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Madison, Hamilton, and Reagan: The Limits of Executive Power in Foreign Policy and the Reagan Intervention in Nicaragua

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Madison, Hamilton, and Reagan:
The Limits of Executive Power in Foreign Policy and the Reagan Intervention in Nicaragua

A Thesis

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University of New Orleans
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in
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Stefan Lallinger

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Abstract

The distribution of power between the executive branch and the legislative branch in the realm of foreign policy is a delicate balance and one that has been debated since the Founding Fathers met in Philadelphia in the summer of 1787. The debate has gotten no less intense and no less crucial in the modern, nuclear age, and it remains unresolved. The Reagan administration's foray into Nicaragua during the 1980's and its confrontations with Congress during that time period illuminate the complexities of the power-sharing arrangement in foreign policy and offer the ideal case study of executive-legislative war power. The lessons to be drawn from America's involvement in Nicaragua are that the expanded Presidential power in the realm of foreign policy are necessary for the safety of the country in today's world, but dangerous without the vigorous oversight and ultimate check by Congress.

U.S. Foreign Policy, Nicaragua, Ronald Reagan, *Contras*, War Power, Foreign Policy, Executive Branch, Legislative Branch, President, Congress

Madison, Hamilton, and Reagan: The Limits of Executive Power in Foreign Policy and the Reagan Intervention in Nicaragua

“Some people say this isn't America's problem. Why should we care if Nicaragua is a democracy or not? Well, we should care for a whole host of reasons. Democracy has its own moral imperatives, as you well know, but it also has advantages that are profoundly practical. Democratic states do not attack their neighbors and destabilize regions. Democratic states do not find it easy to declare and carry out war. Democratic states are not by their nature militaristic. Democracies are traditionally reluctant to spend a great deal of money on arms. Democratic states have built-in controls on aggressive, expansionist behavior because democratic states must first marshal wide popular support before they move.”

-Ronald Reagan, Remarks at a Fund-raising Dinner for the Nicaragua Refugee Fund, April 15, 1985¹

Ronald Reagan received thunderous applause as he concluded his remarks to a crowd of potential donors to the “Nicaragua Refugee Fund,” a group composed mainly of influential Republican lawmakers and their wealthy donors.² But then came the icing on the cake for the famously skillful orator. Reagan invited to the podium a gift-bearing, 8-year-old Nicaraguan refugee named Patricia, whom he promptly lifted into the air and kissed on the cheek.³ The irony of Reagan’s remarks, the most significant of which are captured above, was likely lost on the bedazzled and sympathetic spectators. While expounding on the “moral imperatives” and “advantages” of democracies, Reagan’s own administration was ushering the United States into a militaristic phase, in which it acted aggressively in Nicaragua, and spent a great deal of money on arms for the Contra rebels in an attempt to overthrow the Sandinista government, all without marshaling either wide popular support or broad Congressional support.⁴

¹ John T. Woolley and Gerhard Peters, *The American Presidency Project* [online] (Santa Barbara, CA). Ronald Reagan, “Remarks at a Fund-raising Dinner for the Nicaragua Refugee Fund,” April 15, 1985 in Woolley and Peters, *The American Presidency Project*. <<http://www.presidency.ucsb.edu/ws/?pid=38474>> (accessed 9 February 2010).

² Elizabeth Kastor, “Reagan’s Night for the Refugees,” *Washington Post*, April 16, 1985, C1.

³ Elizabeth Kastor, “Mistaken Identity: Reagan and the Child Refugee Who Wasn’t,” *Washington Post*, April 18, 1985, D1. It was later discovered that Patricia Guerra was not a Nicaraguan refugee, but was, in fact, born and raised in the United States.

⁴ Reagan, “Remarks at a Fund-raising Dinner for the Nicaragua Refugee Fund,” in Woolley and Peters.

America's involvement in Nicaragua can be seen as a battleground over executive power, fought between the Reagan administration and elements of Congress, within the context of America's Cold War foreign policy. The conflict is part of a larger, more fundamental debate over the delegation of war-making power in the United States Constitution. It is a battle that has been waged over many years, with most scholars of foreign policy arguing that power has gradually slid from the Congress to the Presidency.⁵ However, it is a debate that remains unresolved.⁶ The case of Nicaragua is particularly instructive because it illustrates a time when the boundaries were contested in a series of executive orders, legislative maneuvers, loophole evasions, and even deceit and illegality. In the protracted dispute over intervention in Nicaragua, Congress fought back against executive encroachment on the legislative branch's foreign policy powers, as part of a broader backlash against executive power following the Vietnam War.⁷ In essence, Nicaragua is instructive because it illustrates a moment in which the Reagan administration argued that the complexities of modern foreign policy necessitated executive foreign policy-making power unencumbered by Congressional oversight and public support.⁸ Congress and important segments of the public retorted with a full-throated and forceful rebuke.⁹ What Nicaragua clearly illustrates is that 200 years after the writing of the Constitution, the arrangement between Congress and the President over waging war, still has not been settled. It

⁵ Robert DiClerico, *The American President*, 5th ed. (Upper Saddle River, NJ: Prentice Hall, 2000), pp. 33-39. Presidents have unequivocally exercised less restraint in their conduct of war, particularly when it comes to committing troops to combat and giving notice to Congress of military action, as history has progressed. DiClerico points specifically to Truman ordering forces to aid South Korea and Johnson committing troops to the Dominican Republic as prime Cold War examples. One exception to greater executive power in foreign policy is following the Vietnam War when Congress attempted to reassert its constitutional war-making powers with the War Powers Resolution and Hughes-Ryan Amendment.

⁶ Charlie Savage, "Attack Renews Debate Over Congressional Consent," *New York Times*, March 21, 2011. President Barack Obama's actions in Libya were heavily criticized by members of Congress who argued that they were unconstitutional.

⁷ *Ibid.*, p. 38.

⁸ Theodore Draper, *A Very Thin Line: The Iran-Contra Affairs* (New York: Hill and Wang, 1991).

⁹ Joel Brinkley and Stephen Engelberg eds., *Report of the Congressional Committees Investigating the Iran-Contra Affair, with the Minority View* (New York: Random House, Inc., 1988).

also shows that the answer to waging modern warfare is not simply to circumvent the prescribed role of Congress in foreign policy. Instead, Nicaragua demonstrates that there must be some type of flexible and fluid power-sharing agreement between the two branches of government in order to meet the contemporary demands of foreign policy-making in the nuclear age.

It is this back-and-forth between Congress and the Reagan administration over American intervention where the question of primacy in foreign policy and American involvement in Nicaragua meet. This paper begins with a brief history of the constitutional debate over foreign policy in America, beginning with the founders and ending with contemporary scholars and Supreme Court decisions. The paper then gives a brief historical background to the American involvement in Nicaragua. The heart of the paper is a very specific discussion of developments in the American involvement in Nicaragua and an examination of its constitutionality. The underlying themes throughout the saga between Congress and the President are security and liberty. In essence, those who argued for a stronger executive were essentially making the claim that swift and secretive military action was necessary for the nation's security.¹⁰ The proponents of greater Congressional control over foreign policy argued that liberty and democratic control could only be preserved under a transparent and cooperative execution of military action.¹¹ Finally, the paper concludes by summarizing the significance of the Nicaraguan intervention to American foreign policy and putting it into the context of today's foreign policy challenges for the United States.

