

THE NATIONAL SECURITY COUNCIL AND THE IRAN-CONTRA AFFAIR

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I. INTRODUCTION

Early in November of 1986, newspapers in the United States carried the first reports that the United States government, in an effort to gain release of United States citizens held hostage by terrorists in Lebanon, had engaged in a covert policy of supplying arms to elements within Iran.¹ Later in that month, following a preliminary inquiry into the matter, it was revealed that some of the funds generated from those arms sales had been diverted to support the "Contra" forces fighting the Sandinista government in Nicaragua.²

The events giving rise to these disclosures became known collectively as the "Iran-Contra Affair." Both elements of the affair raised serious questions regarding the formulation and conduct of our nation's foreign policy. In regard to the Iranian phase of the affair, the Regan administration's rhetoric had placed the administration firmly in opposition to any dealings with nations supporting terrorism, and with Iran in particular.³ In addition, the United States had made significant

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¹ See *Washington Post*, Nov. 4, 1986, at A-15, col. 1; *N.Y. Times*, Nov. 4, 1986, at A1, col. 4. The first reports of an arms for hostages deal originated in a Lebanese weekly magazine, *Ash-Shiraa*. *Ash-Shiraa* reported that Robert McFarlane, then national security advisor to President Reagan, traveled to Tehran, Iran to discuss with Iranian officials a cessation of that country's support for terrorist groups in exchange for the United States provision of spare parts for Iran's United States-made military equipment. *Id.*

² See 22 WEEKLY COMP. PRES. DOC. 1604-05 (Nov. 25, 1986).

³ See, e.g., Remarks at American Bar Association Annual Convention, July 8, 1985, 21 WEEKLY COMP. PRES. DOC. 876 (July 15, 1985) (Iran, Libya, North Korea, Cuba and Nicaragua constitute "a core group of radical and totalitarian governments — a new, international version of Murder, Incorporated . . . united by one simple, criminal phenomenon — their fanatical hatred of the United States, our people, our way of life, our international stature.")

efforts to cut the flow of arms to Iran to be used in the ongoing Iran-Iraq war by placing diplomatic pressure on other nations to halt arms sales, seizing American military equipment destined for Iran, and making numerous arrests for violations of arms-export laws.⁴

In the "Contra" aspect of the affair, military aid to the Nicaraguan rebels had been a subject of fierce contention between the Administration and the Congress for several years. This fundamental policy disagreement culminated in a series of legislatively-mandated limitations on United States government assistance to the rebels.⁵ As a result, the Iran-Contra revelations precipitated inquiries, unprecedented both in their scope and their openness, into the formulation and implementation of United States foreign policy. In addition to investigations by the press and various groups of private citizens, Attorney General Edwin Meese, III announced on December 2, 1986 that his preliminary investigation of the affair had determined that a possible violation of criminal laws might have occurred; as a result, he sought the appointment of an independent counsel.⁶

The executive and legislative branches undertook the most far-reaching investigations of the Iran-Contra affair. The day after the disclosure of the Contra diversion, the President created a "Special Review Board" and directed it to "conduct a comprehensive study of the future role and procedures of the National Security Council staff in the development, coordination, oversight, and conduct of

⁴ See R. PREECE, *THE IRAN-IRAQ WAR: IMPLICATIONS FOR U.S. POLICY* 15 (Congressional Research Service No. IB84016, 1987).

⁵ See Department of Defense Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1865 (1982) (enacted in Further Continuing Appropriations Act, 1983) ("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 part of a country's armed forces, for the purpose of overthrowing the government of Nicaragua or providing a military exchange between Nicaragua and Honduras."); Department of Defense Appropriations Act, 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421 (1983) (\$24 million cap on funds to agencies involved in intelligence gathering activities for operations concerning Nicaragua); Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1935 (1984) (enacted in Continuing Appropriations Act, 1985) (No funds to agencies involved in intelligence gathering activities for operations concerning Nicaragua without the filing of a presidential report and congressional joint resolution approving such aid.)

⁶ See 44 Cong. Q. Weekly Rep. 3013 (Dec. 6, 1986). On December 19, 1986, Lawrence E. Walsh, a former United States district judge, diplomat and deputy attorney general was named as the independent counsel to investigate the Iran-Contra affair. See 44 Cong. Q. Weekly Rep. 3095 (Dec. 20, 1986).

foreign and national security policy.”⁷ He named former Senator John Tower, former Senator and Secretary of State Edmund Muskie, and former Assistant to the President for National Security Affairs Brent Scowcroft to serve as members of the board.⁸ The panel, referred to as the “Tower Commission” after its chairman, submitted a report to the President on February 26, 1987.⁹

In addition to the Executive branch investigation, in early 1987 both Houses of Congress created select committees to investigate the Iran-Contra affair. The Senate established the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition¹⁰ on January 6, and on the following day, the House of Representatives established the Select Committee to Investigate Covert Arms Transactions with Iran.¹¹ The two chambers ultimately combined their efforts through joint investigations and hearings and the issuance of a joint report.¹²

The dominant theme emerging from these investigations is the question of accountability for the formulation and execution of foreign policy within the Executive Branch: Who is to be responsible for conducting such activities, and who is to be *held* responsible — before the nation and its elected representatives — for the outcome? The Iran-Contra affair has once again focused attention on the decades-old contest for power between competing Executive Branch bu-

⁷ 22 WEEKLY COMP. PRES. DOC. 1605 (Nov. 26, 1986). The Special Review Board was officially established in accordance with the Federal Advisory Committee Act (5 U.S.C. app. I) by Executive Order 12,575 dated December 1, 1986.

⁸ *Id.*

⁹ Report of the President's Special Review Board (Feb. 26, 1987) [hereinafter cited as Tower Report].

¹⁰ S. Res. 23, 100th Cong., 1st Sess., 133 CONG. REC. S100 (daily ed. Jan. 6, 1987). Members of the Senate Committee included Senators Daniel K. Inouye (Chairman), Warren Rudman (Vice Chairman), George J. Mitchell, Sam Nunn, Paul S. Sarbanes, Howell T. Heflin, David L. Boren, James A. McClure, Orrin G. Hatch, William S. Cohen, and Paul S. Trible, Jr.

¹¹ H. Res. 12, 100th Cong., 1st Sess., 133 CONG. REC. H123 (daily ed. Jan. 7, 1987). Members of the House Committee included Lee H. Hamilton (Chairman), Dante B. Fascell (Vice Chairman), Thomas S. Foley, Peter W. Rodino, Jr., Jack Brooks, Louis Stokes, Les Aspin, Edward P. Boland, Ed Jenkins, Dick Cheney (Ranking Republican), Wm. S. Broomfield, Henry J. Hyde, Jim Courter, Bill McCollum, and Michael DeWine.

¹² HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN & SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. (1987) [hereinafter cited as CONGRESSIONAL REPORT].

reaucracies: on the one hand, the staff of the National Security Council (NSC) and its working head, the Assistant to the President for National Security Affairs; and on the other, the cabinet-level departments, particularly the Department of State. The record of the affair also shows the extraordinary latitude under which the Reagan administration permitted the NSC to function, and it demonstrates the serious consequences that can flow from placing authority for the direct conduct of foreign policy initiatives in the hands of individuals who lack both visibility and accountability: the NSC staff.

