Minority Report

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Representative Henry J. Hyde
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Representative Jim Courter
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Table of Contents

77-026 O - 87 - 15

Part I
Introduction

Chapter 1
Introduction

President Reagan and his staff made mistakes in the Iran-Contra Affair.* It is important at the outset, however, to note that the President himself has already taken the hard step of acknowledging his mistakes and reacting precisely to correct what went wrong. He has directed the National Security Council staff not to engage in covert operations. He has changed the procedures for notifying Congress when an intelligence activity does take place. Finally, he has installed people with seasoned judgment to be White House Chief of Staff, National Security Adviser, and Director of Central Intelligence.

The bottom line, however, is that the mistakes of the Iran-Contra Affair were just that—mistakes in judgment, and nothing more. There was no constitutional crisis, no systematic disrespect for "the rule of law," no grand conspiracy, and no Administration-wide dishonesty or coverup. In fact, the evidence will not support any of the more hysterical conclusions the Committees' Report tries to reach.

No one in the government was acting out of corrupt motives. To understand what they did, it is important to understand the context within which they acted. The decisions we have been investigating grew out of:

—Efforts to pursue important U.S. interests both in Central America and in the Middle East;

—A compassionate, but disproportionate, concern for the fate of American citizens held hostage in Lebanon by terrorists, including one CIA station chief who was killed as a result of torture;

—A legitimate frustration with abuses of power and irresolution by the legislative branch; and

—An equally legitimate frustration with leaks of sensitive national security secrets coming out of both Congress and the executive branch.

Understanding this context can help explain and mitigate the resulting mistakes. It does not explain them away, or excuse their having happened.

The Committees' Report and the Ongoing Battle

The excesses of the Committees' Report are reflections of something far more profound. Deeper than the specifics of the Iran-Contra Affair lies an underlying and festering institutional wound these Committees have been unwilling to face. In order to support rhetorical overstatements about democracy and the rule of law, the Committees have rested their case upon an aggrandizing theory of Congress' foreign policy powers that is itself part of the problem. Rather than seeking to heal, the Committees' hearings and Report betray an attitude that we fear will make matters worse. The attitude is particularly regrettable in light of the unprecedented steps the President took to cooperate with the Committees, and in light of the actions he already has taken to correct past errors.

A substantial number of the mistakes of the Iran-Contra Affair resulted directly from an ongoing state of political guerrilla warfare over foreign policy between the legislative and executive branches. We would include in this category the excessive secrecy of the Iran initiative that resulted from a history

*See "Our View of the Iran-Contra Affair," below at 442 ff.

and legitimate fear of leaks. We also would include the approach both branches took toward the so-called Boland Amendments. Congressional Democrats tried to use vaguely worded and constantly changing laws to impose policies in Central America that went well beyond the law itself. For its own part, the Administration decided to work within the letter of the law covertly, instead of forcing a public and principled confrontation that would have been healthier in the long run.

Given these kinds of problems, a sober examination of legislative-executive branch relations in foreign policy was sorely needed. It still is. Judgments about the Iran-Contra Affair ultimately must rest upon one's views about the proper roles of Congress and the President in foreign policy. There were many statements during the public hearings, for example, about the rule of law. But the fundamental law of the land is the Constitution. Unconstitutional statutes violate the rule of law every bit as much as do willful violations of constitutional statutes. It is essential, therefore, to frame any discussion of what happened with a proper analysis of the Constitutional allocation of legislative and executive power in foreign affairs.

The country's future security depends upon a modus vivendi in which each branch recognizes the other's legitimate and constitutionally sanctioned sphere of activity. Congress must recognize that an effective foreign policy requires, and the Constitution mandates, the President to be the country's foreign policy leader. At the same time, the President must recognize that his preeminence rests upon personal leadership, public education, political support, and interbranch comity. Interbranch comity does not require Presidential obsequiousness, of course. Presidents are elected to lead and to persuade. But Presidents must also have Congressional support for the tools to make foreign policy effective. No President can ignore Congress and be successful over the long term. Congress must realize, however, that the power of the purse does not make it supreme. Limits must be recognized by both branches, to protect the balance that was intended by the Framers, and that is still needed today for effective policy. This mutual recognition has been sorely lacking in recent years.

Why We Reject the Committees' Report

Sadly, the Committees' Report reads as if it were a weapon in the ongoing guerrilla warfare, instead of an objective analysis. Evidence is used selectively, and unsupported inferences are drawn to support politically biased interpretations. As a result, we feel compelled to reject not only the Committees' conclusions, but the supposedly "factual" narrative as well.

We always knew, of course, that there would be differences of interpretation. We had hoped at the start of this process, however, to arrive at a mutually agreeable statement of facts. Unfortunately, that was not to be. The narrative is not a fair description of events, but an advocate's legal brief that arrays and selects so-called "facts" to fit preconceived theories. Some of the resulting narrative is accurate and supported by the evidence. A great deal is overdrawn, speculative, and built on a selective use of the Committees' documentary materials.

The tone of the Report flows naturally from the tone of the Committees' televised hearings. We feel strongly that the decision to air the hearings compromised some intelligence sources and methods by broadcasting inadvertent slips of the tongue. But one thing television did do successfully was lay bare the passions that animated too much of the Committees' work. Who can forget the massive displays of travelers' checks being shown to the country to discredit Col. North's character, weeks before he would be given a chance to reply? Or the "j'accuse" atmosphere with which witnesses were confronted, beginning with the first week's prosecutorial confrontation with General Secord, as Members used the witnesses as objects for lecturing the cameras? These tactics had

little to do with factfinding, or with a careful review of policies and institutional processes.

But we shall not dwell on the hearings at this stage. The respected constitutional scholar, John Norton Moore, has written an excellent article about them. We have attached the article, "The Iran-Contra Hearings and Intelligence Oversight in a Democracy," along with other material Professor Moore sent the Committees, as an appendix to our Report. Suffice it to say that we agree with Moore completely. We mention the hearings now only to note that the same spirit, not surprisingly, has dominated the written Report.

Our reasons for rejecting the Committees' Report can best be understood by sampling a few of its major conclusions. By presenting these examples, we hope to alert conscientious readers—whether they agree with our interpretations or not—to take the narrative with a very large grain of salt. Regrettably, readers seeking the truth will be forced to wade through a mass of material to arrive at an independent judgment.

The President's Knowledge of the Diversion

The most politically charged example of the Committees' misuse of evidence is in the way it presents the President's lack of knowledge about the "diversion"—that is, the decision by the former National Security Adviser, Admiral John Poindexter, to authorize the use of some proceeds from Iran arms sales to support the Nicaraguan democratic Resistance, or Contras. This is the one case out of thousands in which the Committees—instead of going beyond the evidence as the Report usually does—refused instead to accept the overwhelming evidence with which it was presented. The Report does grudgingly acknowledge that it cannot refute the President's repeated assertion that he knew nothing about the diversion before Attorney General Edwin Meese discovered it in November 1986. Instead of moving forward from this to more meaningful policy questions, however, the Report seeks, without any support, to plant doubts. We will never know what was in the documents shredded by Lt. Col. Oliver L. North in his last days on the NSC staff, the Report says. Of course we will not. That same point could have been made, however, to cast unsupported doubt upon every one of the Report's own conclusions. This one seems to be singled out because it was where the President put his own credibility squarely on the line.

The evidence shows that the President did not know about the diversion. As we discuss at length in our chapter on the subject, this evidence includes a great deal more than just Poindexter's testimony. Poindexter was corroborated in different ways by the President's own diaries and by testimony from North, Meese, Commander Paul Thompson (formerly the NSC's General Counsel), and former White House Chief of Staff Donald Regan. The conclusion that the President did not know about the diversion, in other words, is one of the strongest of all the inferences one can make from the evidence before these Committees. Any attempt to suggest otherwise can only be seen as an effort to sow meritless doubts in the hope of reaping a partisan political advantage.

The Idea for the Diversion and the Use of Israeli Evidence

In the normal course of the narrative's hundreds of pages, the lack of objectivity stems more from the way it selects, and makes questionable inferences, from a scarcity of evidence, rather than a deliberate decision to ignore what is available. This becomes most obvious when we see a witness dismissed as being not credible for one set of events, and then see the same witnesses' uncorroborated testimony become the basis for a major set of assertions about other events. If these flip-flops could be explained by neutral rules of evidence, or if they were random, we could treat them more lightly. But something quite different seems to be at work here. The narrative seems to make every judgment about the evidence in favor of the interpretation

that puts the Administration in the worst possible light. Two examples involving North will make the point clearly. The first has to do with when he first got the idea for a diversion.

North testified that he first got the idea for diverting some of the Iran arms sale proceeds to the Contras from Manucher Ghorbanifar at a London hotel meeting in late January 1986.[1] He acknowledged that the subject of using the residuals to replenish Israeli weapon supplies, and for related operations, came up in a discussion with Amiram Nir, an Israeli official, in late December or early January. North specifically said, however, that the Nir conversation had nothing to do with the Contras.[2]

The Committees also received a chronology from the Israeli Government, however, that claimed North told Israeli supply officials in New York on December 6 that the Contras needed money, and that he intended to use proceeds from the Iran arms sales to get them some. When North was asked about the December 6 meeting, he reiterated that he did not recall discussing the Contras with anyone involved in the Iran initiative before the late January meeting with Ghorbanifar.[3]

The Committees' Report has used the Israeli chronology, and the timing of North's alleged December 6 conversation, to suggest that the idea of gaining funds for the Nicaraguan Resistance was an important consideration that kept the Iran arms initiative alive, more than a month before the President signed the Finding of January 17. The problem with making this important inference is that we have no way of knowing whether the Israeli chronology is accurate. It may be, but then again it may not. The Government of Israel made its chronology available to the Committees fairly late in our investigations, and consistently refused to let key Israeli participants give depositions to the Committees' counsel.

We have no quarrel with the fact that Israel, or any other sovereign nation, may refuse to let its officials and private citizens be subject to interrogation by a foreign legislature. The United States, no doubt, would do the same. But we do object vehemently to the idea that the Committees should use unsworn and possibly self-serving information from a foreign government to reject sworn testimony given by a U.S. official—particularly when the U.S. official's testimony was given under a grant of immunity that protected him from prosecution arising out of the testimony for any charge *except perjury.*

Even if North did mention the Contras to the Israeli supply officials in early December, however, the inference made from the timing would be unfair. The Committees have no evidence that would give them any reason to believe that anyone other than North even considered the Contras in connection with the Iran arms sales before the January Finding. Poindexter specifically testified that he first heard of the idea when North asked him to authorize it in February.[4] North testified that he first mentioned the idea to the Director of Central Intelligence, William J. Casey, at about the same time, in late January or early February, after the post-finding London meeting.[5] More importantly, North and Poindexter both testified that no one else in the U.S. Government was told about a diversion before this time. What that means is that the diversion cannot possibly have been a consideration for people at the policymaking level when the President decided to proceed with the Iran initiative in January.

Off-the-Shelf, Privately Funded Covert Operations

Paradoxically, the Committees seem to have had no difficulty swallowing North's testimony that Director Casey intended to create a privately funded, off-the-shelf covert operations capability for use in a variety of unforeseen circumstances.[6] This is despite the fact that two people close to Casey at the CIA, Deputy Director of Central Intelligence John M. McMahon and Deputy Director for Operations Clair George, both

denied Casey would ever have countenanced such an idea. "My experience with Bill Casey was absolute," said George. "He would never have approved it." [7]

We have to concede the possibility, of course, that Casey might have discussed such an idea speculatively with North without mentioning it to others at the CIA.* As with so many other questions, we will never know the answers with certainty. Casey's terminal illness prevented him from testifying between December 1986 and his death in May 1987. Nevertheless, it is interesting to note how much the majority is willing to make of one uncorroborated, disputed North statement that happens to suit its political purpose, in light of the way it treats others by North that are less convenient for the narrative's thesis.

The Allegation of Systematic Cover-up

The Report also tries to present the events of November 1986 as if they represent a systematic attempt by the Administration to cover up the facts of the Iran initiative. The reason for the alleged coverup, it is suggested, was to keep the American people from learning that the 1985 arms sales were "illegal."

There can be no question that the Administration was reluctant to make all of the facts public in early November, when news of the arms sales first came out in a Lebanese weekly. It is clear from the evidence that this was a time when covert diplomatic discussions were still being conducted with Iran, and there was some basis for thinking more hostages might be released. We consider the Administration's reticence in the early part of the month to have been completely justifiable.

However, as November 1986 wore on, Poindexter and North did falsify the documentary record in a way that we find deplorable. The outstanding fact about the late November events, however, is that Attorney General Meese understood the importance of getting at the truth. Working on a very tight schedule, Meese and three others from the Department of Justice managed to uncover the so-called "diversion memorandum" and reported it to the President. The President immediately removed Poindexter and North from the NSC staff. Shortly afterwards, he asked for an Independent Counsel to be appointed, appointed the Tower Board, and supported the establishment of select Congressional investigative committees, to which he has given unprecedented cooperation.

The Committees' Report criticizes Meese for not turning his fact-finding operation into a formal criminal investigation a day or two earlier than he did. In fact, the Report strongly tries to suggest that Meese either must have been incompetent or must have been trying to give Poindexter and North more time to cover their tracks. We consider the first of these charges to be untrue and the second to be outrageous. We shall show in a later chapter that Meese worked with the right people, and the right number of them, for a national security fact-finding investigation. Whatever after-the-fact criticism people may want to make, it is irresponsible to portray the Administration, in light of Meese's behavior, as if it were interested in anything but learning the truth and getting it out as quickly as possible.

The "Rule of Law"

Finally, the Committees' Report tries—almost as an overarching thesis—to portray the Administration as if it were behaving with wanton disregard for the law. In our view, *every single one* of the Committees' legal interpretations is open to serious question. On some issues—particularly the ones involving the statutes governing covert operations—we believe the law to be clearly on the Administration's side. In every other case, the issue is at least debatable. In some, such as the Boland Amendment, we are convinced we have by far the better argument. In a few others—such as who owns the

*We use the word "speculatively" here because North testified, at the same time as he introduced the idea, that it never was put into effect.

funds the Iranians paid Gen. Richard Secord and Albert Hakim—we see the legal issue as being close. During the course of our full statement, we shall indicate which is which.

What the Committees' Report has done with the legal questions, however, is to issue a one-sided legal brief that pretends the Administration did not even have worthwhile arguments to make. As if that were not enough, the Report tries to build upon these one-sided assertions to present a politicized picture of an Administration that behaved with contempt for the law. If nothing else would lead readers to view the Report with extreme skepticism, the adversarial tone of the legal discussion should settle the matter.

Our View of the Iran-Contra Affair

The main issues raised by the Iran-Contra Affair are not legal ones, in our opinion. This opinion obviously does have to rest on some legal conclusions, however. We have summarized our legal conclusions at the end of this introductory chapter. The full arguments appear in subsequent chapters. In our view, the Administration did proceed legally in pursuing both its Contra policy and the Iran arms initiative. We grant that the diversion does raise some legal questions, as do some technical and relatively insubstantial matters relating to the Arms Export Control Act. It is important to stress, however, that the Administration could have avoided every one of the legal problems it inadvertently encountered, while continuing to pursue the exact same policies as it did.

The fundamental issues, therefore, have to do with the policy decisions themselves, and with the political judgments underlying the way policies were implemented. When these matters are debated as if they were legal—and even criminal—concerns, it is a sign that interbranch intimidation is replacing and debasing deliberation. That is why we part company not only with the Committees Report's answers, but with the very questions it identifies as being the most significant.

There are common threads to what we think went wrong with the Administration's policies toward Central America and Iran. Before we can identify those threads, however, we will give a very brief overview of the two halves of the Committees' investigations. For both halves, we begin with the context within which decisions were made, describe the decisions, and then offer some judgments. After taking the parts separately, we will then be in a position to talk about commonalities.

Nicaragua

The Nicaraguan aspect of the Iran-Contra Affair had its origins in several years of bitter political warfare over U.S. policy toward Central America between the Reagan Administration and the Democratic House of Representatives. The United States had supported the Sandinistas in the last phase of the dictatorial regime of Anastasio Somoza and then gave foreign aid to Nicaragua in 1979 and 1980, the first years of Sandinista rule. By 1980, however, the Sandinistas had shed their earlier "democratic reformer" disguise and begun to suppress civil liberties at home and export revolution abroad. As a result, the United States suspended all aid to Nicaragua in the closing days of the Carter Administration.

During the early years of the Reagan Administration, the Soviet Union and its allies dramatically increased their direct military support for Nicaragua, and their indirect support, through Nicaragua, of Communist guerrillas in El Salvador. The Reagan Administration decided to provide covert support for the Nicaraguan democratic Resistance in late 1981, and Congress agreed. By late 1982, however, Congress adopted the first of a series of so-called "Boland Amendments," prohibiting the CIA and Defense Department from spending money "for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras." The House voted for this "limitation" by a

margin of 411–0, in large part because everyone understood that the Administration could continue to support the Resistance as long as the purpose of the support was to prevent the revolution from being exported to El Salvador.

This approach left many unsatisfied. Some within the Administration wanted a broader attack on the Sandinista regime. Some within Congress wanted to end all support for the Contras and begin moving back toward the 1979–80 policy of providing economic assistance to the Sandinistas. Neither side of the policy debate was politically strong enough to prevail. Instead, during the course of the next several years, Congress and the Administration "compromised" on a series of ambiguous formulas.

Meanwhile, the Soviet buildup accelerated, and Sandinista support for the insurgents in El Salvador continued. In May 1983, the House Intelligence Committee, chaired by Representative Edward P. Boland, reported:

> It is not popular support that sustains the insurgents [in El Salvador]. As will be discussed later, this insurgency depends for its lifeblood—arms, ammunition, financing, logistics and command-and-control facilities—upon outside assistance from Nicaragua and Cuba. This Nicaraguan-Cuban contribution to the Salvadoran insurgency is long standing. It began shortly after the overthrow of Somoza in July, 1979. It has provided—by land, sea and air—the great bulk of the military equipment and support received by the insurgents.[8]

Despite this finding, House Democrats succeeded in late 1983 in limiting appropriated support for the Resistance to an amount intentionally calculated to be insufficient for the full fiscal year. The funds ran out by late spring or summer 1984. By October, the most stringent of the Boland Amendments had taken effect. Paradoxically, Congress' 1983–85 decisions came in a context in which it was continuing to pass laws that accused the Sandinistas of violating the nonaggression provisions of the charter of the Organization of American States—a violation that the OAS charter says calls for a response by other member nations, including the United States.*

Actions

By the late spring of 1984, it became clear that the Resistance would need some source of money if it were to continue to survive while the Administration tried to change public and Congressional opinion. To help bridge the gap, some Administration officials began encouraging foreign governments and U.S. private citizens to support the Contras. NSC staff members played a major role in these efforts, but were specifically ordered to avoid direct solicitations. The President clearly approved of private benefactor and third-country funding, and neither he *nor his designated agents* could constitutionally be prohibited from encouraging it. To avoid political retribution, however, the Administration did not inform Congress of its actions.

In addition to encouraging contributions, the NSC's North, with varying degrees of authorization and knowledge by National Security Advisers Robert C. McFarlane and Admiral John Poindexter:

—Helped coordinate or facilitate actions taken by private citizens and by certain U.S.

*Despite the fact that the Committees announced that their hearings were to be neither "pro-Contra nor anti-Contra," the fact is that the Committees' staff left no stone unturned in its efforts to obtain information that might be politically damaging to the Resistance, even if irrelevant to the Committees' mandates. The Committees' investigators reviewed major portions, if not all, of the Contras' financial records; met with witnesses who alleged the Resistance was involved in terrorism or drug-running; investigated the financial conduct of the NHAO program, and so on. The fact is, however, that the Committees received no credible evidence of misconduct by the Resistance. It comes as little surprise, of course, that the Committees' majority does not explicitly acknowledge this. To give but one example of the Committees' findings, investigators produced a detailed memorandum concerning allegations of drug running, and concluded that the allegation had no substance. This memorandum was included in the Committees' record and is reprinted as Appendix E to the Minority Report. For this reason, suggestions that the Committees have not investigated such matters, and other Committees of Congress should, ought to be seen for what they are: political harassment by Congressional opponents of the Resistance.

Government officials to direct money, arms, or supplies from private U.S. citizens or foreign governments to the Nicaraguan Resistance;

—Provided the Resistance with expert military judgment or advice to assist in the resupply effort; and

—Together with others in Government, provided the Resistance with intelligence information that was useful in the resupply effort.

Poindexter and North testified that they both believed these activities were legally permissible and authorized. They also said that the President was kept generally informed of their coordinating role. The President has said, however, that he was not aware of the NSC staff's military advice and coordination.

Because the Boland Amendment is an appropriations rider, it is worth noting that there is no evidence that any substantial amounts of appropriated taxpayer funds were used in support of these efforts. In addition, the NSC staff believed—as we do—that the prohibition did not cover the NSC.[9] At no time, in other words, did members of the President's staff think their activities were illegal. Nevertheless, the NSC staff did make a concerted effort to conceal its actions from Congress. There is no evidence, however, to suggest that the President or other senior Administration officials knew about this concealment.

Judgments

The effort to raise foreign government and private funds for the Resistance raised about $35 million between mid-1984 and mid-1986—virtually all of it from foreign countries. In addition, the much discussed and unauthorized diversion orchestrated by North and Poindexter contributed about $3.8 million more. Without this support, according to uncontroverted testimony the Committees received, there can be no question that the Resistance would have been annihilated. In other words, the support clearly did make an important strategic difference in the 2 years it took the Administration to persuade Congress to reverse its position. The short-term benefits of the effort are therefore undeniable. The long-term costs, however, seem not to have been adequately considered.

We do believe, for reasons explained in the appendix to this introductory chapter and in our subsequent chapters on Nicaragua, that virtually all of the NSC staff's activities were legal, with the possible exception of the diversion of Iran arms sale proceeds to the Resistance. We concede that reasonable people may take a contrary view of what Congress intended the Boland Amendments to mean. But we also agree with a letter from Prof. John Norton Moore, which appears as Appendix B to our Report, that to the extent that the amendment was ambiguous, "well recognized principles of due process and separation of powers would require that it be interpreted to protect Executive Branch flexibility." [10]

Notwithstanding our legal opinions, we think it was a fundamental mistake for the NSC staff to have been secretive and deceptive about what it was doing. The requirement for building long-term political support means that the Administration would have been better off if it had conducted its activities in the open. Thus, the President should simply have vetoed the strict Boland Amendment in mid-October 1984, even though the Amendment was only a few paragraphs in an approximately 1,200 page-long continuing appropriations resolution, and a veto therefore would have brought the Government to a standstill within 3 weeks of a national election. Once the President decided against a veto, it was self-defeating to think a program this important could be sustained by deceiving Congress. Whether technically illegal or not, it was politically foolish and counterproductive to mislead Congress, even if misleading took the form of artful evasion or silence instead of overt misstatement.

We do believe firmly that the NSC staff's deceits were not meant to hide illegalities. Every witness we have heard told us his

concern was not over legality, but with the fear that Congress would respond to complete disclosure with political reprisals, principally by tightening the Boland Amendments. That risk should have been taken.

We are convinced that the Constitution protects much of what the NSC was doing—particularly those aspects that had to do with encouraging contributions and sharing information. The President's inherent constitutional powers are only as strong, however, as the President's willingness to defend them. As for the NSC actions Congress could constitutionally have prohibited, it would have been better for the White House to have tackled that danger head on. Some day, Congress' decision to withhold resources may tragically require U.S. citizens to make an even heavier commitment to Central America, perhaps one measured in blood and not dollars. The commitment that might eliminate such an awful future will not be forthcoming unless the public is exposed to and persuaded by a clear, sustained and principled debate on the merits.

Iran

The Iran arms sales had their roots in an intelligence failure. The potential geopolitical importance of Iran for the United States would be obvious to anyone who looks at a map. Despite Iran's importance, the United States was taken by surprise when the Shah fell in 1979, because it had not developed an adequate human intelligence capability there. Our hearings have established that essentially nothing had been done to cure this failure by the mid-1980's. Then, the United States was approached by Israel in 1985 with a proposal that the United States acquiesce in some minor Israeli arms sales to Iran. This proposal came at a time when the United States was already considering the advisability of such sales. For long term, strategic reasons, the United States had to improve relationships with at least some of the currently important factions in Iran. The lack of adequate intelligence about these factions made it important to pursue any potentially fruitful opportunity; it also made those pursuits inherently risky. U.S. decisions had to be based on the thinnest of independently verifiable information. Lacking such independent intelligence, the United States was forced to rely on sources known to be biased and unreliable.

Well aware of the risk, the Administration nonetheless decided the opportunity was worth pursuing. The major participants in the Iran arms affair obviously had some common and some conflicting interests. The key question the United States had to explore was whether the U.S. and Iranian leadership actually felt enough of a common interest to establish a strategic dialogue.

Actions

To explore the chance for an opening, the President agreed first to approve Israeli sales to Iran in 1985, and then in 1986 to sell U.S. arms directly. The amounts involved were meager. The total amount, including all of the 1985 and 1986 sales combined, consisted of 2004 TOW antitank missiles, 18 HAWK antiaircraft missiles, and about 200 types of HAWK spare parts.

There was a strong division of opinion in the Administration about the advisability of these arms sales, a division that never abated. Unfortunately, this served as a pretext for Poindexter's decision not to keep the Secretaries of State or Defense informed about the detailed progress of the negotiations between the United States and Iran. One reason for the failure to inform appears to have been a past history in which some Administration officials may have leaked sensitive information as a way to halt actions with which they disagreed. Poindexter's secretive inclinations were abetted by Secretary Shultz, who all but invited Poindexter not to keep him informed because he did not want to be accused of leaking. They also were abetted by Secretary Weinberger, who—like Shultz—was less than vigorous about keeping himself informed about a policy he had good reason to believe was still going forward.

The first deals with the Iranian Government were flawed by the unreliability of our intermediary, Manucher Ghorbanifar. For all of his unreliability, however, Ghorbanifar helped obtain the release of two U.S. hostages and did produce high Iranian officials for the first face-to-face meetings between our governments in 5 years. At those meetings, one of which was held in Tehran in May 1986, U.S. officials sought consistently to make clear that we were interested in a long-term strategic relationship with Iran to oppose the Soviet Union's territorial interests. As concerned as the President had become personally for the fate of the hostages—including the CIA's Beirut station chief, William Buckley, who was repeatedly tortured until he died—the hostages were always presented in these negotiations as obstacles to be overcome, not as the reason for the initiative. But Ghorbanifar appeared to have misled both sides, and the Iranian officials seemed to be interested only in weapons, and in using the hostages for bargaining leverage.

After the Tehran meeting, the United States was able to approach a very high Iranian official using a Second Channel arranged by Albert Hakim and his associates. There is little doubt about Hakim's business motives in arranging these meetings; there is equally little doubt that this channel represented the highest levels of the Iranian Government. Discussions with this channel began in the middle of 1986 and continued until December. They resulted in the release of one further hostage and U.S. officials expected them to result in some more. Perhaps more importantly, these discussions appear to have been qualitatively different from the ones conducted through the First Channel arranged by Ghorbanifar, and included some talks about broad areas of strategic cooperation.

As a result of factional infighting inside the Iranian Government, the initiative was exposed and substantive discussions were suspended. Not surprisingly, given the nature of Iranian politics, the Iranian Government has publicly denied that significant negotiations were underway. Congress was not informed of the Administration's dealings with Iran until after the public disclosure. The failure to disclose resembled the Carter Administration's similar decisions not to disclose in the parallel Iranian hostage crisis of 1979-81. President Reagan withheld disclosure longer than Carter, however—by about 11 months to 6.

Judgments

The Iran initiative involved two governments that had sharp differences between them. There were also very sharp internal divisions in both Iran and the United States about how to begin narrowing the differences between the two countries. In such a situation, the margin between narrow failure and success can seem much wider after the fact than it does during the discussions. While the initial contacts developed by Israel and used by the United States do not appear likely to have led to a long-term relationship, we cannot rule out the possibility that negotiations with the Second Channel might have turned out differently. At this stage, we never will know what might have been.

In retrospect, it seems clear that this initiative degenerated into a series of "arms for hostage" deals. It did not look that way to many of the U.S. participants at the time. Nevertheless, the fact that the negotiations never were able clearly to separate the long-term from the short-term issues, confirms our instinctive judgment that the United States should not have allowed arms to become the currency by which our country's bona fides were determined. There is no evidence that these relatively minor sales materially altered the military balance in the Iran-Iraq war. However, the sales damaged U.S. credibility with our allies, making it more difficult, among other things, for the Administration to enforce its preexisting efforts to embargo arms sales to Iran.

The decision to keep Congress in the dark for 11 months disturbs all Members of these Committees. It is clear that the Reagan Ad-

ministration simply did not trust the Congress to keep secrets. Based on the history of leaks we shall outline in a later chapter, it unfortunately had good reason to be concerned. This observation is not offered as a justification, but as an important part of the context that must be understood. To help remove this concern as an excuse for future Administrations, we are proposing a series of legislative and administrative recommendations to improve both Congress' and the executive branch's ability to maintain national security secrets and deter leaks.

Diversion

The lack of detailed information-sharing within the Administration was what made it possible for Poindexter to authorize the diversion and successfully keep his decision to do so from the President. We have already indicated our reasons for being convinced the President knew nothing about the diversion. The majority Report says that if the President did not know about it, he should have. We agree, and so does the President. But unlike some of the other decisions we have been discussing, the President cannot himself be faulted for this one. The decision was Admiral Poindexter's, and Poindexter's alone.

As supporters of a strong Presidential role in foreign policy, we cannot take Poindexter's decision lightly. The Constitution strikes an implicit bargain with the President: in return for getting significant discretionary power to act, the President was supposed to be held accountable for his decisions. By keeping an important decision away from the President, Poindexter was acting to undercut one foundation for the discretionary Presidential power he was exercising.

The diversion also differs from the basic Nicaragua and Iran policies in another important respect: we can find nothing to justify or mitigate its having occurred. We do understand the enthusiasm North displayed when he told the Committees it was a "neat idea" to use money from the Ayatollah, who was helping the Sandinistas, to support the Contras. But enthusiasm is not a sufficient basis for important policy decisions. Even if there were nothing else wrong with the diversion, the decision to mix two intelligence operations increased the risk of pursuing either one, with predictably disastrous repercussions.

Unlike the Committees' majority, we believe there are good legal arguments on both sides of the question of whether the proceeds of the arms sales belong to the U.S. Government or to Secord and Hakim. For that reason, we think it unlikely, under the circumstances, that the funds were acquired or used with any criminal intent. Nevertheless, the fact that the ownership seems unclear under current law does not please us. We do believe that Secord and Hakim were acting as the moral equivalents of U.S. agents, even if they were not U.S. agents in law.

The diversion has led some of the Committees' Members to express a great deal of concern in the public hearings about the use of private citizens in covert operations in settings that mix private profits with public benefits. We remain convinced that covert operations will continue to have to use private agents or contractors in the future, and that those private parties will continue to operate at least partly from profit motives. If the United States tries to limit itself to dealing only with people who act out of purely patriotic motives, it effectively will rule out any worthwhile dealing with most arms dealers and foreign agents. In the real world of international politics, it would be foolish to avoid working with people whose motives do not match our own. Nevertheless, we do feel troubled by the fact that there was not enough legal clarity, or accounting controls, placed on the Enterprise by the NSC.

The Uncovering

It is clear that officials of the National Security Council misled the Congress and other members of the Administration about their activities in support of the Nicaraguan Resistance. This occurred without authorization

from outside the NSC staff. It is also clear that the NSC staff actively misled other Administration officials and Congress about the Iran initiative both before and after the first public disclosure. The shredding of documents and other efforts at covering up what had happened were also undertaken by NSC staff members acting on their own, without the knowledge, consent, or acquiescence of the President or other major Administration officials, with the possible exception of Casey.

In the week or two immediately after the Iran initiative was disclosed in a Lebanese weekly, the President did not tell the public all that he knew, because negotiations with the Second Channel were still going on, and there remained a good reason for hoping some more hostages might soon be released. Once the President learned that not all of the relevant facts were being brought to his attention, however, he authorized the Attorney General immediately to begin making inquiries. Attorney General Meese acted properly in his investigation, pursuing the matter as a fact-finding effort because he had no reason at the time to believe a crime had been committed. Arguments to the contrary are based strictly on hindsight. In our opinion, the Attorney General and other Justice Department officials did an impressive job with a complicated subject in a short time. After all, it was their investigation that uncovered and disclosed the diversion of funds to the Contras.

Common Threads

The different strands of the Iran-Contra Affair begin coming together, in the most obvious way, on the level of personnel. Both halves of the event were run by the NSC, specifically by McFarlane, Poindexter, and North. With respect to Nicaragua, the Boland Amendment just about ruled all other agencies out of the picture. With respect to Iran, the other parts of the executive branch—from the State and Defense Departments to the CIA—seemed more than happy to let the NSC be in charge.

It is ironic that many have looked upon these events as signs of an excessively powerful NSC staff. In fact, the NSC's roles in the Iran and Nicaragua policies were exceptions rather than the rule. The Reagan Administration has been beleaguered from the beginning by serious policy disagreements between the Secretaries of State and Defense, among others, and the President has too often not been willing to settle those disputes definitively. The press accounts written at the time Poindexter was promoted to fill McFarlane's shoes saw his selection as a decision to have the National Security Adviser play the role of honest broker, with little independent power.[11] This image of the NSC lasted almost until the Iran arms initiative became public. Poindexter was seen as a technician, chosen to perform a technical job, not to exercise political judgment.[12]

Once the NSC had to manage two operations that were bound to raise politically sensitive questions, it should have been no surprise to anyone that Poindexter made some mistakes. It is not satisfactory, however, for people in the Administration simply to point the finger at him and walk away from all responsibility. For one thing, the President himself does have to bear personal responsibility for the people he picks for top office. But just as it would not be appropriate for the fingers to point only at Poindexter, neither is it right for them only to point to the top.

Everyone who had a stake in promoting a technician to be National Security Adviser should have realized that meant they had a responsibility to follow and highlight the political consequences of operational decisions for the President. Even if the Cabinet officials did not support the basic policy, they had an obligation to remain engaged, if they could manage to do so without constantly rearguing the President's basic policy choice. Similarly, Chief of Staff Donald Regan may not have known, or had reason to know, the details of the Iran initiative or Contra resupply effort. But he should have known that North's responses to Congressional inquiries

generated by press reports were too important politically to be left to the people who ran the NSC staff.

The discussion of personnel ultimately gets around to the importance of political judgment. We can be more precise about what that means, however, if we consider the common threads in the decisions we have already labelled as mistakes. These have included:

—The President's decision to sign the Boland Amendment of 1984, instead of vetoing it;

—The President's less-than-robust defense of his office's constitutional powers, a mistake he repeated when he acceded too readily and too completely to waive executive privilege for our Committees' investigation;

—The NSC staff's decision to deceive Congress about what it was doing in Central America;

—The decision, in Iran, to pursue a covert policy that was at odds with the Administration's public expressions, without any warning signals to Congress or our allies;

—The decision to use a necessary and constitutionally protected power of withholding information from Congress for unusually sensitive covert operations, for a length of time that stretches credulity;

—Poindexter's decision to authorize the diversion on his own; and, finally,

—Poindexter and North's apparent belief that covering up was in the President's political interest.

We emphatically reject the idea that through these mistakes, the executive branch subverted the law, undermined the Constitution, or threatened democracy. The President is every bit as much of an elected representative of the people as is a Member of Congress. In fact, he and the Vice President are the only officials elected by the whole Nation. Nevertheless, we do believe the mistakes relate in a different way to the issue of democratic accountability. They provide a good starting point for seeing what both sides of the great legislative-executive branch divide must do to improve the way the Government makes foreign policy.

Congress

Congress has a hard time even conceiving of itself as contributing to the problem of democratic accountability. But the record of ever-changing policies toward Central America that contributed to the NSC staff's behavior is symptomatic of a frequently recurring problem. When Congress is narrowly divided over highly emotional issues, it frequently ends up passing intentionally ambiguous laws or amendments that postpone the day of decision. In foreign policy, those decisions often take the form of restrictive amendments on money bills that are open to being amended again *every year,* with new, and equally ambiguous, language replacing the old. This matter is exacerbated by the way Congress, year after year, avoids passing appropriations bills before the fiscal year starts and then wraps them together in a governmentwide continuing resolution loaded with amendments that cannot be vetoed without threatening the whole Government's operation.

One properly democratic way to ameliorate the problem of foreign policy inconsistency would be to give the President an opportunity to address the major differences between himself and the Congress cleanly, instead of combining them with unrelated subjects. To restore the Presidency to the position it held just a few administrations ago, Congress should exercise the self-discipline to split continuing resolutions into separate appropriation bills and present each of them individually to the President for his signature or veto. Even better would be a line-item veto that would permit the President to force Congress to an override vote without jeopardizing funding for the whole Government. Matters of war and peace are too important to be held hostage to governmental decisions about funding Medicare or highways. To describe this legislative hostage taking as democracy in action is to turn language on its head.

The Presidency

The Constitution created the Presidency to be a separate branch of government whose occupant would have substantial discretionary power to act. He was not given the power of an 18th century monarch, but neither was he meant to be a creature of Congress. The country needs a President who can exercise the powers the Framers intended. As long as any President has those powers, there will be mistakes. It would be disastrous to respond to the possibility of error by further restraining and limiting the powers of the office. Then, instead of seeing occasional actions turn out to be wrong, we would be increasing the probability that future Presidents would be unable to act decisively, thus guaranteeing ourselves a perpetually paralyzed, reactive, and unclear foreign policy in which mistake by inaction would be the order of the day.