¹⁰ William Hyland, ed., *The Reagan Foreign Policy* (New York: New American Library, 1987). Caspar Weinberger, "U.S. Defense Strategy," in: Hyland, ed., *The Reagan Foreign Policy*.

¹¹ Garry Wills, *Bomb Power: The Modern Presidency and the National Security State* (New York: Penguin Press, 2010).

The founding fathers could not have foreseen the nature of executive-legislative relations in an age when nuclear weapons have the potential to destroy entire civilizations.¹² Nonetheless, they gave much thought to how Congress and the President should work together. In attempting to convince the nation that it ought to adopt the Constitution with Federalist #48, James Madison explains that a government with distinct branches must inherently build in overlapping powers. “Unless these departments be so far connected and blended, as to give to each a constitutional controul [sic] over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained.”¹³ This paper is the story of how President Ronald Reagan and the United States Congress attempted to work out their complicated, overlapping power-sharing arrangement in foreign affairs from 1981 to 1986 and the lessons the nation must learn from it. Publius, Madison’s pseudonym, leaves his readers with one prescient and particularly germane question to our investigation. “Will it be sufficient to mark with precision the boundaries of these departments in the Constitution of the government, and to trust these parchment barriers against the encroaching spirit of power?”¹⁴

¹² John C. Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Kaplan Publishing, 2009).

¹³ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (1787-1788; repr., New York: Bantam Dell, 2003), p. 300.

¹⁴ *Ibid.*, p. 301.

The Constitution and Foreign Policy

“What should be the role of public opinion in setting policy ... in foreign policy? The public’s part should be at once expansive and limited. It should be expansive in the sense that it determines the basic ends to be pursued. It should be limited in the sense that it leaves the details of how an end is to be achieved to others who have the kind of detailed knowledge a general public can never – and need never possess.”

-Everett C. Ladd, *Public Opinion in U.S. Foreign Policy*, 2001¹⁵

“Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.”

-Justice Robert Jackson, *Youngstown Sheet and Tube Co. v. Sawyer*¹⁶

I. The Founding Fathers

In the wake of the revolutionary war, the citizens of America sought in their future system of government an assurance against the encroachments of a powerful despot. The foremost concern was, of course, an executive with complete control over the government, especially the military.¹⁷ Americans were so worried about this possibility that under their first Constitution, the Articles of Confederation, they decided that, “the united states [sic] in congress assembled, shall have the sole and exclusive right and power of determining on peace and war.”¹⁸ Indeed, the Articles did not even provide for a sole executive. The topic of foreign policy was heavily debated at the Constitutional Convention, as well as in the ensuing ratification arguments between federalists and anti-federalists. At the convention, delegates such as James Madison, Elbridge Gerry, George Mason, and Roger Sherman argued about the

¹⁵ Everett C. Ladd, “Foreword,” in: Sobel, ed., *Public Opinion in U.S. Foreign Policy: The Controversy over Contra Aid*, pp. ix-x.

¹⁶ *Youngstown Tube and Sheet Co. v. Sawyer*, 343 U.S. 579 (1952), p. 634-635.
<<http://supreme.justia.com/us/343/579/case.html#634>> (accessed 10 March 2010).

¹⁷ Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969).

¹⁸ Winton U. Solberg, ed., *The Constitutional Convention and the Formation of the Union* (Chicago: University of Illinois Press, 1990), p. 46.

efficacy of vesting the power to make war in the Congress, pointing out that that body was too deliberative and too slow to adequately protect the nation.¹⁹ The other side argued that giving the executive the power of war was contrary to the spirit of a republican democracy in the threats it posed. Ultimately, it was decided and accepted that the Congress has the power to declare war and control the appropriation of money for the armed forces, while the President is commander in chief of the armed forces. In broad terms, Congress can declare war and decide how much money, if any at all, is to go towards the war effort, and the President has the authority to prosecute the war.²⁰ The founders settled on a compromise – when it came to war, Congress and the President would share power.

Even following the ratification of the Constitution, the issue was by no means settled. Various camps emerged on the continuum of executive versus legislative power in foreign affairs. Alexander Hamilton believed in the “unitary executive,” namely that the executive held all powers delegated under executive authority (such as foreign policy), while Congress had enumerated powers.²¹ Others, like James Madison, held that the Congress was the predominant body, and therein held the real power when it came to foreign policy.²² It is a debate that has carried over through the centuries and into modern times. John Yoo, who served in George W. Bush’s administration, is an example of a legal scholar who espouses a Hamiltonian-like view of the executive, whereas historians such as the eminent Garry Wills espouse Madison’s vision. Yoo believes that the executive has a vigorous, central role in modern foreign policy and that the growth of Presidential powers has been necessitated by historical circumstance; moreover, Yoo

¹⁹ Yoo, *Crisis and Command*, p. 18. Much has been made about the founding fathers’ original use of the word “make” and subsequent change to “declare.” Some, like John Yoo, argue that the change to declare was intended to reduce the power of Congress in this situation, whereas others, like Wills, argue that the word “declare” unequivocally means “to commence,” and that it meant the same thing to the founders as it does to us.

²⁰ Solberg, ed. *The Constitutional Convention and the Formation of the Union*, pg. 46.

²¹ Yoo, *Crisis and Command*, p. xv.

²² Garry Wills, *Bomb Power: The Modern Presidency and the National Security State* (New York: Penguin Press, 2010) p. 188.

argues that the framers intentionally created a strong executive, pointing to the failures of the Articles of Confederation and their use of New York's governorship, the strongest executive model at the time, as the guide for the Presidency.²³ Yoo sees the strongest displays of Presidential action, such as under Lincoln, Roosevelt, and George W. Bush, as appropriate uses of executive power, as opposed to atypical Presidential activity spurred by extraordinary circumstances.²⁴ To the contrary, Garry Wills argues that the framers intended a much more limited role for the President in foreign policy making, and that presidential power has grown to a dangerously potent level.²⁵ For him, the turning point was the creation of the atomic bomb (and existential threat) during World War II, after which, "an elaborately constructed set of institutions enforces the idea that anything executive agencies do is justified in the name of national security."²⁶ Others, like Arthur Schlesinger, point to a much longer historical tradition of encroachment of presidential power on congressional turf.²⁷

II. The Reagan Administration

This long-standing tension between executive and legislative predominance in the field of foreign affairs emerged saliently during the Reagan years. It is clear that Ronald Reagan's inner circle was of the view that the President needed greater latitude to make foreign policy decisions. Proponents of a strong executive hand in foreign policy were unequivocal in their belief that it was necessary for national security in the face of modern threats; they were adamant that past Congressional control of foreign policy had had disastrous outcomes. Many Republican Congressmen at the time shared the Reagan administration's views. Reagan himself said, "You

²³ Yoo, *Crisis and Command*, pp. 19-52.

²⁴ *Ibid.*, pp.xiv-xx.

²⁵ Wills, *Bomb Power*.

²⁶ *Ibid.*, p. 53.