II. THE NATIONAL SECURITY COUNCIL — ORIGIN AND BACKGROUND

Congress created the National Security Council through the National Security Act of 1947.¹³ In the years immediately following World War II, a consensus formed around the proposition that the need existed for changes in the organization of the United States overall national security structure — including military forces, supply, national security policy planning, and intelligence. The legislative vehicle for this reorganizational drive became H.R. 2319, as introduced by Congressman Clare E. Hoffman of Michigan, Chairman of the House Committee on Expenditures in the Executive Departments, in the first session of the Eightieth Congress on February 28, 1947.¹⁴

The legislation's proposal for the establishment of a National Security Council to provide coordination and liaison on national security matters reflected the experience of World War II. Various working arrangements effectuated to meet the exigencies of that period provided the precedent for a high-level policy coordination and advisory mechanism. A Standing Liaison Committee, created in 1938 at the instigation of Secretary of State Cordell Hull to concentrate on Latin American issues, consisted of the Under Secretary of State, the Army Chief of Staff, and the Chief of Naval Operations.¹⁵ Other proto-

¹³ National Security Act of 1947, ch. 343, 61 Stat. 495 (1947). The portion of the National Security Act creating the NSC is codified at 50 U.S.C. § 401.

¹⁴ 93 CONG. REC. 1579 (1947). The committee held 20 days of hearings concerning the proposal between April and July of 1947. See *National Security Act of 1947: Hearings Before the Comm. on Expenditures in the Executive Departments*, 80th Cong., 1st Sess. (1947) [hereinafter *1947 Hearings*]. The Committee on Expenditures in the Executive Departments was renamed the Committee on Government Operations in 1952. See H.R. Res. 647, 82d Cong., 2d Sess. (1952).

¹⁵ M. LOWENTHAL, *THE NATIONAL SECURITY COUNCIL: ORGANIZATIONAL HISTORY*, CRS-5 (Congressional Research Service No. 78-104F, 1987).

typical coordinating entities included the National Defense Advisory Council, composed of private citizens with specific areas of professional expertise, and the State, War, Navy Coordinating Committee, created near the end of the war consisting of the assistant secretaries of those departments.¹⁶

The record of the hearings on H.R. 2319 makes clear that military reorganization constituted the legislation's primary purpose. The legislation sought to create a unified military command to replace the existing Cabinet-level Departments of War and Navy. Secretary of War Robert P. Patterson, the lead Administration witness at the hearings, supported the restructuring of the military command framework into a "National Defense Establishment." The bill provided that the new National Defense Establishment consist of the Departments of the Army, Navy, and Air Force, and be headed by an official referred to in that version of the legislation as the Secretary of National Defense.¹⁷

Clearly, the bill's originators viewed the creation of an advisory and coordinating entity like the National Security Council as a secondary concern of the legislation. Patterson's testimony described creation of a National Security Council almost as an afterthought.¹⁸ The function of this proposed council would be to "advise the President on integration of foreign and military policies and to enable the military services and other agencies to cooperate more effectively in matters relative to National Defense."¹⁹

Other witnesses on H.R. 2319 also discussed the NSC principally in its military context. Secretary of the Navy James Forrestal described the proposed entity exclusively in terms of improving military operations: "an instrument for effective and frequent coordination between our national policy and our military potential."²⁰ Similarly, Vice Admiral Forrest Sherman, the Deputy Chief of Naval Operations, referred to "the necessity for an organization . . . to make decisions

¹⁶ *Id.* at CRS-5-CRS-8.

¹⁷ 1947 Hearings, *supra* note 14, at 11.

¹⁸ *Id.* The legislation proposed that the National Security Council consist of the Secretary of State, the Secretary of National Defense, the Secretaries of Army, Navy, and Air Force, the Chairman of the National Security Resources Board, and such other members as the President might appoint. *Id.*

¹⁹ *Id.* The legislation also proposed to create the Central Intelligence Agency to operated under the Council and to replace the previously existing Central Intelligence Group. *Id.*

²⁰ *Id.* at 99.

based on sound estimates as to the most effective manner in which our military and financial resources can be applied."²¹

Possibly because of the National Security Council's position as a minor concern to the Act's drafters in relation to the overall purpose of the legislation, the NSC's structure in final form²² conformed almost identically to the form proposed in H.R. 2319. The enacted law described the NSC's function as "[advising] the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to co-operate more effectively in matters involving the national security."²³ The legislation directed that the Council be composed of the President; the Secretaries of State, Defense, Army, Navy, and the Air Force; the chairman of the National Security Resources Board; and other specified officials if designated by the President.²⁴ In addition to an open-ended clause directing it to perform "such other functions as the President may direct,"²⁵ the NSC had the following specific duties:

- (1) to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith; and
- (2) to consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security, and to make recommendations to the President in connection therewith.²⁶

The language establishing the NSC thus demonstrates that its creators envisioned it as a source of advice, rather than operational activity. The language also shows that this advice was to come from the Cabinet-level officials designated as NSC members, rather than from NSC staff: The Act's only mention of a staff function was a brief provision for "a staff to be headed by a civilian executive secretary who shall be appointed by the President The executive secretary, subject to the direction of the Council, is hereby authorized

²¹ *Id.* at 165.

²² National Security Act of 1947, ch 343, § 101, 61 Stat. 495 (1947) (presently codified at 50 U.S.C. § 402 (1982)).

²³ *Id.* at § 101(a) (presently codified at 50 U.S.C. § 402(a)(1982)).

²⁴ *Id.*

²⁵ *Id.* at § 101(b) (presently codified at 50 U.S.C. § 402(b)(1982)).

²⁶ *Id.*

... to appoint and fix the compensation of such personnel as may be necessary to perform such duties as may be prescribed by the Council in connection with the performance of its functions."²⁷

In response to recommendations of the Hoover Commission,²⁸ Congress statutorily altered the membership of the NSC in 1949²⁹ and in addition to its new composition, the NSC formally became part of the Executive Office of the President in that year.³⁰

III. THE NSC UNDER PREVIOUS PRESIDENTS

The role of the National Security Council and its staff in foreign policy formulation and implementation through the past eight presidencies has been the product of the interplay of a number of factors: the individual President's working relationship with the NSC and other national security officials (particularly the Secretary of State); the degree to which the President desired to take personal control of foreign policy machinery; and the assertiveness of the NSC head in seeking to exercise control over foreign policy processes.

Harry Truman, President at the time of the National Security Act's passage, employed the NSC as an entity to promote discussion and synthesis of policy options and to thereafter forward its recommendations to him. After chairing the first NSC meeting in September of 1947, Truman left that task to the Secretary of State and later to the Vice President, attending only 11 of the 56 weekly NSC meetings prior to the beginning of the Korean War.³¹ The responsibility for forwarding to the President the policy recommendations that the group arrived at, along with the views of the Joint Chiefs of Staff, fell upon the NSC's first Executive Secretary, Sidney Souers.³²

Dean Acheson, Truman's Secretary of State from 1949 to 1953, praised the NSC structure for its role in facilitating orderly foreign

²⁷ *Id.* at § 101(c) (presently codified at 50 U.S.C. § 402(c) (1982)).