If Congress can learn something about democratic responsibility from the Iran-Contra Affair, future Presidents can learn something too. The Administration would have been better served over the long run by insisting on a principled confrontation over those strategic issues that can be debated publicly. Where secrecy is necessary, as it often must be, the Administration should have paid more careful attention to consultation and the need for consistency between what is public and what is covert. Inconsistency carries a risk to a President's future ability to persuade, and persuasion is at the heart of a vigorous, successful presidency.

A President's most important priorities, the ones that give him a chance to leave an historic legacy, can be attained only through persistent leadership that leads to a lasting change in the public's understanding and opinions. President Reagan has been praised by his supporters as a "communicator" and criticized by his opponents as an ideologue. The mistakes of the Iran-Contra Affair, ironically, came from a lack of communication and an inadequate appreciation of the importance of ideas. During President Reagan's terms of office, he has persistently taken two major foreign policy themes to the American people: a strong national defense for the United States, and support for the institutions of freedom abroad. The 1984 election showed his success in persuading the people to adopt his fundamental perspective. The events since then have threatened to undermine that achievement by shifting the agenda and refocusing the debate. If the President's substantial successes are to be sustained, it is up to him, and those of us who support his objectives, to begin once again with the task of democratic persuasion.

Afterword: Summary of Legal Conclusions

Nicaragua

The main period under review during these investigations was October 1984 through October 1986. During this period, various versions of the Boland Amendment restricted the expenditure of appropriated funds available to agencies or entities involved in intelligence activities from being spent directly or indirectly to support military or paramilitary operations in Nicaragua. In August 1985, the State Department was authorized to spend $27 million to provide humanitarian assistance to the Nicaraguan democratic Resistance. In December 1985, the CIA was authorized to spend funds specifically appropriated to provide communications equipment and training and to provide intelligence and counterintelligence advice and information to assist military operations by the Resistance. On October 18, 1986, $100 million in direct military support for the Contras was made available for fiscal year 1987. Our understanding of the effect of these prohibitions rests on both statutory and constitutional interpretations.

(1) The Constitution protects the power of the President, either acting himself or through agents of his choice, to engage in whatever diplomatic communications with other countries he may wish. It also protects the ability of the President and his agents to

persuade U.S. citizens to engage voluntarily in otherwise legal activity to serve what they consider to be the national interest. That includes trying to persuade other countries to contribute their own funds for causes both countries support. To whatever extent the Boland Amendments tried to prohibit such activity, they were clearly unconstitutional.

(2) If the Constitution prohibits Congress from restricting a particular Presidential action directly, it cannot use the appropriation power to achieve the same unconstitutional effect. Congress does have the power under the Constitution, however, to use appropriations riders to prohibit the entire U.S. Government from spending any money, including salaries, to provide covert or overt military support to the Contras. Thus, the Clark Amendment prohibiting all U.S. support for the Angolan Resistance in 1976 was constitutional. Some members of Congress who supported the Boland Amendment may have thought they were enacting a prohibition as broad as the Clark Amendment. The specific language of the Boland Amendment was considerably more restricted, however, in two respects.

(a) By limiting the coverage to agencies or entities involved in intelligence activities, Congress chose to use language borrowed directly from the Intelligence Oversight Act of 1980. In the course of settling on that language in 1980, Congress deliberately decided to exclude the National Security Council (NSC) from its coverage. At no time afterward did Congress indicate an intention to change the language's coverage. The NSC therefore was excluded from the Boland Amendment and its activities were therefore legal under this statute.

(b) The Boland prohibitions also were limited to spending that directly or indirectly supported military or paramilitary operations in Nicaragua. Under this language, a wide range of intelligence-gathering and political support activities were still permitted, and were carried out with the full knowledge of the House and Senate Intelligence Committees.

(c) Virtually all, if not all, of the CIA's activities examined by these Committees occurred after the December 1985 law authorized intelligence sharing and communications support and were fully legal under the terms of that law.

(d) If the NSC had been covered by the Boland Amendments, most of Oliver North's activity still would have fallen outside the prohibitions for reasons stated in (b) and (c) above.

Iran

The Administration was also in substantial compliance with the laws governing covert actions throughout the Iran arms initiative.

(1) It is possible to make a respectable legal argument to the effect that the 1985 Israeli arms transfers to Iran technically violated the terms of the Arms Export Control Act (AECA) or Foreign Assistance Act (FAA), assuming the arms Israel transferred were received from the United States under one or the other of these statutes. However:

(a) Covert transfers under the National Security Act and Economy Act were understood to be alternatives to transfers under the AECA and FAA that met both of these latter acts' essential purposes by including provisions for Presidential approval and Congressional notification.

(b) The requirement for U.S. agreement before a country can retransfer arms obtained from the United States is meant to insure that retransfers conform to U.S. national interests. In this case, the Israeli retransfers occurred with Presidential approval indicating that they did so conform.

(c) The Israeli retransfer and subsequent replenishment made the deal essentially equivalent to a direct U.S. sale, with Israel playing a role fundamentally equivalent to that of a middleman. Since the United States could obviously have engaged in a direct transfer, and did so in 1986, whatever violation may have occurred was, at most, a minor and inadvertent technicality.

(2) A verbal approval for covert transactions meets the requirements of the Hughes-Ryan Amendment and National Security Act. Verbal approvals ought to be reduced to writing as a matter of sound policy, but they are not illegal.

(3) Similarly, the President has the constitutional and statutory authority to withhold notifying Congress of covert activities under very rare conditions. President Reagan's decision to withhold notification was essentially equivalent to President Carter's decisions in 1979–1980 to withhold notice for between 3 and 6 months in parallel Iran hostage operations. We do not agree with President Reagan's decision to withhold notification for as long as he did. The decision was legal, however, and we think the Constitution mandates that it should remain so. If a President withholds notification for too long and then cannot adequately justify the decision to Congress, that President can expect to pay a stiff political price, as President Reagan has certainly found out.

Diversion

We consider the ownership of the funds the Iranians paid to the Secord-Hakim "Enterprise" to be in legal doubt. There are respectable legal arguments to be made both for the point of view that the funds belong to the U.S. Treasury and for the contention that they do not. If the funds do not belong to the United States, then the diversion amounted to third-country or private funds being shipped to the Contras. If they did belong to the United States, there would be legal questions (although not, technically, Boland Amendment questions) about using U.S.-owned funds for purposes not specifically approved by law. The answer does not seem to us to be so obvious, however, as to warrant treating the matter as if it were criminal.

Endnotes

1. North Test., *Hearings*, 100-7, Part 1, 7/8/87, at p. 106; 7/10/87, at 295-96; Vol. II, 7/14/87, at pp. 164-65.

2. *Id.*, Vol. I, 7/10/87, at p. 296.

3. *Id.*, at p. 295.

4. Poindexter Test., *Hearings*, 100-8, 7/15/87, at p. 35.

5. North Test., *Hearings*, 100-7, Part I, 7/8/87, at p. 139.

6. North Test., *Hearings*, 100-7, Part 1, 7/8/87, at p. 140.

7. George Test., *Hearings*, 100-11, 8/6/87, at p. 172. See also McMahon Dep., 9/2/87, at 3-8.

8. U.S. House of Representatives, Permanent Select Committee on Intelligence, Report to Accompany H.R. 2760, Amendment to the Intelligence Authorization Act for Fiscal Year 1983, May 13, 1983, p. 2.

9. McFarlane may be an arguable exception. See chapter 7 below.

10. John Norton Moore, letter to Brendan Sullivan, July 9, 1987, p. 2, reprinted along with other Moore material at the end of our separate views.

11. See, for example, "Primus, Pares and Poindexter," New York Times editorial, December 6, 1985; Mary Belcher, "White House shift realigns influence in foreign policy; more clout likely for State, Defense," The Washington Times, December 5, 1985, p. 1.

12. Leslie H. Gelb, "How the New Admiral at the White House Fares," New York Times, September 23, 1986, p. 24.

Part II

The Foreign Affairs Powers of the Constitution and the Iran-Contra Affair

Chapter 2
The Foreign Affairs Powers and the Framers' Intentions

Judgments about the Iran-Contra Affair ultimately must rest upon one's views about the proper roles of Congress and the President in foreign policy. There were many statements during the public hearings, for example, about the rule of law. But the fundamental law of the land is the Constitution. Unconstitutional statutes violate the rule of law every bit as much as do willful violations of constitutional statutes. It is essential, therefore, to frame any discussion of what happened with a proper analysis of the Constitutional allocation of legislative and executive power in foreign affairs.

One point stands out from the historical record: the Constitution's Framers expected the President to be much more than a minister or clerk. The President was supposed to execute the laws, but that was only the beginning. He also was given important powers, independent of the legislature's, and these substantively were focused on foreign policy.

Our analysis will cover three chapters. The first will be about the debates in and around the Constitutional Convention of 1787 and will show the particular importance of what Alexander Hamilton called "energy in the executive" in this policy arena. The second reviews historical examples. It shows that, throughout the Nation's history, Congress has accepted substantial exercises of Presidential power—in the conduct of diplomacy, the use of force and covert action—which had no basis in statute and only a general basis in the Constitution itself. The third considers the applicable court cases and legal principles.

Taken together, the three chapters will show that much of what President Reagan did in his actions toward Nicaragua and Iran were constitutionally protected exercises of inherent Presidential powers. However unwise some of those actions may have been, the rule of law cannot permit Congress to usurp judgments that constitutionally are not its to make. It is true that the Constitution also gives substantial foreign policy powers to Congress, including the power of the purse. But the power of the purse—which forms the core of the majority argument—is not and was never intended to be a license for Congress to usurp Presidential powers and functions. Some of the statutes most central to the Iran-Contra Affair contain a mixture of constitutionally legitimate and illegitimate prohibitions. By the end of the three chapters, we will be in a position to start sorting them out.

"Necessary and Proper" and the "Invitation to Struggle"

In order to sort out constitutional from unconstitutional exercises of power, however, one first must have a basis, or a set of principles, to guide the sorting. It is a commonplace to note that foreign policy was meant to be shared between the branches. The two branches' respective powers clearly were meant to overlap somewhat, with each branch having different means for addressing parallel policy issues. This overlap led the respected Presidential scholar, Edward S. Corwin, to describe the Constitution as "an invitation to struggle for the privilege of directing American foreign policy." [1]

But to acknowledge the existence of a struggle is a far cry from seeing the Constitution as if it permits any branch to go after another's powers, without bounds. The boundless view of Congressional power began to take hold in the 1970's, in the wake of the Vietnam War. The 1972 Senate Foreign Relations Committee's report recommending the War Powers Act, and the 1974 report of the Select Committee on Intelligence Activities (chaired by Senator Frank Church and known as the Church Committee), both tried to support an all but unlimited Congressional power by invoking the "Necessary and Proper" clause. That clause says Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing [legislative] Powers, and all other Powers vested by this Constitution in the Government of the United States, *or in any Department or Officer thereof.*" The argument of these two prominent committees was that by granting Congress the power to make rules for the other departments, the Constitution meant to enshrine legislative supremacy except for those few activities explicitly reserved for the other branches.[2]

One must ignore 200 years of constitutional history to suggest that Congress has a vast reservoir of implied power whose only limits are the powers *explicitly* reserved to the other branches. It seems clear, for example, that Congress could not legislate away the Supreme Court's power of judicial review, even

though judicial review is not mentioned explicitly in Article III. The same applies to the Presidency. The Necessary and Proper clause does not permit Congress to pass a law usurping Presidential power. A law negating Presidential power cannot be treated as if it were "necessary and proper for carrying" Presidential powers "into Execution." To suggest otherwise would smack of Orwellian Doublespeak.

The issue for this investigation, therefore, is not whether Congress and the President both have a legitimate role in foreign policy. Clearly, both do. Rather, the question is how to interpret the powers the two branches were given. All three of the Government's branches were given both express and implied powers. Congress does not have the authority to arrogate all of the implied power to itself. What we need to determine is whether these implied powers all fall into an undefined war zone, or whether there are theoretical and historical principles that allow one to decide when powers are more properly exercised by one branch or another.

Separation of Powers

One commonly held, but mistaken view of the separation of powers sees its whole function as having been preventive. Justice Louis D. Brandeis, for example, wrote that the "doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." [3] His statement has been accepted in some Congressional quarters as if it holds the force of conventional wisdom,[4] but it misses half of the historical truth.

The fallacy of Brandeis' statement becomes apparent when one considers the defects of the U. S. Government before the Constitution. The Constitutional Convention, among other things, was taking the executive from being under the legislature's thumb, not the legislature from being under the executive's. After suffering through the Articles of Confederation (and various state constitutions) that had overcompensated for monarchy, the 1787 delegates wanted to empower a government, not enfeeble it. Brandeis was partly right to point out that the Framers did not want power to be used arbitrarily, and that checks and balances were among the means used to guard against arbitrariness. But the principles underlying separation had to do with increasing the Government's power as much as with checking it.[5]

For the Government to overcome the Articles' problems, the executive and judiciary had to act directly upon citizens throughout the far-flung new nation. As Charles Thach said in his classic study, "the delegates' chief concern was thus to secure an executive strong enough, not one weak enough." [6] The delegates did not want a monarchy, but felt they had no reason to fear such a threat as long as Members of Congress retained their independent political connection to the people. The problem was to make sure the other branches were not drawn, to use James Madison's word, into the legislature's "vortex." [7]

Constitutional Convention

The need for a strong Executive was not seen or articulated clearly at the beginning of the Constitutional Convention by all of the delegates. On June 1, 1787, in the first debate on the subject, Connecticut's Roger Sherman said "he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect." [8] For that reason, Sherman supported the original Virginia Plan's provisions for the office. As submitted on the first day of the convention's substantive business on May 29, these included election by the legislature, no reeligibility for reelection and a short list of powers.

The Presidency grew considerably in stature between June 1 and September 17, the convention's last day. The leading strong Executive proponents, including James Wilson of Pennsylvania and Gouverneur Morris of New York, persuaded their colleagues to borrow key provisions from the New York State Constitution, whose independently powerful governor stood out from the much weaker executives in the other states. By the time the convention had finished, the Presidency (like the governorship of New York) was to be unified in one person who had an electoral base independent from the legislature's, who was allowed to run for reelection and who was given a qualified veto over legislative bills. With those changes in place, the delegates insured that the Presidency would not be the subservient clerkship originally envisioned by Sherman.

The President's enumerated powers were not discussed until the second half of the Constitutional Convention. For a week after the July 16 Great Compromise on legislative representation, the delegates debated the Presidency without reaching final conclusions. On July 26, they recessed to let a Committee of Detail work on a draft Constitution. At this point, the convention had only given the President the power to enforce laws, appoint officers, and exercise a qualified veto over legislation.

The Committee of Detail's report of August 6 listed specific powers for all three branches, significantly expanding the ones for the President. To the ones listed on July 26, the committee added the ability to recommend legislation, to receive ambassadors, to communicate with other heads of state and to act as commander in chief.[9]

Beyond these powers, however, the committee did not yet see the President as being preeminent in foreign policy. Reflecting the stake that small state delegates felt they had in the Senate, the committee gave the Senate the power to *make* treaties and *appoint*

ambassadors and judges, and gave the full Congress the power to *make* war.

Over the next several weeks, all of these foreign policy decisions were modified to increase the President's power. On August 17, "Mr. Madison and Mr. Gerry moved to insert *'declare'*, striking out [Congress's power to] *'make'* war; leaving the Executive the power to repel sudden attacks." [10] This sentence is sometimes read by advocates of Congressional power as if the President was to be left *only* with the power to repel sudden attacks.[11] The next sentence muddies this interpretation substantially, however. Roger Sherman—the same delegate who was so suspicious of Executive power—said he would oppose the change because he interpreted it to mean the President was being given the power "to commence war." Oliver Ellsworth joined Sherman's reasoning, and Madison's notes (much skimpier for September than earlier) made George Mason's remarks inscrutable.[12] The motion was adopted, but an honest reading of these contradictory interpretations compels the conclusion that the scope of Executive power on this point was not settled. The President clearly was being given some discretion to use force without a declaration of war, but how much would have to be worked out in subsequent practice.

The treaty power was debated on August 23, but left unresolved.[13] On September 4, a Committee of Eleven reported a provision that said, "the President by and with the advice and consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors", other public Ministers, judges and other officers not otherwise provided for in the Constitution. The votes of two-thirds of the Senators present were to be needed to ratify a treaty.[14] The provision for treaties was adopted with little recorded debate on September 7. James Wilson did move to require ratification to be shared by the House of Representatives, but the motion was defeated 1-10 after Sherman said "the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature." [15] The delegates reduced the two-thirds requirement for advice and consent to a simple majority for treaties of peace, but reversed themselves the next day.[16] As with the war power, shifting the power to make treaties away from the Senate clearly was meant to expand the President's role—this time to take the lead in international negotiations. This expansion would parallel the President's sole authority to receive ambassadors and his authority to nominate ambassadors with advice and consent of the Senate. Once again, however, the exact scope of the relationship implied by the treaty power was left to be worked out in practice.

The Federalist Analysis of Political Principles

Although the convention left a great deal unsettled, that does not mean the Framers considered the distribution of foreign policy powers to be unimportant. "Problems of security and diplomacy were among the dominant preoccupations of the men who met at Philadelphia," wrote one legal scholar, "and first among their arguments for Union." [17] John Jay's four papers on foreign affairs come first in the *Federalist* and more than half of the papers in one way or another involve national security or foreign policy. In fact, one of the main differences between Federalists and Anti-Federalists during the whole ratification period turned on the Federalists' insistence that a strong national government was needed to meet foreign threats.[18] So the issues were aired at some length.

If we begin with the discussions about governmental institutions that were not specifically focused on foreign policy, we can see that there were some principles underlying the way powers were allocated to the various branches of government. There was some overlap, to be sure. "Unless these departments be so far connected and blended, as to give each a constitutional controul over the others," Madison wrote in *Federalist* No. 48, no checking or balancing could occur.[19] But the core of each branch's power centered upon tasks it was supposed to be best suited to perform.[20]

The primary concern the Framers had for the Congress was to create a body whose members—naturally concerned with the immediate concerns of their own districts—would be encouraged to debate and deliberate in the name of the national interest.[21] If deliberation was the key word for designing the legislature, energy, the ability to act, was the central concept for the Presidency. In describing the delegates' decision to have a single Executive and a numerous legislature, Alexander Hamilton wrote: "They have, with great propriety, considered energy as the most necessary qualification in the former, and have regarded this as most applicable to power in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation." [22]

The need for an effective foreign policy, it turned out, was one of the main reasons the country needs an "energetic government," according to Alexander Hamilton in *Federalist* Nos. 22 and 23. Madison made the same point in No. 37: "Energy in Government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good Government." [23] The relevance of these observations about the *government's* power is that the Framers saw energy as being primarily an executive branch characteristic.

Energy is the main theme of *Federalist* No. 70 ("energy in the executive is a leading character in the definition of good government.") It is said to be important primarily when "decision, activity, secrecy, and dispatch" were needed. These features are "essential to the protection of the community against foreign attacks." "In the conduct of war . . . the energy of the executive is the bulwark of national security." [24]

But war was not the only aspect of foreign policy described as being more appropriate for the executive than legislative branch. "The actual conduct of foreign negotiations, . . . the arrangement of the army and navy, the direction of the operations of war; these and other matters of a like nature constitute what seems to be most properly understood by the administration of government." [25] On negotiations, Hamilton went further to say that the Executive is "the *most fit* agent" for "foreign negotiations." [26]

In all of the quotations above, the *Federalist* was not treating powers as if they were randomly distributed. "Separated powers are not separated arbitrarily," writes one constitutional scholar.[27] "They are divided on principle, and not according to the prudential considerations of the moment," concludes another.[28] The responsibilities given each branch were the ones most suited to its composition. Activities requiring discussion and deliberation formed the heart of the legislature's job; those calling for "decision, activity, secrecy and dispatch" were the heart of the Executive's. The distribution of these characteristics among the branches would not by itself settle a dispute over the separation of powers. One could not, for example, challenge the existence of Congressional intelligence committees by saying that the *Federalist* called secrecy more of an Executive than a legislative trait. The analysis does show, however, that the Framers had solid reasons for placing the deployment and use of force (but not declarations of war), together with negotiations, intelligence gathering,[29] and other diplomatic communications (but not treaty ratification) at the center of the President's foreign policy powers. The principles underlying this distribution of powers should therefore be respected in constitutional interpretation, except where there are compelling reasons to suppose the Framers intended a different result.

We would be remiss if we failed to note that *Federalist* No. 70 gave two reasons for supporting unity in the Executive. So far, our discussion has concentrated on the first: the need for energy in the Executive. No government, democratic or otherwise, could long survive unless its Executive could respond to the uncertainties of international relations. But energy in the Executive seemed frightening to some people. To them, the Federalists made two responses. The first was that the Executive could not maintain a standing army, equip a navy, or engage in a large-scale use of force, without spending appropriated funds provided and controlled by the Congress.[30]

The second was that an independent, single Executive—in addition to being more energetic—would also be more responsible politically. It would be much easier to hold one person accountable than a committee.[31] In other words, giving the President some independent, inherent power was not seen as being undemocratic. The President and Congress both were considered to be representatives of the people. The Congress produced a more fitting result when the primary need was to moderate internal factional demands through discussion and deliberation before producing general rules. But foreign policy is dominated by case-by-case decisions, not general rules, and the aim is not to moderate internal pressures through deliberation, but to respond to external ones quickly and decisively. For these kinds of situations, multiple bodies—like Congress—are inherently unable to accept blame or responsibility for mistakes. Thus, despite the majority's contentions to the contrary, putting such decisions in the hands of the Congress was considered to be less democratic than giving them to the President, because there would be no way for the people to hold any one person accountable for a legislative decision.

Chapter 2 (Minority)

1. Edward S. Corwin, The President: Office and Powers (1957), p. 171.

2. U.S. Senate, 92d Cong., 2d Sess., Committee on Foreign Relations, War Powers, S. Rept. 92-606 to accompany S. 2956, (1972), p. 16; and U.S. Senate, 94th Cong., 2d Sess., Select Committee to Study Governmental Operations With Respect To Intelligence Activities, Final Report: Foreign and Military Intelligence, S. Rept. 94–755 (1976), Book 1, p. 3.

3. *Myers* v. *United States* 272 U.S. 52, 293 (1926).

4. See, for example, U.S. Senate, 94th Cong., 2d Sess., Select Committee to Study Governmental Operations With Respect To Intelligence Activities, Final Report: Foreign and Military Intelligence, S. Rept. 94–755 (1976), Book 1, p. 31.

5. See, for example, Louis Fisher, President and Congress: Power and Policy (1972) at 3: "I would not go so far as to claim that the framers' search for administrative efficiency, and their adoption of a separate executive for that purpose, represents the whole truth. Still, it is at least half the truth." See also L. Fisher, "The Efficiency Side of Separated Powers," 5 Journal of American Studies 113 (1971).

6. Charles C. Thach Jr., The Creation of the Presidency, 1775–1789 (1923), p. 77.

7. Alexander Hamilton, James Madison, and John Jay, The Federalist (Jacob Cooke, ed., 1961), No. 48, p. 333. Hereafter cited as Federalist.

8. Max Farrand, The Records of the Federal Convention of 1787 (1937), 4 vols., Vol. 1, p. 65. Hereafter cited as Farrand.

9. Farrand, II, 185.

10. Farrand, II, 318.

11. U.S. Senate, 92d Cong., 2d Sess., Committee on Foreign Relations, War Powers, S. Rept. 92–606 to accompany S. 2956 (1972), p. 4.

12. Farrand, II, 318–19.

13. Farrand, II, 392–94.

14. Farrand, II, 498–99.

15. Farrand, II, 538.

16. Farrand, II, 541, 549.

17. Eugene V. Rostow, "Great Cases Make Bad Law: The War Powers Act," 50 Texas L.Rev. 833, 845 (1972).

18. Nathan Tarcov, "The Federalists and Anti-Federalists on Foreign Affairs," 14 Teaching Political Science: Politics in Perspective 38 (Fall, 1986).

19. Federalist No. 48 at 332. William R. Davie made the same point in the North Carolina ratifying convention: "It is true, the great Montesquieu, and several other writers, have laid it down as a maxim not to be departed from, that the legislative, executive, and judicial powers should be separate and distinct. But the idea that these gentlemen had in view has been misconceived or misrepresented. An absolute and complete separation is not meant by them. It is impossible to form a government on these principles." Jonathan Elliot, ed. The Debates in the Several States on the Adoption of the Federal Constitution, 5 vols (1888), Vol. IV, p. 121.

20. See Ann Stuart Diamond, "The Zenith of Separation of Powers Theory: The Federal Convention of 1787," Publius, (Summer 1978) at 51.

21. Michael J. Malbin, "Congress During the Convention and Ratification," in L. Levy and D. Mahoney, eds., The Constitution: A History of its Framing and Ratification (1987); M. Malbin, "Factions and Incentives in Congress," 86 The Public Interest 91 (1987).

22. Federalist No. 70 at 472.

23. Federalist No. 37 at 233.

24. Federalist No. 70 at 471–72, 476.

25. Federalist No. 72 at 486–87.

26. Federalist No. 75 at 505, emphasis added.

27. Gary J. Schmitt, "Separation of Powers: Introduction to the Study of Executive Agreements," 27 The American Journal of Jurisprudence 114, 115 (1982).

28. Glen E. Thurow, "Presidential Discretion in Foreign Affairs," 7 Vanderbilt J. of Int'l. L. 71, 75 (1973).

29. Federalist No. 64 at 435.

30. Federalist No. 26 at 168; No. 41 at 273–74. We discuss the Constitutional limits on the appropriations power as a tool of foreign policy in the next chapter.

31. Federalist No. 70 at 476–77.

Chapter 3
The President's Foreign Policy Powers in Early Constitutional History

Our review of the Constitutional Convention concluded that the original document left a great deal to be worked out in practice. The *Federalist* does not change this conclusion. It does give us a theoretical basis, however, for seeing that the subsequent historical development of the President's foreign policy powers was no aberration. This is evident in the early development of diplomatic power, in presidential deployments of force, and in the use of secret agents for intelligence and covert activities.

Diplomacy

The major uncertainties affecting the President's ability to hold the initiative in negotiations and diplomatic communications were settled early. The President's role as the "sole organ" [1] of international communications was asserted unequivocally on October 9, 1789, when George Washington answered a letter that the King of France had addressed "to the President and Members of the General Congress" by saying that the task of receiving and answering such letters "has devolved upon me." Washington's interpretation was not based on the explicit words of Article II. Confirming this assertion, the Senate twice rejected motions to request the President to communicate messages on behalf of the United States.[2]

The related issue of whether the President may be required to give all requested information to Congress arose in a variety of foreign policy contexts during the Washington Administration. According to Abraham Sofaer's definitive study of the first forty years' practice under the Constitution, Washington repeatedly asserted, and Congress just as repeatedly accepted, a presidential right to withhold information the President thought should be kept secret. In 1794, for example, the Senate requested copies of the correspondence between our ambassador to France and the French Republic. Attorney General William Bradford wrote that "it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed." Washington's response to the Senate clearly indicated that he was withholding some material, but the Senate took no further action.[3]

A year later, the Senate asked President Washington for John Jay's negotiating instructions and dispatches relating to the controversial Jay Treaty, "the first truly significant treaty completed under the new Constitution." [4] The issue here had to do not with the President's right to be the sole negotiator of treaties, but with what information Congress could insist on, after the fact, as a matter of right. Despite some advice to the contrary within his cabinet, Washington decided to give all requested information to the Senate. Thomas Jefferson, Washington's Secretary of State, made it clear later, however, that he considered the decision to have been a matter of political prudence rather than an acquiescence in a Senatorial right of advance consultation.[5]

When it was time for the House to consider implementing legislation for the Jay Treaty, Washington refused the same information—an action that provoked more than 300 pages of debate in the *Annals of Congress.* The President said he was refusing the request because the House had no role in ratifying treaties. The Cabinet, however, had also discussed a second reason for refusing to answer: the President's inherent power to decide what could, with safety, be shared. In a subsequent House debate, James Madison argued that the President should not be allowed to judge what was in the House's power, but supported the idea that the President could withhold papers if "in *his* judgment, it might not be consistent with the interest of the United States at this time to disclose." In other words, Madison was saying that each branch was the proper judge of its own constitutional powers. According to Sofaer, the debate showed "that members widely shared the view that the President had discretion to decline to furnish information requested. . . . Only one member . . . claimed that the House had an absolute right to obtain information it sought." [6]

In addition to negotiating treaties, and sharing information about them with Congress, there was a major dispute during the Washington Administration about subsequent interpretation and implementation. After war broke out between France and England in 1793, Washington decided to issue his famous Proclamation of Neutrality. Public sentiment was in favor of having the United States support France, a course

that arguably would have been consistent with a 1778 Treaty of Alliance between the United States and France. Washington was convinced, however, that taking sides in the war would be disastrous. He took the position that it was up to him, as President, to interpret the country's treaty obligations when he felt those obligations did not require him to ask Congress for a declaration of war. For eight months, Washington implemented his policy without asking Congress to convene for a special session.

One of the truly remarkable aspects of the decision was that, in addition to its assertion of the President's unilateral power to set policy, Washington claimed that he could use military force, if necessary, to prevent violations of the policy outside the United States by privateers and by people who helped outfit them, and that he could treat violations within the United States as criminal acts under the common law. Although unrelated concerns about common law crimes and the difficulty of winning jury convictions led to the first Congressional Neutrality Act, there was never any doubt about Washington's authority to enforce his policy of neutrality abroad.

Washington's proclamation also occasioned one of the great public debates over executive power in the Nation's history. About two and a half months after the proclamation, Hamilton published the first of a series of papers under the pseudonym of Pacificus. The main constitutional issue of the day was whether Congress' power to declare war carried with it the power to declare peace, or to determine whether U.S. treaty obligations with France required supporting that country in its war with England. Hamilton argued that these powers must "of necessity belong to the Executive Department." [7] His reasoning was as follows:

> It appears to be connected to that department in various capacities, as the *organ* of intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is between Government and Government—as that Power, which is charged with the Execution of the Laws, of which treaties form a part—as that Power which is charged with the application of the Public Force.
>
> That view of the subject is so natural and obvious—so analogous to general theory and practice—that no doubt can be entertained of its justness, unless such doubt can be deduced from particular provisions of the Constitution.[8]

At this point, Hamilton turned his attention to the texts of Articles I and II, and particularly to the general clauses introducing each of them.

> The second Article of the Constitution of the United States, section 1st, establishes this general Proposition, That "The EXECUTIVE POWER shall be vested in a President of the United States of America."
>
> The same article in a succeeding Section proceeds to designate particular cases of Executive Power . . . .
>
> It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications . . . . Because the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms—and would render it improbable that a specification of particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Governt. the expressions are—"All Legislative powers *herein granted* shall be vested in a Congress of the United States;" in that which grants the Executive Power the expressions are, as already quoted, "The EXECUTIVE PO[WER] shall be vested in a President of the United States of America". . . .
>
> The general doctrine then of our constitution is that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument . . . .
>
> This mode of construing the Constitution has indeed been recognized by Congress in formal acts, upon full consideration and debate. The power of removal from office is an important instance.[9]

Thomas Jefferson, Washington's Secretary of State, joined the other members of the Cabinet in supporting the President's proclamation. He became upset, however, at *Pacificus*' arguments for executive power, and urged his friend, James Madison, to write a reply. The results were published under the pseudonym of *Helvidius*.

> To see the laws faithfully executed constitutes the essence of the executive authority. But what relation does it have to the power of making treaties and war, that is, of determining what the *laws shall be* with regard to other nations? . . . .
>
> By whatever standard we try this doctrine, it must be condemned as no less vicious in theory than it would be dangerous in practice . . . .

> Whence can the writer have borrowed it?
>
> There is but one answer to this question.
>
> The power of making treaties and the power of declaring war, are *royal prerogatives* in the *British government*, and are accordingly treated as *executive prerogatives* by British *commentators*.[10]

Interestingly, a letter Madison wrote to Jefferson shows that he was extremely reluctant to take on the task.[11] On an earlier occasion when he was supporting the removal power, Madison had described the executive power in terms much closer to Hamilton's.

> The constitution affirms that the executive power shall be vested in the president. Are there exceptions to this proposition? Yes, there are. The constitution says that, in appointing to office, the senate shall be associated with the president, unless in the case of inferior officers, when the law shall otherwise direct. Have we [in Congress] a right to extend this exception? I believe not. If the constitution has invested all the executive power in the president, I venture to assert, that the legislature has no right to diminish or modify his executive authority.[12]

Whatever one may want to say about Madison's narrow construction of Presidential power in the role of *Helvidius*, there can be little doubt that the history of the years and decades immediately following Washington's assertions of broad power, developed more along lines envisioned by *Pacificus*. Sofaer's review of the Washington administration ended by observing that "the framework for executive-congressional relations developed during the first eight years differs more in degree than in kind from the present framework."[13] At least as important as the first eight years, however, was the fact that this framework was maintained by Jefferson and his successors, despite their public identification during the years the Federalists held power with the *Helvidius* view of the Presidency.

One constitutional dispute early in the Jefferson Administration was over the Louisiana Purchase. What would the party whose adherents had insisted on a Senate role in negotiating the Jay Treaty say about the President's power to negotiate the Purchase? Jefferson's Secretary of State Albert Gallatin supported the Louisiana Purchase by saying that the purchase eventually would have to be ratified by treaty and that its negotiation therefore belonged to the President under the Constitution. Jefferson did not embrace Gallatin's constitutional argument. Instead, the President decided to go through with the Purchase, without abandoning his view that the Constitution severely limited the President, by asserting an inherent, *extra*constitutional prerogative power for the Executive that was more sweeping than anything Hamilton had ever put forward. Jefferson justified his decision this way:

> A strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself . . . absurdly sacrificing the end to the means.[14]

One of the remarkable aspects of Jefferson's assertion is the stark way in which it poses a fundamental constitutional issue. Chief Executives are given the responsibility for acting to respond to crises or emergencies. To the extent that the Constitution and laws are read narrowly, as Jefferson wished, the Chief Executive will on occasion feel duty bound to assert monarchical notions of prerogative that will permit him to exceed the law. Paradoxically, the broader Hamiltonian ideas about executive power—by being more attuned to the realistic dangers of foreign policy—seem more likely to produce an Executive who is able and willing to live within legal boundaries. Thus, the constitutional construction that on the surface looks more dangerous seems on reflection to be safer in the long run.

After Jefferson, the notion of executive prerogative was put on the shelf. Instead, Jeffersonian Presidents began asserting Hamiltonian ideas about executive power. Although we will discuss the use of force separately below, Sofaer's comment on the post-Jeffersonians bears quotation here:

> Although Presidents during this period claimed no inherent authority to initiate military actions, Madison [departing from the theory of the Helvidius papers] and particularly Monroe secretly used their powers in ways that could have been justified only by some sweeping and vague claim—such as the right to use the armed forces to advance the interests of the United States.[15]

The reason such inherent presidential power was exercised in this period, and later, was not mysterious. The exercise grew out of the character of foreign policy and of the offices the Constitution had created. As Gary Schmitt put it in an article about Jefferson:

> To some extent, the enumerated powers found in Article II are deceiving in that they appear understated. By themselves, they do not explain the particular primacy the presidency has had in the governmental system since 1789. What helps to explain this fact is the presidency's radically different institutional characteristics, especially its unity of office. Because of its unique features, it enjoys—as the framers largely intended—the capacity of acting with the greatest expedition, se-

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crecy and effective knowledge. As a result, when certain stresses, particularly in the area of foreign affairs, are placed on the nation, it will "naturally" rise to the forefront.[16]

These stresses are particularly evident when it is time to use force or engage in secret diplomacy or covert actions.

We close this section on diplomacy by relating it to some of the issues of the Iran-Contra investigation. Some Members of these Committees seem to have taken the positions (1) that Congress can require the President to notify it whenever the President prepares or begins to conduct secret negotiations or covert operations, whatever the circumstances, and/or (2) that Congress may constitutionally use its appropriations power to prohibit certain forms of communication between the President (or the President's employees in the White House and State Department) and other governments or private individuals. We consider negotiations and communications with foreign governments or individuals to be Presidential powers protected by the Constitution, without reservation. They fall comfortably within precedents established during the Washington Administration which have never been successfully challenged since. The constitutional validity of withholding information about sensitive, covert operations involves additional considerations that will be discussed separately later.

Use of Force

We do not intend to turn this report into an argument about war powers. We have no doubt that we disagree with some of our esteemed colleagues on this issue, but there is no point in getting sidetracked. Nevertheless, we consider it important to say something about the power Presidents traditionally have exercised under the Constitution, to use force with and without prior congressional authorization. This history clearly supports our basic contention that the Constitution expected the President to be much more than a clerk. It will also provide a context for discussing the less drastic projections of U.S. power that fit under the rubric of covert action.

In its 1973 hearings on the War Powers Resolution, the House Foreign Affairs Subcommittee on National Security Policy and Scientific Developments published a list of 199 U.S. military hostilities which occurred abroad without a declaration of war.[17] (The five declarations of war in the Nation's history were for the War of 1812, Mexican War, Spanish-American War, World War I, and World War II.) The list was a revision of one published the year before in a law review article by J.T. Emerson.[18] Of the 199 listed actions, only 81 could be said under any stretch of the imagination to have been initiated under prior legislative authority. The 81 included 51 undertaken under treaties, many of which left substantial room for interpretation. In addition, many of the remaining actions were undertaken with only the vaguest statutory authority. President Jefferson's five-year campaign against the Barbary States, for example, was justified by the claim that Congress' general decision to provide a navy carried with it the authority to deploy the navy whereever the President wished, including a theater in which the President had every reason to expect hostilities.