²⁷ Arthur Schlesinger, *The Imperial Presidency* (Boston: Houghton-Mifflin, 2004).

can't have 535 members of the House and Senate administer foreign policy. If the president doesn't do what the people want him to do, they will let him know it."²⁸ John Tower, a U.S. Senator from Texas from 1961 until 1985, was of this school of thought. Tower was convinced that if "Congress tied the President's hands" in the era of the Cold War nuclear stand-off, it would be akin to allowing the Axis powers to take control of the world in the 1930's, perhaps the world's greatest threat to security and liberty ever.²⁹ Tower specifically resented the restrictions placed on Presidential power in the 1970's such as the War Powers Resolution (1974) and the Hughes-Ryan Amendment (1961), arguing that they endangered America's security.³⁰ For the most part, Republicans in Congress and in the Reagan administration favored a stronger executive hand, particularly those that were preoccupied with national security. They were in essence, modern-day Hamiltonians.

On the other side of the spectrum, many Democrats in Congress felt strongly that the executive needed to be reigned in.³¹ Their views were heavily influenced by the nation's experience in the Vietnam War. Proponents of this perspective tended to emphasize the exertion of democratic will in foreign policy, which they believed the Congress was better able to capture than the President. At the very least, these critics argued, Congress should be able to prevent the

²⁸ Richard Sobel, *The Impact of Public Opinion on U.S. Foreign Policy Since Vietnam* (New York: Oxford University Press, 2001).

²⁹ John G. Tower, "Congress Versus the President: The Formulation and Implementation of American Foreign Policy," in Hyland ed., *The Reagan Foreign Policy*, (New York: Meridian Publishing, 1985), p. 148.

³⁰ Committee on Foreign Affairs, "The War Powers Resolution: Relevant Documents, Correspondence, Reports," June 1981, United States Government Printing Office, David P. Auerswald and Peter F. Cowhey, "The War Powers Resolution and the Use of Force," *International Studies Quarterly*, vol. 41, no. 3 (1997): 505-528. The War Powers Resolution was a framework laid out by Congress that essentially allowed the President of the United States to commit troops to combat without prior Congressional approval, so long as he gave the appropriate persons in Congress notice within 60 days of engaging troops. Furthermore, it gave the Congress the power to terminate the President's commitment of troops if it did not vote to within 120 days to explicitly authorize the military action. There were many dissenters in Congress to its passage in Congress and its constitutionality has not been resolved in the courts. The Hughes-Ryan Amendment similarly requires the executive branch to notify Congress in a timely manner of any covert operations undertaken by intelligence agencies.

³¹ Joel Brinkley and Stephen Engelberg eds., *Report of the Congressional Committees Investigating the Iran-Contra Affair, with the Minority View* (New York: Random House, Inc., 1988).

country from engaging in long-term, costly conflicts. The standard-bearer of these Madisonians was Edward Boland, a representative from Massachusetts (D-MA, 1953-1989), and influential chairman of the House intelligence committee.³²

Then tension between Hamiltonians and Madisonians, then, can be boiled down to preoccupations with either national security imperatives or democratic restraint. This is extremely important given the context leading up to the American involvement in Nicaragua. Each side can be assigned a seminal moment related to their preoccupation with war-making powers. For those concerned about security, it was the Cuban Missile Crisis of 1962. For them, it represented a time when the United States inched away from all-out nuclear warfare. It served as an example for why the executive required every foreign policy tool available to it. For those worried about democratic restraint, the Vietnam War was clearly their watershed moment. Vietnam represented a time when executive decisions spiraled out of control and into one of the worst conflicts in American history. These two events and these two opposing worldviews set the stage for the American involvement in Nicaragua.

III. The Supreme Court

The Supreme Court of the United States traditionally stays out of matters of foreign affairs. There have been very few cases in this realm that the court has weighed in on. Ultimately, however, the court plays an extremely important role, because if there is to be an arbiter in this saga between the executive and legislative branches of government, it must be the judicial branch. In this section, I analyze the most important foreign policy cases to come before the court and relate them to the Reagan administration's confrontation with Congress.

³² Ibid.

The first Supreme Court case with major implications on foreign policy making was *United States v. Curtiss-Wright Corporation (1936)*, which was argued in the years leading up to World War II.³³ The facts and circumstances of the case have proven to be quite inconsequential in the broader picture of American history, but the precedent set forth by the court was highly significant. In 1934, a company known as Curtiss-Wright Corporation attempted to sell 15 machine guns to Bolivia, which was at the time engaged in a war.³⁴ A Joint Resolution of Congress gave the President the authority to intervene and prohibit the sale if he felt it would contribute to establishment of peace in the area. A lower court found that Congress' resolution unconstitutionally delegated legislative power to the executive. The government appealed the ruling, and the case landed on the Supreme Court's docket.³⁵

Justice Sutherland delivered the opinion of the court in which he reversed the lower court's finding. He argued that domestic affairs and foreign affairs were fundamentally different.³⁶ In domestic affairs, he stated, the power of the federal government was carved from the power of the states, and therefore is specifically enumerated by the Constitution.³⁷ In foreign affairs, power is not taken from the states, who have no role in foreign policy making, but rather, is part of the inherent sovereignty of the United States that passed from Great Britain to the colonies upon separation. "Sovereignty is never held in suspense," he argued, "when, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed

³³ *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, <<http://supreme.justia.com/us/299/304/case.html>> (accessed 8 March 2011).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Aaron Wildavsky, *The Presidency* (Boston: Little and Brown, 1969). This concept put forth by Justice Sutherland is very similar to a well-known framework established by Wildavsky in 1969 known as "The Two Presidencies," in which he argues and backs up with research, that the President is afforded much more latitude in the realm of foreign policy than in domestic affairs, and that in fact Congress supports the President much more often in foreign affairs than in domestic affairs.

³⁷ *United States v. Curtiss-Wright Corp.*, p. 315-316.

to the Union.”³⁸ The significance of this is that the President has powers in the realm of foreign policy that are not enumerated by the Constitution. Because the President has better sources and information than Congress in this realm, and because of the efficacy of having one representative of the nation, as opposed to all of the members of Congress, Sutherland concludes, quoting Justice Marshall, that “the President of the United States is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”³⁹ Of particular interest to the case of Nicaragua, Sutherland also notes that, “secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results,” in a further nod to executive prerogative in covert operations.⁴⁰

Perhaps the most influential Supreme Court opinion pertaining to international relations is the concurring opinion written by Justice Jackson in the *Youngstown Sheet and Tube Company v. Sawyer*, also known as the “Steel Seizure Case.”⁴¹ The facts of the case pertain to actions taken by President Harry Truman during the Korean War. A dispute between steel companies and the union representing their workers arose in 1952, threatening the nation’s production of weapons. President Truman responded by ordering his Secretary of Commerce to seize the steel companies and recommence production of weapons for the war effort. Justice Black delivered the opinion of the court in which he found Truman’s actions to be unconstitutional.⁴² While Black set the tone for the court, it was Jackson’s concurring opinion that has served as a guidepost for the court and the other branches more so than any other opinion written on foreign affairs.⁴³

³⁸ Ibid., p. 317.

³⁹ Ibid., p. 319.

⁴⁰ Ibid.

⁴¹ *Youngstown Sheet and Tube Co. v. Sawyer*.

⁴² Ibid., p. 582.

⁴³ Geoffrey Stone et al., *Constitutional Law*, 6th ed., (New York: Aspen Publishers, 2009).