²⁸ THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, GENERAL MANAGEMENT OF THE EXECUTIVE BRANCH (1949).

²⁹ National Security Act Amendments of 1949, ch. 412, § 3, 63 Stat. 579 (1949). The 1949 Amendments altered the membership of the NSC by adding the Vice President to the Council and removing the secretaries of the military departments. *Id.* In addition, the Amendments authorized the President to add, with the consent of the Senate, to the Council's membership the Chairmen of the Munitions Board and the Research and Development Board as well as the secretaries and under secretaries of other executive and military departments. *Id.*

³⁰ Reorganization Plan No., 4, 1949.

³¹ Melbourne, *Odyssey of the NSC*, 11 STRATEGIC REV. 51, 52 (1983).

³² *Id.*

policy decisionmaking by high-level members of the Administration. Acheson posited that the NSC carried out this role effectively because its meetings were limited to principals, with "aides and briefcase-carriers . . . excluded;³³ Cabinet-level participants came to the meetings prepared to argue their case on the basis of previously submitted memoranda."³⁴

Truman's successor, Dwight Eisenhower, created the position of "Special Assistant for National Security Affairs" (generally referred to as the National Security Advisor) to represent his personal perspective within the NSC bureaucracy. Robert Cutler, a former Eisenhower campaign aide, filled the newly-created position, acting as the President's liaison to the NSC while the executive secretary took responsibility over the NSC's career staff.³⁵ Cutler's role was that of a "coordinator . . . the President's assistant in charge of the NSC rather than national security policy."³⁶ The responsibility for the latter role rested with the Secretary of State during most of the Eisenhower presidency, John Foster Dulles.³⁷

The contemporary dominant role of the NSC staff in the formulation and execution of foreign policy can be said to date from the administration of John F. Kennedy. The ponderous nature of the State Department's decisionmaking process reportedly dissatisfied President Kennedy because, "with his temperament and impatience for results, [he] found the State Department an uncongenial element in his national security structure."³⁸ Kennedy turned to his National Security Advisor, McGeorge Bundy, to fashion a "mini-State Department" that could provide foreign policy analysis and options quickly.³⁹

As a result of his dissatisfaction, Kennedy dismantled the elaborate NSC bureaucratic structure that had built up under the previous administration, and "replaced Eisenhower's balanced, cumbersome-

³³ D. ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 733 (1969).

³⁴ *Id.*

³⁵ I. DESTLER, L. GELB, & A. LAKE, *OUR OWN WORST ENEMY: THE UNMAKING OF AMERICAN FOREIGN POLICY* 172 (1984).

³⁶ J. WOLDMAN, U.S. PRESIDENTIAL NATIONAL SECURITY ADVISERS: CHANGING ROLES AND RELATIONSHIPS CRS-4 (Congressional Research Service Report No. 87-334F, 1987) (quoting Nelson, *The "Top of Policy Hill": President Eisenhower and the National Security Council*, *DIPLOMATIC HISTORY*, 313 (Fall 1983)).

³⁷ *Id.*

³⁸ Melbourne, *supra* note 31, at 56.

³⁹ D. HALBERSTAM, *THE BEST AND THE BRIGHTEST* 62 (1969).

looking policy-making system with one that was overtly and aggressively informal, personal, fluid, focused on the here-and-now."⁴⁰ The NSC staff, under Bundy's direction, "came to be a White House staff to shape foreign policy decisions by other than formal Council procedures."⁴¹

Bundy remained as National Security Advisor under Lyndon Johnson until Walt Rostow succeeded him in 1966. While retaining the outline of the Kennedy NSC structure, Johnson worked more through Cabinet secretaries — particularly through the device of weekly meetings (so-called "Tuesday lunches") whose participants included the President, the Secretaries of State and Defense, the National Security Advisor, the Director of Central Intelligence, the Chairman of the Joint Chiefs of Staff, and other officials as the weekly topic might dictate.⁴²

Richard Nixon came to the Presidency in 1969 determined to consolidate the direction of foreign policy in the White House.⁴³ Nixon's first National Security Advisor, Henry Kissinger, quickly adapted the NSC system into a powerful mechanism to centralize the control of foreign policy formulation and execution. As National Security Advisor, Kissinger assumed the role of United States negotiator with foreign countries, including Vietnam, China, and the Soviet Union — a role traditionally within the province of the Secretary of State.⁴⁴ Ratification of Kissinger's preeminence came early in Nixon's second term when he became the only individual ever to hold the positions of White House National Security Advisor and Secretary of State simultaneously. These dual roles continued into the Ford administration, until Kissinger's former deputy, Lt. Gen. Brent Scowcroft, became National Security Advisor. Under Jimmy Carter's presidency, National Security Advisor Zbigniew Brzezinski served as a source of information and new foreign policy initiatives, with resulting tension between Brzezinski and the Secretary of State.⁴⁵

⁴⁰ I. DESTLER, L. GELB, & A. LAKE, *supra* note 35, at 193.

⁴¹ Melbourne, *supra* note 31, at 55.

⁴² INSTITUTE FOR DEFENSE ANALYSIS, *THE PRESIDENT AND THE MANAGEMENT OF NATIONAL SECURITY* 88-89 (K. Clark & L. Legere eds. 1969).

⁴³ J. WOLDMAN, *supra* note 36, at 25 (citing R. NIXON, RN, *THE MEMOIRS OF RICHARD NIXON*, 340 (1978)). Henry Kissinger, President Nixon's Secretary of State and National Security Advisor, wrote that President Nixon considered the State Department untrustworthy and the CIA incompetent and as a result the National Security Advisor "was crucial to him and to his plan to run foreign policy from the White House." H. KISSINGER, *THE WHITE HOUSE YEARS* 13 (1979).

⁴⁴ Tower Report, *supra* note 9, at II-2.

⁴⁵ *Id.*

IV. NSC'S ROLE IN THE IRAN-CONTRA AFFAIR

In 1984, Robert C. McFarlane, then the Assistant to the President for National Security Affairs, referring to the role of the National Security Council in the Reagan Presidency, wrote:

President Reagan rejected the idea that the NSC system should dominate the policy process. Instead, he feels that cabinet departments and agencies concerned with the four principal aspects of security policy — diplomatic, military, economic, and intelligence affairs — should play the lead role in policy development. Although an NSC-centered system can be very responsive to a president's desires, the alternative, a cabinet government, ensures that the President is not isolated from political and institutional realities. The departments are better able to broaden the spectrum of options and to integrate the concerns of diverse organizational and political constituencies than is any White House staff arrangement.⁴⁶

McFarlane, who occupied the position of National Security Advisor as the initial stages of the Iran-Contra affair unfolded, thus made the case for following the exact sort of process that the Iran-Contra affair circumvented. By indirection, he outlined the consequences that would flow from concentration of the decision-making process in the NSC staff: isolation of the President from political and institutional realities, failure to measure the "spectrum of opinions" that might be held on a particular issue by different officials, and an inability to recognize the broader concerns that would be brought to the table by diverse constituencies. The defects of centering power in the NSC staff became even more apparent, and the consequences more acute, as the staff assumed operational control over both assistance to the Contras and supply of arms to Iran.