The point here is not to quibble about the 81 occasions the subcommittee described as having had prior congressional authorization. Rather, it is to show that the list made every effort to include all examples for which some kind of prior congressional authorization could arguably have been claimed. That leaves an extremely conservative number of 118 other occasions without prior legislative authorization. What follows is a sampler of the 118 actions taken solely on executive authority. The descriptive language below is paraphrased from the subcommittee exhibit cited above.

—In 1810, Governor Claiborne of Louisiana, on the sole order of the President, used troops to occupy disputed territory east of the Mississippi.

—During the "First Seminole War," 1816–18, U.S. forces invaded Spanish Florida on two occasions. In the first action they destroyed a Spanish fort. In the second they attacked hostile Seminole Indians, occupying Spanish posts believed to have served as havens. President Monroe assumed responsibility for these acts.

—In 1818, the U.S.S. Ontario landed at the Columbia River and took possession of Oregon, which was also claimed by Russia and Spain.

—In 1844, President Tyler deployed forces to protect Texas against Mexico, anticipating Senate approval of a treaty of annexation. The treaty was later rejected.

—In 1846, President Polk ordered General Scott to occupy disputed territory months before a declaration of war. The troops engaged in battle when Mexican forces entered the area between the Nueces and Rio Grande Rivers. The fighting occurred three days before Congress acted.

—In 1853–54, Commodore Matthew C. Perry led an expedition to Japan to negotiate a commercial treaty. Four hundred armed men accompanied Perry and landed with him at Edo Bay in July, 1853, where he stayed ten days after being told to leave. He then sailed south and took possession of the Bonin Islands. In March 1854, he returned to Edo Bay with 10 ships and 2,000 men. He landed with 500 men and signed a treaty after a six-week campaign. The whole campaign was on executive authority.

—In late 1865, General Sherman was sent to the Mexican border with 50,000 troops to back up the protest made by Secretary of State Seward to Napoleon III that the presence of 25,000 French troops in

Mexico "is a serious concern." The troops remained until February 1866, when Seward demanded a definite date for French withdrawal and France complied.

—In 1869–71, President Grant sent a naval force to the Dominican Republic to protect it from invasion while the Senate considered a treaty of annexation. The Senate rejected the treaty, but the naval force stayed in place for months afterwards.

—Between 1874 and 1915, U.S. forces were put ashore on 29 different occasions to protect American lives or interests in places as diverse as Hawaii, Mexico, Egypt, Korea, Argentina, Chile, Nicaragua, China, Colombia (Panama), Dominican Republic, Syria, Abyssinia, Morocco, Honduras, Turkey and Haiti.

—Between 1915 and 1934, the United States placed Haiti under U.S. military and financial administration. The occupation was sanctioned by a treaty ratified by the Senate in February 1916, but the first months of the occupation were on Executive authority.

—In February 1917, President Wilson asked Congress for authority to arm U.S. merchant vessels. Congress refused and Wilson acted on his own authority to provide the ships with guns.

—In 1918–20, after signing the Armistice for World War I, U.S. troops participated in Allied anti-Bolshevik military actions in Russia.

—Between 1926 and 1933, 5,000 U.S. troops were in Nicaragua at the request of the government during the period of Sandino's attempted revolution. Congressional Democrats opposed President Coolidge's decisions but did not question his authority.

—On September 3, 1940, President Roosevelt informed Congress that he had agreed to deliver a flotilla of destroyers to Great Britain in return for a series of military bases on British soil along the Western Atlantic.

—In April 1941, after the German invasion of Denmark, the U.S. Army occupied Greenland under agreement with local authorities. The action appears to have been contrary to an express congressional limitation.

—On July 7, 1941, U.S. troops occupied Iceland. Congress was notified the same day but was not consulted in advance. The Reserves Act of 1940 and the Selective Service Act of 1940 both provided that U.S. troops could not be used outside the Western Hemisphere.

—By July 7, 1941, President Roosevelt had ordered U.S. warships to convoy supplies sent to Europe to protect military aid to Britain and Russia. By September, the ships were attacking German submarines.

—In July 1946, during an Italian-Yugoslav border dispute in the Trieste area, President Truman ordered U.S. Naval units to the scene. After the Yugoslavs shot down U.S. transport planes in August, Truman ordered U.S. troops and air forces to be augmented. Five thousand U.S. troops remained in Trieste as late as 1948.

—Between 1948 and 1960, U.S. forces were deployed to evacuate, protect or be ready to protect U.S. lives in or near Palestine, China, Egypt, Indonesia, Venezuela, and Cuba.

—In October 1962, President Kennedy ordered a naval "quarantine" of Cuba during the Cuban Missile Crisis.

—On April 24, 1965, a revolt broke out in the Dominican Republic, and on April 28 President Johnson sent American troops. The announced purpose was to protect American lives. At the peak of the action, 21,500 U.S. troops were in the Dominican Republic. An Inter-American Peace Force began arriving on May 21 and stayed through the year.

—On September 17, 1970, King Hussein of Jordan moved against the Palestine Liberation Organization. Syria sent 300 tanks across the Jordanian border and President Nixon ordered the United States Sixth Fleet to deploy off the Lebanese-Israeli coast. The United States apparently was prepared to intervene to prevent Hussein's overthrow. Syrian tanks began withdrawing on September 22 and Hussein and PLO leader Yassir Arafat agreed to a cease-fire on September 25.

As should be obvious from all of these examples, Presidents from the earliest history of the United States have not limited themselves to a Roger Sherman-like limited conception of their job. Neither have they felt, as they have deployed force without congressional authorization, that their actions had to be limited to hot pursuit, repelling attacks or protecting American lives. Until recently, the Congress did not even question the President's authority.

The relevance of these repeated examples of the extensive use of armed force, therefore, is that they indicate how far the President's inherent powers were assumed to have reached when Congress was silent, and even, in some cases, where Congress had prohibited an action. We shall show later that most of the Reagan Administration's actions in Central America in fact were not covered by statute. They therefore fall constitutionally under the heading of unauthorized, but also unprohibited actions. As shown above, Presidents historically have had not only the power to negotiate and communicate, but also to deploy force overtly—sometimes for major campaigns involving significant losses of life—without Congressional approval. The Reagan Administration did not even come remotely close to this level of activity in its support of the democratic resistance in Nicaragua.

Intelligence and Covert Actions

We end this review of historical precedent with a brief overview of intelligence and covert actions authorized by past Presidents. That history begins in the

earliest days of the Nation. As Representative Hyde mentioned during Admiral Poindexter's testimony on July 17,[19] the Continental Congress—which did not have a separate executive branch—set up a Committee of Secret Correspondence made up of Benjamin Franklin, Robert Morris, Benjamin Harrison, John Dickinson and John Jay. On October 1, 1776, Franklin and Morris were told that France would be willing to extend credit to the revolutionaries to help them buy arms. They wrote:

> Considering the nature and importance of [the above intelligence,] we agree in opinion that it is our indispensable duty to keep it a secret from Congress. . . . As the court of France has taken measures to negotiate this loan in the most cautious and secret manner, should we divulge it immediately we may not only lose the present benefit but also render the court cautious of any further connection with such unguarded people and prevent their granting other loans of assistance that we stand in need of.[20]

In a subsequent chapter on leaks, we shall discuss the methods this committee used to protect secrets, some of which should be revived today.

The *Federalist* also recognized the important role intelligence might play under the new Constitution. *Federalist* No. 64, about treaties, was written by Jay, an experienced diplomat as well as a former member of the Committee on Secret Correspondence. He said:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases when the most useful intelligence may be obtained, if the person possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there are doubtless many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although the President must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.[21]

Beginning with George Washington, almost every President has used "special agents"—people, often private individuals, appointed for missions by the President without Senate confirmation—to help gain the intelligence about which Jay wrote, and to engage in a broad range of other activities with or against foreign countries. The first such agent was Gouverneur Morris, who was sent to Great Britain in 1789 to explore the chances for opening normal diplomatic communications.[22] At the same time, Britain sent a "private agent" to the United States who communicated outside normal channels through Secretary of Treasury Alexander Hamilton instead of through the Francophile Secretary of State, Thomas Jefferson.[23] Washington's agents were paid from a "secret service" fund he was allowed to use at his discretion, without detailed accounting.[24]

The early examples that are most interesting for these investigations are ones in which the President used his discretionary power to authorize covert actions. ("Covert action" is an inexact term generally recognized to include covert political action, covert propaganda, intelligence deception, and covert paramilitary assistance.) In the period of 1810–12, for example, Madison used agents to stimulate revolts in East and West Florida that eventually led to an overt, Congressionally unauthorized military force to gain U.S. control over territories held by a country with which the United States was at peace. Even more telling, however, is the following example from the Madison Administration.

> Madison [in 1810] sent Joel R. Poinsett, secretly and without Senate approval, to South America as an agent for seamen and commerce. Poinsett did some commercial work, but he broadly construed instructions from Secretaries of State Smith and Monroe, and worked intimately with revolutionary leaders in Argentina and Chile, suggesting commercial and military plans, helping them obtain arms, and actually leading a division of the Chilean army against Peruvian loyalists. Nothing in Poinsett's instructions specifically authorized these activities. But he had kept the administration advised of most of his plans and received virtually no directions for long periods of time, and no orders to refrain in any way from aiding the revolutionaries . . . . Poinsett was given broad leeway to advance the republican cause, without any commitment from the administration. He was told to write in code, and all his important communications were withheld from Congress.[25]

In other words, Poinsett made Oliver North look like a piker.

In 1843, President Tyler secretly sent Duff Green to Great Britain to engage in secret propaganda activities relating to the U.S. desire to annex Texas. At one point, Green had a letter published in a newspaper without using his own name. This raised a furor among members of Congress, several of whom demanded to know his identity. Because Green was paid out of the President's contingency fund, Congress made the fund an issue during the subsequent administration of President Polk. Polk refused to disclose his expenditures in a statement that openly acknowledged

they were being used for more than intelligence gathering:

> In no nation is the application of such funds to be made public. In time of war or impending danger the situation of the country will make it necessary to employ individuals for the purpose of obtaining information *or rendering other important services* who could never be prevailed upon to act if they entertained the least apprehension that their names or their agency would in any contingency be revealed.[26]

One early example of a covert action brought to an end through a leak is described in Edward Sayle's article on the history of U.S. intelligence:

> President Pierce, as Polk, made extensive use of agents and covert action. One of the most innovative plans was to acquire Cuba from Spain. Spain had refused to part with the troublesome island, and a scheme was devised to force them to sell. It called for cooperative European money-lenders to call in their loans to the Spanish Crown, pressuring Madrid to sell Cuba to the United States as a means to raise the needed cash. The plan went well until leaked to the *New York Herald.*[27]

Examples like these are legion. During the country's first century, Presidents used literally hundreds of secret agents at their own discretion. Congress did give the President a contingency fund for these agents, but never specifically approved, or was asked to approve any particular agent or activity. In fact, Congress never approved or was asked to approve covert activity in general. The Presidents were simply using their inherent executive powers under Article II of the Constitution. For the Congresses that had accepted the overt presidential uses of military force summarized in the previous section, the use of Executive power for these kinds of covert activities raised no constitutional questions.

Conclusion

Presidents asserted their constitutional independence from Congress early. They engaged in secret diplomacy and intelligence activities, and refused to share the results with Congress if they saw fit. They unilaterally established U.S. military and diplomatic policy with respect to foreign belligerent states, in quarrels involving the United States, and in quarrels involving only third parties. They enforced this policy abroad, using force if necessary. They engaged U.S. troops abroad to serve American interests without congressional approval, and in a number of cases apparently against explicit directions from Congress. They also had agents engage in what would commonly be referred to as covert actions, again without Congressional approval. In short, Presidents exercised a broad range of foreign policy powers for which they neither sought nor received Congressional sanction through statute.

This history speaks volumes about the Constitution's allocation of powers between the branches. It leaves little, if any, doubt that the President was expected to have the primary role of conducting the foreign policy of the United States. Congressional actions to limit the President in this area therefore should be reviewed with a considerable degree of skepticism. If they interfere with core presidential foreign policy functions, they should be struck down. Moreover, the lesson of our constitutional history is that doubtful cases should be decided in favor of the President.[28]

Endnotes

1. This phrase, commonly used in contemporary debates over the President's foreign policy powers, originated in Alexander Hamilton's Pacificus papers, was used by John Marshall in a House floor debate in 1800, and then reappeared in the Supreme Court case of *U.S.* v. *Curtiss-Wright.* See Alexander Hamilton, Papers, H. Syrett, ed., Vol. XV, pp. 37-38 (1969); 10 Annals of Congress 613 (1800); *U.S.* v. *Curtiss-Wright Export Corp.* 299 U.S. 304, 319-20 (1936).

2. Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power (1976), p. 94.

3. Sofaer at 83-85.

4. Gary Schmitt, "Executive Privilege," in J. Bessette and J. Tulis, eds. The Presidency in the Constitutional Order (1981) 154, 187 n.38.

5. Thomas Jefferson, Writings, 10 vols., Paul L. Ford, ed. (1892-99), Vol. 1, p. 294; cited in Gary Schmitt, "Jefferson and Executive Power: Revisionism and the 'Revolution of 1800' ", 17 Publius 7,15 (1987).

6. This debate is analyzed by Sofaer at 85-93. The Madison quotation is at 87 and the Sofaer quotation is at 88.

7. Hamilton, Papers, XV at 38.

8. *Id.*

9. *Id.* at 38-40. Hamilton's reference is to the extensive debate in the First Congress in the bill establishing the Department of State that resulted in a close vote rejecting the idea that Senate advice and consent should be needed to remove people from office whose appointment had depended upon Senate confirmation.

10. James Madison, Writings, G. Hunt ed. (1906), VI, 149-50.

11. *Id.* at 138-39.

12. As quoted in Edward S. Corwin, The President's Control of Foreign Relations (1917) at 29.

13. Sofaer at 127.

14. Jefferson, Writings, Vol. 9, p. 279.

15. Sofaer at 378.

16. Schmitt, "Jefferson and Executive Power," at 23, n. 29.

17. U.S. House of Representatives, Committee on Foreign Affairs, 93rd Cong., 1st Sess., War Powers, Hearings Before the Subcommittee on National Security Policy and Scientific Developments, Exhibit II, pp. 328-376 (1973).

18. J.T. Emerson, "War Powers Legislation," 74 W.Va.L.Rev. 53, 88-119 (1972).

19. Hearings, July 17, pp. 205-07.

20. Revolutionary Diplomatic Correspondence of the United States, October 1, 1776.

21. Federalist No. 64 at 434-35, emphasis in the original.

22. U.S. Senate, 94th Cong., 2d Sess., Select Committee to Study Governmental Operations With Respect To Intelligence Activities, Final Report: Foreign and Military Intelligence, S.Rept. 94-755 (1976), Book 1, p.34.

23. Leonard D. White, The Federalists: A Study in Administrative History, 1789-1801 (1948), pp. 212-13.

24. 1 Stat. 128-29. See also, L. White, The Federalists at 343; Sayle, "Historical Underpinnings," at 9.

25. Sofaer, War, Foreign Affairs and the Constitution at 264-65.

26. As quoted by Sayle, "Historical Underpinnings," at 15.

27. Sayle, "Historical Underpinnings," at 16.

28. See letter from John Norton Moore to Brendan Sullivan, July 9, 1987, p. 2, reprinted at the end of the minority report.

Chapter 4
Constitutional Principles In Court

The historical examples given in the preceding section point the way toward a proper understanding of the Executive's foreign policy powers as those powers have evolved under the Constitution. The assertion by Presidents, and the acceptance by Congress, of inherent presidential powers in foreign policy were the normal practice in American history before the 1970s, not an aberration. The history therefore creates a strong presumption against any new constitutional interpretation that would run counter to the operative understanding in the legislative and executive branches that has endured from the beginning.

The Supreme Court has used history in just such a presumptive way. In the Opinion of the Court in the "flexible tariff" delegation case of *Field* v. *Clark,* Justice Harlan wrote:

> The practical construction of the Constitution, as given by so many acts of Congress [involving similar delegations], and embracing almost the entire period of our national existence, should not be overruled unless upon a conviction that such legislation was clearly incompatible with the law of the land.[1]

The point of this quotation is not that historical usage must slavishly be followed. Rather, it is that historical precedents—especially ones that began almost immediately, with the support of many who participated in the 1787 Convention—carry a great deal of weight in any discussion about what the Constitution was supposed to mean in the real world of government.

The historical examples clearly undermine the position of the staunchest proponents of Congressional power: that Presidents were intended to be ministerial clerks, whose only authority (except for subjects explicitly mentioned in Article II) must come from Congress. But that still leaves two other possibilities that must be considered when judging the constitutional validity of executive action. One is that a particular exercise of presidential power may have been acceptable in the past only because Congress had not yet spoken on the subject. The other is that at least some exercises of implied power (i.e., power not explicitly stated in Article II) are so central to the office that they remain beyond the constitutional reach of legislative prohibition. The Supreme Court precedents discussed below show that many of the major Iran-Contra actions undertaken by President Reagan, his staff, and other executive branch officials, fall into the constitutionally protected category.

The Steel Seizure Case and Inherent Presidential Power

Justice Robert Jackson's concurring opinion in the *Steel Seizure Case (Youngstown Sheet and Tube Co.* v. *Sawyer*) is often used as a basis for outlining the logically possible constitutional relationships between legislative and executive power. In the case's most famous dictum, Jackson wrote:

> We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all Congress can delegate . . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . .
>
> 3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.[2]

The major issues in the Iran-Contra investigation have to do with incidents about which Congress ostensibly has spoken. In other words, putting aside

issues of statutory construction to be argued in later chapters, they all fall into Jackson's third category, the one where presidential power is supposedly at its weakest. Even in this category, however, Jackson conceded that Congress is "disabled" from interfering with some matters.

Later in the same opinion, Jackson distinguished between situations in which an exercise of power is turned outward, as it is in most pure foreign policy matters, and those on which it is turned inward, as it was in the labor-management dispute involved in the *Steel Seizure Case*:

> I should indulge the widest latitude of interpretation to sustain his [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic dispute between industry and labor, it should have no such indulgence.[3]

Jackson's opinion was cited with approval by a unanimous court in *Dames & Moore* v. *Regan,* a case that grew out of a claim against Iranian assets frozen by President Carter during the hostage crisis of 1979-81.[4] In the same *Dames & Moore* opinion, however, Justice Rehnquist was careful to say: "We attempt to lay down no general 'guidelines' covering other situations not involved here."[5] Immediately after this statement, and just before the reference to Jackson, Rehnquist also quoted with approval a famous passage from the 1936 case of *U.S.* v. *Curtiss-Wright Export Corp.*:

> [W]e are dealing here not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[6]

Taken together, therefore, the *Steel Seizure Case. Dames & Moore* v. *Regan* and *U.S.* v. *Curtiss-Wright* stand for the following propositions: The President does not have plenary power to do whatever he wants in foreign policy; Congress does have some legislative powers in the field. However, there are some foreign policy matters over which the President is the "sole organ" of government and Congress may not impinge upon them.

The Holding of the Curtiss-Wright Decision

Before we apply these general constitutional principles to the events in these investigations, we should first expand upon the authority of *U.S.* v. *Curtiss-Wright.* That case involved a challenge to a congressional resolution that specified criminal penalties to be invoked against arms merchants if the President should determine and proclaim that prohibiting arms sales would promote peace in a conflict in the Chaco in Bolivia. Because Congress had passed a resolution specifying what would happen if, and only if, the President issued a proclamation, the case is sometimes dismissed as if its statements confirming inherent presidential power in foreign affairs were *obiter dicta* having no value as precedent.

This misreading of *Curtiss-Wright* is based on a misunderstanding of the importance of the main issue of the case in the legal history of the New Deal. The Curtiss-Wright Corporation had challenged the law as permitting criminal penalties to be based on an executive action, a proclamation, that was not guided by clear standards specifying the conditions under which the proclamation should or should not be issued. The challenge, in other words, was that the law involved an excessively broad, standardless delegation by Congress of its own legislative power.*

Delegation was very much of a live issue at the time of *Curtiss-Wright.* In the two years before this case, the Supreme Court in three separate decisions—and for the only three times in the country's history before or since—used the concept of excessive, standardless delegation to declare some of the main pieces of New Deal legislation to be unconstitutional.[7] Because the joint resolution concerning Bolivia contained no more precise standards than the ones in the statutes the Court had just overturned, there was no way for the Court to uphold the Bolivian resolution without either abandoning its recently adopted tough stance on delegation, or somehow distinguishing this case from the others. The Court's statements about the President's inherent foreign policy powers therefore were crucial to its final decision.

The differences between the President's and Congress's powers over domestic and foreign policy made up the bulk of Justice Sutherland's opinion for the Court in *Curtiss-Wright.* When it came time to show the relevance of these differences for the delegation issue, Sutherland used a quotation from Chief Justice Hughes's Opinion of the Court in the first of the three

*Because it has been fifty years since the Supreme Court overturned an act of Congress solely because of excessive delegation, people today tend to overlook the issue's past importance. The doctrine remains on the books, but in the words of administrative law specialist Kenneth Culp Davis, it has become a collection of words "without practical effect." See Kenneth Culp Davis, *Administrative Law and Government* (2d ed., 1975) at 39.

preceding delegation decisions, *Panama Refining Co.* v. *Ryan.* In the *Panama Refining* case, the Court invalidated a major New Deal law, the National Industrial Recovery Act, by saying that the NIRA involved an excessively broad delegation. In order to support the decision, however, the Court felt that it had to distinguish the NIRA from a string of earlier statutes, beginning with the Neutrality Act of 1794, that had been upheld despite seeming to contain similarly broad delegations. What the Court said in *Panama Refining* was that the Neutrality Act and the other previously upheld statutes had "confided to the President, for the purposes and under the conditions stated, an authority which was *cognate to* the conduct by him of the foreign relations of the government."[8] By saying this, the Court was indicating that the lack of inherent and "cognate" constitutional powers in the sphere of domestic policy meant that the Court should apply a more rigorous delegation standard that it had for foreign policy.

In *Curtiss-Wright,* the Court was saying that President Roosevelt had his own, inherent power to issue a statement of neutrality in the Bolivian conflict, and even use force to implement it abroad, just as Washington had in 1794. If the President wanted to go beyond proclamations to impose criminal law sanctions on U.S. citizens for domestic acts, however, congressional authority would be needed.*

The need for legislation before *criminal* sanctions could be imposed for *domestic* activity in turn brought the delegation issue into play. In *Curtiss-Wright,* the court held that solely *because* the President is the sole organ of the country's foreign relations, Congress does not have to spell out the conditions under which a Presidential proclamation may invoke criminal sanctions with the same precision as it must to meet constitutional standards in a case of domestic policy. The underlying premises about the President's foreign policy powers thus were essential to the holding in *Curtiss-Wright,* and have never been challenged or abandoned by subsequent Supreme Courts. Justice Jackson's recognition in *The Steel Seizure Case* that some areas of Presidential authority are beyond Congress's reach, and the 1981 Supreme Court invocation of both *Curtiss-Wright* and Jackson in the previously mentioned *Dames & Moore* case make this abundantly clear.

*The Supreme Court in an unrelated matter in 1812 had held that federal courts could no longer impose criminal penalties based simply on the common law. *U.S.* v. *Hudson & Goodwin* 11 U.S. (7 Cranch) 32 (1812). For contrast, see Chief Justice Jay's charge to the jury in *Henfield's Case,* in which Jay stated his reasons why the government could impose a common law criminal sanctions to support President Washington's Neutrality Proclamation. 11 Fed. Cas. 1099 (C.C.D.Pa., 1793) (No. 6,360).

The President as the "Sole Organ" for Diplomacy

We have shown that the Constitution gives the President some power to act on his own in foreign affairs. What kinds of activities are set aside for him? The most obvious—other than the Commander-in-Chief power and others explicitly listed in Article II—is the one named in *Curtiss-Wright*: the President is the "sole organ" of the government in foreign affairs. That is, the President and his agents are the country's eyes and ears in negotiation, intelligence sharing and other forms of communication with the rest of the world.

This view has a long and until recently unchallenged history. As was mentioned in the earlier historical section, the phrase originated in Alexander Hamilton's *Pacificus* papers of 1793 and was used by John Marshall in a House floor debate in 1800. The 1860 lower court decision of *Durand* v. *Hollins* described the President as "the only legitimate organ of the government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens."[9]

Justice Jackson also referred to the concept in an opinion written just four years before the *Steel Seizure Case.* In *C. & S. Air Lines* v. *Waterman Corp.,* a case involving a Civilian Aeronautics Board decision to deny an airline a license to serve foreign countries, Jackson said:

> Congress may of course delegate very large grants of its power over foreign commerce to the President. [Citation omitted.] The President also possesses *in his own right* certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. For present purposes, the order draws vitality from either or both sources.[10]

Finally, to complete this brief history, the passage from *Curtiss-Wright* with the "sole organ" reference was quoted and reaffirmed in *Dame & Moore* v. *Regan* in 1981.

The "Sole Organ" and the Boland Amendments

What are the implications for the Iran-Contra investigation of characterizing the President as the "sole organ" of foreign policy? For one thing, it is beyond question that Congress did not have the constitutional power to prohibit the President from sharing information, asking other governments to contribute to the Nicaraguan resistance, or entering into secret negotiations with factions inside Iran. Such conversations are paradigms of what Chief Justice John Marshall said in *Marbury* v. *Madison:* "The President is invested [by the Constitution] with important political powers in the exercise of which he is to use his own discre-

tion."[11] In addition, as Marbury made clear, these powers do not stop with the President. To make them effective, the President may exercise his own discretion through agents of his own choice.

> To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* . . .
>
> The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.[12]

What follows from Chief Justice Marshall's opinion in *Marbury* is that if Congress cannot prevent the President from exercising discretion over a particular matter, neither may it prevent the President's personal staff on the National Security Council, the Departments of State and Defense, the Intelligence Community, or the President's *ad hoc* personal representatives, from performing the same tasks on the President's orders and in his own name.

Many, if not all, of the actions by representatives of the U.S. government that have been alleged to run counter to the Boland amendments were essentially forms of information sharing and diplomatic communication. To the extent that such activities by the NSC staff, CIA, State Department or Defense Department were covered by the amendments—and we shall argue that many were not—we believe the activities were constitutionally protected against limitation by Congress. The executive was not bound to follow an unconstitutional effort to limit the President's powers.

Protecting American Citizens Abroad

One inherent presidential power particularly relevant to the Iranian side of this investigation is the power to protect the lives and interests of American citizens abroad. Our earlier summary of presidential uses of force without prior congressional authorization showed the many occasions for which this was the justification. One example was left off the earlier list to be used here.

In July 1854, U.S. Navy Commander George S. Hollins demanded reparations from Nicaragua after a U.S. official was injured during a riot. When he failed to receive satisfaction, Hollins ordered his ships to bombard San Juan del Norte, otherwise known as Greytown. Calvin Durand then sued Hollins in the Circuit Court for the Southern District of New York for damages the bombardment had caused to his property. In its opinion denying Durand's claim, the court said:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interest of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof. . . .
>
> Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not infrequently, require the most prompt and decided action. . . .
>
> The interposition of the president abroad, for the protection of the citizen, must necessarily rest in his discretion; and it is quite clear that, in all cases where a public act or order rests in executive discretion neither he nor his authorized agent is personally civilly responsible for the consequences.[13]

Several times during the public hearing of these Committees, Republican Members referred to the 1868 Hostage Act. This act, which says that a President should take all steps necessary to secure the release of Americans held illegally by a foreign power, is discussed later, in the section of our Iran chapter about the Americans held hostage in Lebanon. Interestingly, the *Durand* v. *Hollins* decision affirming the President's discretionary power came eight years before the Hostage Act changed a discretionary power into an obligation. Even without that act, the *Durand* case stands for the proposition that the President has the discretion to take whatever steps may be necessary, short of a full scale war, to protect American citizens. The Supreme Court reiterated this point in its analysis of the privileges and immunities of U.S. citizens in *The Slaughter-House Cases*:

> Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt.[14]

This privilege of citizenship was specifically endorsed again by the Supreme Court in the 1890 case of *In re Neagle.* Referring to the President's obligation to "take care that the laws be faithfully executed," the Court said:

> In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty . . . to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. . . .
>
> Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms,* or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?[15]

In answering its own question, the Court referred the 1853 Austrian seizure of Martin Koszta, a Hungarian native who had declared his intention to become a U.S. citizen. Captain Ingraham trained his ship's guns on an Austrian ship to gain Koszta's release to France during diplomatic negotiations. The action "met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair," the Court noted. "Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?"[16]

After reviewing these cases, Borchard's 1915 treatise on protecting citizens abroad concluded:

> Inasmuch as the Constitution vests in Congress the authority to 'declare war' and does not empower Congress to direct the President to perform his constitutional duties of protecting American citizens on foreign soil, it is believed that the Executive has unlimited authority to use the armed forces of the United States for the protective purposes abroad in any manner and on any occasion he considers expedient.[17]

Quincy Wright's classic 1922 treatise on the control of U.S. foreign relations quoted this passage from Borchard and endorsed it "with the sole qualification that 'the manner' may not amount to a making of war."[18] Underlying Borchard's, Wright's and the 19th century Supreme Court's interpretation of the President's discretionary power is the Hamiltonian notions in the *Pacificus* papers. We noted earlier that Hamilton had rested part of his argument on the difference in language between Article I and II. Article I gives Congress "all legislative powers herein granted," but Article II gave the President all of "the executive power" without qualification. What the 19th century decisions did, in pure Hamiltonian fashion, was to look at the inherent character of the executive power and then look to Article I only to see if there were explicit exceptions carved out for Congress. When no such exceptions were found, the Presidential actions were upheld.

The Constitutional Limits to Congressional Restrictions

All of these court decisions demonstrate that the President was meant to have a substantial degree of discretionary power to do many of the kinds of things President Reagan did in Iran and Central America. They do not suggest that a President can do anything he wants. Congress and President were given different resources and different modes of influencing the same policy arenas. Both President and Congress can sway the U.S. posture toward Nicaragua or Iran, for example, but each have their own characteristic tools to bring to bear on the subject. What the Constitutional separation of powers protects is not the President's or Congress's precise sway over particular events. That is for the individual occupants of each branch to earn. But the Constitution does prevent either branch from using its own powers, or modes of activity, to deprive the other branch of its central functions.

The Iranian arms sales, for example, involved sales of U.S. assets. As such, the sales were governed either by the Arms Export Control Act, or by the Economy Act and National Security Act. These laws clearly affect one method a President may wish to use to protect American lives abroad. Nevertheless, the constitutionality of the legislation seems assured both by Congress's power to regulate foreign commerce (Article I, Sec. 8) and, perhaps, by Congress's power to set rules for disposing of U.S. property.[19] More importantly, the legislation would withstand constitutional challenge because Congress acted to pursue an explicit grant of legislative power without undermining or negating the President's equally important inherent power to protect American lives and safety.

Similarly, we grant without argument that Congress may use its power over appropriations, and its power to set rules for statutorily created agencies, to place significant limits on the methods a President may use to pursue objectives the Constitution put squarely within the executive's discretionary power. For example—although we shall show later that the Boland amendments, as actually written, permitted the NSC staff to continue providing certain types of military

and operational advice to the Nicaraguan Democratic Resistance—we have no doubt that Congress has the constitutional power to enact a statute that would cut off all military and financial aid to the Resistance, except those that fall under the constitutionally protected rubric of information-sharing and diplomatic communication.

The question thus is not whether Congress has any power overlapping the President's, but what boundaries the Constitution places on congressional attempts to limit the President. The most obvious limit is that just as Congress cannot tell the President to do something unconstitutional, neither can it impose an unconstitutional requirement as a condition for granting a privilege.[20] It therefore may not insist that the President forego some of his constitutionally protected power to get appropriations. The most recent major case on this point is the "legislative veto" decision of *INS* v. *Chadha,* in which the Supreme Court held that Congress cannot demand that the President give up his power to sign, or refuse to sign, legislative decisions—even if the President agreed to the original bill that set up the procedure to bypass the so-called "presentment" requirement.[21]

Power of the Purse

These basic rules apply to appropriations as much as to any other kinds of laws. As Louis Fisher wrote in a 1979 study for the Congressional Research Service, the Constitution "does not distinguish between appropriation and authorization."[22] One recent court case on this point involved an amendment on a Health, Education and Welfare (HEW) Department appropriation bill prohibiting the department from using any of its funds, including salaries, to impose mandatory school busing plans on local communities to promote racial desegregation. The U.S. Court of Appeals for the District of Columbia ruled in 1980 that in order to preserve the statute's constitutionality, it would be construed to prohibit HEW from cutting off federal funds to a school district that refused to implement a busing plan. The statute could not, however, constitutionally prohibit HEW from seeking other ways to promote desegregation. In addition, if HEW believed a particular school district needed busing to enforce the requirements of the Constitution, the law could not be read to prohibit HEW from recommending that the Justice Department bring a suit in the federal courts.[23]

In other words, Congress may not use its control over appropriations, including salaries, to prevent the executive or judiciary from fulfilling Constitutionally mandated obligations. The implication for the Boland amendments is obvious. If any part of the amendments would have used Congress's control over salaries to prevent executive actions that Congress may not prohibit directly, the amendments would be just as unconstitutional as if they had dealt with the subject directly.

There is one other important way the Constitution circumscribes legislative limitations on the executive. To explain the way it works, it is easiest to begin with a quotation from the 1893 case of Swaim v. U.S.:

> Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force Congress cannot take away from the President the supreme command. . . . Congress can not in the disguise of 'rules for the government' of the Army impair the authority of the President as commander in chief.[24]

The same argument extends by analogy to all of the President's inherent powers under Article II. Congress does not have to create a State Department or an intelligence agency. Once such departments are created, however, the Congress may not prevent the President from using his executive branch employees from serving as the country's "eyes and ears" in foreign policy. Even if Congress refuses to fund such departments, it may not prevent the President from doing what he can without funds to act as the nation's "sole organ" in foreign affairs. Even the final report of the Church committee acknowledged this point.[25]

In the same vein, Congress does not have to appropriate any funds for covert operations. Or, it may decide to give funds only for specified operations one at a time. Since 1789, however, Congress has chosen to give the President a contingency reserve fund for secret agents and operations. The existence of such a fund is obviously crucial, because without it Congress would have to make individual appropriations for each action and thereby harm the country's ability to respond to breaking events during a fiscal year without compromising the secrecy of the operation. Nevertheless, even though a contingency fund is an essential tool for foreign policy, there is nothing in the Constitution requiring Congress to set one up. Once Congress makes the decision to establish such a fund, therefore, it may as a quid pro quo set rules for its use.

However, there are some limits to the rules Congress may thereby impose. For example, Congress may not insist, and has never insisted upon giving advance approval to covert operations because such a requirement would be the functional equivalent of a legislative veto. Similarly, Congress may not condition an authorization or appropriation upon any other procedural requirements that would negate powers granted to the President by the Constitution. What Congress grants by statute may be taken away by statute. But Congress may not ask the President to give up a power he gets from the Constitution, as opposed to one he gets from Congress, as a condition for getting something, whether money or some other good or power from Congress.

Notifying Congress

This observation bears directly on the legal requirements for notifying Congress. Before we explain how, another "implied powers" analogy is in order. In the 1821 case of *Anderson* v. *Dunn*, the Supreme Court upheld Congress's contempt power by finding that even though the power was not explicitly mentioned in the Constitution, it was clearly necessary to implement other powers that were.

> There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.
>
> The idea is utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. . . .
>
> If there is one maxim which necessarily rides over all others, it is, that the public functionaries must be left at liberty to exercise the powers which the people have entrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation. . . .[26]

Using this line of reasoning, the Court argued that even though courts were vested with the contempt power by statute, they would have been able to exercise that power without the aid of a statute. For the same reason, the court held, Congress must have inherent authority to exercise a similar power.[27] Later cases tried to circumscribe Congress's contempt power, but the power itself was always held to be a necessary adjunct to Congress's legislative functions and therefore to rest on an implied constitutional foundation.[28]

The argument that a power must be implied by the Constitution because it is essential to some other constitutional power, is what lay behind the claims of President Carter's and President Reagan's Justice Departments that Congress may not constitutionally require the President to give advance notification, or even notification to a limited number of members within 48 hours, of all covert operations. Some operations, by their very nature, may make notification within 48 hours impossible. The situations are rare, but they clearly exist.

According to Admiral Stansfield Turner, who was the Director of Central Intelligence at the time, there were three occasions, all involving Iran, in which the Carter Administration withheld notification during an ongoing operation. By contrast, the CIA's general counsel has told the House Intelligence Committee that the Iran arms sales were the only time President Reagan withheld notice during his two terms.[29] In the Carter examples, notification was withheld for about three months until six Americans could be smuggled out of the Canadian Embassy in Teheran. As Representative Norman Mineta pointed out in testimony following Turner's, the Canadian government made withholding notification a condition of their participation.[30] Notification was also withheld for about six months in two other Iranian operations during the hostage crisis. Said Turner: "I would have found it very difficult to look . . . a person in the eye and tell him or her that I was going to discuss this life threatening mission with even half a dozen people in the CIA who did not absolutely have to know".[31] In these situations, President Carter thought his constitutional obligation to protect American lives could not have been fulfilled if he had been required to notify Congress within 48 hours. As the Canadian example makes clear, the choice is sometimes put on us by people outside U.S. control between not notifying or not going ahead at all.