Jackson's opinion lays out the framework that he believes best captures the framers' intentions for Congress' arrangement with the President in foreign affairs.⁴⁴ Jackson's structure is based on his view of the coordination of the branches, "It [the Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."⁴⁵ Jackson sets up three hypothetical scenarios involving the President and Congress.⁴⁶ In the first scenario, Congress expressly or implicitly authorizes the President to undertake a specific action. In this scenario, Jackson argues that the President's power is at its zenith, and that there is little in the realm of foreign policy, with Congress' assent, the President can do that is unconstitutional. Jackson's second scenario presupposes that Congress is tacit on a particular matter, and there is no indication one way or another as to Congress' intention. In this realm, the President has some power, although, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which distribution is uncertain."⁴⁷ This is the zone with the least clarity, and likely the zone under which the majority of cases exist, until Congress takes action. The final scenario is the one in which the President's power "is at its lowest ebb," when his will is incompatible with Congressional decree.⁴⁸ In this sphere, there is little that can justify presidential action, as according to Jackson, "what is at stake is the equilibrium established by our constitutional system."⁴⁹

Whereas Justice Black finds Truman's actions unconstitutional because he believes they are a usurpation of legislative power, Justice Jackson uses his framework to come to a

⁴⁴ *Youngstown Sheet and Tube Co. v. Sawyer*, p. 634.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, pp. 635-637.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

decision.⁵⁰ Jackson argues that due to Congress' passage of the Taft-Hartley Act of 1947, which essentially legislated Congress' control over union and labor issues, President Truman's actions fall within the third realm of Presidential power. He then expounds on the dangers of violating the expressed will of Congress, invoking the fall of both the Weimar Republic and the First French Republic to make his point.⁵¹ Jackson is unequivocal – the President does not have the authority to upset the precious balance set up by the Constitution, particularly in matters of foreign affairs. Justice Jackson's decision was upheld and his framework was used to settle a later case, *Dames & Moore v. Regan*, wherein President Carter's power to freeze certain Iranian assets during the Iranian hostage crisis was called into question.⁵² Justice Rehnquist, who wrote the decision for the court, finished, "We can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims."⁵³

⁵⁰ Ibid., p. 582, 638.

⁵¹ Ibid., p. 651.

⁵² *Dames & Moore v. Regan*, 453 U.S. 654 (1981), <<http://supreme.justia.com/us/453/654/case.html>> (accessed March 5, 2011).

⁵³ Ibid., p. 688.

Background of U.S. involvement in Nicaragua

“Imperialism’s current military aggression is the continuation of a long history: 130 years of intervention and aggression by various U.S. administrations.”

-Dr. Rafael Chamorro, *The Charges Brought by Nicaragua Against the U.S. Government*⁵⁴

CIA covert operations in 1981 were not the first time the United States became involved with Nicaragua. The United States and Nicaragua have had a long, intertwined history, first beginning as Nicaragua emerged as a nation-state.⁵⁵ America asserted its self-proclaimed authority over countries in its “backyard” with the Monroe doctrine in 1823, stating that further encroachment by European powers in the Western Hemisphere would be met by American intervention.⁵⁶ America’s right to meddle in the affairs of Central American countries was established early. In the 1850’s, an American named William Walker attempted to take over the country and name himself head-of-state. His attempt was short-lived, but not forgotten by Nicaraguans.⁵⁷ Another crucial moment was at the beginning of the 20th century, which featured two American interventions and occupations of Nicaragua. The later intervention led to the rise of the Somoza family dictatorship that lasted until 1979 and to the death of guerilla rebel General Augusto Sandino, the anti-imperial folk hero who became the inspiration for the “Sandinista” party against whom Reagan’s war was fought.⁵⁸

Over the ensuing decades, the U.S. government became perhaps as comfortable with the Nicaraguan dictator Anastasio Somoza, and later his son Anastasio Somoza Debayle, as it had become with many other Latin American dictators.⁵⁹ Life under Somoza in Nicaragua was

⁵⁴ Marlene Dixon ed., *On Trial: Reagan’s War Against Nicaragua* (San Francisco: Synthesis Productions, 1985), pp. 2-3.

⁵⁵ Andrew Kimmers ed., *Nicaragua and the United States* (NY: The H.W. Wilson Company, 1987).

⁵⁶ Robert F. Turner, *Nicaragua v. United States: A Look at the Facts* (Washington: Pergamon Brassey’s, 1987), p. 4.

⁵⁷ Dixon ed., *On Trial: Reagan’s War Against Nicaragua*.

⁵⁸ Robert S. Leiken and Barry Rubin, eds., *The Central American Crisis Reader* (New York: Summit Books, 1987), p. 40.

⁵⁹ *Ibid.*

characterized by graft and greed for those fortunate enough to be in the Somoza clan's inner circle. The primary reason that the United States tolerated him was out of fear that a revolution might rise up in his absence, as he was one of America's many "friendly dictators" in the region.⁶⁰ In 1972, a key event sparked a gradual mobilization against the Somoza regime that would eventually lead to its toppling in 1979. The event was a catastrophic earthquake that hit Managua. As copious amounts of foreign aid poured into Nicaragua fund the recovery effort and humanitarian disaster, the extent of Somoza Debayle's greed became apparent and intolerable. The events that unfolded were the beginnings of a broad and all-encompassing revolution that would force Somoza out and sweep the Sandinistas into power. While the revolution began as a fairly broad democratic coalition, a number of fortuitous events combined with the cold calculation of the Sandinistas allowed them to consolidate power and gain a virtual stranglehold on the Nicaraguan government.⁶¹

President Jimmy Carter, who had previously supported the Somoza regime with aid in the expectation that its human rights record would improve, contributed \$75 million to the fledgling Sandinista government, hoping that it would become more moderate.⁶² Not only did Carter's policy fail, but major changes were coming to the American political system as well. The gradual consolidation of the Sandinistas' power and the vociferation of their socialist beliefs ran up against Ronald Reagan's rise to the office of the Presidency in 1981. His Cold War ideology played a crucial role in the rapidly changing relationship of America to Nicaragua. Reagan believed that the Sandinistas were an intolerable, left-leaning government in America's backyard, and that the United States should be doing everything in its power to support the

⁶⁰ Richard Millett "The Somoza Regime," in: Leiken and Rubin, eds., *The Central American Crisis Reader* (New York: Summit Books, 1987), pp. 138-140.

⁶¹ Ibid.

⁶² Turner, *Nicaragua v. United States*, p. 6.

opposition, the so-called *contras* (short for “contrarevolucionarios,” which means counter-revolutionaries in Spanish). Reagan was surrounded by like-minded people, including his Secretary of Defense, Caspar Weinberger, who held similar views about the containment of communism in the region and nuclear deterrence.⁶³ His Secretary of State, George Shultz, shared the conviction that allowing the Sandinistas to maintain control would be like allowing a scourge to fester in America’s backyard.⁶⁴ The administration’s approach can be summed up by the “The Reagan doctrine,” first enunciated by Charles Krauthammer in *Time* magazine in 1985, which essentially states that the United States would overtly and unabashedly support groups attempting to overthrow communist or socialist regimes everywhere in the world.⁶⁵ Reagan’s assumption of the Presidency must not be understated, as “The Reagan doctrine” differed greatly from Jimmy Carter’s foreign policy centered on human rights. Reagan historian Sean Wilentz has even argued that “breaking with the past” was a major theme in Reagan’s campaign and presidency, and perhaps most evident in the realm of foreign policy.⁶⁶ Reagan’s break with the past on Nicaragua when he entered office is where the intervention began to test American constitutional boundaries.