The NSC Staff and Contra Assistance

Support for the Contra forces fighting the leftist Sandinista government in Nicaragua became a policy of the Reagan administration from its first months in 1981. Operating under authority of presidentially-approved intelligence "findings," and using funds appropriated by the Congress for that purpose, the Central Intelligence

⁴⁶ McFarlane, *The National Security Council: Organization for Policy Making*, in 5 CENTER FOR THE STUDY OF THE PRESIDENCY, THE PRESIDENCY AND NATIONAL SECURITY POLICY 261, 264-65 (1984).

Agency (CIA) initially assumed responsibility for providing the Contras with arms and other supplies.⁴⁷

The legislative branch, however, did not fully share the executive's commitment to the Contra cause. Through successive legislative mandates, generally attached as riders to appropriations bills, Congress imposed a series of limitations on the amount and type of assistance which it authorized the United States government to provide to the Contras. Late in 1982, Congress explicitly prohibited the CIA and the Department of Defense (DOD) from furnishing "military equipment, military training or advice, or other support for military activities . . . for the purpose of overthrowing the Government of Nicaragua."⁴⁸ One year later, Congress placed a \$24 million ceiling on military support for the Contras.⁴⁹ In October of 1984, following the disclosure earlier that year that the CIA had participated in mining Nicaraguan harbors, Congress prohibited the expenditure of funds by the CIA, DOD, or "any other agency or entity of the United States involved in intelligence activities . . . 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."⁵⁰ In floor debate on the 1984 amendment, Congressman Boland, sponsor of the amendments, declared that the provision "clearly ends U.S. support for the war in Nicaragua. Such support can only be renewed if the President can convince the Congress that this very strict prohibition should be overturned."⁵¹

Despite this expression of Congressional disapproval, the Reagan administration remained determined to maintain support for the Contras — in the words of former National Security Advisor McFarlane, to "help them hold body and soul together"⁵² — until such time as

⁴⁷ CONGRESSIONAL REPORT, *supra* note 12, at 3.

⁴⁸ Defense Appropriations Act, Pub. L. No. 97-377, § 793, 96 Stat. 1865 (1982) (enacted in Further Continuing Appropriations Act, 1983).

⁴⁹ Department of Defense Appropriations Act, 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1452 (1983).

⁵⁰ Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1935 (1984) (enacted as part of Continuing Appropriations Act, 1985). The so-called "Boland Amendment" bore the name of Congressman Edward Boland of Massachusetts, a member of the Appropriations Committee and former chairman of the House Select Committee on Intelligence, who sponsored the amendments.

⁵¹ 130 CONG. REC. H11980 (daily ed. Oct. 10, 1984).

⁵² *Testimony of Robert C. McFarlane, Gaston J. Sigur, Jr., and Robert W. Owen: Joint Hearings Before the House Select Committee to Investigate Covert Arms*

the Congress could be persuaded to resume active support of the Contras. Pursuant to this general objective, the National Security Council staff, under the direction of Lt. Col. Oliver North, began conducting all operational aspects of Contra assistance.

In order to provide the financial resources that had been denied by the Congressional cut-off of funding, the NSC staff sought contributions from two unorthodox sources: foreign nations and private United States citizens. According to the Congressional committees' report, foreign governments contributed \$34 million to the Contra effort between June of 1984 and early 1986, with an additional \$2.7 million solicited from private citizens.⁵³ At the beginning of the Contra support operation those funds were deposited in accounts controlled by Contra leaders. After mid-1985, however, two private citizens, Richard Secord and Albert Hakim, administered the funds through bank accounts under their control. Secord and Hakim's "Enterprise," as they referred to the operation, received contributions and disbursed funds out of a series of Swiss shell companies and bank accounts, took charge of weapons purchases for the Contras, and, in later phases of the effort, assumed responsibility for running the weapons and logistical material resupply operation.⁵⁴

The NSC Staff and the Iran Hostages/Arms Initiative

The NSC staff's activities on behalf of the Contras first paralleled and then became intertwined with its operational role of supplying arms to elements within Iran in an effort to secure the release of American hostages held captive in Lebanon. In mid-1985, according to the Congressional Report, the Israeli government proposed a plan whereby missiles would be sold to the government of Iran in exchange for Iranian intercession to secure the release of American citizens held hostage in Lebanon and the possibility of an improved long-term relationship between Iran and the United States.⁵⁵ The plan gained approval over the objections of the Secretaries of State and Defense, who disputed the likelihood of being able to establish contact

Transactions with Iran and Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, 100th Cong., 1st Sess. 10 (1987) (Testimony of Robert C. McFarlane, May 11, 1987) [hereinafter cited as *Congressional Hearings*].

⁵³ CONGRESSIONAL REPORT, *supra* note 12, at 4; see also *id.* at 69-71 (support from foreign governments); *id.* at 85-101 (support from private citizens).

⁵⁴ *Id.* at 4; see also *id.* at 327-59 (Congressional findings on the role and operations of "the Enterprise").

⁵⁵ Tower Report, *supra* note 9, at B-8-B-9.

with any "moderate" elements within the Iranian government⁵⁶ and who argued that trading weapons for hostages would contravene United States policy and violate the Arms Export Control Act.⁵⁷ Under the leadership of Colonel North, members of the NSC staff already involved in the Contra assistance effort became responsible for implementing the operational details of the United States government's involvement in the Iran weapons supply program.⁵⁸ In addition, the private citizens in control of the "Enterprise" assumed control over the financial brokering of the weapons transactions.⁵⁹

Several Israeli arms sales to Iran during the remainder of 1985 netted the return of only one American hostage.⁶⁰ (One such transaction, however, did net the "Enterprise" \$800,000 in spare cash, which Colonel North directed be retained and spent for the Contras — thus beginning the "diversion".⁶¹) During December of 1985, in the face of the apparent failure of the program to achieve its goals and the continued objections of the Secretaries of State and Defense, outgoing National Security Advisor McFarlane recommended that the sales to Iran be halted. The President, however, sided with his new National Security Advisor, Admiral John Poindexter, and CIA Director William Casey, who favored the continuation of the arms sales. Continuing the strategy of selling arms to Iran, the President, in January of 1986, authorized direct sales of weapons from the United States to Iran.⁶²

Between February and October of 1986, the NSC staff directed repeated sales of weapons by the United States government through the "Enterprise" to the government of Iran.⁶³ The result of these activities, however, secured the release of only one additional United States hostage. In addition, the United States gained no other apparent

⁵⁶ *Id.* The Secretary of Defense initially characterized the proposal as "absurd" and said that attempting to develop new links with Iranian leaders "is roughly like inviting Qadhafi over for a cozy lunch." *Id.*

⁵⁷ Arms Export Control Act, 22 U.S.C. § 2751 (1982).