These examples show that the situations under which notification may have to be withheld depends not on how much time has elapsed, but on the character of the operation itself. In the very rare situation in which a President believes he must delay notification as a *necessary* adjunct to fulfilling his constitutional mandate that decision must *by its nature* rest with the President. As the Supreme Court has said: "In the performance of assigned constitutional duties, each branch of the government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[32] The President obviously cannot consult with Congress about whether to consult. Any other conclusion would be logically absurd.

In some respects, requiring notification within a specific time period might look like other Congressional report-and-wait requirements imposed on the executive branch that the Supreme Court has explicitly endorsed.[33] There is one important difference, however. The report and wait requirements the Court has upheld have all been in domestic policy matters over which the President has no inherent power to act without statutory authorization. In foreign relations, Congress can use statutes to deprive Presidents of the means necessary to conduct an effective policy, but it cannot use its control over the means to deprive the President of his underlying authority or its essential adjuncts.

Some people in Congress worry that the power to withhold notification may be abused, as we think it was in 1985–86 in the Iran arms sales. To avoid abuse, Representatives Stokes and Boland have introduced a bill that would require advance notification in most cases, and notification within 48 hours for *all* of the rest. We are convinced this approach would be un-

constitutional. Equally importantly, we think it is not needed. The constitutional basis for withholding notification can only be invoked credibly, by its own terms, in very rare circumstances. A generalized fear that Congress might leak would not by itself suffice, because the same fear could be invoked equally for all covert actions and therefore would not be credible. The members who think they need new legislation underestimate the political leverage they now have to insure that a President will not abuse his inherent power. The oversight rules already in place assure that Congress eventually will find out about any operation. Once that happens, Congress's control over the purse, and its power to investigate, give it ample means to exact a severe political price on a President whom it feels has overstepped proper bounds. The Iran-Contra investigations have made this abundantly clear to President Reagan. We cannot believe any future President will miss the point.

Conclusion

The Constitution gives important foreign policy powers both to Congress and to the President. Neither can accomplish very much over the long term by trying to go it alone. The President cannot use the country's resources to carry out policy without congressional appropriations. At the same time, Congress can prohibit some actions, and it can influence others, but it cannot act by itself, and it is not institutionally designed to accept political responsibility for specific actions. Action or implementation is a peculiarly executive branch function.

The Constitution's requirement for cooperation does not negate the separation of powers. Neither branch can be permitted to usurp functions that belong to the other. As we have argued throughout, and as the Supreme Court reaffirmed in 1983, "the powers delegated to the three branches are functionally identifiable."[34] The executive branch's functions are the ones most closely related to the need for secrecy, efficiency, dispatch, and the acceptance by one person, the President, of political responsibility for the result. This basic framework must be preserved if the country is to have an effective foreign policy in the future.

Endnotes

1. Field v. Clark 143 U.S. 649,691 (1892).
2. Youngstown Sheet and Tube Co. v. Sawyer 343 U.S. 579, 635-38 (1952).
3. *Id.* at 645.
4. Dames & Moore v. Regan 453 U.S. 654, 661-62 (1981)
5. *Id.* at 661.
6. *Id.* at 661, citing U.S. v. Curtiss-Wright Export Corp. 299 U.S. 304 (1936).
7. Panama Refining Co. v. Ryan 293 U.S. 388 (1935); Schechter Poultry Corp. v. U.S. 2295 U.S. 495 (1935); Carter v. Carter Coal Co. 298 U.S. 238 (1936).
8. 293 U.S. at 422. Emphasis added.
9. Durand v. Hollins 8 Fed. Cas. 111, 112 (C.C.S.D.N.Y., 1860) (No.4,186).
10. C. & S. Air Lines v. Waterman Corp. 333 U.S. 103, 109-10 (1948), emphasis added
11. Marbury v. Madison, 11 Cranch 137, 165-66 (1803).
12. Id. at 166.
13. 8 Fed. Cas. at 112.
14. Slaughter-House Cases, 16 Wall. 36, 79 (1872).
15. In re Neagle 135 U.S. 1, 59, 64 (1890).
16. Id. at 64.
17. Borchard, The Diplomatic Protection of Citizens Abroad (1915) at 452.
18. Quincy Wright, The Control of American Foreign Relations (1922) at 307.
19. Article IV, Sec. 3. In this clause, the phrase "territory or other property" suggests an original meaning having more to do with land than money or other material assets, but subsequent cases have extended it to include mineral leases, U.S. v. Gratiot 39 U.S. (14 Pet.) 526 (1840), and electricity, Ashwander v. Tennessee Valley Authority 297 U.S. 288, 335-40 (1936).
20. Frost Trucking Co. v. Railroad Commission 271 U.S. 583, 598 (1925)
21. INS v. Chadha 462 U.S. 919 (1983).
22. Louis Fisher, "The Authorization-Appropriations Process: Formal Rules and Informal Practices," Congressional Research Service, Report No. 79-161 GOV, Aug. 1, 1979, p. 3.
23. Brown v. Califano 627 F. 2d 1221 (1980).
24. Swaim v. U.S. 28 Ct. Cl. 173, 221 (1893).
25. U.S. Senate, Select Committee To Study Governmental Operations, Final Report at 39.
26. Anderson v. Dunn 6 Wheat. 204, 225-26 (1821).
27. *Id.* at 628-29.
28. *Kilbourn* v. *Thompson* 103 U.S. 168 (1881) read the power narrowly, but *McGrain* v. *Dougherty* 273 U.S. 135 (1927) and *Sinclair* v. *U.S.* 279 U.S. 263 (1929) in turn read *Kilbourn* narrowly. Later cases have tended to involve conflicts between the contempt power and the First Amendment, *Watkins* v. *U.S.* 354 U.S. 178 (1957) and *Barenblatt* v. *U.S.* 360 U.S. 109 (1959).
29. U.S. House of Representatives, Permanent Select Committee on Intelligence, Subcommittee on Legislation, 100th Cong., 1st Sess., *Hearings on H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to the Congress.* April 1 and 8, June 10, 1987, p. 176.
30. *Id.* at 158.
31. *Ibid. at 45. See also 46, 49, 58. 61.*
32. *U.S.* v. *Nixon* 418 U.S. 683, 703 (1974).
33. See *Sibbach* v. *Wilson* 312 U.S. 1 (1941) and *INS* v. *Chadha* 462 U.S. at 935, n. 9.
34. *INS* v. *Chadha*, 462 U.S. at 951 (1983).

Part III
Nicaragua

Chapter 5
Nicaragua: The Context

It is impossible to understand the motivations for the Administration's actions without first understanding the strategic and political context within which it was operating. In describing these circumstances, it is necessary to begin with the fact that the Sandinista Government in Nicaragua is a Communist regime that openly espouses the expansionist, Leninist doctrine of "revolution without borders." Because of this, and because the Sandinistas have behaved in a manner consistent with the doctrine by supporting Communist insurgencies elsewhere in Central America, Nicaragua has become a direct threat to the stability of the governments of its neighbors and to U.S. security interests.

In 1979, in the belief that it was supporting a turn toward a more pluralistic, more democratic path in Nicaragua, the United States decided, with bipartisan support, to cut off all military aid to the corrupt predecessor dictatorship of Anastasio Somoza, supported its removal, and provided $118 million in economic aid to the new regime in its first 18 months. That bipartisan support included some of us who are among the more conservative Members of these Committees. Indeed, a clear majority in Congress accepted the Carter Administration's arguments that the Sandinista-led revolution should be judged by its actions. In short, the U.S. Government wanted to believe that the incoming revolutionary government would honor its mid-1979 pledge to the Organization of American States of implementing democratic reforms.

It was not too long, however, before it became apparent that once again the United States had been fooled by Marxists masquerading as democrats, much as the Sandinistas' mentor, Fidel Castro, had done 20 years before. By April of 1980, the Nicaraguan Council of State was packed with Sandinista adherents who were more attuned to policies of internal repression than to fulfilling the dashed promises that had led Social Democrats to join the revolutionary cause. That turn of events prompted the resignation of Alfonso Robelo and led him ultimately to join the leadership of the Nicaraguan resistance. Nevertheless, United States assistance continued.

But Sandinista repression goes beyond packing the key governmental forums. Consider these remarks by Resistance leader Adolfo Calero in our hearings:

> The Sandinistas are systematic breakers of human rights. There is no habeas corpus in Nicaragua. If people are not brought over to tribunals they are kept in jails at Sands, the secret jails. Their secret jails are spread throughout the country. There is torture going on. While I was living in Nicaragua I was personally told of experiences of one of my drivers, driver salesman of the Coca Cola. I remember he was put into a freezer and when he was about to die, and started to—I don't know what you call—the last reaction that people have when they are about to die—somebody heard him and took him out.[1]

What ultimately turned the course on aid to Nicaragua was not only the change in the Sandinista's behavior inside Nicaragua, however, but its growing importance in the global competition between the U.S. and the Soviet Union. The 1979 Foreign Assistance Act giving aid to the Sandinistas contained a provision, authored by Rep. C.W. "Bill" Young of Florida, that required the aid to be terminated if the President could not certify that Nicaragua was not exporting or supporting violence and terror in neighboring Central American nations. By September 1980, some Members of Congress began to question President Carter's certification on this point.

Representative Young, then a Member of the House Intelligence Committee, was disturbed by President Carter's certification of Sandinista compliance with democratic procedures and with its pledges to the OAS. As a Member of the intelligence panel, Young was privy to information that contradicted what the President was saying. On September 30, 1980, he decided to voice his concerns in public testimony before the House Foreign Affairs Committee's Subcommittee on Inter-American Affairs. Young had this to say about the main substantive point at issue:

> I am very concerned about the President making the certification that the government of Nicaragua is not involved in the exporting of terrorism or in supporting the overthrow of other duly constituted governments in Central America, since I have access to the intelligence information of the Central Intelligence and Defense Intelligence Agencies concerning this matter. While I

cannot quote classified information in this open session, I can tell you that the intelligence reports confirm in overwhelming detail that the Sandinista clique that rules Nicaragua is engaged in the export of violence and terrorism.

Young's testimony did not stop at this point, however. It seems that the Democratic Administration was less than forthcoming about giving the legislative branch the information it needed to fulfill its policy responsibilities. Young said:

I feel that you should also know about the difficulties that we have recently had in obtaining the classified information on this subject from the Executive Branch.

As I previously noted, the staff of the Subcommittee on Evaluation has had an ongoing study of intelligence on Nicaragua which began in late 1978. As part of that responsibility the staff often makes visits to the CIA to talk with analysts and periodically requests studies produced by the CIA and other intelligence agencies in Washington, and in general has paid attention to what is going on.

On 12 August of this year, the staff made a routine request to talk with an analyst at CIA's National Foreign Assessment Center about Nicaragua. The staff was told that they would not be able to talk with the analyst at CIA since there was "a Presidential Embargo" on talking about Nicaragua. I was unaware of this at the time since this took place during the recess, but the staff was quite concerned. The Chairman of the Committee, Mr. Boland, sent a letter to the Director of Central Intelligence on this matter, on August 22. To date the CIA has not responded to that letter.

I would further note that the staff was notified via telephone on September 10 that the embargo had been lifted and that discussions could be held with CIA analysts. Two days later, the President made his certification that Nicaragua is not exporting terrorism and/or acting as a conduit for arms or sanctuary for revolutionaries in other Central American countries.

It is very disturbing that the Central Intelligence Agency was directed to not provide an answer to the Chairman of the House Permanent Select Committee on Intelligence to the questions that he asked in his letter of August 22.

The conclusion Young drew from this was very serious. It mirrors one particular charge we have heard in the Iran-Contra hearings, but from a much firmer base.

What we have is a case of the intelligence community being manipulated by the Executive Branch to protect a political sensitivity. What dismays me is the political misuse of the intelligence community, which rightfully has a reputation for objectivity. The intelligence community must be free of political bias so that our decision makers can use their reports to reach decisions based on the facts of the matter, and not on desired political outcomes.[2]

Following Young's testimony, the Carter Administration slowed down its aid to Nicaragua. It was not until January, however, in the final days of his Presidency, that President Carter decided to suspend aid.

The Reagan Administration quickly decided to conduct a careful review of available intelligence regarding Nicaraguan subversive, extraterritorial activities. In April 1981, the Administration determined that the Sandinistas were furnishing logistical and political assistance to the rebels in El Salvador. By November 1981, the Sandinista armed forces had grown from an armed force of only 5,000 2 years before, to about 40,000 troops supported by Soviet tanks, artillery, and armored personnel carriers.[3] Some 2 years later, the House Intelligence Committee, chaired by Representative Boland, corroborated this finding when it declared that:

[T]his (Salvadoran) insurgency depends for its life-blood, arms, ammunition, financing, logistics and command-and-control facilities, upon outside assistance from Nicaragua and Cuba. This Nicaraguan-Cuban contribution to the Salvadoran insurgency is longstanding. It began shortly after the overthrow of Somoza in July, 1979. *It has provided, by land, sea and air, the great bulk of the military equipment and support received by the insurgents.*[4]

During the period between January 1982 and January 1985, while Congress was vacillating and pinching pennies, the Soviet Union and its allies provided about $500 million in military aid alone to Nicaragua. By early 1985, at the time of the cutoff of U.S. taxpayer military assistance to the Resistance, the Sandinista armed forces included 62,000 troops. Their arsenal also included nearly 150 tanks (of which more than 110 were T-55 Soviet battle tanks that were clearly superior to any other tank in the region), 200 other armored vehicles (mostly machine-gun-armed BTR-60 and BTR-152 personnel carriers that can carry an infantry squad), 300 missile launchers, 45 airplanes, and 20 helicopters, including the deadly Soviet MI-24 HIND-D "flying tanks" that General Singlaub described as "the most effective people killing machine[s] in the world."[5]

During 1985, the already high level of aid accelerated. According to publicly available material provid-

ed by the State Department, the Soviet Union, Cuba, and Eastern Bloc countries gave Nicaragua another $150 million in military aid in 1985. (In addition to the Soviet Union and Cuba, Nicaragua is receiving aid from Czechoslovakia, North Korea, Libya, and the Palestine Liberation Organization, among others.[6]) That figure for military aid jumped to $580 million for 1986 alone. Between December 1982 and October 1986, according to Defense Intelligence Agency estimates discussed in these Committees' public hearings, the same countries gave $1.34 *billion* in military aid and *another* $1.8 *billion* in economic aid to the Nicaraguan Government.[7] The net result is that Nicaragua has far and away the largest armed force in all of Central America, and that does not even take into account approximately 2,500 to 3,000 advisers from the Soviet Union, Cuba, and other Soviet bloc countries.[8] In contrast, all U.S. humanitarian and military aid to the Resistance during the entire 1980s amounted to approximately $200 million, $100 million of which came in the fiscal year from October 1, 1986 to September 30, 1987.

These numbers only begin to give a picture, however, of the reasons for viewing Nicaragua as a threat to the region. According to former National Security Advisor Robert C. McFarlane:

> The danger is not Nicaraguan soldiers taking on the United States, it is that country serving as a platform from which the Soviet Union or other surrogates like Cuba can subvert neighboring regimes and ultimately require the United States to defend itself against a Soviet threat, whether by spending more dollars on defense that we didn't need to, to worry about our southern border, whether we need to worry more about the Panama Canal now that Russians are here, whether we need to be concerned about the half of our oil imports that come from refineries in the Caribbean within MIG range of Nicaragua, and we have not had to think about these things for a long time.[9]

The danger, it should be obvious from what McFarlane said, is not simply that posed to other Central American countries by Nicaragua's own armed forces.

According to information presented during General Singlaub's testimony, the Nicaraguans are building a 10,000-foot-long airstrip at Punta Huete. As Representative Hyde observed, the runway is "capable of accommodating any Soviet aircraft in their inventory. That includes the Backfire bomber, the Bear-D reconnaissance aircraft, and it's strictly a military facility with antiaircraft guns deployed around the airfield."[10] Singlaub agreed, and said that what made the airfield significant was that it would accommodate intercontinental as well as short-range aircraft.

Nor is this all. The Soviet Union has an intelligence collection facility at Lourdes near Havana, Cuba, that is able to monitor maritime, military and space communications as well as telephone conversations in the Eastern portion of the United States. A similar base in Nicaragua would mean a similar capability for the Pacific and West Coast.[11] Finally, the Nicaraguans are building the Corinto port facility that is being made into a deep water port able to accommodate submarines.[12] The Soviet presence in Nicaragua, in other words, when combined with its presence in Cuba, could mean a Soviet base on both ends of the Caribbean as well as the only Soviet port in the Pacific outside the Soviet Union itself. The latter, Singlaub said, "would give them for the first time a base from which they could threaten the West Coast of the United States."[13]

Figure 5-1.


United States
Atlantic Ocean
Mexico
45% of U.S. Imports/Exports
60% of NATO Resupplies
55% of U.S.
Crude Oil Imports
Pacific Ocean
NICARAGUA
South
America
65% of Ships Transiting Panama Canal
Carry Goods to/from United States

So there is plenty of reason for a President of the United States to think the Nicaraguan Government is not merely unfortunate for its own people, but a distinct threat to the security of the region and, ultimately, to the United States. This is no speculative threat. In 1983, the Congress found that:

> By providing military support (including arms, training, and logistical, command and control, and communications facilities) to groups seeking to overthrow the government of El Salvador and other Central American governments, the Government of National Reconstruction of Nicaragua has violated article 18 of the Charter of the Organization of American States which declares that no state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state.[14]

This finding was not repealed by the Boland Amendment the following year. In fact, in the International Security and Development Cooperation Act of 1985, the Congress found that Nicaragua:

> Has committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention.[15]

The legal significance of these findings can be found in the charter of the Organization of American States. The specific clause of the treaty Congress charged Nicaragua with violating was the one that said: "No State or group of States has the right to intervene, directly or indirectly, in the internal affairs of any other State."[16] By defining Nicaragua's behavior as aggression, the Congress also, knowingly, was bringing another clause of the treaty into play:

> Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States.[17]

Finally, by invoking these clauses, Congress also was involving a third that fundamentally distinguishes U.S. actions from Nicaragua's: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles as set forth in Articles 18 and 20."[18]

What all of this means is that when President Reagan sought to bring pressure on the Nicaraguan Government by aiding the Resistance, he was doing something more than merely furthering his own policy goals. According to the findings of the Congress of the United States and the terms of the OAS charter, the President was obliged to do what he could to act against Nicaragua's aggression against its neighbors. The finding would not have permitted the President to violate laws that explicitly prohibited the use of appropriated funds for a particular purpose. Beyond these explicit prohibitions, however, the President was not only permitted by his inherent foreign policy powers under the Constitution, but was positively obliged to do whatever he could, within the law, to respond to Nicaragua's behavior.

Because of this obligation, it is not proper to assert that the President should have gone out of his way to avoid any actions that some of the Boland Amendment's sponsors might arguably have wished to prohibit. Although no President is required to so interpret a law on any subject within his constitutional authority, such a response might have made sense as an act of prudence and comity *if* Congress had only passed a prohibition. The fact, however, is that Congress put two sets of obligations on the President, one mandating action and the other restricting it. Under the circumstances, the President had a duty to try to satisfy both of the mandates, to whatever extent he could possibly do so.

Endnotes

1. Calero Test., *Hearings*, 100-3, 5/20/87, at 51.

2. All of the above quotations from Representative Young are in U.S. House of Representatives, 96th Cong., 2d Sess., Committee on Foreign Affairs, Subcommittee on Inter-American Affairs, Hearing: "Review of the Presidential Certification of Nicaragua's Connection to Terrorism." Sept. 30, 1980; Prepared Statement of C.W. Bill Young, pp. 16-17.

3. U.S. Departments of State and Defense, *The Challenge to Democracy in Central America* (June 1986) at 20.

4. U.S. House of Representatives, 98th Cong., 1st Sess., Permanent Select Committee on Intelligence, H. Rept. 98-122, Part I, Amendment to the Intelligence Authorization Act for Fiscal Year 1983, p. 2, emphasis added.

5. The data are from Ex. OLN-212, *Hearings*, 100-7, Vol. II and from U.S. Departments of State and Defense, *The Sandinista Military Buildup, An Update* (Oct. 1987), at 5, 9. The quotation is from Singlaub Test., *Hearings*, 100-3, 5/21/87, at 178.

6. McFarlane Test., 5/13/87, *Hearings*, 100-1, at 79.

7. Calero Test., *Hearings*, 100-2, 5/20/87, at 111.

8. McFarlane Test., *Hearings*, 100-2, 5/13/87, at 76.

9. McFarlane Test., *Hearings*, 100-2, 5/14/87, at 64.

10. Singlaub Test., *Hearings*, 100-3, 5/21/87, at 217.

11. *Ibid.*, at 218.

12. *Ibid.*,

13. *Ibid.*, at 184.

14. Section 109 of the Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, 97 Stat. 1475.

15. Section 722 (c)(2)(vi) of the International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, 99 Stat. 149.

16. Article 18 of the Organization of American States, as reprinted in the Congressional Record, June 7, 1985, p. S7744.

17. *Ibid.*, Article 27.

18. *Ibid.*, Article 22.

Chapter 6
The Boland Amendments

People listening to the public hearings on the Iran-Contra Affair heard many statements about the "spirit of the Boland Amendments." Everyone knows, the argument goes, that Congress wanted to cut off all U.S. aid to the Nicaraguan resistance. Congress did not anticipate that anyone on the National Security Council staff would support private and third-country fundraising or give advice to and help coordinate the private resupply effort. Col. North's activities were a clear attempt, the argument concludes, to circumvent the law.

There are three basic problems with this line of reasoning. First, as previously discussed, the Constitution does not permit Congress to prevent the President or his designated agents from communicating with the Nicaraguan resistance or from encouraging other countries and private citizens to support the resistance. Second, as Justice Frankfurter said in *Addison* v. *Holly Hill Co.*, "Congress expresses its meaning by words . . . . It is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive."[1] One of the reasons there was so much discussion of the "spirit of the law" at the hearings is, as we shall show, that it is difficult to argue the letter of the law had been violated. Finally, even this last statement concedes too much. The fact is that Congress was not animated by a single "spirit" when it passed the Boland Amendments. It is necessary, therefore, to take account of the political history in the first part of this chapter as well as the statutory history in the rest.

The "Spirit" of October 1984

We have already noted that at the same time Congress was denying appropriations for the anti-Sandinista resistance, it was also declaring the Sandinista Government to be in violation of a provision of the OAS Charter that calls for a response by the President. In addition, Congress has changed its collective mind virtually every year over policy toward Nicaragua. The United States gave aid to the Sandinistas in fiscal 1980, took aid away from the Sandinistas at the end of 1980 for fiscal year 1981, and then gave covert support to the democratic resistance in 1981 for fiscal year 1982. For fiscal 1983, Congress denied aid "for the purpose of overthrowing the government," a restriction that was all but meaningless and therefore adopted by the House unanimously. For fiscal year 1984, Congress removed the language about purpose but limited the amount of assistance to a level that it knew would not last for the full year. Then, the strictest version of the Boland Amendment was adopted for fiscal 1985—partly, it is often said, because Congress was upset at allegedly not having been informed about the CIA's role in connection with the mining of Nicaraguan harbors.*

*Much has been written about whether the late Director of Central Intelligence, William Casey, adequately informed the Senate Intelligence Committee about the mining of Nicaraguan harbors in 1984. A review of the record indicates that while Casey could have been more expansive, he did clearly tell the Committee on March 8, and again on March 13, that mines were being placed in the Nicaraguan harbors of Corinto and El Bluff, as well as at the oil terminal at Puerto Sandino. See Bob Woodward, Veil: The Secret Wars of the CIA 1981-1987 (1987), Chapter 16, 319-338; also McMahon Dep., 9/2/87, at 32-41.

On the House side, the Intelligence Committee, chaired then by Edward Boland, received a mining briefing on January 31, 1984, more than two months before these activities became a public controversy, and approximately three weeks after the first mines were deployed. The CIA had been discussing the possibility of mines being employed in Nicaragua with the House panel as far back as the summer of 1983.

In essence, what appears to have happened in the Senate is that following disclosures in the media in early April 1984 about these operations, a number of Senators feigned ignorance of these activities. In fact, they had known about them for some time. Senator Leahy was one who had known for some time and scolded his colleagues for their hypocrisy. Reportedly, some Senators who knew about the mining when they voted for additional assistance for the Contras turned around after the media disclosures and voted for a resolution condemning and prohibiting the mining. As Leahy put it, "There were Senators who voted one way the week before and a different way the following week who knew about the mining in both instances and I think were influenced by public opinion, and I think that's wrong and that is a lousy job of legislative action." (See Henry J. Hyde, *Can Congress Keep a Secret?*, National Review, Aug. 24, 1984, pp. 46-61; also, Bernard Gwertzman, *Moynihan to Quit Senate Post in Dispute on CIA*, New York Times, April 16, 1984; Joanne Omang & Charles Babcock, *Moynihan Resigns Intelligence Panel Post, Assails CIA*, Washington Post, April 16, 1984; *Sen. Moynihan's Point*, Washington Post, editorial, April 17, 1984; McFarlane Test., *Hearings*, 100-2, 5/13/87, at 230-32.)

During this period, Casey's deputy was John McMahon. His recollection of this matter is consistent with Leahy's. He indicates

The way the majority treats the mining incident is symptomatic of its entire pre-history of the Boland Amendment. The basic argument is that Congress had an open mind about Nicaraguan policy, but that the Administration offered shifting rationales for the policy, misled Congress as to its intentions and actions, and finally justified a cutoff of funds by failing to notify Congress adequately about the mining of the harbors in Nicaragua. This is, of course, a totally subjective, hence fundamentally misleading account of the political history, to the limited extent that the facts it cites are accurate. First, the majority thesis utterly ignores what the Soviets and Sandinistas were doing during the same period to escalate the conflict and consolidate the Marxist regime in Managua.* Second, it ignores the fact that many Members of Congress, almost all Democrats, opposed U.S. policy in Nicaragua almost from the beginning, and that most of the votes in both the House and the Senate during the relevant periods, including the votes on the various contested versions of the Boland Amendments, were almost completely straight party-line votes.

One key result of its remarkably distorted account is that the majority often confuses cause and effect. This is almost self-evident in its treatment of the mining of Nicaraguan harbors. In October 1983, Congress decided to limit funding for the Contras to $24 million for fiscal year 1984, an amount deliberately calculated to fall considerably short of the Contras' needs for that period. This was the handwriting on the wall, that the Contras might well be cut off completely if there was a slight change in the climate of opinion. The Contras knew it; the Sandinistas knew it; and the U.S. Government knew it. The mining was therefore an effort to bring the Sandinistas to the table before Congress cut off support. In short, it was an effect of the Congressional decision, not the cause of a later decision. But this reversal of cause and effect is typical of the majority's amateur psychohistory. Unfortunately for them, in many other parts of the world psychohistory is correctly not regarded as a useful tool in foreign relations.

The strictest of the Boland Amendments was in effect for only eight months when Congress decided to allow some humanitarian aid to the resistance. Then, a few months into the fiscal year, Congress also permitted communications assistance and advice. Finally, for fiscal 1987, Congress resumed full funding for the resistance at a level of $100 million. As McFarlane said to Representative Courter during testimony, "It is absolutely out of the question to have a coherent policy with that kind of a change in the legal framework." [2]

Congress's ambivalence expressed itself not only from year to year, but within years as well—including the year of the strictest Boland prohibition. If all we were talking about was a clear expression of Congressional intent in the form of a strict prohibition, that clear statement would have to govern for as long as it stayed in effect. The fact, however, is that Congress was of more than one mind—even within the statute that contained the strictest Boland prohibition.

The most stringent Boland Amendment was part of a continuing appropriations resolution that included 9 of the 13 appropriations bills needed to fund the Gov-

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that on the March 12, 13 Appropriations Committee Senators were briefed, and on the following day, "Casey was back to the Senate Intelligence Committee" to remind Members of what he had told them previously about the mining. After that session, McMahon recalls:

> [There was] still not a word. We then, on March 28, got a letter from Senator Pell in Foreign Relations saying, "Tell me about this mining." So we prepared a written response, sent it to Senator Pell through Barry Goldwater, who was then Chairman of the Senate Select Committee on Intelligence. Not much happened until the latter part of the first week, in April, when there was a great deal of furor in the press, which generated in Europe, about the mining of the harbors, was picked up by the Post and Times here and a lot of noise, and suddenly amnesia struck Capitol Hill, no one remembered hearing about the mining . . . Barry Goldwater sent a letter to Casey telling him he was "pissed." When I got this letter I went in to Casey and said, "What the hell is he talking about, where has he been for the last two months?" (See McMahon Dep. 9/2/87 at 35-37.)

Subsequently, according to McMahon, Casey confronted Goldwater regarding the mining notification. McMahon recalls:

> [Casey] showed him then the transcript from the hearings on the 8th and on the 13th of March, and Barry [Goldwater] said, "You know, I don't know, I just don't remember." And it's my understanding that Barry wanted to send a letter of apology to the agency but was urged not to do so—because the Senate apologizes to no one.

McMahon added that as far as he was concerned, "there was no intent by the agency to keep the mining of the harbors from the committees. We did everything we possibly could to tell them about it and tell them about it in a timely fashion." (McMahon Dep., 9/2/87 at 36-38.)

Interestingly, Senator Goldwater, who excoriated Casey for allegedly not properly informing the Senate Intelligence Committee on the mining, voted on April 10, 1984, against the resolution condemning the mining. (See Congressional Record, April 10, 1984, p. S4205.)

Ultimately, Casey felt the politically expedient thing to do was to "apologize" to the Senate Intelligence Committee and get this brouhaha behind him. When he finally did so, Senator Jake Garn reportedly became enraged because he believed there had been adequate notification. In his new book, Veil, Bob Woodward claims Garn underscored his fury by screaming:

> "You're all [expletive deleted]s—the whole Congress is full of [expletive deleted]s, all five hundred thirty-five Members are [expletive deleted]s" . . . . Members stood up, including Moynihan, who wanted to prevent a further confrontation. "Smile," Moynihan said, "when you call me an [expletive deleted]." Garn later wrote to Goldwater and apologized for disrupting the Committee. (See Woodward, Veil, at 33.)

Garn subsequently confirmed most of this story, saying only that the incident occurred after the committee meeting was over and that he did not apply the expletive to the full Senate. See *Around the Hill*, Roll Call, October 25, 1987, p. 13.

*It is one of the curious facts of the Majority Report that the first acknowledgement of the communist nature of the regime comes on page 11 of the Executive Summary while the first political description of the Sandinistas comes on page 3.

ernment for fiscal 1985.[3] The fiscal year started on October 1, 1984. President Reagan had already vetoed one continuing resolution because of its spending levels; Government workers even had to be furloughed at one point. By the time a reworked funding bill reached the floor on October 10 and 11, there was a great sense of *political* urgency. Election Day was only 3 weeks away, the resolution contained a large number of contentious water and public works projects important for individual districts, and members of the House and Senate were all eager to get home to campaign.

All year long, passage of the Intelligence Authorization and Department of Defense Appropriations Acts had been stalemated between the staunch opponents of aid for the resistance, who made up a majority in the House, and the equally staunch supporters of aid, who formed a majority in the Senate. In the compressed, highly politicized pre-election timetable of October, the two groups were willing to work out a compromise. The final defense appropriations bill included the famous Boland prohibition quoted below, together with a series of expedited procedures that would let Congress vote on a new, $14-million aid package for the Contras any time after February 28.

Some supporters of aid for the resistance, such as Senator John East of North Carolina, criticized the Senate Republican leadership for agreeing to the deal. "What I think we have done in this conference report is exchange the aid to the Contras and other important defense-related items . . . for water projects," East said.[4] Senator Ted Stevens, who was the Assistant Majority Leader and, as Chairman of the Appropriations Subcommittee on Defense, was the floor manager of this portion of the conference report, was the other main speaker on the Senate floor at the same time as East. Stevens said that:

> [East's position] is counterproductive to his point of view. There is money in this bill for assistance to the Contras. There is $14 million . . . . I can tell the Senator that it would take less than 31 days to pursue that subject under this report, in terms of fast-tracking both the House and Senate, a resolution to approve the President's certification.
>
> That money is in the bill and it can be used.
>
> The money that was provided the Contras ran out in August. The Contras are still supporting themselves with assistance they are getting from elsewhere in the world. Having that assistance out there to be made available on March 31 will encourage that assistance from other sources to the Contras during this period.[5]

Representative Boland's explanation of the conference agreement took note of the same compromise language, albeit in terms that emphasized the importance of the prohibition he had been so strongly supporting. Representative Boland did say:

> This prohibition applies to all funds available in fiscal year 1985 regardless of any accounting procedure at any agency.
>
> It clearly prohibits any expenditure, including those from accounts for salaries and all support costs.
>
> The prohibition is so strictly written that it also prohibits transfers of equipment acquired at no cost.[6]

In the same speech, however, Boland also said:

> The compromise which we have worked out on Nicaragua preserves the House position with one important proviso.
>
> No funds may be spent on the secret war in Nicaragua until February 28, 1985 . . . .
>
> Only if Congress affirmatively provides for a renewal of funding for the war could any funds be used for that purpose.[7]

Representative Boland, in other words, essentially was confirming Senator Stevens' interpretation of the compromise. The Senate supporters of Contra aid were willing to agree to the conference report, and the President was willing to sign the bill, only because there was a general understanding that a second vote would be forthcoming after the 1984 elections were out of the way. Clearly, that understanding would have made no sense unless the resistance continued to exist. Thus, President Reagan's instructions to his staff to do whatever they could within the law to keep the democratic resistance alive, and the actions he took that were consistent with Congress's findings about the OAS charter, all were entirely in keeping with the full spirit—the spirit expressed by all of the participating Members of Congress—of even the strictest Boland prohibition.

The Words of the Boland Amendment

The real legal issue turns, therefore, on the exact words of the Boland Amendment.* Before turning to

*The majority criticizes the only contemporaneous executive branch legal opinion on the issue, from the President's Intelligence Oversight Board, which concluded that the NSC was not covered by the Boland Amendment. The majority asserts that the drafter was not given all the facts needed for his opinion, but ignores the fact that the drafter specifically testified at the hearings that having the additional facts then before the Committees would not have changed his key legal conclusions. (Sciaroni Test., *Hearings*, 100-5, 6/8/87, at 12.) The majority also criticizes the credentials of the

those words, however, it is important to bear in mind that they were a rider, or a limitation amendment, to an appropriations bill. The Boland Amendment was not, for example, like the Hatch Act, which prohibits specific (political) activities by civil servants whether they are on the job or off.[8] Nor is it like the Neutrality Act, which also prohibits defined activities and makes them criminal.[9] An appropriations rider, even if it reaches salaries, is nothing more than a limitation on the way Federal funds may be used. It does not reach a person's whole life and does not make activities criminal.

What were the precise "funds available," to use Mr. Boland's words, whose use was prohibited? The relevant language read as follows:

> 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.[10]

The terms of this prohibition apply to funds made available to specific arms of the executive branch. The fiscal 1983 prohibition of aid "for the purpose of overthrowing the government" applied only to funds available to the Department of Defense and Central Intelligence Agency. The fiscal 1985 law broadens the prohibition to include "any other agency or entity of the United States involved in intelligence activities." The obvious question, given Col. North's activities in behalf of the democratic resistance, is whether the staff of the National Security Council (NSC) is an "agency or entity" covered by the act.

Comparing the Boland Language With Broader Prohibitions

The phrase "agency or entity involved in intelligence activities" is surely an odd one that needs explaining. Some Members of Congress may have thought they were enacting an absolute prohibition in 1984, and that feeling may help explain the vehemence of their reaction to what the NSC staff did. But if that is the result Congress wanted to achieve, it chose very bad language for doing so—language that, as we shall show soon, carried a legislative history that specifically excluded the NSC from its coverage.

If Congress had simply wanted to prohibit all U.S. activity that might help the resistance, there were plenty of easier ways available for it to have done so. All it needed to do was look at another very well known and similar law, the Clark Amendment, that cut off support to the resistance fighters in Angola in 1976. That language read as follows:

> *Notwithstanding any other provision of law, no assistance of any kind* may be provided for the purpose, or which would have the effect, of promoting or augmenting, directly or indirectly, the capacity of any nation, group, organization, movement or individual to conduct military or paramilitary operations in Angola.[11]

Congress obviously knows how to write an airtight prohibition when it wants to. As in this example, it does not write about agencies or entities, but simply bars "assistance of any kind" from any source.

Virtually every year, appropriations bills contain prohibitions worded more broadly than the Boland Amendment. The continuing resolution for 1986, for example, says that "none of the funds available *in this or any other Act* shall be made available for the proposed Woodward light rail line in the Detroit, Michigan area" unless certain conditions are met.[12] If this example seems too far-fetched, consider the Hughes-Ryan Amendment to the Foreign Assistance Act of 1981, an amendment that anyone responsible for the Boland Amendment would know in detail: "No funds appropriated *under the authority of this or any other Act* may be expended by or on behalf of the Central Intelligence Agency" for foreign operations unless the President finds the action to be important to the national security and reports a description of the operation to Congress in a timely fashion.[13]

The absence of the phrase "any other Act" from the Boland Amendment is important for considering whether the NSC was covered by that act. The fiscal 1985 continuing resolution containing the Boland Amendment stitched together nine appropriations bills and a comprehensive crime control bill. The major sections of the resolution followed the wording of the original appropriations bills by designating each of the original bills as a separate "act," each with its own preamble and title.[14] That each "act" within the continuing resolution was treated as a separate legal entity is shown by the fact that several of them contained prohibitions against using the money "in this act" for lobbying, but each of the lobbying provisions was worded differently, prohibiting different kinds of behavior for different departments.[15] The Boland Amendment was not contained in the same appropriations bill that provides funds for the NSC. The Department of Defense Appropriations, for example, includes traditional elements of the intelligence community. The National Security Council, in contrast, is and traditionally has been funded together with the rest of the White House in an entirely separate appropriations bill for Treasury, Postal Service, and General Government that is considered by a separate appro-

drafter, but ignores the fact that Committee testimony proves the opinion was approved and issued after review by a Board which includes Charles Meyers, former Dean of the Stanford Law School, as one of its three members. (*Id.*)

priations subcommittee.[16] If Congress had intended to cover the funds made available to the NSC staff for salaries, in other words, it could easily have followed the broad language of the Clark Amendment, the Arms Export Control Act, or words often used to extend appropriation riders to funds made available in "any other act."