⁶³ Caspar Weinberger, “U.S. Defense Strategy,” in Hyland ed., *The Reagan Foreign Policy*, p. 148.

⁶⁴ George P. Shultz, “New Ways of Thinking,” in Hyland ed., *The Reagan Foreign Policy*, p. 39.

⁶⁵ Charles Krauthammer. “The Reagan Doctrine,” *Time Magazine*, April 1, 1985, <<http://www.time.com/time/magazine/article/0,9171,964873-5,00.html>>, (accessed March 5 2010).

⁶⁶ Wilentz characterizes Reagan’s foreign policy as, “not a coherent plan for the downfall of communism but a patchwork of policies in different parts of the globe, sometimes successful, sometimes vacillating, and often disastrous.” Sean Wilentz, *The Age of Reagan: A History 1974-2008* (New York: Harper, 2008), p. 151.

The Constitution and America's Involvement in Nicaragua

“Since the Vietnam War we have had this growing involvement by the legislative branch in the details of foreign policy that – you can make a constitutional argument – are properly left to the president. When you do that, you drive him in the direction of using other techniques to achieve objectives.”

-National Security Council member, 1981⁶⁷

“We cannot know too much about this case history of the thin line that separates the legitimate from the illegitimate exercise of power in our government.”

-Theodore Draper, *A Very Thin Line*, 1991⁶⁸

The explosion of media coverage over the Iran-Contra scandal was instrumental in exposing some of the executive overreach in conducting foreign affairs – but that is not where the story began. The drama between the Reagan administration and the Democratic majority in the House of Representatives on Nicaragua started with Reagan's first actions in Nicaragua during his first year as President, eventually culminating in the events we now know as the Iran-Contra affair. The entire back-and-forth is instrumental to the story. As we trace the to-and-fro of executive and legislative actions, we examine their constitutionality and analyze various players' claims to American national security and democratic will.

Ronald Reagan took office on January 28, 1981. Everything about President Reagan denoted a marked difference with his predecessor.⁶⁹ The soft-spoken Carter contrasted with the supremely confident Reagan as much as Carter's emphasis on human rights differed from Reagan's obsession with containing communism. Reagan believed that his electoral mandate in the 1980 election not only gave him the power to drastically change course on domestic

⁶⁷ Jonathan Marshall et. al., *The Iran-Contra Connection: Secret Teams and Covert Operations in the Reagan Era*. (Boston: South End Press, 1987), p. 8.

⁶⁸ Theodore Draper, *A Very Thin Line: The Iran-Contra Affairs* (New York: Hill and Wang, 1991), p. xi.

⁶⁹ Wilentz, *The Age of Reagan*, p. 151.

economic policy, but also to adopt a firm anti-leftist posture in Nicaragua.⁷⁰ He was determined to ensure the Sandinistas failed and began extremely early in his Presidency to use the resources as his disposal to support the contras.

Reagan's first action in Nicaragua in 1981 on behalf of the contra cause was a series of covert operations by the Central Intelligence Agency (CIA), unbeknownst to the American people and, for a time, to Congress. Where exactly did the CIA derive the authority to undertake these operations? The answer is that the CIA was authorized directly by the President of the United States. On March 9, 1981, only a couple of months after taking office, President Ronald Reagan issued a top secret Presidential finding, in which he authorized the CIA to undertake actions beyond the scope of mere intelligence collection in Central America.⁷¹ The portions of the finding that are declassified call for "all forms of training, equipment, and related assistance" for "cooperating governments" in Central America. Intentionally vague in writing the finding, the President gave the CIA broad interpretive power in implementing his finding. But later in the year, on December 1, Reagan issued a further Presidential finding, giving the CIA even broader power and a specific budget framework within which to work. Arguing that it was important to the national security, Reagan authorized the CIA to "support and conduct paramilitary operations against Nicaragua."⁷² In plain words, the President of the United States

⁷⁰ I.M. Destler "Reagan, Congress, and Foreign Policy in 1981," in Norman J. Ornstein ed., *President and Congress: Assessing Reagan's First Year* (Washington: American Enterprise Institute, 1982), p 67.

⁷¹ Reagan "First Presidential Finding on Covert Operations in Central America," 9 March 1981, Nicaragua Collection, Item NI01287, Digital National Security Archive [DNSA], the George Washington University, Washington, D.C. <<http://nsarchive.chadwyck.com.libproxy.tulane.edu:2048/cat/displayItemImages.do?queryType=cat&ResultsID=1275069F49C1&ItemNumber=13&ItemID=CNI01287>> (accessed 11 April 2010).

⁷² Reagan "Presidential Finding Authorizing \$19.95 Million for the CIA to organize, train, and arm Nicaraguan counterrevolutionary forces," 1 December 1981, Nicaragua Collection, Item NI01414, DNSA <http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:dnsa&rft_dat=xri:dnsa:article:CNI01414> (accessed 11 April 2010).

authorized covert military action against the recognized government of Nicaragua without consulting Congress, or informing the American public.⁷³

What of the constitutionality of this order by President Reagan? In what ways did it enhance national security or detract from democratic governance? Reagan's finding was by no means a declaration of war, and therefore did not necessitate an official declaration by Congress. Nonetheless, American agents were committed to operate in a foreign country without Congressional authorization or direct funding. Reagan used non-appropriated money for the mission. Anticipating that there would be times when a President would take quick and decisive action, Congress allowed for this in Section 662 of the Foreign Assistance Act of 1961, known as the Hughes-Ryan Amendment.⁷⁴ In essence, Congress allows the President, and the President only, to authorize covert operations by the CIA if he deems it "important to the national security of the United States," and he notifies Congress in a "timely fashion." For the purposes of accountability, the President must issue a Presidential Finding, to prove that he authorized and had knowledge of the order.

While few might have seen the Sandinista regime, as it existed in 1981, as an imminent threat to the national security of the United States of America, in the eyes and worldview of Ronald Reagan, opposing this regime was instrumental to keeping the United States safe. It is indisputable that there was significant Cuban support of the fledgling regime.⁷⁵ However, Cuban meddling came in addition to many other outside influences that were attempting to push

⁷³ NSC "Scope of CIA Activities Under the Nicaragua Finding," 12 July 1982, Iran-Contra Affair Collection, Item IC00060, DNSA

<<http://nsarchive.chadwyck.com.libproxy.tulane.edu:2048/cat/displayItemImages.do?queryType=cat&ResultsID=127C1A93FE311&ItemNumber=4&ItemID=CIC00060>> (accessed 20 April 2010). A declassified document regarding the "scope of the CIA activity" under the finding further illuminates the administration's intentions. It specifically states that the CIA will provide funding, arms, and training to the forces opposing the Sandinistas.

⁷⁴ "Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2242) ("The Hughes-Ryan Amendment")," c. 1961, Iran-Contra Affair Collection, Item IC0002, DNSA <http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:dnsa&rft_dat=xri:dnsa:article:CIC00002> (accessed 11 April 2010).