⁵⁸ CONGRESSIONAL REPORT, *supra* note 12, at 6-7.

⁵⁹ *Id.*

⁶⁰ *Id.* at 7. The United States authorized Israel to sell 100 TOW missiles to Iran through an Iranian born arms dealer, Manucher Ghorbanifar. *Id.* at 169. While the first shipment of TOW missiles netted no hostages, a second shipment of 400 additional missiles secured the release of one United States hostage, the Reverend Benjamin Weir. *Id.* at 168-69.

⁶¹ *Id.* at 7; *see also id.* at 179.

⁶² *Id.* at 7; *see also id.* at 193-97.

⁶³ *See* Tower Report, *supra* note 9 at B-180-B-185.

benefits, such as any evidence of an improved relationship with the government of Iran, as a result of the continuing sales. In an attempt to improve contacts with responsive elements within Iran, Albert Hakim opened a "Second Channel" in September and October of 1986.⁶⁴ With the exposure of the Iran arms transactions in November of 1986, however, and the subsequent revelation that part of the proceeds of those transactions had been diverted to support the Contras, the NSC staff's operations came to an end.

V. SOME LESSONS OF THE IRAN-CONTRA AFFAIR

United States Foreign Policy Activities Must Be Internally Consistent

In order to avoid the disapproval of entities that would normally have had knowledge of national security operations (including the Congress, the State and Defense Departments, and the CIA), in both the Iran and Contra activities the NSC staff bypassed the normal institutional framework for conducting such operations and substituted processes that were largely ad hoc and unregulated. One by-product resulting from this action was a high degree of inconsistency, both in rhetoric and in substance. The most obvious example of this inconsistency is shown by the United States dealings with Iran: at the same time the United States publicly proclaimed both its opposition to nations supporting terrorism and its neutrality in a regional conflict, the NSC staff carried out a program of supplying weapons to a terrorist state involved in that conflict.

During the Contra phase of the affair, this same inconsistency between stated purpose and actual execution became apparent. Colonel North declared the promotion of democracy in Central America to be the purpose of the covert Contra assistance effort;⁶⁵ in internal documents he referred to the undertaking as "Project Democracy,"⁶⁶ and asserted that the foreign governments asked to aid the Contras were willing to supply such assistance because they were more committed to promoting the cause of democracy in Central America than

⁶⁴ *Id.* at 8-9. The "Second Channel" opened by Hakim worked through an Iranian revolutionary guardsman (The "Relative") to the Iranian Government. *Id.* at 249.

⁶⁵ See *Congressional Hearings*, *supra* note 52, at 4 (testimony of Oliver L. North, July 9, 1987) (presently available only in galley form).

⁶⁶ See CONGRESSIONAL REPORT, *supra* note 12, at 72-73.

the United States Congress.⁶⁷ Yet, not one of the solicited countries that ultimately provided funding for the Contras had a democratic form of government; indeed, the totalitarian character of a number of those governments was beyond dispute.⁶⁸

The NSC staff purposefully excluded the major elements of democracy within the United States government, namely, elected officials and Cabinet-level appointed officials who by virtue of their confirmation by the Senate were bound to be available for testimony before the Congress, from knowledge of the private Contra funding process. The legislative branch of the government received no information at all concerning the Iranian arms program, and participants structured the arms sales in such a way as to circumvent legislatively mandated Congressional notification requirements.⁶⁹ Yet, at the same time the NSC staff withheld information from the legislative branch and high-level executive branch officials (including statutory members of the National Security Council such as the Secretary of Defense, the Secretary of State, and the Joint Chiefs of Staff), ostensibly to preserve the security of the initiative, the NSC staff shared that information with a host of other, clearly less trustworthy figures:

- Manucher Ghorbanifar, who flunked every polygraph test administered by the U.S. Government;
- Iranian officials, who daily denounced the United States but received an inscribed Bible from the President;
- Officials of Iran's Revolutionary Guard, who received the U.S. weapons;
- Secord and Hakim, whose personal interests could conflict with the interests of the United States;
- Israeli officials, international arms merchants, pilots and air crews,

⁶⁷ *Congressional Hearings*, *supra* note 52, at 77 (testimony of Oliver L. North, July 7, 1987) (presently available only in galley form).

⁶⁸ *See id.* at 13. The specific list of solicited countries referred to by Mr. Jenkins during the Congressional hearings was contained in a memorandum to the members of the Committees and Witnesses, dated July 7, 1987, attaching identifying numbers to nine foreign countries. This numbering system, devised pursuant to an agreement between the White House, State Department, and the Committees, was to be used during the hearings when discussing "solicitation or contributions for Contra aid, or military assistance to the Contras."

⁶⁹ *See* CONGRESSIONAL REPORT, *supra* note 12, at 206-209 (outlining a plan to circumvent the Congressional reporting procedures of the Foreign Assistance Act and the Arms Export Control Act in regard to the arms transfers to Iran).

whose interests did not always coincide with ours; and

—An unknown number of shadowy intermediaries and financiers who assisted with both the First and Second Iranian Channels.⁷⁰

In the case of Contra assistance activity, the NSC staff at least circumvented, if not violated, Congress' explicit direction vis-à-vis its Constitutional power to limit expenditures of government funds; when Congressional committees sought to inquire as to the NSC staff's activities, officials responding to their inquiries misled them.⁷¹ At the point where the Iran and Contra activities intersected operationally — the diversion of funds from the Iran arms sales to support the Contras — not one democratically-elected United States government official was aware of, much less involved in, the decision making process. Congress of course had no knowledge, since it was ignorant of, or had been misled about the underlying activities.⁷² The Vice President did not know,⁷³ and the National Security Advisor did not inform the President of this major activity.⁷⁴ The diversion — part of a purported effort to advance the cause of democracy — was the product of decisions made entirely by undemocratic, unelected, unaccountable bureaucrats within the National Security Council.

"Tin Cup Diplomacy" Places United States Interests in Jeopardy

In the face of what the Administration regarded as insufficient support in Congress for assistance to the Contras, the NSC staff undertook to supplement Congressionally-appropriated funds, and to replace those funds after Congress curtailed direct government funding, by seeking the assistance of foreign nations. Initially, National Security Advisor McFarlane gave consideration to a plan for "farming out" the entire Contra operation to a third country, which would then be completely responsible for training and directing the forces as well as providing funding.⁷⁵ When that nation, identified as "Country 1" in the Committee report, declined the invitation to assume such a role, overtures to the government of "Country 6" took place.⁷⁶

⁷⁰ *Id.* at 14.

⁷¹ *Id.* at 19-20.

⁷² *Id.*

⁷³ *Id.* at 21.

⁷⁴ *Id.* Admiral John Poindexter, President Reagan's National Security Advisor, testified that he "shielded the President from knowledge of the diversion." *Id.*

⁷⁵ *Congressional Hearings*, *supra* note 52, at 14 (testimony of Robert C. McFarlane, May 11, 1987) (presently available only in galley form).

⁷⁶ CONGRESSIONAL REPORT, *supra* note 12, at 38.