The Boland Amendment's Language in Other Intelligence Law

What accounts for the narrowness of the language of the Boland Amendments? The phrase "agency or entity involved in intelligence activities" did not originate with these particular prohibitions. The history of its use in intelligence legislation begins with the attempts during the late 1970s to pass a comprehensive charter for the intelligence community.

On February 8, 1980, the last version of the broad charter bill was introduced in the Senate. It contained the following definition:

> The terms "intelligence community" and "entity of the intelligence community" mean
>
> (A) the office of the Director of National Intelligence [the bill's successor to the Director of Central Intelligence];
>
> (B) the Central Intelligence Agency;
>
> (C) the Defense Intelligence Agency;
>
> (D) the National Security Agency;
>
> (E) the offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs;
>
> (F) the intelligence components of the military services;
>
> (G) the intelligence components of the Federal Bureau of Investigation;
>
> (H) the Bureau of Intelligence and Research in the Department of State;
>
> (I) the foreign intelligence components of the Department of Treasury;
>
> (J) the foreign intelligence components of the Department of Energy;
>
> (K) the successor to any of the agencies, offices, components or bureaus named by the clauses (A) through (J); and
>
> (L) such other components of the departments and agencies, to the extent determined by the President, as may be engaged in intelligence activities.[17]

Later, the same bill said that "the entities of the intelligence community [defined above] are authorized to conduct intelligence activities, under the direction and review of the National Security Council, but only in accordance with the provisions of this Act."[18] The bill, in other words, clearly and intentionally did not treat the NSC as an "entity of the intelligence community."

At least one staff consultant to the Senate Select Committee on Intelligence was concerned that the bill would not require the NSC to report any covert operations it might undertake. William R. Harris was directly involved in the deliberations that led to the statutory language we have been analyzing. Because of his expertise on the subject, House Chairman Lee Hamilton and Ranking Minority Member Dick Cheney wrote a letter to the former Senate consultant asking him "for any observations or recollections that relate to the concept of an 'intelligence agency' or 'intelligence entity' as traditionally understood by Congress or the Chief Executive." Harris responded on September 25, 1987, with a 14-page statement that is reprinted as Appendix A to this Minority Report. In his position as consultant, Harris urged the Committee to write language that would include the NSC:

> It was my position that, unless the mandatory reporting duties included the NSC and its staff, there was a foreseeable risk of the NSC managing covert operations through the NSC itself, without a specific duty to report on such activities to the oversight committees of the Congress. The Charter and Guidelines Subcommittee staffers indicated that the President would not authorize this change in customary practice, precisely because, upon discovery, the Congress would enact legislation requiring mandatory reporting by the National Security Council or the President regarding its activities.
>
> At this point (on a day in February 1980 that I cannot ascertain from my records), I took the issue to the staff director of the Senate Select Committee, William G. Miller. Any change of the nature I was proposing would reopen constitutional issues of concern to the Attorney General and the Counsel to the President. Mr. Miller reminded me that both Vice President Mondale and David Aaron, the Deputy Special Assistant to the President for National Security Affairs, served with the committee. The President would not permit, I was advised, the conduct of covert operations by the NSC staff itself. I reminded the staff director that intelligence charters must be designed to function under changed and partly unforeseen circumstances, well beyond the service of officials who knew the precise reasons for legislative action.[19]

Harris' position was that if Congress wants to prohibit or require the President and the NSC to do something—as he thought it should—then Congress should say so clearly and not rely on the political sympathy of a current Vice-President and NSC staffer. We agree with this position wholeheartedly. As Justice Frankfurter said in the quotation we used at the beginning of this chapter, "Congress expresses its meaning by words."[20]

One month later, the Committee staff produced a draft that partly addressed Harris's concern, not by expanding the definition of the intelligence community, but by adding language that would have made it more difficult for the NSC and other parts of the Government to conduct covert operations.[21] The Congress did not enact this language, however, and decided to concentrate strictly on the subject of oversight.

The Intelligence Oversight Act of 1980 started out as one section of the charter bill. After some change, it was enacted as an amendment to the National Security Act of 1947. The shorter version omits the original bill's long definition of the intelligence community to require reports of intelligence activities to Congress from:

> The Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities.[22]

In this version, the language is almost identical to the jurisdictional language of the Boland Amendment. Given the statutory history, the phrase appears simply to be a shorthand substitute for items (C) through (L) on the long itemized list in the proposed charter.

The fact that the Oversight Act was an amendment to the National Security Act is instructive. The National Security Act created the National Security Council, which has only four statutory members: the President, Vice President, Secretary of State, and Secretary of Defense, with the President clearly put at the head. In order to believe that the phrase "agencies and other entities involved in intelligence activities" applied to the NSC, one would have to accept the entirely preposterous idea that the 1980 law contemplated the head of the NSC, that is, the President, personally reporting any "significant anticipated intelligence activity"—including any of a purely information-gathering character—to the Intelligence Committees. Even if Congress had wanted to engage in the constitutional confrontation such a reading would imply, it is difficult to imagine Congress specifically mentioning the Director of Intelligence in the Oversight Act, and then reaching the President by indirection without even bothering to say so.

The point that Congress did not intend to treat the President as the head of an "intelligence agency or entity" is strengthened when one realizes that the Oversight Act also amended a sentence that appears immediately after the one in the Hughes-Ryan Act, which does require Presidential Findings for covert CIA operations. There is no way the Members of Congress could have amended one sentence without considering its relation to the other. As the words of Hughes-Ryan make clear, when Congress wants to place a requirement on the President, it does so directly.

There is no way to avoid the conclusion that the text of Oversight Act imposes. Even though many people today seem to assume that this law imposes a reporting requirement directly on the President, the fact is that it does not. The Oversight Act's reporting requirements cover the Director of Central Intelligence and the heads of all other agencies or entities involved in intelligence activities. It deliberately did not cover the NSC or its head, the President. It knowingly exempted the NSC, even though the NSC staff had engaged in many activities during the 1970s that were well known to Congress and would have called for a required report under the 1980 act if the NSC had been covered. In fact, no one even hinted in 1980 that the NSC or its staff should be covered by the Oversight Act. It is fanciful to maintain that Congress intended to break almost 40 years of complete deference to the President's use of the NSC without provoking some extended discussion or controversy.[23]

Harris concludes that Congress adopted language in 1980 that deliberately stepped back from earlier proposals for Government-wide reporting requirements to narrower language that excluded the NSC. He wrote:

> In the period 1975-1978, Congressional investigations of intelligence activities encompassed entities of the entire federal government, and proposals for mandatory reporting to the Congress mirrored that broad jurisdictional concern.
>
> Commencing in 1978, the intelligence oversight committees adopted the procedure of enacting separate intelligence authorization acts for all entities of the "intelligence community" engaged in national intelligence or counterintelligence. Concurrently, from 1978 onwards, draft legislation proposing mandatory self-reporting by heads of intelligence departments, agencies, or entities encompassed expressly specified departments and agencies and other "entities" that performed classified missions within the "intelligence community." Proposals in 1980 to extend the scope of "entities" to include the National Security Council and its staff were *expressly* rejected in the course of streamlining what became the Intelligence Oversight Act of 1980.[24]

Once again, we agree completely with Harris' conclusions. His words, we should point out, gain credibility from the fact that he wanted the NSC to be covered, over the opposition of President Carter's White House. Nevertheless, we acknowledge that a statement from a former Senate staff aide has no compelling legal weight as legislative history. What gives the interpretation its real weight is that it is the only one that can make sense of the words Congress used in the various bills it considered and the final law it enacted.

After the Oversight Act

To complete this line of analysis, President Reagan issued Executive Order 12333 on December 4, 1981, defining the intelligence community essentially along the lines of the charter bill. This language was meant to be a definition of the phrase "agencies or entities involved in intelligence activities" that appeared in the Oversight Act. The principal NSC staff coordinator for the executive order was Kenneth DeGraffenreid, who had worked on the staff of the Senate Select Committee on Intelligence at the time the Oversight Act was enacted.[25] The relevant section read as follows:

> The *Intelligence Community* and *agencies within the Intelligence Community* refer to the following agencies or organizations:
>
> (1) The Central Intelligence Agency (CIA);
>
> (2) The National Security Agency (NSA);
>
> (3) The Defense Intelligence Agency (DIA);
>
> (4) The offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs;
>
> (5) The Bureau of Intelligence and Research of the Department of State;
>
> (6) The intelligence elements of the Army, Navy, Air Force, and Marine Corps, the Federal Bureau of Investigation (FBI), the Department of the Treasury, and the Department of Energy, and;
>
> (7) the staff elements of the Department of Energy.

It is worth noting that missing from this enumeration is the charter bill's elastic provision, which could potentially expand the list.

It is also worth noting that the enumeration is followed in Intelligence Authorization Acts, including the specific one for fiscal 1985 that contained the same prohibitory Boland Amendment as the continuing resolution. The previous year, the House had adopted a version of the Boland Amendment that also would have reached "any other agency or entity of the United States involved in intelligence activities."[26] The Senate refused to agree and $24 million, or enough to fund the resistance for about half a year, was finally adopted as a compromise. During the House's consideration of the bill, however, Representative Boland offered the following description of what the Authorization Act covered:

> Mr. Chairman, H.R. 2968, the Intelligence Authorization Act for fiscal year 1984 authorizes funds for all the activities of the Central Intelligence Agency; the Defense Intelligence Agency; The National Security Agency; other intelligence components of the Department of Defense and the Departments of the Army, Navy and Air Force; the Bureau of Intelligence and Research at the Department of State; the Intelligence Divisions of the Federal Bureau of Investigation; intelligence elements of the Departments of Treasury and Energy, and of the Drug Enforcement Administration; and the intelligence community staff of the Director of Central Intelligence.
>
> Generally, these activities are divided into two categories. The first is intelligence activities—that is to say, national intelligence activities—which produce intelligence for important policy-makers of the Government—the President, the Cabinet, the National Security Council and the Joint Chiefs of Staff.[27]

Representative Boland, in other words, adopted the traditional distinction of the Oversight Act and Executive Order 12333 between the intelligence community, on the one hand, which produces intelligence, and the National Security Council, which is not an agency "involved in intelligence activities" but a consumer. He made it clear that the authorization bill did not apply to the NSC.

The authorization acts follow the jurisdiction, or power to legislate, that the rules of the House and Senate give to the Intelligence Committees. The White House and NSC staff authorizations clearly and exclusively fell within the jurisdictions of other committees at the time of the Boland Amendment, as they do now. The importance of this fundamental fact of legislative history may be lost unless one has a sense of the jealousy with which committees traditionally guard their own jurisdictions. If Congress had intended to cover staffs that fall within the jurisdictions of two committees, the procedure virtually always adopted would have been for the second committee to ask for, and get, a multiple referral of the bill. Committees normally insist on multiple referral even when they are in complete agreement with what a bill is trying to do, because they want to preserve their own jurisdictional claims for the future.

To summarize, the Oversight Act, the Executive Order, and the typical intelligence authorization act do not cover the President or the National Security Council.* To quote Harris again, this history "establishes a presumption that only 'intelligence community' entities are intended to be covered by other intelligence-related legislation utilizing the phrasing."Harris does acknowledge that "the presumption may be rebutted by evidence of actual legislative intent to the contrary" and says that he does not know the specific legislative history of the 1984 and subsequent Boland Amendments.[28] We have searched that history, however, and there is no evidence of an intention to change a well-known term of art that excluded the NSC into one that included it.**

The Spirit Redux

Some members of these Committees have tried to argue, without addressing the legislative history just presented, that the Boland Amendment should be read not to cover a specific list of agencies, but any agency or entity that might in the future become involved with intelligence activities. Any other reading, it is said, would render the law meaningless by letting the President get around its provisions by putting agents in any of the Government's departments outside the intelligence community, including the Department of Agriculture.[29]

We consider this argument to be completely mistaken. For one thing, as we have just demonstrated, the term "agency or entity involved in intelligence activities" was not made up by the Boland Amendment out of whole cloth. If the phrase is to have any meaning, it must be the same in the Boland Amendment and Oversight Act. But the argument that an interpretation of Boland which excludes the NSC would be a "slippery slope" is also wrong because the slope is not in fact slippery. Arguments about the NSC staff do not automatically apply to other departments and agencies. The NSC staff is the President's personal foreign policy staff; the Department of Agriculture is not. The NSC is therefore authorized to conduct, and historically has conducted, activities directly related to the President's Contra policy that others may not conduct without explicit statutory authority.

If the language of the Boland Amendment did not cover the NSC, can the Administration fairly be said to have evaded the law through Oliver North's actions to help the democratic resistance? On the most obvious level, no one is evading the law if he or she continues to do something the law permits, or fails to prohibit. But to leave the matter there makes it look as if the Administration was faced with a clear Congressional mandate. In fact, as we have shown, the mandate was two-sided.

Part of what Congress wanted in 1984 was to cut off U.S. financial aid to the Contras. That objective was fulfilled. During fiscal 1984, Congress appropriated $24 million to support the resistance, and permitted the full infrastructure of the CIA, Defense Department, and other intelligence agencies to back up the expenditure of the money. When the Boland Amendment went into effect, the CIA's financial and infrastructure support was eliminated. The entire National Security Council appropriation, for all salaries and all worldwide activities, was between $4 million and $5 million during the mid-1980s. The *most* the NSC staff could do would be to spend a part of a few people's salaries to encourage activities that did not spend U.S. funds. At its most ambitious, the NSC staff's activity would therefore represent a minuscule fraction of the U.S. Government's support for the resistance before the prohibition.

This judgment is strongly reinforced by the facts disclosed by the record of these Committees' public hearings. During the period of the Boland Amendment, a very small number of NSC staff officials had responsibilities that related to the resistance. These responsibilities included, among other things, maintaining political contact with the resistance, exchanging information with it, and providing it with guidance and political advice. No one—especially not anyone familiar with U.S. intelligence—would maintain that the Boland Amendment outlawed these activities. At the same time, the NSC staff engaged in more controversial activities, such as giving the resistance expert assistance on arms procurement, helping to coordinate the operational details of military resupply, and persuading other countries to give financial support to the resistance. If one tried to keep a diary of the NSC staff's time, however, it would quickly become clear that any expenditure of NSC staff salaries on activities that *might* have been outside the law *if* the NSC were covered, was clearly incidental to expenditures for activities that remained clearly legal

*A technical question exists about whether North was covered by the Boland Amendment as an individual because his salary apparently was paid from the Department of Defense appropriation. Because North's salary could just as easily have been paid or reimbursed from the NSC appropriation, and because the functions he performed on detail to the NSC were clearly NSC duties unrelated to his DOD assignment, our basic point is unaffected.

**We note that the Department of Justice has concluded that language in section 403(b)(1) of the Intelligence Authorization Act reaches the NSC because it covers "any agency or entity involved in intelligence or *intelligence-related* activities." See U.S. Department of Justice, Memorandum for the Attorney General, "Legal Authority for Recent Covert Arms Transactions to Iran," December 17, 1986, p. 5, n. 10.

Given the history we have discussed, the accuracy of the Justice Department's conclusion is clearly open to question. Even assuming its correctness, *arguendo*, Attorney General Meese made the point in his testimony that the underlined phrase does not appear in the Boland Amendment and therefore makes this phrase broader than the one in that amendment. Therefore, Meese said, this language is clearly distinguishable from the definitional language of the Boland Amendment, which appears in a separate section of the same bill. See Meese Test., *Hearings*, 100-9, 7/29/87, at 421-22.

during the time of the most stringent Boland Amendment.

There were no other significant expenditures of appropriated funds to support the resistance during the period of the Boland Amendment—no " diverted" tanks or planes, for example. In short, the appropriations limitation purposes of the Boland Amendment in fact were met. Even though the NSC staff did support the resistance in the ways just described, the level of U.S. support dropped to just a trickle of personal advice. In addition, we must reiterate that Congress' full intention involved more than just the limitation provision. Congress assumed there would be a future vote on the resistance, and that the resistance would continue to exist as a viable force until that vote with funds from private and non-U.S. sources. Satisfying Congress's full intention, therefore, would almost seem to require some form of NSC staff involvement.

Oliver North and John Poindexter testified that they attempted to comply with the law.[30] We have seen that the NSC was not covered by the law's language. But even if the NSC had been covered, virtually all, if not all, of North's and Poindexter's activities in behalf of the democratic resistance would still have been lawful. This point can be best understood by looking at the different interpretations placed on the law from the beginning, and at the changes Congress began making to the Boland prohibitions within months of its adoption.

Sharing Information and Intelligence Under the Boland Amendment

A review of the legislative history of the Boland Amendment and related subsequent amendments makes clear that it was lawful for Col. North and others to provide intelligence to the resistance leadership. The legislative history also makes clear that it is reasonable to view the Boland Amendment as allowing the type of information transfer, advice, and coordination that Col. North and others provided to the Contra resupply effort.

On December 19, 1984, Director of Central Intelligence William J. Casey wrote to Representative Boland, Chairman of the House Permanent Select Committee on Intelligence, to describe some activities the CIA considered to be consistent with the prohibition bearing the Chairman's name. Casey's letter did not discuss normal information and intelligence-sharing because, as a still classified exhibit to Col. North's testimony makes clear,[31] Members of Congress already knew about, and approved, such communication between the resistance and CIA. Rather, Casey's letter was about providing specific, detailed intelligence that might be useful operationally. Casey wrote:

> We are contemplating providing defensive intelligence to the FDN . . . . This intelligence would be furnished exclusively for the purpose of precluding hostile actions against the FDN. We would ensure that the information provided does not contain the specific details requisite for the planning/launching of offensive operations.
>
> We are fully aware of the current restrictions pertaining to Agency support for insurgent forces. It is our belief, however, that provision of this information is consistent with our long-established practice of providing intelligence as appropriate to prevent loss of life.[32]

On January 14, 1985, Casey's letter was answered by Boland and Representative Lee Hamilton, who was soon to succeed Boland as chairman. According to their response:

> The thrust of the public debate [over the Boland Amendment] . . . was clearly directed at the complete severance of all intelligence community connections with the Contras and the end of all support for anti-Sandinista military activity. Therefore, your stated intention to provide "defensive intelligence" to the FDN is troubling . . . .
>
> It is our opinion that, at a minimum, section 8066 prohibits the provision of intelligence information to the FDN on any systematic or continuing basis, particularly if such information will enable a FDN force to avoid tactical contact with the enemy and thus be in a better position to continue military operations of its own.
>
> On the other hand, the unplanned for, isolated provision of incidentally acquired information to a person threatened by imminent assassination would seem reasonable.
>
> In any event, on the basis of the imprecise information given to us, we are unable to approve or disapprove any contemplated CIA activity. Some examples of intelligence you would provide to the FDN could, in our view, violate the law, yet not every example seemed illegal . . . .
>
> If your decision is to proceed, we ask that you provide the Committee with the guidelines under which your General Counsel will approve or disapprove the furnishing of intelligence to the FDN.[33]

In the first of the sentences quoted above, Hamilton and Boland clearly went beyond both the letter and spirit of the Boland Amendment by suggesting that its purpose was to eliminate "all intelligence community connections with the Contras." Those connections were continuing throughout the period with the

77-026 0 - 87 - 17

Chairmen's full knowledge and acquiescence, as we indicated above. However, there remained a valid dispute over exactly how detailed such intelligence sharing could be. Hamilton and Boland took the view that tactical information of a militarily useful sort was prohibited, even if it were for defensive purposes.

Two months later, the CIA responded to the Chairmen's request to provide Congress with detailed guidelines. On March 18, 1985, Casey wrote to Hamilton and to Senator David Durenberger, Chairman of the Senate Select Committee on Intelligence:

> This is in response to questions raised by the Committee regarding the Agency's plans to provide certain defensive intelligence to opposition groups in Nicaragua . . . . We do not intend to provide intelligence on any systematic or continuing basis. Our goal is humanitarian in nature and any intelligence we would pass would be strictly limited, on a case-by-case basis, to information which in general affects the lives of U.S. persons or third country noncombatants or which suggests that a holocaust-type situation involving substantial loss of life may occur.[34]

Casey thus indulged Hamilton and Boland temporarily on the specific issue, but presented the CIA's guidelines as the Agency's statement about what *it* would do, without conceding the House Chairmen's interpretation of what the law required. Until the CIA was able to get the law clarified, it behaved in a manner consistent with its own guidelines, which were drafted, as shown below, to be stricter than the law itself.

Five months later, on August 8, 1985, Congress resolved the interpretation dispute in the CIA's favor. In the Supplemental Appropriations Act for fiscal 1985, Congress said:

> Nothing in this Act, section 8066(a) of the Department of Defense Appropriations Act, 1985 (as contained in section 101 of Public Law 98-473), or section 801 of the Intelligence Authorization Act for Fiscal Year 1985 (Public Law 98-618) shall be construed to prohibit the United States from exchanging information with the Nicaraguan democratic resistance.[35]

Congress did not say it was creating new authority. The phrase, "nothing in this act . . . shall be construed to prohibit," is the kind of language Congress uses when it is indicating its interpretation of what a past law has always meant. The report of the House conferees made this abundantly clear:

> The conference committee discussed, and the Intelligence Committees have clarified, that *none* of the prohibitions on the provision of military or paramilitary assistance to the democratic resistance prohibits the sharing of intelligence information with the democratic resistance.[36]

This point was made again in December 1985, when Congress again addressed the subject of intelligence sharing. In the Intelligence Authorization and Department of Defense Authorization Acts of 1986,[37] Congress permitted the intelligence community to provide communications equipment and related training, and to exchange information with *and provide advice* to the democratic resistance. The conference report explained the provision this way:

> The conferees note that *under current law* and the restriction contained in Section 105 of this Conference Report, the intelligence agencies may provide advice, including intelligence and counterintelligence information, to the Nicaraguan democratic resistance. Section 105 does not permit intelligence agencies to engage in activities, including training other than the communications training pursuant to Section 105, that amount to participation in the planning or execution of military or paramilitary operations in Nicaragua by the Nicaraguan democratic resistance, or to participation in logistics activities integral to such operations.[38]

As with the August statute, the statutory history contains a clear reference to words that interpret what the law has been and not just what it will be. It is clear, therefore, that the law allowed Col. North and others to pass intelligence of military value to the resistance.

Advice for and Coordination of the Resupply Operation

The language and legislative history of the Boland Amendment, as modified by the "communications" and "advice" provisions, also make clear that Col. North and other U.S. Government officials could legally provide general advice, coordination, and information with respect to the Contra resupply operation that began in late 1985.

The Boland Amendment provides that:

> No funds . . . 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. [Emphasis added.]

This language does not prohibit all support, but only support of a specific kind. The question that always arose, however, was what kind of support would constitute indirect support of a military operation inside Nicaragua? After the "communications" and "advice" provisions were enacted in 1985, the Chairmen of the House and Senate Intelligence Committees disagreed

about their meaning—particularly as they might apply to a resupply operation, as opposed to specific military or paramilitary operations in Nicaragua.

Rep. Hamilton, in a December 4, 1985, letter, took the position that the law prohibited advice about "logistical operations upon which military or paramilitary operations depend." [39] Senator Durenberger, in a letter dated the next day, however, said that he believed the law meant to allow just such advice. Faced with these conflicting interpretations, the CIA, after a careful analysis of the legislative history, chose to accept the position that most clearly represented a harmonization of the points of difference between the two Chambers:

> The legislative history, therefore, seems to draw distinctions between, on the one hand, participation, planning, and providing advice (which would not be permitted in support of paramilitary operations) and, on the other hand, information sharing, including advice on the delivery of supplies . . . . There is no clear indication that Congress intended to prohibit the CIA from giving advice on supply operations, and some indication that it did intend to distinguish between mere information-sharing and actual participation in such operations. Furthermore, there would appear to be a valid distinction between permissible, general military resupply operations and operations in the context of specific military operations, which were not authorized . . . .
>
> Merely passing intelligence on Sandinista gun or radar placements, weather conditions, flight vectors, and other information to assist in the delivery of supplies for general maintenance of the forces in the field would not seem to be prohibited, both because this would not constitute "participation," and because this would not be "integral" to a "paramilitary operation" as contemplated by Congress." [40]

We agree with the legal conclusions reached in this memorandum. Based on these conclusions, we would argue that virtually all, if not all, of Col. North's activities in support of the democratic resistance would have been legal even if the Boland Amendment had applied to the NSC. By extension, we believe that virtually all, if not all, of the activities of employees of other executive branch agencies and entities that were covered were also legal. The worst that can be said of all of these people is that they adopted one side of a reasonable dispute over interpretation. In that dispute, the opinions of the Senate are every bit as much of a valid indicator of Congress's intention as the House's. There is no way, therefore, that behavior undertaken in reliance on the Senate's legislative record can fairly be interpreted as an intentional flouting of the law.

Endnotes

1. *Addison* v. *Holly Hill Co.* 322 U.S. 607, 617 (1944).
2. McFarlane Test., *Hearings*, 100-2, 5/13/87, at 187.
3. Pub. L. No. 98-473; 98 Stat. 1837.
4. Congressional Record, Oct. 11, 1987, p. S14206.
5. *Id.* at S14205.
6. *Id.* at H12206.
7. *Id.*
8. 5 U.S.C. 7324(a)(2).
9. 18 U.S.C. 960.
10. Pub. L. No. 98-473; 98 Stat. 1837, 1937 (Oct. 12, 1984), Continuing Resolution, Department of Defense Appropriations Act, Sec. 8066 (a).
11. 22 U.S.C. 2293, emphasis added.
12. Pub. L. No. 99-190, 99 Stat. 1287.
13. 22 U.S.C. 2422.
14. See, for example, P.L. 98-473, 98 Stat. 1877, 1885, 1905, 1923.
15. For example, compare Pub. L. No. 98-473, 98 Stat. 1923 with 1937-38.
16. See Pub. L. No. 98-441, 98 Stat. 1699 (Oct. 3, 1984).
17. 96th Congress, 2d Sess., S.2284, Sec. 103 (12).
18. *Id.*, Sec. 111 (a).
19. William R. Harris, "Reporting Obligations and Funding Restrictions Affecting Intelligence Departments, Agencies, and Entities of the United States," Prepared Statement in reply to a request of the U.S. House Select Committee to Investigate Covert Arms Transactions with Iran," Sept. 25, 1987, p. 7. Full statement reprinted as Appendix A to the Minority Report.
20. *Addison* v. *Holly Hill Co.* 322 U.S. at 617.
21. Harris, "Reporting Requirements," prepared statement at 8.
22. 50 U.S.C. 403.
23. See *TVA* v. *Hill*, 98 S. Ct. 2279, 2300 (1978).
24. Harris, "Reporting Obligations," prepared statement at 14, emphasis added.
25. *Id.*, p. 11.
26. Congressional Record, Oct. 20, 1983, p. H8413.
27. *Id.*, p. H8389.
28. Harris, "Reporting Obligations," prepared statement at 11-12.
29. See Senators Inouye and Mitchell, Meese Test. Hearings, 7/29/87, at 428-29.
30. This point was corroborated by Generals Secord and Singlaub. See Secord Test., Hearings, 100-1, 5/21, at 197; Singlaub Test., Hearings, 100-3, 5/21/87 at 197.
31. OLN-91.
32. North testimony, Exhibit OLN-333A.
33. *Id.*
34. *Id.*
35. Pub. L. No. 99-88, Sec. 102 (b).
36. U.S. House of Representatives, 99th Cong., 1st Sess., H.Conf. Rept. 99-237, International Security and Development Cooperation Act of 1985, p. 144, emphasis added. The provision first appeared in the ISDCA, but the conferees agreed to drop the provision because the same language was to appear in the supplemental appropriations act. Nevertheless, this interpretation is the one that was offered to the House by the committee of jurisdiction that had originated the language. The interpretation was not contradicted in other reports or on the House or Senate floor.
37. Pub. L. No. 99-169; Pub. L. No. 99-190.
38. U.S. House of Representatives, 99th Cong. 1st Sess., H. Rept. 99-373, Conference Report to Accompany H.R. 2419, p. 16, emphasis added.
39. As quoted in March 2, 1987, memorandum from CIA Associate General Counsel W. George Jameson to the General Counsel, p. 6; Ex. TC-13, *Hearings*, 100-4.
40. *Id.* at 5, 7.

Chapter 7
Who Did What To Help The Democratic Resistance?

The public hearings of these Committees presented a confusing picture of U.S. assistance to the Nicaraguan democratic Resistance during the period of the Boland Amendments. The overall impression the Committees' majority tried to create was that the government was engaged in a massive effort to subvert the law. A careful review shows, however, that this simply was not the case. The NSC staff's activities fell into two basic categories. Some were the kinds of diplomatic communication and information sharing that Congress may not constitutionally prohibit, even if Congress had intended the Boland Amendment to apply to the NSC. Others, with the possible exception of the diversion, were in accordance with the law, as we have analyzed it in the preceding section.

Given the nature of the strategic threat in Central America, we also believe President Reagan had more than a legal right to pursue this course of assistance to the Contras. We believe he was correct to have done so. The mixed signals Congress was giving indicates that many members agreed. Our *only* regret is that the Administration was not open enough with Congress about what it was doing.

We have no intention here of trying to present all of the evidence the Committees received about what each person did. If we did, our dissent would have to be as long as the Committees' narrative. Frankly, we believe the mind-numbing detail in that narrative obscures as much as it reveals, leaving readers with some fundamentally mistaken impressions. In the following few pages, therefore, we will limit our comments to a broad factual overview to indicate why we reach the conclusions we do.

The President

President Reagan gave his subordinates strong, clear and consistent guidance about the basic thrust of the policies he wanted them to pursue toward Nicaragua. There is some question and dispute about *precisely* the level at which he chose to follow the operational details. There is no doubt, however, about the overall management strategy he followed. The President set the U.S. policy toward Nicaragua, with few if any ambiguities, and then left subordinates more or less free to implement it.

The first crucial step was the President's decision to back a December 1981 Central Intelligence Agency (CIA) proposal for covert action. Within a year, the policy was covert in name only and Congress began passing the first of the Boland Amendments. Nevertheless, when the Kissinger Commission recommended a more overt policy of support for the Resistance in 1984, former National Security Adviser Robert C. McFarlane testified that the recommendation was ignored by the President and by Congress.[1]

The Administration was aware as early as mid-1984 that Congress would probably cut off funds to the Resistance; the mining incident served as either a reason or as a convenient pretext for the cutoff, depending upon one's point of view. The President instructed the NSC staff, according to both McFarlane and Col. North, as early as the spring of 1984 to keep the "body and soul" of the Resistance together until Congress could be persuaded to resume support for them.[2] North testified that he understood this to mean specifically, among other things, that he was to keep the Contras together in the field as a fighting force.[3] Although McFarlane appears to have interpreted the President's desires somewhat more narrowly, McFarlane said that the President repeatedly made his general desire to support the Resistance known both privately and publicly.[4]

McFarlane and his successor, Admiral John Poindexter, both portrayed the President as having been generally aware that the Resistance was receiving funds from third countries and from private parties, but not of the details of Contra expenditures.[5] There is no evidence that the President authorized or directed McFarlane or the NSC staff to contact third countries in 1984 or 1985 to raise funds for the Resistance. There also is no evidence that the President personally solicited such funds from foreign heads of state, and the President has denied having done so.[6] However, it is clear that the President knew such funds had been given to the Resistance during 1984-85,[7] and that he did not tell the NSC staff not to encourage such foreign political or financial support. In addition, Poindexter said the President considered contributions from third countries to be entirely acceptable and

thought they should be encouraged.[8] But whatever the President's precise knowledge or direction of the NSC staff's role in encouraging contributions, *we are firmly convinced that the Constitution protects such diplomacy by the President or by any of his designated agents—whether on the NSC staff, State Department or anywhere else.*

The President also knew that some private U.S. citizens were giving money to help the democratic Resistance—another activity that was perfectly legal.[9] In 1986, after Congress specifically stated that third country solicitations by the State Department were not precluded, the President did authorize such a solicitation in a National Security Planning Group meeting. That decision that eventually led Secretary of State George Shultz and Assistant Secretary Elliott Abrams to solicit the Government of Brunei.

The President's exact knowledge of other aspects of the NSC staff's support for the Resistance is less clear. The President knew North was the main staff officer acting as liaison to the Resistance. The President was briefed by Poindexter about the construction of an emergency air field in a neighboring country that was to be used for the private Southern Front resupply operation,[10] and, according to McFarlane, he personally intervened with the head of state of a Central American country to obtain release of an arms shipment for the Resistance that had been seized immediately after a vote in Congress to reject an effort to resume Contra funding.[11] On most other aspects of the resupply operation and North's military advice to the Resistance, the President seems not to have been informed of what McFarlane and Poindexter considered to be "details," many of which McFarlane denied knowing himself. Again, whatever the President's precise level of information, it is clear that matters about the President's knowledge of which these Committees can be sure—including the ones just cited—*all fall within the sphere of constitutionally protected diplomatic communication or the equally protected speech and encouragement of legal activity by U.S. citizens.*

The Vice President

There is *no* evidence that Vice President George Bush knew about either the Contra resupply effort or the diversion of funds to the democratic Resistance. The Vice President's staff does acknowledge having learned about General Secord's resupply operation from Felix Rodriguez in August 1986. The staff members informed the relevant agencies, but said they did not think the issue warranted informing Bush at the time. The testimony all says the subject was not discussed with the Vice President. Two April scheduling memoranda did use the word "resupply" in connection with one Rodriguez visit to the Vice President's office, but there is no reason to infer from a single phrase that the Vice President's staff had full knowledge of a subject the NSC staff was deliberately keeping from them.

Felix Rodriguez

The one point of connection between the Vice President, his staff, and the resupply effort, was Felix Rodriguez (also known as Max Gomez) a retired CIA officer and personal friend of Donald P. Gregg, the Vice President's Assistant for National Security Affairs. Rodriguez was a significant figure in North's resupply operation as the facilitator/coordinator of private benefactor flights. He had three short personal meetings with the Vice President during this time period. According to his testimony, all three related to his counter-insurgency efforts in Central America.[12]

The second of these meetings took place on May 1, 1986, some eight months after Rodriguez began working with North on the resupply effort and a few months after that effort became active.* According to his testimony, Rodriguez was fed up with the operation and was planning to quit.[13] Neither Watson nor Gregg had been told about his role at this time, Rodriguez said.[14] He had purposely kept that information from all others at North's request,[15] and asserted that he did not intend to inform the Vice President or

* The majority in Chapter 3 claims that North employed the assistance of other U.S. officials in order to obtain approval from a Central American country to serve as the host for the resupply operation air base. Thereafter, it strongly suggests that Col. James Steele and Donald Gregg, the Vice President's National Security Adviser, were those other officials and that very matter was discussed by the three of them at a meeting on September 10, 1985.

The reference to a meeting on September 10, 1985, is based exclusively on ambiguous notes contained in Col. North's notebooks. Since Col. North was never asked about that meeting or those notes, we cannot tell when they were made, let alone whether they were accurate or reflect a meeting which actually occurred.

Moreover, despite being subject to lengthy depositions and being totally cooperative with these Committees, neither Col. Steele nor Mr. Gregg has been asked whether such a meeting ever took place and if so, whether the quoted material was discussed. In short, there is simply no credible evidence against which the meaning or accuracy of these notes has been tested.

Indeed, the evidence before the Committees, to date, suggests the contrary. North recruited Rodriguez to perform the function of obtaining support for the use of the Central American country's air base, and that he did so, with permission to use North's name. North directed Rodriguez not to inform Gregg and his office about this (Rodriguez's) involvement, and he didn't. Moreover, the majority's own account of events indicates that Rodriguez was first considered by North as a possible source of assistance when Col. Steele suggested that idea on September 16, 1985; 6 days after this supposed meeting between North, Steele, and Gregg. Therefore, there is no evidence to suggest that North's private resupply operation was discussed on September 10. And finally, the reference made in Chapter 3 to Gregg not knowing about a resupply operation prior to the summer of 1986 is not even accurate. A close reading of the very pages cited by the majority to Gregg's deposition indicates that he admitted to knowing in early 1986 about an informal, non-lethal, supply operation funded by American citizens. Gregg Dep., 6/18/87 at 26-28.

his staff about the effort on May 1.[16] Nevertheless, a scheduling proposal dated April 6, and a very short April 30 briefing memorandum, described the purpose of the meeting as being, in part, to provide a briefing about "resupply of the Contras."[17] It is not clear how this language got into these documents.* Whatever the explanation, the people present at the meeting—former Senator Nicholas Brady, Gregg, Colonel Samuel J. Watson III (Gregg's deputy), and Rodriguez—all said they were certain resupply never was discussed with the Vice President,[18] and the Committees have no reason to doubt these statements. Neither do the Committees have any reason to suspect that Watson or Gregg knew about North's involvement at this time.

Let us shift focus now to August 1986.** On August 8, Rodriguez met with Gregg and Watson and told them about North's involvement with the resupply operation and possible profiteering by Secord and his associates.*** Rodriguez's disclosures on the eighth of August, and Gregg's ensuing conversations with North's deputy, Robert Earl, prompted Gregg to call a multi-agency meeting on August 12 to alert the agencies of the problems Rodriguez felt deserved their attention.[19] In other words, when Bush's staff became aware that some aspects of the resupply effort might be harmful to the Resistance, the staff met with the appropriate agencies (State, CIA and Defense) and told them of the potential problem. Gregg did not, however, bring the matter to the Vice President's personal attention.