⁷⁵ Robert S. Leiken and Barry Rubin, eds., *The Central American Crisis Reader* (New York: Summit Books, 1987).

the regime in many directions. For instance, the Carter administration authorized millions of dollars to go towards the new regime in the hopes that it would embrace a more moderate ideology. For Reagan to use a Presidential Finding to authorize covert CIA action required that he believe the situation posed imminent danger to national security. Regardless of Cuban, Soviet, or any other ties, the acting government of Nicaragua was harmless to the United States in 1981. Even in the Reagan worldview, Nicaragua's hostile posture may have eventually posed a threat to the United States, but certainly not of an immediate and outright danger. Therefore, it seems logical to conclude that Reagan misused his power under the Hughes-Ryan amendment. Furthermore, it seems likely that he used the tactic of a secret Presidential finding simply in order to avoid having to gain the approval of a skeptical Congress or sell the idea to a combat-weary American public. Reagan's misuse of the power does not mean that the President should not have this tool at his disposal. To the contrary, this tool, if used appropriately, seems a useful and necessary part of a President's ability to keep the nation safe. It merely illustrates that in this instance it was not employed in the spirit in which it was crafted by Congress.

In early 1982, news stories began to break of the CIA's involvement in Nicaragua, prompting furor by some House representatives.⁷⁶ The result was an amendment to the House Defense Appropriations bill for the fiscal year 1983 introduced by Democratic Representative Edward Boland of Massachusetts that later became known as the first Boland Amendment or ("Boland I"). The amendment stated "None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not a part of a country's armed forces, for the purpose of overthrowing the government of

⁷⁶ Richard Sobel, ed., *Public Opinion in U.S. Foreign Policy: The Controversy over Contra Aid* (Lanham, MD: Rowman and Littlefield Publishers, 1993), p. 30.

Nicaragua or provoking a military exchange between Nicaragua and Honduras.”⁷⁷ This amendment was rather clearly intended to block further American military involvement in Nicaragua. Boland, and Congress, were attempting to exert their Madisonian ideal of Congressional primacy of foreign policy. Hamiltonian hawks within the Reagan administration interpreted it rather differently.

Those in the administration with strong convictions about the necessity of the operations in Nicaragua did not simply roll over and bow to the wishes of Congress and the Boland amendment. Instead, they worked their way around the amendment. There are two parts of the amendment that those within the administration who wanted to keep the covert action going exploited.⁷⁸ First and foremost, while the amendment specifically prevented the CIA and the DOD (Department of Defense) from action, it did not mention the National Security Council (NSC). This immediately shifted the administration’s focus from CIA operations to the NSC taking the lead, in particular Lieutenant Colonel Oliver North (an NSC staffer), Deputy National Security Advisor John Poindexter, and National Security Adviser Robert McFarlane. Secondly, the amendment stated that the U.S. could not engage militarily “*for the purpose of overthrowing the government of Nicaragua or provoking a military exchange between Nicaragua and Honduras,*” which the administration read to mean that military action could be taken so long as its purpose was neither of the ones stated specifically in the wording.

Because the amendment did not explicitly mention the NSC by name, the planning and operations began to be funneled through the NSC and its leaders. A constitutionally powerless entity, the NSC was established in 1947 under the National Security Act to provide the President

⁷⁷ Joel Brinkley and Stephen Engelberg eds., *Report of the Congressional Committees Investigating the Iran-Contra Affair, with the Minority View* (New York: Random House, Inc., 1988), pp. 343-344.

⁷⁸ Ibid.

of the United States with a group of advisors on matters of national security. It was the responsibility of the NSC to advise the President and coordinate policy through various executive branch departments.⁷⁹ There is no authority vested in the NSC to actually undertake or authorize any military action, simply to “coordinate” it. In fact, it is likely for this reason that the authors of the bill felt no need to mention the NSC as an entity since it was unauthorized to take military action. In the aftermath of the Iran-Contra affair, it became clear that Oliver North, who essentially took command of the operation in Nicaragua, worked in conjunction with foreign non-military personnel, and selected members of the CIA, to carry out the support of the Contras. Poindexter was quoted as saying, North “was the switching point that made the whole system work...I viewed Ollie as the kingpin to the Central American opposition once the CIA was restricted.”⁸⁰ It is hard to rationalize the great lengths taken by the Reagan administration to continue supporting the Contras in the name of national security. The Congress was well-informed of the situation and deemed it inappropriate and unnecessary that the United States participate militarily. North and others deliberately ignored the “spirit” of the law and created loopholes to continue action. On the second apparent loophole, the “overthrowing” clause, the logic and truth were very clearly stretched to accommodate a questionable endeavor. The entire purpose of the contra insurgency was to overthrow the Sandinista government, therefore any military support of the counterinsurgency was by definition “for the purpose of overthrowing the government of Nicaragua.”

Despite the clear message of the Boland amendment from the U.S. Congress, secret American operations in Nicaragua were ongoing throughout fiscal year 1983. The amendment was renewed for the following year. The only difference was that only \$27 million was

⁷⁹ R.W. Apple, Jr., ed., *The Tower Commission Report* (New York: Random House, 1987), p. 6.

⁸⁰ Brinkley/Engelberg, eds., *Report of the Congressional Committees*, p. 344

appropriated by Congress for American operations in Nicaragua (supposedly humanitarian aid and logistical support), a fact that would play an important role later as the Iran-contra scandal fully emerged. In the interim, however, news reports out of Nicaragua made it clear that the United States was very much still involved in supporting the Contra's cause militarily, despite the restrictions of the first Boland amendment. House Democrats grew increasingly irritated at the Reagan administration's apparent disregard of Congress' restriction, and began making plans to prohibit all funding for Nicaragua (the so called Boland-Zablocki bill).⁸¹

Administration officials were still hopeful that they could convince Congress to provide them with more money for Nicaragua.⁸²

In April of 1984, a game-changing revelation was made.⁸³ It became publicly known that under direction of Oliver North, the CIA, and foreign contractors, the United States had mined the harbor of Managua, outraging the Nicaraguan government and shocking the world.⁸⁴ A declassified memorandum from North (and NSC-staff associate Constantine Menges) to McFarlane, proved North's orchestration of the event and the President's knowledge of it. It stated, "Our intention is to severely disrupt the flow of shipping essentials to Nicaraguan trade in this peak export period...No American citizen will be directly involved in the operational event." Finally, in perhaps the most damning line of the document, North wrote, "Recommendation that you approve this operation and brief the President using the points above." McFarlane initialed and checked "approve," indicating that the President was fully

⁸¹ Sobel, ed. *Public Opinion in U.S. Foreign Policy*, p. 31.

⁸² Robert McFarlane, "Support for the Anti-Sandinista Forces," February 16, 1984, Iran-Contra Affair Collection, Item IC00340, DNSA, <<http://nsarchive.chadwyck.com.libproxy.tulane.edu:2048/cat/singleResults.do?queryType=cat&&ResultsID=127C2BD93CB1&pageNumber=2>> (accessed 20 April 2010).

⁸³ Steven Strasser, "The CIA's Harbor Warfare," *Newsweek*, April 16, 1984.

⁸⁴ Jonathan Marshall, Peter Dale Scott, and Jane Hunter, *The Iran-Contra Connection: Secret Teams and Covert Operations in the Reagan Era* (Boston: South End Press, 1987) p. 11.

briefed on the plans to mine the Nicaraguan harbor.⁸⁵ Three months later, Congress fired back with what became known as Boland II, an all out prohibition on funding for operations in Nicaragua. This became a turning point in the administration's efforts to fund its activity in Nicaragua.