These discussions broke off, however, due to the coincidental public furor over the disclosure of CIA involvement in the mining of Nicaraguan harbors.⁷⁷

The next approach for third country assistance to the Contras proved much more fruitful. In May of 1984, with Congressional appropriations about to expire and the prospects for their renewal dim, McFarlane approached the ambassador of "Country 2," who offered to provide the Contras with funding of \$1 million per month through the end of that year.⁷⁸ In addition, early in 1985, "Country 2," agreed to provide an additional \$24 million to the Contras.⁷⁹

The NSC staff also sought assistance from other governments. Late in 1984, Colonel North approved of the efforts of retired Army General John Singlaub in contacting "Countries 3 and 5" to persuade them to provide equipment and arms.⁸⁰ In 1986, after Congress amended the law to specifically authorize the State Department to solicit humanitarian aid from foreign nations,⁸¹ Assistant Secretary of State Elliot Abrams secured an additional \$10 million pledge from Brunei's head of state (because of a transposition in the bank account number, however, these funds never reached the Enterprise's bank account).⁸² Abrams accurately captured the demeaning nature of this process when he described it as "tin-cup diplomacy."⁸³ Though the perception of the United States appearing as a supplicant before other nations, begging for the resources to pursue foreign policy goals that it is precluded from providing itself is damaging, the ramifications of "tin-cup diplomacy" on United States bilateral relations with other nations extend beyond a mere problem of image. Secretary of State Shultz recognized the pitfalls inherent in soliciting contributions from other nations when he established the criteria for the countries from

⁷⁷ *Id.* Duane Clarridge, Chief of the Latin American Division of the CIA Directorate of Operations, traveled to Country 6 to discuss the possibility of Country 6's assistance. *Id.* After being told to "hold off" on such discussions due to the disclosure of the CIA's involvement in the mining of Nicaraguan harbor, Clarridge wrote: "Current furor here over the Nicaraguan Project urges that we postpone taking [Country 6] up on their offer of assistance." *Id.*

⁷⁸ *Id.* at 39.

⁷⁹ *Id.* at 45.

⁸⁰ *Id.* at 44-45.

⁸¹ Intelligence Authorization Act, Fiscal Year 1986, Pub. L. 99-169, § 105, 99 Stat. 1003 (1986).

⁸² CONGRESSIONAL REPORT, *supra* note 12, at 352.

⁸³ *Congressional Hearings*, *supra* note 52, at 189 (testimony of Elliott Abrams, June 3, 1987) (presently available only in galley form).

which humanitarian assistance might be sought, after the authorization of such activity in 1985:⁸⁴ Shultz "ruled out any countries receiving U.S. aid or whose political relationship with the United States was otherwise delicate."⁸⁵ Yet, those criteria — receipt of aid or a "delicate" political relationship — are far too narrow as disqualifying categories and fail to reflect the broad range of sensitive dealings that the United States carries on with other nations. Inevitably, any contributing nation will expect some form of future accommodation from the United States as a *quid pro quo* for having come to the United States aid in this manner, and the mere fact of solicitation places the United States in a subordinate position.

Congressman Jenkins raised one facet of this problem — the potential impact of a foreign contribution on the domestic legislative process — during the hearings in a colloquy with former National Security Advisor McFarlane:

[Mr. Jenkins.] In October 1985 when the State Department was scheduling an appointment for Colonel North to meet with one of these countries that later contributed \$2 million, I was involved in a tough legislative battle in this House. On October 12, I believe, of 1985, this House passed a textile bill, very controversial. At that very time, Colonel North apparently was soliciting, from a nation that was impacted by this bill, funds secretly and that country later delivered \$2 million, according to the testimony.

The President vetoed that bill in December 1985 and between December 1985 and August 1986, when the Congress decided to sustain the President by an eight-vote margin, there were entreaties apparently made to many other nations that were impacted by this legislation.

Now, I am pointing this out without making any allegations, because I don't think that occurred — as I say, I am a fair person — but as I see a nation that is severely impacted by a Congressional bill, where the State Department is involved in lobbying against it, and the administration, through its agents, goes to a foreign nation that is impacted, or may be impacted and says "we need financial help secretly," and it is delivered: Is that nation placed in a compromising position if that legislation is important one way or another

⁸⁴ See *supra* note 81.

⁸⁵ CONGRESSIONAL REPORT, *supra* note 12, at 352.

to that country?

Mr. McFarlane. What is worse, we would be.⁸⁶

United States Foreign Policy Must Not Generate Private Profit

In turning to the "Enterprise" as a financial and supply conduit for both the Contra and Iran operations, the NSC staff enabled private citizens to reap significant profit from their involvement in foreign policy initiatives of United States government. The Committee report found that "The Enterprise took in nearly \$48 million during its first 2 years. Its income-generating capacity came almost entirely from its access to U.S. government resources and connections: the contributions directed to it by North, the missiles sold to Iran, and the brokering of arms to the Contras as arranged by North."⁸⁷

During this period, the Enterprise spent almost \$35.8 million (including the funding of covert operations that were unknown to Congress and occasionally to the President), leaving a surplus of around \$12.2 million. Three principals of the Enterprise — Secord, Hakim, and Thomas Clines — "took self-determined 'commissions' from the \$12.2 million surplus to reward themselves for their work on arms deliveries to the Contras and the CIA. The commissions totaled approximately \$4.4 million, with an average markup of about 38 percent over the cost of the arms."⁸⁸

Because the Enterprise shrouded its activities in secrecy and ran outside the pattern of "normal" covert operations that would be undertaken on behalf of the United States government, the government exercised no scrutiny of any sort concerning the source of the Enterprise's funds, how it spent its money, or the profits that private parties derived from this government-sanctioned entity. Even Colonel North claimed that he "did not know how Secord and Hakim actually spent the money committed to their custody."⁸⁹

United States Negotiators Must Represent Only United States Interests

Possibly nowhere in the Iran-Contra affair did events diverge more dramatically from traditional patterns of foreign policy than in the practice of placing private citizens, each with a potential personal

⁸⁶ *Congressional Hearings*, *supra* note 52, at 279-80 (testimony of Robert C. McFarlane, May 14, 1987) (presently available only in galley form).

⁸⁷ CONGRESSIONAL REPORT, *supra* note 12, at 331.