* Phyllis Byrne, the secretary in the Vice President's offices who typed these memos, testified that after Rodriguez had requested the appointment, she asked Colonel Watson about the visit's purpose. She said that Watson gave her the language she used for the "purpose" section of the scheduling proposal when she typed it on April 14. Two weeks later she simply reused the same language for the Vice President's scheduling memorandum. (Byrne deposition, June 16, pp. 12-13.) Colonel Watson has testified not only that he has no recollection of providing Ms. Byrne with that information, but reiterated that he would have had no reason at that time to connect Rodriguez with resupply at all. Furthermore, Watson said that he had no recollection of reviewing the scheduling memorandum either alone or with Rodriguez before the meeting. (Watson deposition, June 16, pp. 27-40.) Similarly, Gregg does not remember reading that language at either the proposal or memorandum stages, and says he would never have phrased such a discussion in that manner. (Gregg deposition, May 18, pp. 32-33.)

**Watson's notes, which were exhibits to his deposition, indicate that three times during the first week of August 1986, either North or Earl made resupply-related references to Watson regarding Rodriguez's activities in Central America. Each time, according to Watson, he asked about the statements, only to be rebuffed. (Watson Dep., 6/16/87, at 43-55.) Ironically, the apparent purpose of these asides, according to Watson, was to get him (and Gregg) to "admonish" Rodriguez about whatever it was he was supposedly doing to harm the resupply effort.

***According to all three, however, Rodriguez did not outline his own resupply role until December 1986, weeks after North had been reassigned. (Rodriguez Test., *Hearings*, 100-3 5/27/87, at 315; Rodriguez Dep., 5/1/87 at 43; Watson Dep., 6/16/87 at 34; Gregg Dep., 5/18/87 at 81.

National Security Council Staff

Robert McFarlane and John Poindexter appear to have had different views of what the President wanted, and what the law would allow, the NSC staff to do. It is important to be clear, however, that with the possible exception of some small fraction of NSC staff salaries, overhead, and small amounts of travel expenses—all of which could legitimately have been used in any event to maintain contact by the NSC staff with the Resistance leadership and others—no appropriated funds were devoted to the efforts discussed below.

Robert McFarlane testified that he believed (1) that the NSC staff was covered by the Boland Amendment, and (2) that one of the principal purposes of the amendment was to prevent the government from raising funds in support of the Resistance.[20] He testified that he took this position for political reasons, not on the basis of an analysis of the law.[21] It should be noted, however, that although McFarlane says he was quite vocal on the point of NSC coverage, Commander Paul Thompson, formerly the NSC's legal counsel, has a different recollection. Thompson said that he remembers a discussion in which he and McFarlane considered whether the NSC might conceivably be covered and then decided that the issue was moot because nothing the NSC staff was doing would be a violation even if it were covered.[22] Thompson also remembered a conversation with Bretton Sciaroni, the counsel for the Intelligence Oversight Board.

> I told him that we at NSC Staff had already determined that the NSC Staff was not an intelligence agency under that definition. But the real message I left with him was that McFarlane had already represented to the members of Congress that whether or not we were subject to the Boland Amendment, we considered ourselves subject to it, or words to that effect. The reason being that Mr. McFarlane had already made the determination that we had not violated the Boland Amendment, so it was almost a moot argument to make.[23]

Whatever McFarlane's contemporaneously expressed view of the Boland Amendment might have been, he testified that his understanding of the role of the NSC staff was that it was limited to providing political support and direction for the Resistance movement, and did not include fundraising.[24] He also specifically denied that the President intended him to provide military assistance to the Contras.[25] Poindexter testified, however, that he was familiar with, and approved the details, of North's work as a "switching point" for activities related to the democratic Resistance advice.[26] Poindexter also said that the President was generally aware of North's role,

and that he believed the President had implicitly authorized the NSC staff's efforts.[27]

Whatever the differences in their understandings, McFarlane and Poindexter both chose North to carry out their instructions. North claimed his activities throughout were fully authorized. McFarlane claimed that several of North's actions during his tenure were not authorized, but Poindexter said that he had generally authorized North's actions.

During McFarlane's tenure as National Security Adviser and after the previously appropriated funds had been used up in or about June of 1984, the National Security Council Staff engaged in a series of activities described below.

Fundraising From Third Countries

Beginning in June of 1984, Country Two provided what ultimately amounted to $32 million for support of the Resistance; the support was provided at the level of $1 million per month in 1984, and then in a lump sum of $25 million in early 1985. It is clear from the hearing record that the NSC staff was engaged in an effort to encourage Country Two, and other third countries, to support the Contra cause, both politically and financially. Even though McFarlane and North both claim not to have "solicited" funds, McFarlane personally encouraged contributions, unsuccessfully from Country One and successfully from Country Two. North, occasionally using Gaston Sigur who was then on the NSC staff, General Secord and General Singlaub, encouraged contributions from several other countries as well. It is important to note, however, that there is no evidence of any kind in the records of the Committees which suggests that any quid pro quo was sought or received in return for any third country contribution to the Resistance.

Raising Private Funds in Support of the Resistance

Beginning in the spring of 1985, a group of private individuals began to raise funds to support the Contra cause. North met with the fundraisers and their potential contributors, alone and in small and larger groups, and helped acquaint these groups with the humanitarian and military needs as well as the political and military situation of the Resistance. In addition, North helped to arrange White House briefings for certain groups of contributors on a few occasions; the President spoke at some of these briefings. The President believed, and was consistently briefed, that the private groups were using their funds to purchase television advertising to promote the Contra cause and to engage in other such public awareness programs on behalf of Administration policies. There is no evidence that North was aware of people using the promise of such meetings to obtain contributions of a certain minimum amount. Generally, North did not personally solicit funds from contributors, although the record is clear that he was acting in general concert with individuals who were soliciting funds and that he did direct the disposition of some of the funds so raised. From the record, it also appears that the nature of North's presentations to groups was that he tried to present the reasons behind the President's policy of support for the democratic Resistance and opposition to the Sandinistas. These presentations apparently were similar, if not identical to ones he gave to many other groups of noncontributors to persuade them to support the President's policy.

Assisting in Arms Purchases and Humanitarian Supplies

During McFarlane's tenure as NSC Adviser, North asked General Secord, by then a private citizen, to assist the Contras in their arms procurements. North met with Secord and, on other occasions, with General Singlaub to obtain their assistance as private citizens. The arms were purchased with third country or private funds. It seems clear that Colonel North discussed the proposed procurements with Resistance leaders, and also made his own suggestions for appropriate procurements.

North appears to have had detailed knowledge about what was being shipped, and the shipment details necessary to coordinate air drops with the Resistance. In fact, there is evidence that North intervened on at least one occasion with officials of a foreign country to persuade them to allow a proposed shipment of arms which had been purchased with private funds to proceed.[28] McFarlane testified during his second appearance that he did not regard these activities as having been authorized by him.[29]

Giving Military Advice to the Democratic Resistance

In addition, during McFarlane's tenure and during the period of the most restrictive Boland Amendment, North appears to have given strategic military advice to the democratic Resistance. Secord testified that North actively participated in a "program review" meeting in Miami in July 1985, a principal purpose of which was to discuss the overall military situation of the Resistance and to decide how their military effort should be reoriented.[30] North provided military advice of a general nature to the Resistance on the other occasion as well.[31] McFarlane claimed he was not informed of the Miami "program review" meeting by North, or of other specific occasions on which North gave military advice, although he also testified that he did not regard such advice as central to the Boland Amendment's restrictions.[32] North specifically denied having given tactical military advice on specific military operations.[33]

Giving Intelligence to the Democratic Resistance

During the entire period of the Boland Amendment's restrictions, both the CIA and the NSC were expected to continue obtaining information about the activities of the democratic Resistance as part of their normally assigned duties. Obtaining detailed knowledge about the Resistance by all normal intelligence gathering methods, including direct conversations with Contra leaders, was clearly consistent with the law at all times.

During McFarlane's tenure, North provided intelligence to the Resistance by conveying information provided to him by certain officials of the Central Intelligence Agency who testified they did not know North was passing it to the Contras. Some of the information was principally of military significance, and was provided for defensive purposes, while other information could have been used for humanitarian purposes as well. The CIA could not have passed the information directly, under the agency's own cease and desist order, which, as we indicated earlier, went well beyond the requirements of the Boland Amendment. North also developed an informal intelligence source of his own in the person of Robert Owen, whom he used as a secret courier and transfer agent for cash and intelligence.

Private Air Resupply Network

In the fall of 1985 after the "program review" meeting in Miami, North approached Secord to develop a privately funded private air resupply network to support the Resistance. General Secord proceeded to establish this network during late 1985 and ran it through early October 1986, when a resupply airplane carrying Eugene Hasenfus was shot down over Nicaragua. This air resupply network delivered both lethal and humanitarian cargo to Contra forces operating within Nicaragua. The air resupply network was funded by private contributions, the Iran arms sales and some third country funds.

As part of the development of the resupply network, North, through other U.S. officials in Central America, such as CIA station chief "Tomas Castillo" and Ambassador Lewis Tambs, sought the creation of an emergency airstrip in a neighboring Central American country. It appears that this was done with Admiral Poindexter's approval; McFarlane, who had essentially left the NSC by then, claimed he did not know about the airstrip or about instructions to Ambassador Tambs to open a "Southern Front." [34]McFarlane testified that North did not tell him about Secord's involvement in this resupply network, though he stated that North did indicate that "occasionally" air deliveries were made to the Resistance. McFarlane denied he had authorized North to direct the air resupply of arms to the Contras.[35] Poindexter said he was aware of the air resupply network. He regarded it as a byproduct of Colonel North's other efforts for the Resistance, within the scope of the President's direction to the NSC staff.[36] In the course of the resupply effort, North provided some people with KL-43 encryption devices. This occurred *after* the law was changed to permit intelligence agencies to provide communication assistance and information to the Resistance.

Conclusion

In sum, the NSC's activities, aside from its normal duties, generally fell into two categories. One involved information sharing with the democratic Resistance and encouraging contributions that—with the possible exception of the diversion—were perfectly legal. Activities such as these could not constitutionally have been prohibited by statute. The second category involved North's military advice to the Resistance and detailed coordination of the resupply effort. Since the NSC was not covered by the Boland Amendment, these activities were clearly legal. But even if one assumes the NSC were covered, we showed earlier that the amendment did not prohibit general military advice and resupply coordination. Some of these latter activities, however, perhaps could have been reached by Congress without violating the Constitution. It was to protect these unpopular, but legal activities from possibly being made illegal that we believe the NSC staff misled Congress. There is no evidence that the President knew more than general information about this side of North's activities, or anything at all about the deceptions of Congress.

State Department

Little or no evidence surfaced during these hearings to suggest that the State Department was used wittingly or unwittingly to circumvent the Boland Amendment. Individuals such as Louis Tambs (Ambassador to Costa Rica) and Robert Owen (who had a contract relationship with UNO under a grant agreement with the Nicaraguan Humanitarian Assistance Office, or NHAO) did assist North with the resupply effort, but this was done without the knowledge and blessing of their superiors at the Department. Owen's assistance arguably took place during his "off" hours, but Tambs' assistance with the establishment of the Point West airfield was clearly done in the course of his long, ambassadorial day. Even Tambs' activities, however, fell within the normal, *legal and constitutionally protected* scope of activity for an ambassador. His error was to bypass his superiors in the State Department by reporting outside channels to North.* That

*Ambassador Tambs had been a friend of Col. North's going back to 1982 when Tambs was a consultant to the NSC. Later when Tambs was the Ambassador to Colombia, North personally

is, the error—like that of a CIA station chief, "Tomas Castillo"—was a matter of violating his own department's policy rather than violating the law.

Robert Owen's activities received a great deal of attention during the early days our public hearings. The examination of his role during the period of his NHAO contract seem to proceed upon two suspicions: (1) that North had placed Owen in the NHAO program to be his eyes and ears in Central America; and (2) that North had also done this to gain access to NHAO facilities to assist the covert resupply effort. The major problem was how to reconcile his "off-hours" assistance with lethal aid drops, with the humanitarian purposes NHAO was designed to accomplish. The Boland Amendment clearly would have prohibited the use of NHAO resources for lethal assistance, and Owen did not step over that line. As a limitation on appropriations, the Boland Amendment does not cover a person's private time. However, Owen's contract with NHAO reads as if it may well have prohibited such off-hours activity, even if the Boland Amendment did not.[37] In any event, Owen was not totally forthright with the State Department about the assistance he gave North. In that respect, he joins a long list of people whom North persuaded to work outside normal channels.

Elliott Abrams

The main State Department focus of the Nicaragua side of the Committees' investigation, however, was Elliott Abrams, Assistant Secretary of State for Inter-American Affairs. Abrams was the main spokesman for the Contra program.[38] As chairman of the Restricted Interagency Group (RIG), Abrams therefore was a natural object of suspicion for those opposed to Contra aid.

The theory that seemed to structure the investigation of Abrams' role was that he either knowingly assisted and advised North, or that he realized what North was doing but ignored it to let North keep the Resistance alive while the Administration fought for renewed Congressional aid. There was a third possibility testified to by Abrams, however: that North effectively kept Abrams in the dark. The evidence more clearly substantiates what Abrams said than either of the other, more conspiratorial theories. In this respect, Abrams was more of a victim than a co-conspirator. He was deliberately kept uninformed by North and Poindexter, just as were the President, Secretaries Shultz and Weinberger, the Intelligence Oversight Board's Bretton Sciaroni, and the United States Congress.

Abrams was not engaged in any conduct that even remotely qualified as a violation of the Boland prohibitions or of any other law.* Indeed, on the one occasion he was presented with information about the activities of the CIA's Tomas Castillo, he immediately went to the Secretary of State[39]. This happened about three weeks after Hasenfus's airplane had been shot down. During this period, Abrams appears to have been misled by North and by CIA officials. As a result, he repeatedly informed Congress, the press and the Secretary, to his later chagrin, that there was no Government involvement with the resupply effort.[40] As he himself said during our hearings, his statements were "completely honest and completely wrong"[41]. So convincing was Abram's testimony on this point in our hearings that Senators Rudman and Mitchell, and House Vice Chairman Fascell, characterized Abrams as having been hung out to dry.**

An even better barometer of the extent to which Abrams had been kept in the dark by North was his testimony regarding his knowledge of critical key players and their involvement in the resupply effort and in the Southern Front. With regard to the resupply, Abrams testified that he did not know General Secord, Robert Dutton, Richard Gadd, Rafael Quintero or Felix Rodriguez, let alone what role they were playing in the resupply effort.[42] He stated categorically that neither he nor anyone else at State knew that Owen, in his "off-hours", was assisting North in coordinating lethal drops to the Resistance. He asserted that if he or anyone at State had known this, Owen would have been fired immediately.[43] There is no evidence to challenge those assertions, nor were they challenged by the Committees.

Some on these Committees questioned whether Abrams lived up to the instructions Secretary Shultz gave him to "Monitor Ollie".[44] Underlying the questions seems to have been an assumption that Abrams knowingly averted his glance. To reach this conclusion, however, one has to believe that everyone in government always should act on the assumption that his or her colleagues are potential liars. Business would then be conducted through investigative tech-

saw to it that troops were sent to the embassy in Colombia to protect Tambs when his life was threatened by drug dealers. Tambs Test., *Hearings*, 100-3, 5/28/87, at 366-67.

* A clear indication of the extent to which the State Department attempted to comply with the Boland Amendment is the level of debate within the NHAO program over what constituted humanitarian aid. As Elliott Abrams testified:

"This was not something we did carelessly. I remember . . . Ambassador Deumling coming to a RIG meeting and saying the Contras have asked for wrist watches, can I pay for wrist watches. . . . This was deadly serious because of the legal restrictions. We actually debated. Of course, wrist watches weren't lethal aid, but were they humanitarian aid? . . . We ultimately decided . . . wrist watches were okay." Abrams Test., *Hearings*, 100-5, 6/2/87, at 35-36.

** Abrams Test., *Hearings*, 100-5, 6/2/87, at 131, 142, 154. In chapter 7 of the Majority Report, Assistant Secretary Abrams is quoted as having admmitted to these Committees that certain statements that had been made by him were "completely wrong." For some reason, the majority failed to point out that Abrams preceded that admission by noting that while the statements were completely wrong, they were "completely honest." *Id.* at 65.

niques rather than through normal comity. Congress does not apply this standard when it looks at Administration presentations to Congressional Committees, nor should it apply it to relationships inside the Administration. Abrams—like Secretaries Shultz and Weinberger on the Iran initiative, and like several Committees of Congress that asked about North's Contra assistance—proceeded on the assumption that his colleagues were telling him the truth. If they were not, the blame surely belongs more to the deceiver than the deceived.

The other major area of inquiry regarding Abrams was his November 25, 1986 testimony before the Senate Select Committee on Intelligence on the clearly lawful solicitation of funds from Brunei. With regard to the solicitation itself, the only problem that seemed to raise any concern during the hearings was the fact that Abrams gave the Brunei representative a mistyped Swiss bank account number that was provided by Colonel North instead of using another number supplied by the Chief of the CIA's Central American Task Force. The account number North intended to give Abrams was one controlled by General Secord and Albert Hakim. However, despite theories and suspicions to the contrary, Abrams' selection of that account, on the advice and with the blessing of his superiors at State, was based on his belief that it was an account controlled by the Resistance. His selection of that account was not part of a clandestine venture calculated to assist Lake Resources and the Secord-Hakim enterprise.[45]

There is no question that Abrams exercised very poor judgment in his SSCI testimony by attempting to answer questions regarding third country fundraising in a technically correct, but misleading, manner to protect the confidence of Brunei. Abrams himself described it as an indefensible and foolish act that he greatly regretted.[46] He surely could have asked the Senators to let him refrain from answering the question until he had a chance to discuss the matter with the Secretary. Ultimately, Abrams apologized to the Senate Intelligence Committee for his error, six months before these hearings began.[47]

The CIA's Role

The Central Intelligence Agency was not a major player in the Administration's efforts to help the Nicaraguan Resistance during the period of the prohibitory Boland Amendments. That was partly because the amendments explicitly limited the CIA and other intelligence agencies. In addition, the CIA, as an agency, wanted to avoid even coming close to the edge of the law. As Admiral Poindexter said in our public hearings, "They wanted to be careful and Director Casey was very sensitive to this, they wanted to keep hands-off as much as they could." [48]

Of course, the agency could not simply keep hands off. For one thing, it was expected throughout this period to continue intelligence gathering and political support for the Resistance. At the same time, the CIA felt it had to be responsive both to Congress's mandate and to the Administration's strong support for the Contras. The result was an extremely difficult situation for career professionals who had to implement policy at the operational level. The Chief of the Central American Task Force described his feelings this way:

> I knew almost from the beginning that I was caught between the dynamics of a giant nutcracker of the Legislative on the one hand and the Executive on the other, and I was in the center of a very exposed position.[49]

The agency had been traumatized during the post-Vietnam Congressional investigations of the 1970s. The Latin American division was traumatized once again when five reprimands were issued as a result of the agency's role in helping to prepare a manual for the Resistance that some interpreted as talking about assassination,[50] a technique the U.S. was explicitly prohibited from using. As a result, the CIA was very concerned throughout this period with protecting itself, and the government's future intelligence capability, from political retaliation.[51] Two different effects flowed from this. First, as a matter of internal policy, the CIA regularly issued extremely conservative guidelines that avoided taking legally defensible actions for political reasons. Second, we believe this posture, and Director Casey's own protective feelings toward the agency, contributed to Casey's decision to work closely with Col. North.

Because of their efforts to avoid both sides of the nutcracker, four of the CIA's career civil servants find themselves the subject of persistent reports suggesting that their careers may now be on the line. The four include (1)"Tomas Castillo" (a pseudonym), who was chief of station in a Central American country, (2)the Chief of the Central American Task Force, ("C/CATF") (3)Duane (Dewey) Clarridge and (4)Clair George, the deputy director for operations (DDO). Castillo is now on duty pending a final determination of his status. The others have been the subject of press reports. We discuss the major allegation about Clarridge in our section on the legal issues raised by the Iran initiative. For the others, the main questions all grow out of the CIA's relationship with the Nicaraguan democratic Resistance during the time of the Boland Amendments.

There is substantial conflict in the testimony we have received, particularly between Castillo and Task Force Chief. It is impossible for us to resolve all of these conflicts in our own minds. Our bottom line judgments, however, are as follows:

—The CIA tried as an organization to work within the Boland Amendment, and succeeded.

—The essential dispute between Task Force Chief and Castillo is whether Task Force Chief's policy guidelines were clearly articulated, whether Castillo overstepped those guidelines, and whether Castillo properly informed his superiors of what he was doing.

—The policy guidelines themselves, which should have been written more clearly, were issued for political reasons, and not because Task Force Chief thought Castillo had overstepped the CIA's legal authority.[52]

—Finally, we do not believe these individuals deserve to pay with their own careers for the political guerrilla warfare that was going on over Nicaragua between the President and a vacillating Congress.

We will not dwell on the legal issues here. At the end of the Boland Amendment chapter, we discussed an internal CIA legal memorandum with which we agree. That memorandum, it will be remembered, argued that it was legal for the CIA to:

> provide information involving safe delivery sites, weather conditions, hostile risk assessments and the like to assist the Nicaraguan Resistance in their resupply activities where the CIA's role did not amount to participating in the actual delivery of material or in planning, directing, or otherwise coordinating deliveries during the course of or in the context of specific military engagement.[53]

This legal opinion should have been written in early 1986, instead of a year later.[54] But it was not, and people had to make judgments on the ground. We believe their judgments were legally correct. Nevertheless, a few of them have been controversial.

In judging the agency's activities to support the Resistance, it is important to keep the level of assistance in perspective. Tomas Castillo was the CIA official who worked most directly with the Resistance's private resupply network. He apparently was far more active in this respect, for example, than the passive stance of the CIA elsewhere in Central America. Despite this, he has testified that he spent only about one-tenth of one percent of his time in 1986 facilitating the resupply effort.[55]

The Task Force Chief was a member of the Restricted Interagency Group, or RIG, along with Abrams and North. In this capacity, he had plenty of opportunity to see how North had become the "point man" for the Administration's Contra policy. According to the Task Force Chief, constant feuding among RIG members before Abrams became Assistant Secretary, eventually led to a situation in which power gravitated toward North.[56] In addition, North managed to develop a relationship with Castillo,* in which Castillo—like Ambassador Tambs—was willing to work with North outside of normal channels. Castillo said he disagreed with the Task Force Chief on various policy matters and hoped he could get his voice heard through North.[57] North claimed that Casey knew Castillo reported to North.[58]

The relationships between Castillo, North and the Task Force Chief obviously led to some misunderstandings and missed communications. The main issues on which these Committees focused were the development of an emergency airfield and Castillo's role in passing useful overflight intelligence to the private suppliers. The last issue also has led to a dispute over the Task Force Chief's instructions to Castillo and Castillo's response.

Southern Front Air Strip

Castillo and the Task Force Chief corroborate each other, and the other evidence we have seen, on the absence of a significant CIA role in conjunction with the construction of a privately owned, emergency landing strip to help the Southern Front resupply effort. Castillo did admit that he was "probably" the first to have the idea that the air strip should be built.[59] Castillo testified that a resupply operation was a logistical necessity to supply the insurgents he wanted to see moved out of a neighboring country into Nicaragua. He considered the move to be important politically, because the Resistance's presence in the other country was causing resentment in that other country.[60] The airstrip was in turn required for the success of the resupply operation.

Castillo himself, upon specific instructions from the CIA,[61] took no concrete steps to assist in the plan to construct an airstrip, other than to visit potential sites on one occasion, on his own decision, as an observer with Robert Owen.[62] Castillo specifically denied that he instructed Ambassador Tambs to seek authorization for the airstrip from local officials.[63] He testified that Ambassador Tambs' goals with respect to creation of a Southern Front were based on instructions Tambs received from Oliver North, but Castillo denied North asked for the airstrip.[64] Castillo felt his role was "passively [to] monitor" the activities of the private benefactors with respect to the airstrip; he knew those activities were being coordinated by North.[65]

The Task Force Chief's testimony parallels Castillo's on these points. There is no evidence to indicate that the Task Force Chief, on his own or on behalf of the Agency, instructed or suggested to anyone, that Castillo should establish a Southern Front for the Contras. He categorically denied (as did Elliott Abrams) ever knowing about, let alone agreeing to, North's alleged discussion with Tambs and Castillo about the necessity for opening a Southern Front.[66] Indeed, the first time he can recall learning about the airstrip was in a brief conversation with Castillo at a

* As with Tambs, North developed a personal friendship with Castillo. The North and Castillo families vacationed together in February 1986. See Castillo Test., *Hearings*, 100-4, 5/29/87, at 8.

meeting on December 9, 1985. The Task Force Chief's best recollection was that he was "worried and concerned" when Castillo indicated that it was being built and that Castillo did not mention who was doing the building. He simply assumed that it was being built by the private benefactors and the Task Force Chief cautioned Castillo to make sure that whatever he was doing was legal.[67]

Several months afterward, when North started showing pictures of the work being done on the airstrip at the conclusion of a meeting of Administration officials, the Task Force Chief had to pull him aside to caution him about the wisdom of showing such pictures. It was at that point that the Task Force Chief became concerned that North might not only be exceeding the boundaries of the politically acceptable in his dealings with this highly controversial program, but flaunting it before others. He realized he did not have the power to control North. "I was going to keep the agency and myself within the bounds of propriety and legality," but "there were things that were beyond my powers." [68]

Providing Intelligence for Air Resupply

In February 1986, General Secord complained to Director Casey that the air resupply effort was not getting any help from the Central American Task Force.[69] At about this same time, in February, North distributed KL-43 communications encryption devices that he had obtained from the National Security Agency to Secord, five people in Secord's resupply network and Castillo. North also kept one for himself.[70] It should be noted that these devices were distributed after Congress, in December 1985, passed a law specifically authorizing intelligence agencies to share intelligence with the Resistance, and to spend money to help the Resistance with communications.

Castillo testified that he received a KL-43 machine from North, through Rafael Quintero, in order to relay drop zone information between the Southern Front Commanders to the private benefactors.[71] From this point forward, Castillo was described by both General Secord and Robert Dutton as having been very helpful—Dutton used the word "critical"—to the resupply effort.[72] Castillo's facilitation of the efforts of the resupply operation involved the passing of information such as the location of proposed drop zones and times back and forth from the southern front commanders to the private benefactors.[73] During the Spring, Castillo also requested intelligence such as hostile risk assessments and flight vectors from the CIA to support the flight activities, and filed intelligence reports concerning the results of these activities.[74] Castillo specifically denied that he was involved in the planning of any of the resupply flights.[75] He also denied, in response to a point made by Dutton, that there was any United States Government involvement in obtaining permission for the refueling of two resupply flights at a Central American country airport.[76]

Castillo testified that the Chief of the Latin American Division ("Division Chief") and the Task Force Chief knew of his activities,[77] and the above cited cable traffic from the Spring would bear him out. The first successful lethal air drop was in April, and was supported by cabled intelligence from headquarters. No one in the operations directorate knew, however, about the KL-43 until the Division Chief designate's maiden visit to the country in April 1986.[78] Castillo testified that he asked the new Division Chief for assurance that relaying information with the KL-43 between the private benefactors and the Resistance was legal under the Boland Amendments. He said that the Division Chief designate assured him he would look into it upon returning to Washington.[79]

The Task Force Chief testified that his superior, the Division Chief, never informed him of this discussion with Castillo.[80] The Task Force Chief also said that he did not know about Castillo's direct contact with the private benefactors until a May 1986 CIA officials' meeting that he, Castillo and the Division Chief attended. He said he was surprised to learn at that meeting how closely Castillo had been dealing with the private benefactors.[81] At the meeting, Castillo said that he let it be known that he thought the fact that he was the communications link between headquarters, the Resistance and the supply operation, presented a "problem." He suggested, therefore, that the agency train someone from the Resistance to take over that role.[82]

On May 28, the Task Force Chief sent Castillo the following message:

> [Headquarters] wishes to reaffirm with . . . guidelines that no repeat no . . . materiel or monetary support can be provided to UNO/FDN or UNO/South representatives. . . . can provide advice and commo [communication] equipment as approved by hqs. and can engage in intelligence exchange as approved by hqs.[83]

After this cable, the agency worked to find and train an UNO communicator. At this point, the President's $100 million aid package was going through the Congress. On June 24, a Resolution of Inquiry into North's support of the Resistance was filed in the House, in a move whose timing was obviously meant to influence floor votes. The next day the House, in a major reversal, voted an aid package for the Contras.

On July 12, just 17 days after the House vote, the Task Force Chief sent a vaguely worded, confusing cable that read, in part, as follows:

> Headquarters has reviewed our commitment to provide secure communications. . . . We have taken a second look at the commo link. To date we have maintained our distance from the private

benefactors (PB) who are providing assistance to the Resistance and have repeatedly briefed Congress that we do not have any relationship with the PB's. The proposed program of assistance would change our policy. . . . There have been numerous allegations of violations of law by PB's. We do not have a firm handle on whether all of the allegations floating around are false. . . . We have come too far at this time to let the solid operations that [deleted] has built to be jeopardized by elements which we are unable to control.[84]

The Task Force Chief and Castillo have very different interpretations of this cable. The Task Force Chief says it was a "cease and desist" order, especially in light of the one he had sent in the end of May.[85] It is interesting to note, however, what it was he was supposed to cease and desist doing. The Task Force Chief describes the cable as telling Castillo, in effect, to break all contact with the private benefactors.[86] Based on his own testimony, the Task Force Chief assumed Castillo would still continue to get information to the resupply operation, but would work directly with the Resistance rather than the private benefactors.[87]

Castillo, in contrast, saw it as saying that what he was doing "to date" was acceptable. The outstanding feature of the cable, from his point of view, was that headquarters was telling him he was not going to get a communicator, but seemed to expect him to continue to be ready to get intelligence information to the resuppliers. "They were satisfying their situation, but not mine," Castillo said.[88]

As we read the cable, in context, the following points seem to stand out: (1) Headquarters was concerned primarily about the current legislative situation in Congress, and with representations that had been made to Congress. The concern, in other words, was political rather than legal. (2) Castillo had to address a tough set of problems on the ground. (3) The cable was not written clearly, if the intent was "cease and desist." Cease and desist orders can be, and often are, written simply without all of this cable's ambiguities. (4) If the Task Force Chief was trying to tell Castillo to use an UNO "cutout" to pass information to the resuppliers, he should have said so clearly. Of course, there would have been no legal difference between working directly with the suppliers or indirectly, through the Resistance. The difference, as seen by the Task Force Chief, was a domestic U.S. political one.

We want to make clear, as we interpret the cable, that we are not disputing the Task Force Chief's statements about his intentions. If we assume both the Task Force Chief and Castillo are telling the truth, as seems likely to us, it would mean that the Chief sent a poorly worded cable that let the sender and receiver reach different conclusions, with each reading his own problems and preferences into its meaning. The problem, in other words, appears to us to have been one of missed communications. That would not be the first time this has happened, nor will it be the last. Administrative errors such as these should not force the end of a career.

Congressional Testimony of October 1986

In September, when the Task Force Chief learned of the final airdrops coordinated by Castillo, he assumed that Castillo must have somehow found a way to assist without being in the middle of the operation and thereby placing the Agency at political risk.[89] The political problem came to a head in mid-October, after Eugene Hasenfus' airplane was shot down, when one of the Agency's people learned that Castillo had used a KL-43. Upon relaying that information to the Task Force Chief and Division Chief, an internal investigation was instituted.

Assistant Secretary of State Abrams was informed, on October 23, of this potential U.S. Government involvement in this network.[90] Abrams immediately informed the Secretary of State about this surprise turn of events which potentially undercut his prior Congressional testimony and media statements that there was no United States Government involvement with Hasenfus or with the resupply effort. This may have been particularly surprising to Abrams, because the Task Force Chief and the Deputy Director for Operations, Clair George, had been sitting next to him when he gave that unqualified testimony. Questions about George's statements, and the Task Force Chief's silence in the face of the Assistant Secretary's blanket denials, became a third major focus of the Committees' inquiry into the CIA's role.

George had advised the House Intelligence Committee on October 14, 1986, that the CIA was not involved in "arranging, directing, or facilitating" the private resupply missions.[91] Significantly, George stated that he could not speak for the rest of the U.S. Government.[92] Abrams spoke after George and expanded the claim, without knowing its falsity, to cover the whole government. The Task Force Chief stayed silent. The Task Force Chief knew Castillo had been "facilitating" the resupply effort in the spring, but may have thought Castillo had not done so in September.

In testimony before these Committees, George stated that his denial was based on incomplete information, that the CIA did not organize or conduct the resupply operations, and that he wanted to protect the CIA. He apologized for the problems caused by his testimony.[93] The Task Force Chief also said that he regretted his silence in response to Clair George's unqualified denial of any CIA involvement, and Secretary Abram's denial of any U.S. Government involvement in the Hasenfus flight.[94]

One should not underestimate our concern over misleading testimony. We are satisfied, however, that this was not a byproduct of an orchestrated conspiracy to keep Congress in the dark.

Conclusion

The CIA had to work under difficult, politically charged circumstances. To protect the agency, its personnel steered a wide berth around the prohibitions of the law. This was particularly difficult to do in an environment in which people were dying for a cause the Administration and the agency supported. There were misunderstandings in management, and errors in judgment, particularly in Congressional testimony. But the blame for this situation must rest upon unclear laws, and a vacillating Congressional policy, at least as much as it does upon the career professionals who were faced with the Herculean task of implementing the law.

Private Fundraising

The private fundraising activities in support of the Contras conducted by Carl R. (Spitz) Channell and Richard Miller received considerable attention in the news reports surrounding the Iran-Contra affair. The fundraising efforts were also the focus of early criminal prosecutions by the Independent Counsel, and were explored somewhat during our public hearings. They have also received significant attention in the Majority's Report, where it is portrayed in a lengthy chapter as a project devoid of proper purposes.

We cannot agree with the analysis and conclusions of the Majority Report. We agree that a private fundraising effort organized and conducted by Mr. Channell raised funds for the Nicaraguan democratic Resistance; and we agree that the manner in which the fundraising activities were carried out can be criticized. We are in particular concerned that a rather sizable portion of the donated funds appears not to have actually gone to the Contras. But we disagree with the majority's theme that the fundraising activities represented an illegal conspiracy imbued throughout with criminal intent and improper motivations. Based on the evidence, we see the private contributors as being worthy of praise rather than scorn. For the most part, their actions represented good faith activities of well-intentioned American citizens motivated by a genuine—and completely legal—desire to do what they could to help the Contras in a time of need. The private actions, especially those of the donors, were patriotic responses in harmony with the policies of the President that were designed to rebut the growing spread of Soviet communism in North America. Our basic conclusions are as follows:

—Channell developed the private fundraising organizations and controlled their solicitations. Colonel North did not solicit money. He did not conspire with Channell to commit tax fraud. Any suggestion that North deliberately created or nurtured the fundraising network to provide tax write-offs, tax expenditures, or backdoor Federal financing for the Contras, is wholly without support from the evidence.

—President Reagan had no specific knowledge of the private fundraising efforts. He generally believed the persons he met with had donated to a media campaign designed to generate support for further Contra funding by Congress.

—President Reagan met with individuals in the White House to thank them for their long term support for his policies, not for a particular contribution to Channell's organization.

—This investigation unfairly chastised conservative fundraising efforts that supported foreign policy goals inconsistent with those of the majority of Congressional Democrats. However, the Committees failed to investigate parallel fundraising efforts by organizations that support the Communist forces in Central America, and use Members of Congress in their fundraising.

—Finally, the private fundraising investigation of our Committees needlessly harassed private citizens whose political views happen to be contrary to the views held by the majority, by asking them questions that intruded on their privacy and were irrelevant to the Committees' investigation.

The Channell-Miller Network

The Channell-Miller fundraising network developed as a result of common interests and chance occurrences. The Committees have not uncovered evidence that Colonel North sought to establish a private fundraising group or that he motivated any individuals such as Channell and Miller to operate the necessary organizations. The evidence demonstrates that Channell was the primary force behind the private fundraising organizations. Colonel North was a relatively minor participant.[95]

When Channell left the National Conservative Political Action Committee (NCPAC) in 1982 he possessed a valuable asset—a relationship with contributors willing to donate large sums of money to political causes. He formed a network of organizations, one of which was the National Endowment for the Preservation of Liberty (NEPL), incorporated in 1984 as a 501(c)3 tax exempt corporation. According to section 501(c)3 of the Internal Revenue Code, a tax exempt organization must be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes." *

* Channell also formed several non-charitable organizations around this time period. He formed the American Conservative Trust (ACT) in 1984 as a Federal election political action committee. He also formed the American Conservative Trust State Elec-

NEPL was the major organization Channell used for his fundraising in support of the Resistance, and it is the one whose tax exempt status later became of interest to the Independent Counsel.

