false testimony given.

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

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

Problems Posed by Congressional Immunity Grants

The magnitude of Iran/contra does not by itself explain why Independent Counsel took so long to complete the task assigned by the Special Division which appointed him. The word "independent" in Independent Counsel is not quite accurate as a description of his work. Time and again this Independent Counsel found himself at the mercy of political decisions of the Congress and the Executive branch. From the date of his appointment on December 19, 1986, Independent Counsel had to race to protect his investigations and prosecutions from the congressional grants of immunity to central Enterprise conspirators. At the same time, he had to wait almost one year for records from Swiss banks and financial organizations vital to his

work. Once Congress granted immunity, Independent Counsel had to insulate himself and his staff from immunized disclosures, postponing the time he could get a wider view of the activities he was investigating.

Despite extraordinary efforts to shield the OIC from exposure to immunized testimony, the North and Poindexter convictions were overturned on appeal on the immunity issue. While the appellate panels did not find the prosecution was "tainted" by improper exposure to the immunized testimony of North or Poindexter, they ruled that the safeguards utilized by the trial courts did not ensure that witnesses' testimony was not affected by the immunized testimony.

Although Independent Counsel warned the Select Committees of the possibility that granting use immunity to principals in the Iran/contra matter might make it impossible to prosecute them successfully, he has never contended that Congress should refrain from granting use immunity to compel testimony in such important matters as Iran/contra. In matters of great national concern, Independent Counsel recognizes that intense public interest and the need for prompt and effective congressional oversight of intelligence activities may well force the Congress to act swiftly and grant immunity to principals.

But, in light of the experience of Independent Counsel in the Iran/contra cases, Congress should be aware of the fact that future immunity grants, at least in such highly publicized cases, will likely rule out criminal prosecution.

Congressional action that precludes, or makes it impossible to sustain, a prosecution has more serious consequences than simply one less conviction. There is a significant inequity when more peripheral players are convicted while central figures in a criminal enterprise escape punishment. And perhaps more fundamentally, the failure to punish governmental lawbreakers feeds the perception that public officials are not wholly accountable for their actions. In Iran/contra, it was President Reagan who first asked that North and Poindexter be given immunity so that they could exculpate him from responsibility for the diversion. A few months later, the Select Committees did that—granting immunity without any proffer to ensure honest testimony.

The Classified Information Procedures Act

After Independent Counsel brought the principal operational conspiracy cases, he was forced to dismiss the central conspiracy charges against North, Poindexter, Hakim and Secord because the Administration, which had opposed the charge in the first instance, refused to declassify the information needed to proceed in the *North* case. Later, the entire case against Joseph F. Fernandez, the CIA's station chief in Costa Rica, was dismissed when the Administration declined to declassify information necessary for the trial. In both instances, Independent Counsel concluded that the classified information in question was already publicly known, but the Administration declined to engage in meaningful consultation with Independent Counsel before making its decision.

In any prosecution of a national security official, a tension inevitably arises between the Executive branch's duty to enforce the criminal law and its obligation to safeguard the national security through protecting classified information. The Classified Information Procedures Act (CIPA) was enacted in 1980 to assist the Department of Justice and other Executive branch agencies in resolving this tension in a manner consistent with our nation's commitment to the rule of law. Under CIPA, only the attorney general has the authority to make the decision between the Government's need to enforce the law and the Government's need to withhold information for national security reasons. If the intelligence agencies decline to declassify information deemed necessary by the trial court for the fair trial of a case, only the attorney general can overrule them. Likewise, if the attorney general decides that the information should not be disclosed, he is empowered to file a CIPA § 6(e) affidavit to prohibit the disclosure. Current law does not require that the attorney general's decision to withhold classified material from disclosure at trial meet any objective or articulated standard. No court can challenge the substance of a § 6(e) affidavit; no litigant has standing to contest the attorney general's decision to file one.

The Administration has the power to make the CIPA process work when it wants to, as

in the case of alleged spies or in the trial of former Panamanian dictator Manuel Noriega. Since CIPA became law in 1980, no attorney general killed a prosecution by filing a § 6(e) affidavit until Attorney General Richard Thornburgh forced the dismissal of the *Fernandez* case in November 1989. As the *Fernandez* and *North* cases show, the Administration also has the power to derail the CIPA process when, for reasons of its own, it chooses not to make it work.

The attorney general's unrestricted CIPA § 6(e) authority becomes questionable when an independent counsel, rather than the Justice Department, has jurisdiction over the prosecution. An independent counsel is appointed only when the attorney general determines, after a preliminary investigation, that high-level officials within the Executive branch may have been involved in criminal activity or that the Department of Justice may be perceived to have a conflict of interest. The problems of conflict are compounded in CIPA because the issue involves classified information controlled by an intelligence agency in a case charging one or more of the officials of that agency in criminal activity. Congress could not have intended that CIPA—a statute designed to facilitate trials involving classified information—be used by the attorney general to control prosecutions of independent counsel.

Final Thoughts

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

The tone in Iran/contra was set by President Reagan. He directed that the contras be supported, despite a ban on contra aid imposed on him by Congress. And he was willing to trade arms to Iran for the release of Americans