⁸⁸ *Id.*

⁸⁹ *Id.* at 9.

financial stake in the outcome, in the position of negotiating the United States interests with representatives of a foreign nation. In October of 1986, United States representatives met with the relative of a leading Iranian official in Frankfurt, Germany, as part of the effort to open the "Second Channel" to the leadership structure in Iran. The United States contingent consisted of Colonel North, Secord, Hakim, and a former CIA official. North presented a negotiating position of seven points which he said the President had approved; these included provisions for delivery to Iran of weapons, weapons parts, and medical supplies, the release of all American hostages, and the return of the body of an American who had died in captivity.⁹⁰

One by one, the American delegation departed, leaving Hakim as the sole United States negotiator with the Iranian representatives. The agreement that he reached with the Iranians, which came to be known as the "Hakim Accords," differed markedly from the earlier seven-point United States negotiating position. The nine-point "Hakim accords" provided for the release of only "1-1/2 American hostages" ("1 definitely and the 2nd with all effective possible effort"⁹¹) rather than all of them; the agreement would have committed the United States to provide Iran with updated military intelligence, and also would have provided Iran with technical support and prices for other weapons.⁹²

One of the most serious concessions of the "Hakim Accords," as compared to the previous seven-point United States position, involved the injection of the "Da'Wa Prisoners" into the negotiations. The Da'Wa were 17 terrorists convicted in Kuwait for crimes including the bombing of the United States Embassy in that country. Kuwait had resisted pressure from Iran for the release of the Da'Wa, and the United States had supported that resolve, urging other countries to follow Kuwait's example. The United States policy was clear: "Terrorists should be punished—not freed, as the Iranians were now asking."⁹³ Nevertheless, the "Hakim Accords" contained a provision under which a plan would be drawn up for the release of the Da'Wa.⁹⁴

⁹⁰ *Id.* at 257-58.

⁹¹ *Id.* at 257 (library of Congress translation of original Farsi version of "Hakim Accords").

⁹² *Id.*

⁹³ *Id.* at 240.

⁹⁴ *Id.* at 257.

Irrespective of the national interest, Albert Hakim, the individual who found himself in the position of negotiating with the Iranians on behalf of the United States, possessed an intense personal interest in keeping channels of communication open with Iran. First and last, Hakim was a businessman: he sought a major segment of the Iranian foreign trade business in some future period of better relations between that nation and the United States. Hakim saw the Iranian market as "providing spectacular opportunities for wealth. He testified that he hoped to obtain for Secord and himself at least a 3 percent share of the annual \$15 billion Iranian market if commercial relations with the United States could be renewed. . . . Hakim was not only promoting a solution to the impasse over the hostages, but also pursuing his and Secord's own commercial interests."⁹⁵

Despite this clear conflict, the NSC staff allowed Hakim to assume a role which at the very least cloaked him with the apparent authority to negotiate on behalf of the United States with representatives of Iran, a country with which the United States hoped to establish a more trusting relationship.⁹⁶ Again, going outside the traditional channels of foreign policy operations produced results which proved to be at the very least damaging and could easily have been catastrophic.

Congress's Power of the Purse Must be Preserved

One of the most unambiguous powers granted to the legislative branch under our Constitution appears in its "Appropriations Clause": "No money may be drawn from the Treasury, but in consequence of appropriations made by law."⁹⁷ This provision sought to ensure that the elected representatives of the people would retain control over any activity of the executive branch requiring the expenditure of funds.⁹⁸

⁹⁵ *Id.* at 350.

⁹⁶ The degree of Hakim's actual authority with the "Second Channel" representatives, and of United States officials' knowledge and approval of Hakim's activities, is a matter of conjecture and dispute. He testified that he learned from North that the President approved the plan, *id.* at 257, and Admiral Poindexter testified that the President approved the plan, *id.* at 9. But Secretary of State Shultz testified that when he told the President of the portion of the plan concerning the Da'Wa prisoners after first learning of it in December of 1986, the President gave no indication he had any previous knowledge of negotiations involving the Da'Wa and "reacted like he had been kicked in the belly", *id.* at 263.

⁹⁷ U.S. CONST. art. I, § 9, cl. 7.

⁹⁸ CONGRESSIONAL REPORT, *supra* note 12, at 412.

The NSC staff, however, structured the activities of the Iran-Contra affair precisely to avoid this democratic check. Moreover, those involved in the Iran-Contra affair contemplated that this extra-governmental structure would be available for use in other future applications. In his testimony, Colonel North suggested that the "Enterprise" that handled the financial aspects of the Iran-Contra affair grew out of a goal of the late CIA Director Casey to establish a permanent entity outside the bounds of government "capable of conducting operations or activities of assistance to U.S. foreign policy goals."⁹⁹ This entity, he said, would be "self-financing, independent of appropriated monies and capable of conducting activities similar to the ones we had conducted here."¹⁰⁰ No clearer challenge to the legislative branch's power of the purse could be imagined than the creation of an operational covert foreign policy apparatus expressly designed to be "independent of appropriated monies."

VI. CONCLUSION

The revelation of the activities of the National Security Council staff in the Iran-Contra affair demonstrates how radically this entity has evolved over the past four decades. The NSC, originally intended as an advisory and coordinating body to synthesize the positions of others and oversee the execution of policy, became the initiator of policy and then the operational executor as well.

In Harry Truman's White House, the "briefcase-carriers" — second and third-tier bureaucrats — were restricted from participation in NSC meetings as a means of encouraging high-level discussions of national security policy.¹⁰¹ In the Iran-Contra affair, the latter-day counterparts of the "briefcase-carriers" came to assume control not only over the formulation of such policy, but its implementation as well. In the process, the essential idea underlying the creation of the National Security Council itself — to provide a mechanism by which officials at the highest level of the executive branch could bring their experience and institutional concerns to bear on questions of national security — was completely subverted. The process, intended as an instrument for inclusion of a range of views, became instead a means of their exclusion. This action resulted in the shipment of arms without

⁹⁹ *Congressional Hearings*, *supra* note 52, at 314 (testimony of Oliver L. North, July 10, 1987) (presently available only in galley form).

¹⁰⁰ *Id.*

¹⁰¹ See D. ACHESON, *supra* note 33.

the knowledge of the Joint Chiefs of Staff, diplomatic negotiations being conducted without the knowledge of the Secretary of State, and advice on the direction of military action in Central America being given without the knowledge of the Secretary of Defense. Further, all of this took place without the knowledge of the legislative branch.

Shortly after the Tower Commission submitted its report on the Iran-Contra affair, the President took steps to correct some of the more obvious defects in NSC operations that had been exposed by the affair. In a message to Congress,¹⁰² the President transmitted the text of a National Security Decision Directive¹⁰³ (NSDD) he had issued to implement the Commission's recommendations. The NSDD designates the NSC as "the principal forum for consideration of national security policy issues requiring presidential decision,"¹⁰⁴ and specifies that Cabinet-level officials including the Secretary of State, Secretary of Defense, and Director of Central Intelligence would be the President's "principal advisors" on matters within the jurisdiction of their respective departments.¹⁰⁵ In addition, the NSDD delineates the duties of the National Security Advisor and requires the Advisor to "present his own views and advice and, at the same time, faithfully represent the views of other NSC participants."¹⁰⁶ Other provisions of the NSDD formalize procedures for NSC meetings and call for a review of the interagency decisionmaking process.¹⁰⁷ The section of the NSDD titled "Covert Activities and Non-Government Personnel" requires coordination of proposed covert actions with members of the NSC, including the Attorney General, and the transmittal of their recommendations to the President. The directive mandates that "the NSC

¹⁰² MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE TEXT OF THE DECISION DIRECTIVE ISSUED TO IMPLEMENT THE RECOMMENDATIONS OF THE SPECIAL REVIEW BOARD, H.R. DOC. NO. 58, 100th Cong., 1st Sess. (1987) [hereinafter cited as PRESIDENTIAL MESSAGE].