Raising Funds for the Resistance

The idea of raising money for the Resistance was Channell's. He identified the Nicaraguan Refugee Fund Dinner held in Washington, D.C. on April 15, 1985 as the event that inspired him.[96] Following President Reagan's speech at this dinner, Channell recognized that his contributors were enthusiastic supporters of the Administration's Central American program. Channell initially intended to raise money for an educational media program designed to win Congressional support for U.S. aid to the freedom fighters. He deviated from his original idea, however, when he realized that his contributors would be interested in donating directly to the freedom fighters instead of to a media campaign. Individuals working closely with Channell believed he chose the content of his fundraising themes for the purpose of drawing out the resources of his wealthy contributors.[97]

There has been an impression created that Channell was working at North's behest. But Channell solicited money for the freedom fighters (from John Ramsey of Wichita Falls, Texas) two months before he even met Colonel North.[98] Colonel North attempted to discourage Channell from raising money for lethal materiel for the Contras on at least two occasions.[99] Channell ignored this advice and directly approached Adolfo Calero, leader of the FDN. It was after learning of the Channell-Calero discussions that Colonel North directed the funds to their most efficient purpose.[100]

Channell's Control

Another sign of Channell's control over his fundraising operation was his relationship with his many consultants. Channell surrounded himself with consultants who had substantive expertise and access to influential political leaders. In March or April of 1985, he retained Richard Miller and his consulting firm, International Business Communications (IBC). Miller and his partner had a contract with the State Department in which they worked closely with the leaders of the Nicaraguan Resistance and with members of the Reagan Administration. Channell used IBC to work on practically every aspect of fundraising efforts for many issues. Channell also retained the services of David Fischer,* Dan Kuykendall, Penn Kemble, Bruce Cameron, Miner and Fraser, the Robert Goodman Agency, Martin Artiano, Eric Olson and others.

Channell perceived a division of responsibility among his associates in the fundraising organization. Channell was the creative force and developed the fundraising concepts for his various projects, not all of which related to the Nicaraguan Resistance. Daniel Conrad handled the administrative matters. Miller, Kuykendall, Fischer and the other consultants provided advice.[101] The clear indication from the record is that Channell—not North or anyone else—was thoroughly in charge of the Channell network of organizations.

White House Role

Although Channell was in charge of his network, two kinds of questions have been raised about his relationship with the Administration. One is whether the President was using the power of his office to help Channell raise funds for the Resistance. The other deals with the level and legality of North's role.

President Reagan

Channell used White House briefings and photo opportunities with the President as a way to thank contributors for their support of Administration policy.[102] The individuals who had a photo opportunity with the President, however, were not being thanked for a single contribution to Channell's organizations. Rather, the President thanked them for their long-term support of his policies. As Channell said, "I don't know of anybody who was thanked by the President solely because of a single act." [103] Channell denies ever telling contributors they could meet with the President if they made a large contribution to his organization.** He did not believe he had any control

tion Fund (ACT-SEF) as a state political action committee to take advantage of state laws allowing corporate contributions to such entities. In 1983, he formed Sentinel to lobby Congress under the terms of Section 501(c) 4 of the Federal tax code. In the Spring of 1986, Channell formed the Anti-Terrorist American Committee as a federal political action committee to focus on Congressional attitudes towards terrorism. During this time period (1984-1986) Channell also formed other, less active organizations, including the Channell Corporation which was his original for-profit consulting corporation. See Channell Dep., 9/1/87, at 62-65.

* David Fischer, a former special assistant to President Reagan, was instrumental in arranging several meetings at the White House for Channell's contributors. The Majority Report suggests that Fischer and his colleagues, Martin Artiano and Richard Miller, were involved in selling meetings with the President for a set fee. While the evidence suggests that Channell viewed his consulting payments to IBC, Fischer and Artiano as fees for White House meetings, it appears that Fischer himself is as unaware of Channell's view. Fischer's retainer agreement with IBC was based on Fischer's understanding that he would provide consulting advice on a large variety of Channell's public education projects, including most notably a project regarding the strategic defense initiative, and a series of messages celebrating the bicentennial of the U.S. Constitution. Fischer's efforts to arrange meetings at the White House represented a small percentage of his work for IBC.

**During the public hearings, one contributor, William B. O'Boyle said that Channell told him he could meet with the President if he contributed $300,000. See Coors, Garwood and O'Boyle Test., *Hearings*, 100-3, 5/21/87, at 119. During the same day's

over photo opportunities with the President and in fact several requested meetings were not agreed to by the White House.[104]

Colonel North

North briefed Channell's potential contributors and directed the disposition of funds after Miller received them. He did not solicit money from contributors and made it his practice not to be present when money was solicited by others. He made speeches to and met with people from whom Channell was trying to raise money.[105] North would brief potential contributors on the weapons needs of the Contras and Channell often would followup by asking for funds directly related to Colonel North's briefing. At times, North also prepared lists of humanitarian and military needs of the freedom fighters that he turned over to Channell. We have not received any evidence to suggest that the items North briefed contributors about were actually purchased. Channell never knew if weapons were ever purchased with the money he sent to IBC.[106]

Conclusions

It is fully legal for private individuals to raise money for weapons, and then send that money to bank accounts controlled by the Nicaraguan democratic Resistance. The information to which Channell pled guilty was not about raising money for lethal aid for the Contras *per se,* but about using a tax exempt corporation, NEPL, to do so. Channell formed several entities in his fundraising network to respond to the complicated tax laws covering charitable and political activities. There is no evidence that indicates North knew about the tax problem, much less conspired with Channell and Miller. This conclusion is supported by the fact that Channell did not know of any contributors who donated money because NEPL was tax exempt who would not have donated if NEPL were not tax exempt.[107] As for Colonel North's other activities, there is no evidence that North instructed Channell to use NEPL to raise money for the Contras.[108] In addition, he did not solicit money from contributors.[109] There can be no question that North knowingly conveyed the impression that he favored what Channell was trying to do, but there is nothing wrong with the White House openly endorsing private activities in support of Administration policy.

Left Wing Private Fundraising

Conservative fundraising organizations have been criticized during this investigation because they have raised money to support policy goals that a majority of the Democratic Members of Congress did not support. Clearly, it is permissible under current law to raise money for foreign political movements, including military activities. If there were any question about this, the Committees should—for the sake of a balanced, fair record—have devoted similar resources investigating organizations that support left-wing forces in Central America opposed to United States foreign policy that use Members of Congress in their fundraising.

Several organizations have opposed United States policy in Central America by sending money and supplies to El Salvador. The most notable is the Committee in Solidarity with the People of El Salvador (CISPES) which Assistant Secretary Abrams described as an organization that "essentially serves as a front for the FMLN guerrillas in El Salvador".[110] According to a 31 page set of State Department cables about these groups that was introduced by Rep. Bill McCollum as a Committee exhibit, CISPES was founded in 1980 by the leader of the Salvadoran Communist Party, Shafik Handal.[111] This Washington, D.C. based organization coordinates efforts of a major U.S. support network. CISPES activities are said to include, among other things, a program to send material aid to Central American struggles and "creative harassment" at public appearances and speaking engagements of individuals who support U.S. policy.[112]

New El Salvador Today (NEST) is an organization that has worked closely with CISPES on fundraising, volunteer training, and other activities.[113] NEST has raised funds for projects in areas of El Salvador controlled by the Communist insurgents.[114]

There have been allegations, included in the State Department cables, to the effect that much of the money received by organizations such as these ends

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hearing, Joseph Coors said he had given money to what he thought was a Swiss bank account controlled by the Contras to buy an airplane for them. The account actually was owned by Lake Resources, a Secord-Hakim company. In addition, in the same hearing, Ellen C. Garwood said that Channell produced a list of weapons, in North's presence, that could be purchased with a contribution from her. We have no reason to believe these kinds of requests were typical. During the hearing, Rep. McCollum made the following statement, which was not challenged by anybody:

> It might appear to the casual observer that the three who are here with us . . . are typical contributors to the Spitz Channell organizations or, in the case of Mr. Coors, more directly to the Contras. But from my understanding of the depositions and various taking of testimony that went on and efforts to get statements from folks before, many many contributors were interviewed and deposed and not asked to testify because they did not have a list like was involved with Mrs. Garwood or they didn't have an occasion where they were suggested to them that they might see the President if they gave money and they didn't give to the Lake Resources account.
>
> I just simply want to make that clear to everybody who is involved—and I think it needs to be—that these three witnesses are not the typical contributors, and in fact, many others gave more money to Mr. Channell's organization.
>
> No list was found in those cases. Nobody else was told that they had to see the President or could see the President if they gave money and no other private contributor, at least that we discovered, received or sent his money to Lake Resources. See *Id.* at 146.

up in the coffers of guerrilla groups, or being used to provide welfare services that help the FMLN's political program in areas the FMLN controls. According to a State Department interview with former Salvadoran leftist guerrilla leader, Miguel Castellanos, the Western Democracies became the largest source of cash for the guerrillas during the 1980s. Castellanos served on the finance committee of the Popular Forces of Liberation (PFL) in 1978 and defected in 1985. He stated that the guerrilla groups set up institutions to collect donations from leftist humanitarian organizations and use that money without concern for its original purpose. Approximately 70% of the money which purported to go for humanitarian assistance actually went for the purchase of arms.

Senator McClure introduced an exhibit which is a fundraising letter for CISPES purportedly written over the signature of a Member of Congress.[115] Another exhibit is purportedly from another Member which states that "NEST is a non-profit, tax-exempt foundation which is sending humanitarian aid to those whose lives are most affected by the violence of the U.S. supported war."[116] The same two Members also hosted a reception for NEST in Washington D. C. on July 10, 1986.[117]

By repeating Castellanos' general statement and mentioning the fundraising role played by two Members of Congress, we do not mean to suggest that we have evidence to prove (1) that Castellanos' general allegation applies specifically to CISPES or NEST or (2) if it applies, that the two Members of Congress knew about the allegation. The point is that we can neither confirm nor deny the allegation because the Committees did not review the subject in its investigation.

The similarities between the conservative and liberal fundraising efforts for Central American groups are striking: both used politicians to support their respective causes, both used tax-exempt organizations, both may have donated money which was ultimately used to buy weapons, both supported foreign policy goals inconsistent with the declared Congressional policy. The primary difference between these two fundraising efforts is that the Committees have publicized the conservative fundraising efforts in an attempt to embarrass the President. If one set of groups was worthy of investigation, then so surely was the other.

Overstepping the Bounds

With the time it saved not investigating groups on the left, the private fundraising investigation has needlessly harassed private citizens who happen to hold conservative foreign policy views. Witnesses were forced to travel long distances and testify concerning money which they legitimately gave to political organizations.[118] Committee attorneys questioned witnesses about their political activity,[119] religious affiliations,[120] educational backgrounds,[121] employment history,[122] political lineage,[123] roommate's political contributions,[124] social associations,[125] and more. The subpoenas issued to many of Channell's contributors required tax returns, correspondence related to Nicaragua, documents concerning political contributions and other broad categories of personal papers, without any apparent effort being made to limit the material to items that fell within the Committees' legitimate mandate to investigate governmental activities.

The Committee used its subpoena powers, and the wedge of a reasonable inquiry into private fundraising, to go on a wide-ranging fishing expedition into irrelevant political issues. For example, counsel asked Martin Artiano if he knew who stole the 1980 Carter debate manuals.[126] David Fischer, who was responsible for Corazon Aquino's very successful American tour, was asked several questions to determine whether he prevented Aquino from meeting with liberal groups at the Kennedy Library in Boston.[127] Counsel inquired of several witnesses whether they had any knowledge of Ambassador Faith Whittlesey's dinner to honor Sir James Goldsmith.[128] Counsel also asked about Roy Godson's efforts to counter Soviet disinformation in Europe.[129] Finally, Carl Channell was asked about President Reagan's Strategic Defense Initiative.[130]

Many other examples could be cited, but these are enough to make the point.* These Committees had

*Unfortunately, even the non-partisan reputation of the General Accounting Office (GAO) has been tarnished during this phase of the investigation. The incident does not quite fit in with this list of outrageous questions asked of witnesses, but is too important to Congress for us to let it pass without comment. The Comptroller General of the United States sent a letter on September 30, 1987 to Reps. Jack Brooks and Dante Fascell which concluded that the State Department violated a restriction on the use of appropriated funds for publicity. Unlike its normal procedure with a final opinion or report, the GAO issued this letter in time to be used in this report, before its audit was complete and without giving the head of the relevant office or his deputy a chance to hear and reply to the allegations. The opinion fails even to mention, let alone respond to, documentary evidence that conflicts with the conclusions it presents as "facts." We are in no position to say whether the pressure for "timely" publication was generated inside GAO or externally. In any case, the preliminary opinion was then given to the press by counsel in a release with an October 5 embargo date in the name of the two House Democrats who had asked for the audit. See GAO Letter of September 30, 1987 to Reps. Brooks and Fascell, B-229069.

In a letter to Representatives Lee Hamilton and Dick Cheney, Lawrence L. Tracy, Colonel, U.S. Army (Ret.), disputes the factual basis for the GAO Report. Tracy worked for the Office of Public Diplomacy for Latin America and the Caribbean from 1984–1986. Col. Tracy believes that Jonathan Miller's memo discussing "white propaganda" was probably an exaggeration intended to curry favor with the White House. In a thoughtful analysis, Col. Tracy compares the Office of Public Diplomacy for Latin America and the Caribbean to the public diplomacy campaign conducted by the Carter Administration on the Panama Canal Treaty. "Although many in this country disagreed with the Carter policy, I do not recall anyone in Congress calling on the GAO to investigate a

legitimate reasons to ask about private fundraising. If Congress wants to be worthy of trust as an institution, however, it has to restrain itself. Just as the President ultimately has to accept responsibility for the actions of any one subordinate who zealously steps over the line, so too must these Committees bear the responsibility for the actions of one of its own staff, even if—or especially because—they were not typical of the Committees' work as a whole.

Conclusion

Our analysis of the past two chapters has largely been about legal questions. It has shown the Administration did stay within the law. By giving the Administration a clean bill of legal health, however, we do not intend to be endorsing the wisdom of everything it was doing. Notwithstanding our legal opinions, we think it was a fundamental mistake for the NSC staff to have been secretive and deceptive about its actions. The requirement for building long term political support means that the Administration would have been better off if it had conducted its activities in the open. Thus, the President should simply have vetoed the strict Boland Amendment in mid-October 1984, even though the amendment was only a few paragraphs in an approximately 1,200 page long continuing appropriations resolution, and a veto therefore would have brought the Government to a standstill within three weeks of a national election. Once the President decided against a veto, it was self-defeating for anyone to think a program this important could be sustained by deceiving Congress. Whether technically illegal or not, it was politically foolish and counterproductive to mislead Congress, even if misleading took the form of artful evasion or silence instead of overt misstatement.

We do believe firmly that the NSC staff's deceits were not meant to hide illegalities. Every witness we have heard told us his concern was not over legality, but with the fear that Congress would respond to complete disclosure with political reprisals, principally by tightening the Boland Amendments. That risk should have been taken.

We are convinced that the Constitution protects much of what the NSC staff was doing—particularly those aspects that had to do with encouraging contributions and sharing information. The President's inherent constitutional powers are only as strong, however, as the President's willingness to defend them. As for the NSC actions Congress could constitutionally have prohibited, it would have been better for the White House to have tackled that danger head on. Some day, Congress's decision to withhold resources may tragically require U.S. citizens to make an even heavier commitment to Central America, perhaps one measured in blood and not dollars. The commitment that might eliminate such an awful future will not be forthcoming unless the public is exposed to and persuaded by a clear, sustained, and principled debate on the merits.

'propaganda' effort The public was well-served by the national debate that ensued, for the American people came to understand both the costs and the benefits of the Treaty, and were better able to advise their representatives in Congress of their position on the issue. That is the essence of democracy." (See Appendix D to the Minority Report for Col. Tracy's letter.)

Endnotes

1. McFarlane Test., *Hearings*, 100-2, 5/11/87, at 9.
2. *Id.* at 5; North Test., *Hearings*, 100-7, Part 1, 7/9/87, at 264-65.
3. *Id.* at 264-65.
4. McFarlane Test., *Hearings*, 100-2, 5/11/87, at 5-6, 21.
5. *Id.* at 17, 23, 27-28; Poindexter Test., *Hearings*, 100-8, 7/15/87, at 54-55. See also Poindexter Test., *Hearings*, 100-8, 7/16/87, at 89, 101.
6. Compilation of Presidential Documents, May 13, 1987, pp. 526-27; "Excerpts From President's Meeting With Editors," The New York Times, May 16, 1987, p. 6.
7. McFarlane Test., *Hearings*, 100-2, 5/11/87, at 17 and 22-24.
8. Poindexter Test., *Hearings*, 100-8, 7/15/87, at 54-55; 7/16/87, at 89.
9. *Id.* 7/15/87, at 54-55; Garwood Test., *Hearings*, 100-3, 5/21/87, at 131, 132.
10. Poindexter Test., *Hearings*, 100-8, 7/20/87, at 3.
11. McFarlane Test., *Hearings*, 100-2, 5/11/87, at 28.
12. Rodriguez Test., *Hearings*, 100-3, 5/27/87, at 300-02, 312. That testimony is corroborated by Donald Gregg and his deputy, Colonel Samuel J. Watson III. See Gregg Dep., 5/18/87 at 46; Watson Dep., 6/16/87 at 21-24.
13. Rodriguez Test., *Hearings*, 100-3, 5/27/87, at 299-300.
14. Id. at 315.
15. Gregg Dep., 5/18/87 at 44.
16. Rodriguez Test., *Hearings*, 100-3, 5/27/87, at 301.
17. Gregg Dep., 5/18/87, Ex. 4.
18. Brady Dep., 10/1/87, at 7-9; Gregg Dep., 5/18/87, at 59; Watson Dep., 6/16/87, at 22-24; Rodriguez Test., *Hearings*, 100-3, 5/28/87, at 324.
19. Gregg Dep., 5/18/87 at 24, 74.
20. McFarlane Test., *Hearings*, 100-2, 5/11/87, at 20, 21-22.
21. *Id.*, 5/12/87, at 128–30.
22. Thompson Dep., 7/24/87 at 11-12. See also 21-25.
23. *Id.* at 14.
24. McFarlane Test., *Hearings*, 100-2, 5/11/87, at 21-22.
25. McFarlane Test., *Hearings*, 100-7, Part II, 7/14/87, at 221.
26. Poindexter Test., *Hearings*, 100-8, 7/15/87, at 73-75.
27. Poindexter Test., *Hearings*, 100-8, 7/15/87, at 89, 100-01.
28. Memorandum from North to McFarlane, Dec. 4, 1984, Ex. 32, *Hearings*, 100-2, at 466.
29. McFarlane Test., *Hearings*, 100-7, Part II, 7/14/87, at 222.
30. Secord Test., *Hearings*, 100-1, 5/5/87, at 57-60.
31. North Test., *Hearings*, 100-7, Part I, 7/8/87, at 167.
32. McFarlane Test., *Hearings*, 100-2, 5/11/87, at 75; *Hearings*, 100-7, Part II, 7/14/87, at 211.

33. North Test., *Hearings*, 100-7, Part 1, 7/8/87, at 167.
34. McFarlane Test., *Hearings*, 100-7, Part II, 7/14/87, at 210, 222.
35. McFarlane Test., *Hearings*, 100-7, Part II, 7/14/87, at 248.
36. Poindexter Test., *Hearings*, 100-8, 7/15/87, at 73-75; 7/16/87, at 100-01. See also, 7/20/87, at 2, 5.
37. Ex. RWO-17, Attachment 1, Sec. 4(4), *Hearings*, 100-2, at p. 835.
38. Abrams Test., *Hearings*, 100-5, 6/3/87, at 131.
39. *Id.*, 6/2/87, at 69-70, 98.
40. *Id.* at 64-65.
41. *Id.* at 65.
42. *Id.*, 6/2/87 at 97-98, 102.
43. *Id.* at 102.
44. *Id.*, 6/2/87 at 14 and 6/3/87 at 124-25.
45. *Id.*, 6/2/87 at 45-47.
46. *Id.*, 6/3/87 at 117-18. See also Shultz Test., *Hearings*, 100-9, 7/23/87, at p. 274.
47. Abrams Test., *Hearings*, 100-5, 6/3/87 at 117-18.
48. Poindexter Test., *Hearings*, 100-8, 7/15/87, at 76. See also North Test., *Hearings*, 100-7, vol. II, 7/13/87, at 114.
49. Task Force Chief Test., 8/4/87, at 83.
50. C/CATF Test., 8/5/87, at 108.
51. For expressions of this concern, see C/CATF Test., 8/4/87 at 93 and 8/5/87, at 130; George Test., *Hearings*, 100-11, 8/6/87, at 210-212.
52. Task Force Chief Test., *Hearings*, 100-11, 8/5/87, at 128.
53. Ex. TC-13, *Hearings*, 100-4 at 130.
54. C/CATF Test., *Hearings*, 100-11, 8/5/87, at 126.
55. Castillo Test., *Hearings*, 100-4, 5/29/87, at 51.
56. C/CATF Test., *Hearings*, 100-11, 8/4/87, at 89.
57. Castillo Test., *Hearings*, 100-4, 5/29/87, at 79.
58. North Test., *Hearings*, 100-7, Vol. II, 7/13/87, at 116.
59. Castillo Test., *Hearings*, 100-4, 5/29/87, at 52.
60. *Id.* at 8.
61. *Id.* at 13.
62. *Id.* at 17.
63. *Id.* at 11-12.
64. *Id.* at 13.
65. *Id.* at 17-18.
66. C/CATF Test., *Hearings*, 100-11, 8/4/87 at 98.
67. *Id.* at 95-97.
68. Task Force Chief Test., *Hearings*, 100-11, 8/4/87, at 97-98.
69. Secord Test., *Hearings*, 100-1, 5/5/87, at 71.
70. Secord Test., *Hearings*, 100-1, 5/5/87, at 65-66.
71. Castillo Test., *Hearings*, 100-4, 5/29/87, at 19.
72. Secord Test., *Hearings*, 100-1, 5/5/87, at 62; Dutton Test., *Hearings*, 100-3, 5/27/87, at 233-34.
73. Id at 24.
74. Ex. TC-4, *Hearings*, 100-4.
75. Castillo Test., *Hearings*, 100-4, 5/29/87, at 22.
76. *Id.* at 28-30; Dutton Test., *Hearings*, 100-3, 5/27/87, at 218.
77. *Id.* at 54
78. *Id.* at 20, 24-26.
79. *Id.* at 25
80. Task Force Chief Test., *Hearings*, 100-11, 8/5/87, at 28.
81. Task Force Chief Test., *Hearings*, 100-11, 8/5/87, at 110-11.
82. Castillo Test., *Hearings*, 100-4, 5/29/87, at 26.
83. Cable, May 28, 1986, Ex. [C/CATF]-31, *Hearings*, 100-11.
84. Ex. TC-14, *Hearings*, 100-4, 5/29/87.
85. Task Force Chief Test., *Hearings*, 100-11, 8/5/87, at 111-12.
86. *Id.* at 111-12. See also Ex. 3, *Hearings*, 100-1, at 426.
87. Task Force Chief Test., *Hearings*, 100-11, 8/5/87, at 109-11.
88. Castillo Test., *Hearings*, 100-4, 5/29/87, at 47. See also 27, 41, 44-47.
89. C/CATF Test., *Hearings*, 100-11, 8/5/87, at 113.
90. Abrams Test., *Hearings*, 100-5, 6/2/87, at 70.
91. Ex. C/CATF-39, p. 4, *Hearings*, 100-11.
92. *Id.*, p. 17.
93. George Test., *Hearings*, 100-11, 8/6/87, at 164, 165, 168.
94. C/CATF Test., *Hearings*, 100-11, 8/5/87, at 120
95. Channell Dep., 9/17/87, at 49.
96. Channell Dep., 9/1/87 at 167.
97. Miller Dep., 7/3/87 at 61.
98. *Id.*
99. *Id.*
100. *Id.*, at 62.
101. Channell Dep., 9/17/87, at 66.
102. Channell Dep., 9/17/87, at 60.
103. Channell Dep., 9/17/87, at 61.
104. Channell Dep., 9/17/87, at 66.
105. Miller Dep., 7/3/87, at 49.
106. Channell Dep., 9/17/87, at 70.
107. Channell Dep., 9/17/87 at 82.
108. Channell Dep., 9/17/87 at 71, 76.
109. Miller Dep., 7/3/87 at 49.
110. Abrams Test., *Hearings*, 100-5, 6/3/87, at 159.
111. State Department Cable, December 4, 1986, p. 4, Ex. EA-49, *Hearings*, 100-5.
112. Ex. 38, Miller Dep., 9/16/87.
113. State Department Cable, December 4, 1986, p. 3, Ex. EA-49, *Hearings*, 100-5.
114. *Id.* at 2.
115. Ex. EA-48, *Hearings*, 100-5.
116. Ex. EA-47, *Hearings*, 100-5.
117. State Dept. cable, p. 3, Ex. EA-49, *Hearings*, 100-5.
118. Garwood Test., *Hearings*, 100-3, 5/21/87, at 110-12.
119. Fischer Dep., 8/11/87 at 6.
120. Godson Dep., 9/9/87 at 58.
121. Fischer Dep., 8/11/87.
122. Henry Miller Dep., 8/6/87, at 1-2.
123. Garwood Test., *Hearings*, 100-3, 5/21/87, at 112.
124. Channell Dep., 9/17/87 at 27.
125. Henry Miller Dep., 8/6/87 at 40.
126. Artiano Dep., 7/31/87, at 180.
127. Fischer Dep., 8/11/87, at 216-17.
128. Henry Miller Dep., 8/6/87, at 40.
129. *Id.* at 43.
130. Channell Dep., 9/2/87, at 96, 165.

Part IV
Iran

Chapter 8
The Iran Initiative

Simple plots make for stirring fiction. Sometimes, amateur historians fall into the temptation of presenting events as if all lines inevitably and always pointed toward the already known conclusion. That is not the way events happen in the real world. The Iran chapters of the majority report create the impression that its authors have fallen into the amateur historian's trap. The narrative tries to simplify events and motivations for the sake of a story line. That does a disservice to history. The record ought to reflect the complex motives of the participants in these operations. The motives may be difficult to determine, but papering the difficulties over will not help future generations learn from what happened.

The majority report seems alternately to be torn between two theses about the Iran Initiative: that it was strictly an arms-for-hostages deal or that, starting in December 1985 or January 1986, it was driven by a desire to provide funds for the Contras. Additionally, the Iran sections of the report continue the majority's portrayal of the Administration as a gang of lawbreakers who would do virtually anything to achieve their objectives, while invoking an exaggerated fear of leaks to keep the truth about activities from Congress.

This portrayal is patently absurd. The hostages were important to President Reagan. He probably did fall victim to his own compassion, and let their personal safety weigh too heavily on him. But it is clear from all the evidence we have that the initiative was pursued primarily for strategic reasons. We may disagree with the underlying assumptions, or with the decision to sell arms, but any honest review of the evidence must acknowledge these intentions, and with the fact that strategic considerations played an important part in the discussions conducted through the so-called Second Channel.

Similarly, the use of residuals to benefit the Contras was certainly seen as a plus—a "neat idea"—by North and Poindexter. But Contras funding never *drove* the Iran initiative. A sober look at the amount of money involved would make that clear to anyone. At most, the residuals were seen as a peripheral benefit from a policy whose justification lay elsewhere.

We shall show in this section of our report that the Administration did, in fact, substantially comply with the legal requirements. Moreover, the decision not to notify Congress was not based on an anti-democratic obsession with secrecy, but was based on the same sound reasoning that led the Carter Administration to the identical decision not to report operations during the Iranian hostage crisis of 1979 and 1980.

Summary Overview

The United States was taken by surprise when the Shah fell in 1979, because it had not developed an adequate human intelligence capability in Iran. Our hearings have established that little had been done to remedy the situation by the mid-1980's. The United States was still without adequate intelligence when, in 1985, it was approached by Israel with a proposal that the United States acquiesce in Israeli sales of U.S.-origin arms to Iran. This proposal came at a time when the NSC was already circulating a recommendation that the United States consider the advisability of such sales to Iran. Long term strategic considerations dictated that the United States try to improve relations with at least some of the important factions in Iran. The lack of adequate intelligence about the situation inside Iran made it imperative to pursue any potentially fruitful opportunity; it also made those pursuits inherently risky. United States decisions of necessity had to be based on the thinnest of independently verifiable information. Lacking such independent intelligence, the United States was forced to rely on sources known to be biased and unreliable. Well aware of the risk, the Administration nonetheless decided that the opportunity was worth pursuing.

To explore the chance for an opening, the President decided to sell arms to Iran.* Some suggest that this decision stemmed from little more than the President's ignorance, the NSC staff's foolhardiness, and private

*It is important at the outset to note the small amounts involved. The total arms sold included 2004 TOW anti-tank missiles, 18 Hawk antiaircraft missiles, and some 200 or so types of spare parts for Hawk batteries. Some of the missiles were sold from Israeli stocks with U.S. approval. The remaining materiel came from U.S. stocks. A small amount of perishable intelligence information was also transferred to the Iranians. The amounts involved were trivial, compared to the world arms trade with Iran, which Secretary Weinberger estimated at $10 billion. For the last point, see Weinberger Test., *Hearings*, 100-10, 7/31/87, at 166.

greed. We completely reject this interpretation. The initiative was controversial. We disagree with the decision to sell arms, and we wish that the whole initiative had proceeded with more caution. But despite these reservations, we remain convinced that the decision to pursue some such initiative was *not* an inherently unreasonable one.

The major participants in the Iran arms affair obviously had some common and some conflicting interests. The key question the United States had to explore was whether the U.S. and Iranian leadership actually felt enough of a common interest to establish a strategic dialogue. No one can deny the common U.S. and Iranian interest in opposing Soviet expansion. But how much would that community of interest be felt, acknowledged and acted upon? Iran and the United States have compatible goals in Afghanistan. The question was whether such isolated examples could be broadened into something more substantial.

The initial dealings with the Iranian government were undermined by the unreliability of the intermediary, Manucher Ghorbanifar. Nevertheless, Ghorbanifar did help obtain the release of two U.S. hostages (Rev. Benjamin Weir and Father Lawrence Jenco) and he did also produce high Iranian officials for the first face to face meetings between our governments in five years. At those meetings, U.S. officials sought consistently to make clear that we were interested in a long-term strategic relationship with Iran to oppose Soviet expansionism. The hostages issue was presented as an obstacle to an enhanced relationship that would have to be overcome, not as the objective of the initiative. Colonel North made an extensive presentation to this effect in February 1986; former National Security Adviser McFarlane made a similar presentation in Tehran in May 1986. But the Iranian officials brought by Ghorbanifar seemed to be interested only in weapons, and in using the hostages for bargaining leverage. The full extent of the difference between these approaches finally was made obvious to the United States at the meeting in Tehran, which North, McFarlane and others attended at great personal risk. Ghorbanifar appears to have misled both sides in the preparations for that meeting. Afterwards, the United States suspended discussions arranged by Ghorbanifar, except to complete the transactions already underway.

After the Tehran meetings, the United States was able to approach a very high-ranking Iranian official using a second channel arranged by Albert Hakim and his associates. Clearly, Hakim had business motives in arranging these contacts. Whatever his motives, he did produce contacts at the highest levels of the Iranian government. Discussions with this channel began in the middle of 1986 and continued until December. They resulted in the release of one further hostage (David Jacobsen), and U.S. officials expected them to result in the release of more hostages. Perhaps more importantly, these discussions appear to have considered the possibility of broad areas of strategic cooperation. However, as a result of factional infighting inside the Iranian government, the initiative was exposed * and substantive discussions were suspended. Not surprisingly, given the nature of Iranian politics, the Iranian government has publicly denied that significant negotiations had taken place.

The Reagan Administration's Iran initiative represented an attempt to narrow the differences stemming from the Iranian revolution and the intervening years of hostility. Both sides confronted sharp internal divisions over the issue of rapprochement. In such a situation, the margin between success and failure looms much larger in retrospect than it may seem while events are unfolding. While the initial contacts developed by Israel and used by the United States do not appear likely to have led to a long-term relationship, we cannot rule out the possibility that negotiations with the second channel might have turned out differently. At this stage, we never will know what might have been.

In retrospect, it seems clear that this initiative degenerated into a series of "arms for hostage" deals. But it did not look that way to many of the U.S. participants at the time. In our view, it is simply wrong, therefore, to reduce the complex motivations behind these events to any one simple thesis. Clearly, the participants from different countries, and even those within each country, had different, and sometimes conflicting, motives. Without endorsing or agreeing with the use of arms sales as a tactic, we believe that U.S. officials made a risky, but nevertheless worthwhile effort. To explain why, we shall begin by outlining the strategic importance of Iran.

The Strategic Context

Iran is the largest country in the Persian Gulf region, an area of vital economic importance to the United States and its allies. It is in a strategic position potentially to dominate the world's largest proven oil reserves and threaten the vulnerable pro-Western states of the Gulf littoral.

* The most complete public information about this incident appeared in a September 29, 1987 *New York Times* article about the execution of Mehdi Hashemi. The article identified Hashemi as the former director of the office of Ayotollah Hussein Montazeri, "Ayotollah Ruhollah Khomeini's personal choice as his successor in the post of supreme religious guide." *The Times* also said, (1) Montazeri and Speaker of the Parliament (or Majlis) Hashemi Rafsanjani were factional rivals, (2) Hashemi was arrested in October 1986, and (3) the Montazeri/Hashemi faction was responsible for a story that appeared in the Lebanese weekly *Al Shiraa* in early November 1986 describing a May meeting in Tehran between Mr. McFarlane and Rafsanjani. That was the story that led to the Iran arms initiative's unraveling. See John Kifner, "Aide to Khomeini Heir Apparent Is Reported Executed in Tehran," *The New York Times*, Sept. 29, 1987, pp. A1, A13.

For the same reasons, Iran is of critical interest to the Soviet Union which, in addition to seeking access to and control of the West's oil supplies, continues in its historic quest for a warm water port. The United States has long recognized these critical and competing interests. At the end of the Second World War, President Truman was willing to threaten military action to force the Soviet Union to withdraw from areas of Northern Iran it had occupied during the war. In defense of its interests, the United States has maintained a naval presence in the Persian Gulf since 1949.

Figure 8–1. Map of Middle East

Iran dominates the entire eastern shore of the Persian Gulf; it controls the Strait of Hormuz and can threaten the free flow of oil from the Gulf to the industrial economies of the West. In 1987, as part of its effort to disrupt non-Iranian shipping traffic in the Gulf, Iran has used anti-ship missiles and other munitions to attack neutral oil tankers, and laid mines throughout the Gulf. U.S. and allied warships have been deployed in the Gulf to ensure that the flow of oil is not impeded. Although less than six percent of U.S. oil consumption transits the Gulf, 24 percent of Western Europe's oil and almost half of Japan's total oil consumption must pass through the Strait of Hormuz. Iran alone supplies some five percent of Western Europe's and Japan's oil. Increased oil production elsewhere in the world, and the opening of new pipelines to take oil through Turkey, Iran and Saudi Arabia have somewhat reduced the Gulf's relative importance.[1] Even so, Iran remains able to be a seriously disruptive force to the world's economy.

In addition to its importance to oil supplies and oil routes, Iran, whose population of about 45 million is larger than the other Gulf states combined, is in a position to dominate or destabilize the small, weak, pro-Western countries of the Western Gulf coastal region. Recent Iranian policy toward Kuwait exemplifies the pressure Iran can exert on its neighbors. An aggressive Iran can promote anti-Western Shiite fundamentalism throughout the Middle East, threatening key U.S. allies such as Israel, Egypt, and Turkey.

Events of the last decade have raised the strategic stakes in the Persian Gulf region and given the Soviet Union the chance to expand its influence in an area where it historically has had little. The fall of the Shah, the installation of a revolutionary Islamic regime in Tehran, and the Iran-Iraq war have given the Soviet Union strong incentives to try to improve its position in Iran and the entire Gulf region.

A Soviet-dominated Iran would pose an even greater threat to Western interests than the current radical regime. Such a development, for example, would give Moscow direct land access to warm water ports on the Persian Gulf and Arabian Sea. The Soviet Navy's home ports on the Soviet mainland are frequently ice bound in winter, or provide limited access to the open ocean, making it easier for U.S. and allied navies to contain the Soviet fleet. Soviet land access to a warm water port in this region would seriously endanger U.S. security interests in the entire Indian Ocean region, from the Indian subcontinent to Eastern Africa.

On Iran's eastern border, the Soviet aggression in Afghanistan has further skewed the unstable strategic balance of the region, unsettled Iran's neighbor Pakistan, and left the Soviet Union better-placed to meddle in post-Khomeini Iran. In response to events in the Gulf, the Carter Administration developed a Rapid Deployment Force to demonstrate an increased U.S. resolve to defend U.S. and Western interests there. It was against this background that the Reagan Administration conceived its policy opening to Iran.

On May 17, 1985, just before the United States decided to pursue the Iran initiative, Graham Fuller, the CIA's National Intelligence Officer for Near East and South Asia, produced a memorandum, "Toward a Policy on Iran," reporting that the intelligence community was learning of signs of significant internal unrest in Iran and was monitoring "Soviet progress toward developing significant leverage in Tehran".[2] By the end of 1985, the intelligence community took a less worried view which was reflected in a new estimate published in February 1986.[3]

By mid-1987, however, press reports were beginning to suggest that Fuller's original concern might have been well founded. These reports involved possible Soviet intelligence sites in Iran and a pipeline and railroad through Iran to its long sought after Persian Gulf warm water port.[4] Should these accounts prove true, the 1985–86 initiative might eventually be seen as a farsighted attempt to prevent seriously troublesome developments that could occur after the factional struggle everyone expects to begin when the aged Ayotollah Khomeini dies, if it has not already begun.

Strategic Opening, Or Only An Arms-For-Hostages Deal?

The majority report systematically downplays the importance of strategic objectives in the Iran initiative. We believe, to the contrary, that the record is unambiguous on the following facts: (1) that strategic objectives were important to the participants at all times; (2) that the objectives were credible, (3) that they were the driving force for the initiative at the outset, and (4) that without such a strategic concern, the initiative would never have been undertaken.