Congress passed Boland II in late 1984 to apply to fiscal year 1985. It stated, "During fiscal year 1985, 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."⁸⁶ In as plain language as possible, and addressing any potential ambiguities that the first Boland amendment may have left open, this amendment effectively choked off any attempt by the administration to support the Contras. Or so Congress and the American people thought. But before engaging the illegality that ensued, which is known as the Iran-Contra scandal, we must first deconstruct Boland II as it pertains to the Constitution.

In restricting all funding for operations in Nicaragua, the Congress exercised its most fundamental control over the conduct of foreign policy, the power of the purse. It is this critical check on executive power in the foreign policy arena that prevents the executive branch from simply doing as it pleases. Some Reagan hardliners took objection to the amendment, claiming that it was unconstitutional to limit the President's ability to conduct war. This objection is fundamentally flawed, because it is exactly the check that Congress has over the executive

⁸⁵ Oliver North and Constantine Menges, "Special Activities in Nicaragua," 2 March 1984, Iran-Contra Affair Collection, Item IC00352, DNSA, <<http://nsarchive.chadwyck.com.libproxy.tulane.edu:2048/cat/displayItemImages.doqueryType=cat&ResultsID=127C2BD93CB1&ItemNumber=24&ItemID=&&imageNumber=2#imageTop>> (accessed 24 April 2010).

⁸⁶ Brinkley/Engelberg, eds., *Report of the Congressional Committees*, p. 344

branch that is expressly written into the Constitution. It, in fact, *constitutionally* limits the President's ability to conduct war. From the standpoint of national security, were an emergency to befall the situation in Nicaragua such as the discovery of Soviet nuclear weapons, the President would be unable to act swiftly and covertly due to the prohibition by Congress. However, the risks to liberty would also be great, simply allowing a President unfettered control over the military. Therefore, barring any freak doomsday scenarios, the Congressional check over executive authority is a basic and critical component of the national security apparatus.

The mess that befell the Reagan administration hardliners who still believed strongly in supporting the Contras after Boland II elicited two responses from the Reagan administration: first, a public diplomacy campaign directed at the public and members of Congress; and second, an illegal operation whose goal it was to solicit private funds from donors and illegal weapons sales to Iran. Both bring up important Constitutional questions. In public, the Reagan administration went on the offensive, beginning right after Boland I and the drying up of funds in 1984. In April of 1983, Ronald Reagan had addressed a Joint Session of Congress, urging action on Nicaragua. In a poignant line, he attempts to bring others to his side: "To those who invoke the memory of Vietnam: There is no thought of sending American combat troops to Central America; they are not needed – indeed, they have not been requested there. All our neighbors ask of us is assistance in training and arms to protect themselves while they build a better, freer life."⁸⁷ The President knew he would have to win over members of Congress and the skeptical public, whose support remained thin throughout the entire episode, with opposition to U.S. aid by majorities of 50 to 60 percent.⁸⁸

⁸⁷ Ronald Reagan, "Address to Joint Session of Congress," 27 April 1983 in: Leiken et al. ed., *The Central American Crisis Reader*, pp. 548-554.

⁸⁸ Sobel, ed. *Public Opinion in U.S. Foreign Policy*, p. 11.

An important examination of the Reagan administration's efforts at persuading the public elicits the question as to "how far is too far?"⁸⁹ As Larry Storrs and Nina Serafino note, it is critical to determine "the extent to which those efforts exceeded persuasion and constituted manipulation and intimidation to obtain an anti-democratic result."⁹⁰ The administration took a number of steps to convince the public. Reagan formed a National Bipartisan Commission on Central America led by Henry Kissinger; he spoke passionately about the Contras in his 1985 State of the Union Address and the administration created special outreach ("public diplomacy") efforts through the White House Office of Public Liaison and the State Department Office of Public Diplomacy.⁹¹ This last effort prompted critics to decry the administration's efforts as propaganda. If the President believes the case to be a matter of national security, is it not permissible for him to elicit public support in order to pursue the matter through legal channels? It seems that the President has every right to attempt to persuade the public, and that this is one of the most preferable methods available to a President in a democracy.

The question as to "how far is too far,"⁹² is a difficult one to answer. At issue here, seems to be what resources the President should be allowed to use and devote to persuading his fellow citizens. Interestingly enough, Storrs and Serafino show that the President's efforts had little to no effect on the public, but are widely thought to have contributed to a reinstating of funds for Nicaragua in 1985 and 1986 by Congress. An undeniable tipping point was the revelation that Daniel Ortega, the newly-elected President of Sandinista Nicaragua, took a trip to the Soviet Union in 1985. The Reagan administration pounced upon this information, portraying the Sandinistas as dangerous Communists in the dark shadow of the Soviet Union's Marxism.

⁸⁹ K. Larry Storrs and Nina Serafino, "The Reagan Administration's Efforts to Gain Support for Contra Aid," in: Sobel, ed. *Public Opinion in U.S. Foreign Policy*, p. 36.

⁹⁰ *Ibid.*, p. 36.

⁹¹ *Ibid.*, p. 39.

⁹² *Ibid.*

Reagan also took the opportunity to laud the contras (who were by no accounts model humanitarians), at one point calling them “the moral equivalent of the founding fathers.”⁹³

While the efforts at public diplomacy raise few constitutional questions, there is no question that the secret attempts to procure money from the sale of arms to Iran for the contra cause was illegal. As the main goal of this paper is to explore the light that the Nicaragua case sheds on executive versus legislative roles in foreign policy making, the minutiae of the Iran-contra scandal are not explored here in any depth. Many instructive and in-depth investigations of Iran-contra already exist.⁹⁴ The aim here, rather, is to show which elements of the scandal were particularly dangerous to the delicate balance between Congress and the President, and how they were made possible.

On Tuesday, November 25, 1986, President Reagan and Attorney General Edwin Meese held a press conference regarding the scandal that was beginning to emerge. The details the White House released were succinct and manipulated.⁹⁵ In short, the United States had sold weapons to Israel, who in turn sold them to Iran (in exchange for the hostages), and used the profit to support the contra insurgency in Nicaragua. In the aftermath, Admiral Poindexter resigned from the NSC, Oliver North was released from duty, and President Reagan had not been “fully informed,” and therefore claimed seeming innocence. In the trials and investigations that ensued, it became clear that virtually no one involved in the scandal was forthright about their roles.⁹⁶ Even President Reagan conveniently claimed to have forgotten certain episodes that would have implicated him in the faulty decision-making. Declassified documents show

⁹³ Storrs and Serafino, “The Reagan Administration’s Efforts to Gain Support for Contra Aid,” p. 144.

⁹⁴ See Theodore Draper, *The Very Thin Line*, Michael Ledeen, *Perilous Statecraft*, and Oliver Trager ed., *Iran-Contra Arms Scandal*.

⁹⁵ Draper, *The Very Thin Line*, pp. 541-546.

⁹⁶ Wilentz, *The Age of Reagan*, p. 236. Oliver North admitted to shredding incriminating documents following public knowledge of the events.

that the idea of involving third parties in the operations slowly evolved over time as Boland II severely hampered the administration's efforts in Nicaragua. For example, in an NSC document from early 1985, among the many options being advocated for, North presents "the solicitation of third-country support," for the carrying out of lethal operations and weapons support.⁹⁷ The Iran-Contra affair was merely the culmination of these plans.