¹⁰³ National Security Decision Directive 266 (March 31, 1987), *reprinted in* PRESIDENTIAL MESSAGE, *supra* note 102.

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *Id.* at 4-5.

¹⁰⁶ *Id.* at 6.

¹⁰⁷ *Id.* at 8-9. "The NSC, through the National Security Advisor, shall review the structure of senior interagency groups and regional and functional interagency groups established pursuant to, or under the authority of Presidential directives or applicable memoranda, and shall recommend all such changes thereto as may be necessary or desirable to realize fully and promptly in practice the Special Review Board's recommended model for the NSC system, as well as all of the Board's other recommendations." *Id.*

staff itself will not undertake the conduct of covert activities;" and directs that the use of private parties in the conduct of covert activities be tightly limited and closely supervised.¹⁰⁸

In his message, the President reiterated the Tower Commission's recommendation that no legislative changes be made in the NSC's structure, and he noted that the Council's "flexibility is an important part of its usefulness."¹⁰⁹ The President endorsed only one substantive structural change in the NSC apparatus, a change internal to the legislative branch: merger of the existing separate Intelligence Committees of the Senate and House into a single Joint Committee.¹¹⁰

While the content of the NSDD responds to many of the recommendations for changes in the National Security Council's operations put forward by the Tower Commission, it fails to allay the concerns of many observers that the "flexibility" in the NSC structure and operations, cited by the President as a virtue, could in the future again be used to produce the damaging consequences of the Iran-Contra affair. In addition, the NSDD's prescriptions and prohibitions are by their nature impermanent and alterable at will, as Assistant Attorney General Charles J. Cooper noted in discussing a different NSDD in testimony before the Congressional committees, such directives lack the force and effect of law. Cooper stated that "the NSDD is an internal intrabranh directive and obviously the President can deviate from requirements that he places upon himself."¹¹¹ Likewise, any President — current or future — would be free to order his subordinates in the executive branch to deviate from the specifications and limitations on NSC operations in NSDD 266.

Accordingly, a number of proposals have been advanced to render changes in the NSC structure and operations in more permanent, legislative form. One such proposal, to make the National Security Advisor to the President subject to Senate confirmation, is intended to place that individual under scrutiny at the beginning of his or her term and to make him or her available for questioning by the legislative branch thereafter.¹¹² As the Tower Commission noted, however, the NSC Advisor should answer only to the President:

¹⁰⁸ *Id.* at 9.

¹⁰⁹ PRESIDENTIAL MESSAGE, *supra* note 102, at 1.

¹¹⁰ *Id.* at 1-2.

¹¹¹ *Congressional Hearings*, *supra* note 52, at 316 (testimony of Charles J. Cooper, June 25, 1987) (presently available only in galley form).

¹¹² See R. CELADA, NATIONAL SECURITY ADVISOR: ACCOUNTABILITY TO CONGRESS CRS-9-CRS-12 (Congressional Research Service No. 86-1025-A, (1986)).

"[C]onfirmation is inconsistent with the role the National Security Advisor should play. He should not decide, only advise. . . . He should serve the President, with no collateral and potentially diverting loyalties."¹¹³

A more focused approach to counter the specific abuses uncovered by the Iran-Contra affair is to entirely remove the NSC and its staff from an operational role. The Congressional committees made such a recommendation, stating, "[t]he Committees recommend that the members and staff of the NSC not engage in covert actions. By statute the NSC was created to provide advice to the President on national security matters. But there is no express statutory prohibition on the NSC engaging in operational intelligence activities."¹¹⁴ The Tower Commission also gave inferential support to such a proposal: while recommending that "no substantive change be made in the provisions of the National Security Act dealing with the structure and operation of the NSC system," the Commission stated that the National Security Advisor "should not decide, only advise. He should not engage in policy implementation or operations."¹¹⁵

A bill introduced by Congressman Charles Bennett early in 1987¹¹⁶ would require that "[n]either the Council nor the staff of the Council (including any individual member of that staff) may conduct any operational activities, whether covert or overt."¹¹⁷ In addition, Congressman Jack Brooks, a member of the House Select Committee, introduced legislation to repeal the statutory authority under which the NSC staff engaged in operational activities. The Brooks bill¹¹⁸ would remove the catch-all clause of the National Security Act of 1947 authorizing the NSC to carry out "such other functions as the President may direct"¹¹⁹ — thereby effectively limiting it to the role of advice and coordination originally envisioned by its drafters.

While such legislative efforts to redirect and channel the activities of the NSC would have a more permanent effect than a directive issued unilaterally by the President, correcting the problems exposed by the Iran-Contra affair is a question of whether Presidential lead-

¹¹³ Tower Report, *supra* note 9, at V-5.

¹¹⁴ CONGRESSIONAL REPORT, *supra* note 12, at 425.

¹¹⁵ Tower Report, *supra* note 9, at V-5.

¹¹⁶ H.R. 70, 100th Cong., 1st Sess. (1987).

¹¹⁷ *Id.*

¹¹⁸ H.R. 3652, 100th Cong., 1st Sess. (1987).

¹¹⁹ National Security Act of 1947, Pub. L. No. 80-253, § 101(b), 61 Stat. 495 (1947) (presently codified at 50 U.S.C. § 402(b) (1982)).

ership is exerted in foreign policy formulation and execution. As the Tower Commission noted, "[t]he National Security Council is only advisory. It is the President alone who decides."¹²⁰ It is the President therefore who must determine the degree to which he will consult with and rely on the advice of his Cabinet-level officers on matters of national security. It is the President who must establish and maintain a working relationship with the Congress in the national security area. And it is the President who must be in a position to correct any subordinate who is under the misapprehension, as was Admiral Poindexter, that the buck stops on the NSC Advisor's desk rather than the President's.¹²¹

¹²⁰ Tower Report, *supra* note 9, at V-2.

¹²¹ Congressional Hearings, *supra* note 52, at 38 (testimony of John M. Poindexter, July 15, 1987) (presently available only in galley form).

The 1988 Dean Rusk Award

The Dean Rusk Award, named in honor of Professor Dean Rusk, Sibley Professor of Law at the University of Georgia, is given each year to the student author of the most outstanding international or comparative law paper submitted. The competition, sponsored by the Georgia Society of International Law, is open to all students currently enrolled in accredited Georgia law schools. *The Georgia Journal of International and Comparative Law* congratulates the winner of the Eleventh Annual Dean Rusk Award, Nathan G. Knight, Jr. of the University of Georgia School of Law, and is pleased to present his paper, *Section 337 and the GATT: A Necessary Protection or an Unfair Trade Practice?*

Both the Georgia Society and the *Georgia Journal* wish to extend their gratitude to this year's esteemed Dean Rusk Award judges: Thomas M. Buergenthal, I. T. Cohen Professor of Human Rights, Emory University School of Law; Bertis E. Downs, IV, Legal Writing Instructor, University of Georgia School of Law; Thomas Harrold, Partner, Glass, McCullough, Sherrill & Harrold, Atlanta, Georgia; and Louis B. Sohn, Woodruff Professor of International Law, University of Georgia School of Law.