There are two specific elements of Iran-contra that are particularly alarming in the context of the U.S. Constitution's restrictions. First and foremost, the executive branch, in secretly deciding that its options were being unfairly limited by Congress with respect to military action in Nicaragua, sought alternate means of securing funding for their mission. The Constitution is clear that Congress has exclusive control of the federal government's expenditures, and that if Congress has not appropriated funds for a particular cause, then the government cannot pursue its funding through other means. In Article I, Section 9 of the Constitution, "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."⁹⁸ Congress' power of the purse is the ultimate check on Presidential power. Any attempt to circumvent this power is a major usurpation of constitutional authority. The Reagan administration attempted to do this in two ways. First and foremost, members of the administration lobbied private parties to donate funds for the government to use in helping the Contras (such as the Sultan of Brunei and beer magnate Joseph Coors).⁹⁹ Oliver North spent significant time traveling around the world to solicit private donations. Secondly, through indirect arms sales to Iran, North, with approval from Poindexter,

⁹⁷ Oliver North Memorandum to Robert McFarlane, NSC, 15 January 1985, Iran-Contra Affair Collection, Item IC00725, DNSA, <<http://nsarchive.chadwyck.com.libproxy.tulane.edu:2048/cat/displayItemImages.doqueryType=cat&ResultsID=127C2BD93CB1&ItemNumber=54&ItemID=&&imageNumber=3#imageTop>> (accessed 25 April 2010).

⁹⁸ Brinkley/Engelberg, eds., *Report of the Congressional Committees*, p. 348.

⁹⁹ Draper, *The Very Thin Line*, p. 521.

and likely Reagan himself, skimmed money that technically belonged to the United States government, by diverting it through the CIA to the Nicaraguan Contras.¹⁰⁰ In the grand scheme of things, the executive branch attempted to force an agenda using money that the Constitution prohibited it from using. These actions unquestionably harmed both the national security interest and democracy.

¹⁰⁰ Brinkley and Engelberger, *Report of Committees Investigating Iran-Contra Affair*, p. 271.

Conclusion

Ultimately, in a twist of fate for the Reagan administration, funding was restored for operations in Nicaragua for the fiscal years 1986 and 1987 in the face of blatant illegality and disregard for constitutional checks.¹⁰¹ Ironically, the testimony of Oliver North before a joint congressional committee played out extremely favorably for the Reagan administration, winning enough public support to essentially repeal the Boland amendments. This outcome, however, is not indicative of the lessons that must be drawn from the Reagan administration's foray into Nicaragua.

The Reagan administration's actions in Nicaragua over its eight years in power amounted to constant attempts to circumvent Congressional checks on its power in the realm of foreign policy. The effort began with an entirely new departure from the previous administration with the advent of the "Reagan doctrine," whereby the administration overtly voiced its support for organizations and peoples working to overthrow socialist or communist regimes.¹⁰² This translated into secret Presidential orders mandating covert action through the CIA, and the use of legitimate foreign policy tools available to the executive (i.e. through the Hughes-Ryan amendment), for the purposes of getting around a skeptical Congress and reluctant American public. As Congress caught wind of these actions, it attempted to clamp down on the administration's escalating involvement in Nicaragua through the first Boland amendment. This led to further actions by the administration to get around Congress. The administration took advantage of semantics and used non-appropriated money and funneled it through the NSC and a few hard-line operatives. Again Congress retaliated with the second Boland amendment. In response, the administration took illegal measures to procure private funds and weapons for the

¹⁰¹ Wilentz, *The Age of Reagan*, p. 240.

¹⁰² Krauthammer, "The Reagan Doctrine."

contras through illicit weapons sales to Iran in return for hostages. This final attempt at getting around Congress was the most egregious, as it violated one of the most basic principles of the separation of powers in the Constitution, namely that the Congress shall have control of the purse.

The importance of the two centuries-old debate about balance of power among the coequal branches of the Constitution cannot be overstated, especially in a time when the intent of the founders, and the relevance of that intent, is vigorously debated as to its significance for current public policy. History has shown that the delicate balance between Congress and the executive in the realm of foreign policy can be influenced and swayed by the context of the moment. American intervention in Nicaragua, is itself evidence of this. In an age where there are novel threats to security and to liberty with every passing moment, the stakes are exceedingly high.

President Barack Obama, whose ideological worldview stands in stark contrast to that of Ronald Reagan, came under quite heavy criticism by members of Congress in late March of 2011 for authorizing the use of force in Libya.¹⁰³ His critics argued that his actions necessitated congressional approval, and that they stood in stark contrast to his enunciated understanding of executive power before becoming President, once stating, “The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.”¹⁰⁴ Obama’s administration responded to the criticisms by distinguishing between limited military intervention and the commencement of war, once again reigniting the debate that has yet to be resolved, but seems to be growing ever-more significant.

¹⁰³ Charlie Savage, “Attack Renews Debate Over Congressional Consent,” *New York Times*, March 21, 2011.

¹⁰⁴ Charlie Savage, “Barack Obama’s Q&A,” *The Boston Globe*, December 20, 2007.

What conclusions can be drawn then from the Nicaraguan case about the appropriate relationship between Congress and the President in the realm of foreign policy? First and foremost, it indicates that the complexity of foreign policy necessitates a complex relationship between the executive and the legislative branches, but one that must be clearly enunciated, agreed upon, and followed. Simply siding with Hamiltonians or Madisonians is not the solution. In this case, an executive who attempted to push his power too far by being too Hamiltonian was rebuked by an attentive Congress, led by a Madisonian Massachusetts representative with strong convictions about the role of the president in shaping foreign policy. A sound framework for Congressional-executive cooperation in foreign policy requires a number of things. First of all, an executive must have the flexibility to engage militarily without prior approval by Congress, especially given the special pressures emanating from modern, nuclear warfare. The framers intended to give the executive branch this latitude to repel threats, and understood its necessity for the protection and well being of the nation. However, the framers did not include provisions to deal with abuses of this power. Therefore, this engagement must be checked by immediate and frequent notification of the appropriate committees in Congress.¹⁰⁵ Perhaps the most important lesson to be taken from the Iran-Contra scandal, is that strong convictions combined with secret activities can quickly be blown out of proportion and lead down a dangerous path. Secondly, as determined by the courts and in accordance with the spirit of the balance of powers, if the executive and the Congress cannot come to a consensus on a military operation already initiated by a President, the action must cease. If the danger to the national security is great enough, the executive must be able to make the case to the people, through their direct representatives in Congress. Finally, the Congress must always have the option available to it to

¹⁰⁵ DiClerico, *The American President*, 5th ed, pp. 38-41 As DiClerico notes, the War Powers Act attempts to do just this; however, it has been ignored almost categorically by every single President since it was passed over Nixon's veto.

prevent military engagement by a president by controlling the funds required to engage militarily. The President should have no means available to pursue military engagement other than through the resources provided by Congress. There are elements of this arrangement that the founding fathers could not have foreseen, therefore care must be taken to preserve the original intent of the balance of power in the modern context of foreign policy making even in the nuclear age. Only then, can both the security *and* the liberty of the American people be assured.

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