One of the most disappointing forms of evidence-slanting throughout the majority's narrative is that it refuses adequately to present the key witnesses' accounts of their own motives, in their own words, from the hearing record. That failure is most glaring in connection with the witnesses' statements about the strategic motives behind the Iran policy. We have no intention of trying to recite all of the evidence here. We are convinced, however, that anyone who reads the material we cite will recognize the bias involved in presenting what purports to be any analysis of the arms sales without including the participants' own explanations of their motivations. The majority may not agree with the Administration's strategic reasoning, but it is simply unfair to ignore it.

The President's words are probably the most important here. Dale Van Atta, a reporter, knew the essential facts of the initiative in February 1986. The President was willing to talk to him on February 24, on the condition that the information not be used until

the hostages came home. Van Atta asked the President about the hostages. Instead of answering in kind, the President spoke about strategic matters.

> All right. The Iranian situation. We have to remember that we had a pretty solid relationship with Iran during the time of the Shah. We have to realize also that that was a very key ally in that particular area in preventing the Soviets from reaching their age old goal of the warm water ports, and so forth. And now with the take-over by the present ruler, we have to believe that there must be elements present in Iran that—when nature takes its inevitable course—they want to return to different relationships . . . We have to oppose what they are doing. We at the same time must recognize we do not want to make enemies of those who today could be our friends.[5]

The President's own statements were supported by senior officials in his Administration testifying before these committees. For simplicity's sake, we will cite this material by grouping the references under the substantive topics covered. These included:

—establish a new U.S. relationship with Iran, thus strengthening the U.S. strategic posture throughout the Persian Gulf region;[6]

—counter Soviet influence in Iran;[7]

—lessen Iran's dependence on the Soviet Union and other communist nations as arms suppliers;[8]

—open a channel to pragmatic Iranian officials;[9]

—wean the Iranian regime away from terrorism;[10]

—encourage a negotiated settlement of the Iran-Iraq war;[11]

—protect the northern tier countries—Pakistan, India and their neighbors—and encourage their interest in supporting the Afghan resistance forces;[12]

—protect the southern tier countries—Saudi Arabia, Kuwait, Jordan, Israel and Egypt;[13]

—improve U.S. intelligence capabilities in Iran;[14] and

—discourage Iranian arms exports to Nicaragua.[15]

As we said earlier, one need not agree with these strategic goals, or agree that arms sales were a good way to achieve them, to recognize their importance to the key players. The Administration felt it was crucial to begin making some inroads into Iran, before that country became embroiled in a succession crisis. The last thing we wanted was to abandon the field to the Soviets. It was important to keep looking for opportunities. Unfortunately, our ignorance of the situation in Iran was such that we had few realistic ways to do so

U.S. Intelligence Weaknesses in Iran

Although the motives were clearly present for trying to develop a new relationship with Iran, the means were not. In an important respect, the Iran initiative had at least one of its roots in an intelligence failure. There are two different intelligence issues raised by the Iran initiative. One is that intelligence gaps or weaknesses influenced U.S. decisions. We agree with this point. The other is that intelligence was "cooked" to match the preconceived conclusions of policy makers. We strongly disagree with this charge, to the extent that it relates to the information generated by the executive branch. We do believe, however, that some officials—most notably, Admiral Poindexter and Director Casey—failed adequately to present the U.S. intelligence community's assessment to the President at a crucial moment of decision.

Let us begin with the issue of intelligence gaps. Gary Sick, who worked on the National Security Council staff during the Carter Administration, described the state of U.S. intelligence in Iran when the Shah fell in 1979:

> I had written a briefing paper for [National Security Adviser Zbigniew] Brzezinski noting that "the most fundamental problem at the moment is the astonishing lack of hard information we are getting about developments in Iran." I commented that "this has been an intelligence disaster of the first order. Our information has been extremely meager, our resources were not positioned to report accurately on the activities of the opposition forces, on external penetration, the strike demands, the political organization of the strikers, or the basic objectives and political orientation of the demonstrators."[16]

General Secord, who became Deputy Commander of the hostage rescue task force in 1980 after the unsuccessful Desert I operation, confirmed that the lack of intelligence was the reason why his combat-ready task force never made a second effort to rescue the hostages.[17]

Faced with the loss of the Tehran embassy and its intelligence secrets, the flight or execution of pro-Western officials and agents, a ruthless secret police network and restrictions on travel to Iran, U.S. intelligence efforts had to start again from scratch. According to new reports, efforts to rebuild our intelligence capability were further devastated by the 1983 bombing of the U.S. Embassy in Beirut, which killed many of the CIA's leading Middle East experts, and by the abduction of the post-bombing Beirut station chief, William Buckley. Before his death as a result of torture, Buckley was allegedly forced to reveal his ex-

tensive knowledge of CIA anti-terrorism and other operations in the Middle East.

There was near unanimity inside the government on the weakness of U.S. intelligence in Iran. Director Casey reportedly conceded the point, and his former deputy, John McMahon, agreed.[18] Casey believed that the need for intelligence was one of the main reasons for going ahead with the initiative.[19] Robert McFarlane and John Poindexter both lamented the dearth of intelligence on internal Iranian politics and Iranian support for terrorism, which left them vulnerable and "flying blind". In particular, U.S. policy makers lacked the information necessary to assess the influence and *bona fides* of the Iranian officials with whom they were dealing.[20]

The core problem was a lack of well-placed human agents within Iran.[21] The CIA's Deputy Director for Operations, Clair George, is responsible for clandestine human intelligence collection. He freely acknowledged that the Directorate was not collecting the information necessary to influence or deal with Iran. In the opinion of some intelligence professionals the CIA's weakness of human intelligence collection reflects a long-term shift toward a greater reliance on more exotic, technical collection methods, which are considered "clean" and safe compared to the messy business of running human spies. As Admiral Poindexter said:

> The problem is that with technical means of collection, there is no way that you can find out about intent as to what the people are planning or doing. The only way you can get that is through human intelligence. A satellite will tell you how many divisions or how many tanks or how many airplanes, but it won't tell you what they are planning to do with that.[22]

One problem with human intelligence is that it often requires the use of individuals of dubious reputations. Despite criticism of the use of Ghorbanifar in the Iran initiative, U.S. intelligence may have no choice but to rely on questionable individuals in future operations. As George told the Committees: "If we only served and dealt with the honest and fair, we would be out of business fairly fast."[23] Poindexter made essentially the same point: "Human intelligence is messy, because you have to deal with people. You don't always know if they are telling you the truth or not . . . . [You] have to deal with pretty despicable characters if you are going to get penetration of these organizations".[24]

Faced with this frustrating lack of intelligence, it appears that Admiral Poindexter adopted the view that the Israelis had better information on the situation in Iran. Poindexter was so convinced of this that he even accepted the Israeli view that Iraq gradually was acquiring a battlefield advantage in the war with Iran,[25] even though he knew U.S. intelligence held a contrary view,[26] and the issue would have been open to independent verification.

The Issue of "Cooked" Intelligence

One of the many dramatic charges Secretary Shultz made about his own Administration involved this assessment of the Iran-Iraq war. Responding to Senator Inouye, Shultz said that the failure to separate "the functions of gathering and analyzing intelligence from the function of developing and carrying out policy"[27] resulted in the Administration getting faulty information on which to base its judgments and decisions.

> I hate to say it, but I believe that one of the reasons the President was given what I regard as wrong information, for example about Iran and terrorism was that the agency or the people in the CIA were too involved in this. So that is one point. And I feel very clear in my mind about this point. And I know that long before this all emerged, I had come to have great doubts about the objectivity and reliability of some of the intelligence I was getting.[28]

Despite Secretary Shultz's statement, these committees have found absolutely no evidence to support allegations of intelligence bias within the CIA. As Deputy CIA Director Gates has observed, one of the best guarantees against an intelligence bias is the widespread circulation of CIA analyses on Capitol Hill, particularly the intelligence committees' scrutiny of virtually everything the CIA and intelligence community produces.[29] With the exception of one controversial 1982 report, neither committee has exhibited any concern over the objectivity of analysis within Casey's CIA, despite the committees' often stormy relationship with the Director.* Shultz is also refuted by former Deputy CIA Director McMahon who, in response to a deposition question regarding the Secretary's assertions, said: "It wouldn't happen. This is just so [expletive deleted] outrageous, I can't stand it. That is just so damn false, and I think George Shultz got away with murder on that one." McMahon also said he asked Director Webster "why the hell he didn't challenge Shultz on that." Webster, according

* The 1982 exception provoked the resignation of Admiral (Ret.) Bobby Inman as a consultant to the House committee. Specifically, Inman—a former director of NSA and a former Deputy Director of Central Intelligence and one of the intelligence community's most respected alumni—gave as his reason for leaving the fact that he had not been consulted on a Congressional subcommittee report criticizing intelligence analyses on Central America. Inman felt that the report, which focused on El Salvador, was "put out on party lines." Inman also underscored, in his resignation statement, that Congressional oversight of intelligence agencies had to be nonpolitical to earn public credibility. He added that "if the country doesn't establish a bipartisan approach to intelligence, we are not going to face the problems of the next fifty years." See Washington Post, October 15, 1982.

to McMahon, said he did ask Shultz, but "I guess he hasn't heard from Shultz yet."[30]

Admiral Poindexter's reliance on an Israeli assessment that Iran's position was deteriorating in the war with Iraq was particularly controversial. White House Chief of Staff Donald Regan's notes of a November 10, 1986 meeting of top advisers makes it clear that the President was still using the assessment as a justification for his decision the previous January to sell arms to Iran.[31] Poindexter acknowledged, however, that the assessment differed from that of the U.S. intelligence community. Poindexter had the option, of course, of agreeing with such an assessment over the one he was getting from U.S. intelligence. But he and Director Casey should have felt an obligation to highlight that disagreement at the time it was being used to buttress the proposed January 1986 finding. It is clear from Poindexter's testimony that he did not remind the President at the time that this view differed from the majority view within the intelligence community. The evidence seems to suggest strongly, in other words, *not* that intelligence was "cooked" by U.S. intelligence, but that the views of U.S. intelligence were not properly passed up the line and highlighted to the President.

The Israeli Connection

The Administration's reliance on Israeli intelligence has raised questions about Israel's role in the Iran initiative. That role probably will never be fully understood. The Tower Commission Report,[32] supplemented by some new material in the majority narrative, lays out the basic outline. We have too little confirmed evidence, however, and too many conflicting theories, to sort it all into neat packages.

The immediate background to the Iran arms initiative had two separate strands in 1984. One strand begins with Ghorbanifar's desire to sell arms; the other with an independent review of U.S. policy toward Iran conducted by the NSC. The two strands came together in mid-1985.

Ghorbanifar began trying to approach the United States in June 1984 with the story that he had access to some important figures in the Iranian government who wanted to improve relations with the West. The CIA polygraphed Ghorbanifar, he failed (not for the first time) and the agency issued a "burn notice" to its field personnel and other U.S. intelligence services warning them to treat Ghorbanifar as a known liar. Clair George told the Committees: "You have to work at it pretty hard to get a burn notice out of the Operations Directorate at the CIA."[33]

Over the next several months, Ghorbanifar and Adnan Khashoggi, a Saudi arms dealer, reportedly made several attempts to develop a U.S.-Iran arms relationship.[34] One of the approaches they made in 1984, according to the Tower Commission, was through a former CIA officer, Theodore Shackley. In that approach, the arms dealers specifically linked weapons to Americans held hostage in Lebanon:

> Shackley, a former CIA officer, reported that, in a meeting November 19-21, 1984, in Hamburg, West Germany, General Manucher Hashemi, former head of SAVAK's Department VIII (counterespionage), introduced him to Manucher Ghorbanifar. Hashemi said Ghorbanifar's contacts in Iran were "fantastic." Ghorbanifar was already known to the CIA, and the Agency did not have a favorable impression of his reliability or veracity. Shackley reported that Ghorbanifar had been a SAVAK agent, was known to be an international deal maker, and generally an independent man, difficult to control.[35]

Shackley's report went to the State Department but the department was not interested.

By January 1985, Ghorbanifar was discussing a potential arms relationship that would have involved the United States, Iran and Israel. Participating in these discussions with Ghorbanifar were Adolph Schwimmer, an Israeli arms dealer who had been an adviser to Prime Minister Peres since September 1984, Amiram Nir, Peres' Adviser on Counterterrorism, and Yaacov Nimrodi, another arms dealer who had been an Israeli defense attache and then an unofficial "consultant" in Tehran for a total of 24 years.[36] At least one of these meetings included Roy Furmark, a business associate of Khashoggi's and an acquaintance of Casey's.[37] Israel and the United States were major arms suppliers to the Shah's Iran during the 1970s, and a classified State Department document says Israel had sold some arms to the Khomeini regime in 1981 and 1982.* The arms dealers in the 1985 group had an obvious stake in resuming such sales.

At roughly the same time, beginning in early 1984, the NSC staff was beginning to rethink the U.S. posture toward Iran. The net effect of the 1984 efforts was to conclude that the United States neither knew enough about, nor was in a position to have much influence over, future developments in that country. "Early in 1985," the Tower board wrote, "the NSC

* According to a November 1986 classified State Department document, in 1981 and 1982, prior to the initiation of Operation Staunch, the Government of Israel asked the United States to approve shipment of certain military items under U.S. control to Iran. Israeli representatives made many of the same points that were made in the 1985 arms sale proposals, including that such transfers would improve access and influence with "moderate elements" and could lead to progress in securing the release of U.S. hostages. The United States stated that certain types of U.S. controlled items could be shipped if specific U.S. Government approval were obtained, but no shipment of such items was ever approved. In May 1982, Israeli officials acknowledged publicly that Israel had sold substantial quantities of U.S. origin military supplies to Iran. U.S. Department of State, Memorandum from Richard W. Murphy to Secretary of State Shultz, "U.S.-Israel Discussions on Arms Sales to Iran—1980-82," November 21, 1986, S3547. See also Secord Test., *Hearings*, 100-1, 5/8/87, at 273-74.

staff undertook actions aimed at least to improve the government's knowledge about Iran".[38]

One person who got involved with that job was NSC consultant Michael Ledeen. When Ledeen was in Europe in March or April of 1985, an official of a West European country told Ledeen that the situation in Iran was more fluid than it had been in the past. If Ledeen wanted to know more about Iran, the official said that Israel had the best intelligence there of any country in the Western world.[39] Ledeen visited Israel in early May where he met alone for about 45 minutes with Prime Minister Peres to express the U.S. interest in learning more about Iran. The hostages were not part of this discussion, Ledeen said. According to Ledeen, Peres said that Israeli information was not all that outstanding, but Peres urged Ledeen to meet with Shlomo Gazit, President of Ben Gurion University and a former director of military intelligence. In that subsequent meeting, Ledeen was asked to carry a request back to McFarlane asking for permission for Israel to sell some artillery to Iran.[40]

During May and June, the NSC staff continued to work on a draft National Security Decision Directive (NSDD). At the end of its analysis of the United States' long and short term goals in Iran, a June 11 draft NSDD recommended "provision of selected military equipment as determined on a case-by-case basis". McFarlane circulated the NSDD draft to Shultz, Weinberger and Casey. Shultz responded on June 29 by saying he disagreed "with the suggestion that our efforts to reduce arms flows to Iran should be ended." Weinberger's July 16 answer was sharper. "This is almost too absurd to comment on," he wrote. "This is roughly like inviting Qadhafi over for a cozy lunch." Only Casey endorsed the "thrust of the draft," but his July 18 response said nothing about arms sales.[41] The draft NSDD was never brought to the President's attention and was not adopted.

The two separate strands came together in the weeks after the draft NSDD was circulated and before all the answers were in. On July 3, McFarlane met with David Kimche, Director General of the Israeli Foreign Ministry. According to McFarlane, Kimche wanted to know "the position of our government toward engaging in a political discourse with Iranian officials," and thought the Iranians would ultimately need something, namely arms, to show for the meetings.[42]

About July 11, Schwimmer came to see Ledeen. Ledeen testified that Schwimmer claimed he and his colleagues:

> had been introduced a short time before by Adnan Khashoggi to a very interesting Iranian by the name of Ghorbanifar, and that Ghorbanifar had a lot of very interesting things to say both about Iran and about the intentions of the leading figures in the Government of Iran.[43]

We do not intend to produce a full recitation of events here, but it is worth pausing at Schwimmer's reported statement that he had just been introduced to Ghorbanifar. The clear implication of the statement, as it was understood by Ledeen, was that Ghorbanifar was a new source of information for the Israelis, even though Ghorbanifar had been meeting with them since January. There is a dispute over Ghorbanifar's exact relationship with Israel, but no one seems to think the relationship was new. North, Poindexter, George and Hakim have said they thought Ghorbanifar was an Israeli agent or asset.[44] Hakim specifically said he thought someone working for Nimrodi had recruited Ghorbanifar years before in Tehran.[45] Shackley, however, described him as "an independent man" with SAVAK connections (Hakim had also mentioned SAVAK.) The view of Ghorbanifar as being essentially independent would be consistent with his having had a past relationship with Israel, but with different connotations on the extent to which Israel could have controlled Ghorbanifar. The interpretation that stresses Ghorbanifar's independence gains some support from the sheer number and variety of methods Ghorbanifar tried to use to approach the United States Either way, however, Ghorbanifar and Nimrodi knew each other during Nimrodi's quarter century of service in Tehran. Schwimmer's alleged representation to Ledeen that he was a new source therefore seems disingenuous, to say the least.

So, Israel was more than a passive message bearer at the outset of the initiative. In addition, it weighed in to help keep the initiative on track at several points later. These included, among other things, an August 2, 1985 visit Kimche paid to McFarlane to seek authorization for the first Israeli TOW transfer;[46] Nir's January 1986 proposal to keep the initiative moving forward at a time when U.S. interest appeared to be flagging,[47] and Peres' February 1986 letter to [48] and September 1986 communication with President Reagan.[49]

Shultz v. Shultz—Suckers or Big Boys?

The question that arises out of all this is whether Israel was playing on U.S. ignorance to draw the United States into the Iran arms transactions. At a November 10, 1986 meeting between the President and his top advisors, Secretary Shultz said, according to Donald Regan's notes, that he "Thinks Israeli [sic] suckered us into this so we can't complain of their sales."[50] Shultz apparently expanded on this point in a private meeting he held with the President ten days later. A briefing paper Shultz brought with him to that meeting stated:

> Much if not all of the incentive on the Israeli side of the project may well have been an Israeli "sting" operation. The Israelis used a number of justifications to draw us into this operation—in-

telligence gains, release of hostages, high strategic goals, . . . Israel obviously sees it in its national interest to cultivate ties with Iran, including arms shipments. Any American identification with that effort serves Israeli ends, even if American objectives and policies are compromised.[51]

We are inclined to agree with Shultz that Israel was actively promoting the initiative because the initiative suited Israel's own national interest. We disagree, however, with the idea that the United States was being played for a sucker. We believe the U.S. Government responsibly made its own judgments, and its own mistakes.

To show the extent to which U.S. eyes were open, it is worth reviewing a few more items in the Committees' records. In McFarlane's July 13 cable to Schultz about his own meeting with Kimche and Ledeen's meeting with Schwimmer, McFarlane seemed to be more aware than Ledeen that the relationships being described were not new ones. McFarlane said that in the course of his conversation with Kimche it "became clear that [their access to Iranian officials] has involved extensive dialogue for some time." His cable also mentioned Ghorbanifar.[52] On the same day, Assistant Secretary Richard Armacost sent a cable to Shultz saying that the U.S. Government considers Ghorbanifar to be "a talented fabricator." [53] Shultz told the Tower Commission he read this cable on July 16.[54] From early in the initiative, in other words, the U.S. Government had good reason to be wary of Ghorbanifar.

Why, then, did the NSC want to pursue this channel at all? North's answer is persuasive.

I knew, and so did the rest of us who were dealing with him, exactly what Mr. Ghorbanifar was. I knew him to be a liar. I knew him to be a cheat, and I knew him to be a man making enormous sums of money. He was widely suspected to be, within the people I dealt with at the Central Intelligence Agency, an agent of the Israeli Government, or at least one of, if not more, of their security services.

That is important in understanding why we continued to deal with him. We knew what the man was, but it was difficult to get other people involved in these kinds of activities. I mean, one can't go to Mother Theresa and ask her to go to Tehran . . . . I know there is a lot of folks who think we shouldn't have dealt with this guy, but at the bottom we got two Americans out that way and we started down a track I think we could have succeeded on. As bad as he was, he at least got it started there.[55]

The United States also went into the initiative knowing full well that there was far from an identity of interests between the U.S. and Israel. McFarlane mentioned in his cable to Shultz at the start of the initiative, that the risks of failure would be different for the United States than for Israel: "Surely we ought to expect that Israel's fear over any Arab (as opposed to Iranian) fallout would not necessarily coincide with our own." [56] Shultz's cable of the next day also mentioned that "Israel's interests and ours are not necessarily the same".[57]

As for the character of the difference between U.S. and Israeli interests toward Iran, several witnesses testified that the United States would like to see a quick end to the Iran-Iraq war, but Israel, at a minimum, might find its interests served by prolonged fighting between the two countries.[58] This key difference was said by McFarlane to have been openly discussed in his July 3, 1985 meeting with Kimche:

[Kimche] said, "Obviously Israel's interests are very different from your own," and pointed out that they have an interest in sustaining the conflict. We don't.

I stressed all of our policy points . . . . They are different in many respects from Israel's. But that was clear on both sides, going in, eyes open. The President was very conscious of that.[59]

Another major point of difference was that Israel, like most West European and many other countries, reportedly was selling arms to Iran. The United States was trying to stop the flow of such arms. For that reason, the specific method for trying to establish a relationship, involving arms and hostages, was a particularly risky one for U.S. policy interests. Once again, however, this point was thoroughly argued within the Administration.

The point of all this is that Israel had good reasons for wanting the United States to get involved, but the U.S. had its own reasons for listening. The United States decided the initiative was worth pursuing, for all of the reasons we have already noted. To be sure, the U.S. did make important errors of judgment. It was overeager. On occasion, it did listen too uncritically to Israeli advice. But the warning flags were there, and McFarlane at least paid lip service to noting their presence. Any U.S. mistakes, therefore, can be laid only at our own country's feet. As Secretary Shultz said before our Committees, "We are big boys and we have to take responsibility for whatever it is we do. We can't say that well, somebody else suggested it to us, therefore it is their fault." [60]

Hostages and the Iran Initiative

We are convinced, as we have argued, that the Iran initiative started as a desire to pursue a strategic opportunity, and that these considerations always remained important. At the same time, there can be no question—as the President himself acknowledged—

that the President's personal concern for the hostages added a sense of urgency that skewed our negotiating tactics, and helps explain the imprudently wishful thinking that led Poindexter and Casey to proceed despite repeated disappointments.

It is important to note that the President has an affirmative duty under U.S. law to do everything in his power to secure the release of Americans illegally imprisoned or held hostage abroad. Under the 1868 Hostage Act, invoked by President Carter during the Iranian hostage crisis of 1979-81:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of the government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.[61]

Under the Hostage Act, the President has a positive, legal obligation to take whatever steps may be necessary and proper, short of war, to secure the release of American citizens. Even without the act, however, we observed in our chapters on the Constitution that the President has a duty to protect the lives and liberty of Americans abroad.

Unfortunately, the duty to protect lives does not always give clear guidance about what to do in specific cases. Taking the wrong steps to save an individual hostage can make hostage taking seem profitable to terrorists. The methods used to save one hostage, in other words, may threaten countless other Americans traveling or living abroad. We have to acknowledge, however, that it is easier to put advice on a piece of paper than to implement the advice in the face of a constant barrage of public criticism, and direct pressure from the hostages' families.

As hard as it may be to let any American remain hostage, one was a special case: William Buckley, the Beirut Station Chief. Buckley was rebuilding the CIA's Lebanon station after the disastrous embassy car bombing of 1983. When he was taken hostage, he knew a great deal about U.S. sources and methods in the Middle East and U.S. officials strongly suspected that he was being tortured to force him to divulge those secrets.

> Mr. CHENEY. I would assume partly on the basis that he was literally one of our own, a man in service to the nation, that there were special feelings on the part of Director Casey for Mr. Buckley as well?
>
> Mr. NORTH. It was my understanding that there was not only a professional relationship between Mr. Buckley and Director Casey but a personal one, and that Director Casey felt very strongly about William Buckley. To the very end, Director Casey was anxious to get the body of Bill Buckley home, and certainly the tortured confession.
>
> Mr. CHENEY. Would it be fair to say that the situation of the hostages, and especially Mr. Buckley, had an impact at least upon the policy decisions we have been talking about here in connection with the opening to Iran, the decision to ship weapons to the Ayatollah?
>
> Mr. NORTH. I believe it did . . . . One of the most difficult things that I experienced in this rather lengthy ordeal, and I am sure it was the same for Mr. McFarlane and Admiral Poindexter and the President, was to see the pictures that we were able to obtain, the videotapes particularly, of Bill Buckley as he died over time, to see him slowly but surely being wasted away.[62]

This testimony from North certainly makes it easier to understand how concern for the hostages could come to have played too prominent a role in the Iran initiative.

DEA Activities

We shall digress briefly from the Iran initiative at this point to discuss another effort the Administration undertook to gain the release of the hostages in Lebanon. This one involved Drug Enforcement Administration (DEA) agents and began in early 1985. The majority is highly critical of this effort in its report. This is puzzling to us, because if the DEA operation had succeeded, there would have been no temptation to mix concern for the hostages with the strategically more important talks with Iran.

The majority repeatedly describes the DEA activities, which were under North's direction, as an overt attempt to pay ransom for the hostages. Indeed, a number of the points made by the majority depend on the ransom theme. The importance of this claim, to the overall thesis of the majority report is that, if true, it would show a predisposition toward paying ransom that would tend to confirm an interpretation of the Iran initiative as an arms-for-hostages deal. We too would be troubled if ransom were being contemplated. But, according to the evidence received in the Committees' investigation, the DEA rescue plans contemplated bribes as the means to gain the hostages'

77-026 O - 87 - 18

release. There was no attempt to pay ransom to the captors.

The majority discounts the testimony of one of the two DEA agents involved, whom we shall call Agent 1. The agent clearly stated that the plan was to offers bribes to certain individuals, and not to pay ransom to those who had directed the capture of the hostages. The agent emphasized that none of the captors had solicited ransom. Rather, money was to be delivered as bribes to those who could effect the release of the hostages, not to the people who actually controlled the terrorist organization. The idea was to find individuals who could be paid off without the knowledge of those in control. The money was intended to go directly to these individuals.[63]

The majority also ignores the account of the Defense Intelligence Agency (DIA) Major who served on the Hostage Locating Task Force in 1985 and 1986. In January 1986, the DIA Major met with the other DEA agent involved in hostage activities, whom we shall call Agent 2, and with two sources who were assisting the DEA agents. The DIA Major observed that one of the two sources was more promising because of his contacts and superior access to the hostage takers.[64] The DIA Major prepared a memorandum of these meetings, and he testified to its accuracy.[65] According to the memorandum, the more promising of the two sources suggested bribery to free the hostages.[66]

Furthermore, Agent 2 testified that when one source suggested that the Lebanese hostage takers would release the hostages in exchange for weapons, the agent dismissed the suggestion. Asked whether the subject of weapons was ever raised again, the agent replied: "No, because I think we had told the source that forget it, you know. It has got to be a bribe situation, not a ransom, but a bribe situation".[67] In fact, the questions from the majority's own counsel clearly recognized that the plan involved bribery.*

A prime example of the majority's attempt to characterize the DEA plans as ransom plans is their analysis of activities in May and June of 1985. The majority alleges that the plan in that time-frame was to pay ransom money of $1 million per hostage. On the contrary, three memorandums on the issue, written by Col. North, all clearly described a plan to bribe individuals other than the hostage takers. The bribe money was to be paid to individuals with access and to those who would arrange transportation and safe passage for the hostages. None of these memorandums mentioned any ransom payments to the hostage takers.[68] North's superior, Robert McFarlane, similarly described the plan as one of bribery.[69]

The majority also claims that the DEA activities were inconsistent with the simultaneous effort to gain the release of the hostages through the Iran initiative. Such a claim is based on the majority's view that at the same time North was arranging to sell weapons to the Iranians to induce them to influence the Hizballah captors to release the hostages, North was offering direct ransom payments to the captors. As shown above, the majority's ransom notion conflicts with the facts. Also, the majority's theme of inconsistent channels for release of the hostages ignores the fact that the DEA activities, which commenced in early 1985, were in existence months before the first sale of arms to Iran in August and September 1985. In any event, the fact is that, notwithstanding the DEA plans as well as other plans for hostage release, the Iran initiative did lead to the release of three hostages. Any alleged conflict or inconsistency is based on speculation. Given the majority's inclination to criticize every perceived or misperceived activity of the Administration in its effort to free the American hostages, the case can be made that if North had not pursued alternatives to the Iranian arms sales, the majority would have found fault with such failure to find better ways to free the hostages.

The last important majority contention is that the activities of the DEA agents were "operational" rather than intelligence-related, and that such activities therefore required that Congress be notified. The facts show that the DEA agents gathered intelligence, planned several operations to free the hostages, and took some preparatory steps for these operations. However, the actual operations to free the hostages did not take place, to a large extent because of events in the Middle East beyond the control of the agents. The participants should, however, have paid closer attention to accounting, funding, and reporting requirements, in order to ensure full compliance with the applicable rules and regulations.

In the final analysis, the DEA efforts to free the hostages must be viewed in perspective. The President was personally committed to do all that he could to bring the hostages home, and there was intense national pressure to do so. Accordingly, the Administration initiated several alternative programs, including the plan to use DEA assets in Lebanon. DEA efforts ultimately failed, and in hindsight these efforts could have been better implemented. Nonetheless, the facts show that many involved in these activities acted at great personal risk and with the best of intentions. Moreover, the Administration deserves recognition for its efforts to explore every promising avenue for the release of the hostages.

* The counsel stated during the deposition: "You were trying to bribe these people with money at the same time they were trying to get weapons from North" See Agent 2 Dep., 8/28/87, at 61. Later, the same counsel asked: "How were these people to be released? In other words, was it to be a forcible extraction. Was it to be a bribing . . . to look the other way?" The agent responded. "Bribing It was always bribing. May not even be bribing. It may be they go shoot all the guards." See Agent 2 Dep., 8/28/87, at 109.

The Second Channel

It is tempting, knowing Buckley's fate and the depth of the President's feeling, to portray U.S. policy as having become "hostage to the hostages." The hostages did become too prominent. Negotiations conducted through the First Channel, arranged by Ghorbanifar, never got off the arms-for-hostages track, despite repeated U.S. efforts. Once discussions began through the Second Channel, however, they began to take in broader geopolitical issues. Some aspects might potentially have been promising. Others, such as the Da'wa prisoners, should have been turned off from the beginning.

The "First Channel" talks between Iran and the United States, from late 1985 through the May 1986 Tehran trip, were arranged and principally conducted by representatives of the Iranian prime minister, who has ties to the more radical elements of the government. Representatives of the so-called "middle of the road" Rafsanjani faction also appear to have attended some of these meetings. Rafsanjani, generally regarded as the number two official in Iran,[70] is the Speaker of the Majlis or Parliament and has principal responsibility for foreign affairs and the conduct of the war. These early meetings used an unreliable intermediary, Ghorbanifar, who misled both sides and who thereby frustrated the progress of the discussions.

The discussions during the Fall of 1986, on the other hand, generally referred to as the "Second Channel" meetings, were sought, arranged and conducted by representatives of Speaker Rafsanjani. Rafsanjani proposed that representatives of the other factions be included in the joint commission that was to be established to pursue the normalization of relations.[71] These changes in the leadership of the negotiations appear to have corresponded with an increasingly serious willingness on the part of the Iranian leadership to consider renewed strategic cooperation with the United States, although the leadership did not abandon its interest in acquiring arms in return for hostages.

The Ayatollah Montazeri, a prominent religious leader who is virulently anti-American and a supporter of radical fundamentalist violence in Saudi Arabia and elsewhere, was excluded from both sets of discussions. It was later determined that Ghorbanifar had leaked information concerning the First Channel meetings, including the secret participation of Israeli representatives, to the Montazeri faction. This faction was responsible for disclosing the U.S.-Iran negotiations in the Fall of 1986 in retaliation for the arrest of several of its leaders. After the disclosure, factional warfare within Iran and the U.S. public's response effectively ended the discussions. Since then, they have been overtaken by events in the Gulf.

Negotiations

The initial meetings with the second channel took place secretly in Washington, D.C. over two days in September, 1986. Detailed contemporaneous notes have been made available to the Committees. They show that Colonel North, accompanied by George Cave, a CIA expert on Iran, engaged in two-way discussions of the elements of a new relationship in a way that had not apparently been of interest to the previous channel. The discussions moved from broad, strategic objectives to a number of sensitive and highly specific points. According to the notes, these included the following:

—U.S. and Soviet interests in Iran;
—U.S. and Iranian interests in Afghanistan;
—Iran's objectives in the Iran-Iraq war;
—Soviet objectives in the Iran-Iraq war;
—Intelligence information about deceased hostage William Buckley; and
—Establishing secure communications between the two governments to avoid compromise by hostile third governments.

The negotiators also raised the possibility of an expanded military supply relationship, but the U.S. participants made it clear that such a relationship presupposed resolution of the hostage situation, which was also discussed extensively.[72]

The next significant meetings were held in October 1986 in Frankfurt, West Germany. The U.S. participants were North, Cave, Secord and Hakim. The Iranians made it clear that they wanted the relationship to go beyond a "merchant" or "trading" relationship.[73] The U.S. and Iranian representatives discussed common geopolitical interests extensively, and compared available information. The discussion then turned to the extent to which the United States was willing to supply additional weapons to Iran. U.S. negotiators made clear that the weapons Iran had requested could be supplied if the hostage issue was resolved first.[74] The U.S. and Iranian negotiators also discussed the Iran-Iraq war, the meaning of an honorable "victory" for Iran, the status of Iraq's Saddam Hussein.[75]

North then left the meeting after stating that his "Seven Point" proposal[76] was the full limit of his authority.* The Iranians made a counterproposal. Hakim and Secord were left with authority to try to come to an agreement with the Iranians, subject to approval by the U.S. Government. After some additional discussion, Hakim and Secord reached a new "Nine Point" agreement.[77] It provided in substance for the release of one hostage, with a promise to attempt to obtain another, in return for the shipment of some U.S. weapons, instead of insisting on all of

* He had to leave suddenly because he had learned that the airplane carrying Eugene Hasenfus had been shot down over Nicaragua. See North Test., Hearings, 100-7, Vol. II, at 6.

the hostages as North's original proposal had done. It also included a plan that might result in direct Iranian-Kuwaiti negotiations over release of the infamous Da'wa prisoners.** The agreement was reviewed by North and Poindexter and Poindexter claims to have briefed the President.[78] The evidence indicates, however, that the President was not told about the Da'wa. When he learned about the Da'wa part of the talks later, the President found it repugnant.[79] So do we.

It is hard to reach a definitive judgment about the Second Channel meetings. Consider this exchange between Representative Hyde and Admiral Poindexter from the public hearings:

> Mr. Hyde: The conventional wisdom is that the Iran overture was a policy disaster. Is that not too precipitous a judgment? Shouldn't the jury still be out on that? Because if we do lack good intelligence, we don't really know whether we were getting somewhere or not on the hostage issue or the strategic opening. Is that a fair statement?
>
> Mr. Poindexter: I think that is a very fair statement. I think it is possible if the present people working this problem in government go about it properly, I think it is still possible. One of the interesting things is that we maintained contact with the second channel right up until the day I left the White House and we were alerting the channel as to what we were getting ready to do so that the President's speech, so that his press conference didn't surprise them.
>
> We got the Iranian Government to have their ambassador at the U.N. make a statement which referred to the United States in terms that are more favorable than ever had been made public by this particular Iranian Government, because I truly believe that with the second channel that we had established, we were in contact with some people that really wanted to bring about some changes in the Iranian Government that would be much to the benefit of the United States.
>
> I am not talking about returning to a situation in Iran that was the same as when the Shah was there, but turning the government around to a direction where we could indeed have a constructive relationship with them.
>
> I think it is still possible that that may come about.[80]

In some respects, the actual results of the Second Channel negotiations—a small shipment of arms, the release of one hostage—were similar to the earlier agreements conducted through the First Channel. Two elements of the Second Channel meetings were different, however. First, although some of the same people participated in meetings held through both of the channels, the Second Channel meetings involved a different, more powerful leadership. Second, the Iranians this time clearly seemed to recognize that if the hostage problem could be finally resolved, the United States and Iran had important, mutually compatible interests that might well sustain a substantially increased level of cooperation.

The precise elements of the strategic relationship being discussed were decidedly mixed, however. Some were beneficial to the United States, such as the exchanges of information over mutual geopolitical interests in the region. Others, such as proposed Da'wa release, were not. North may have been correct in saying that the position he endorsed on the Da'wa did not exactly contradict publicly stated U.S. policy.[81] This technical accuracy does not begin to account, though, for the way such a position would have undermined U.S. credibility. It is another example of the NSC staff thinking about literal compliance, without adequately considering the long term political consequences.

Conclusion: The Role of the NSC Staff, and Others

The Tower Commission concluded that the Iran initiative was pursued with a flawed decision process managed by the NSC staff, and suggested that the procedural flaws were responsible for some of the initiative's substantive errors.[82] The Tower board, we believe, underestimated the extent to which major issues were aired and argued before the President from November 1985 through January 1986. But the board was right to say that the lack of regular procedures, fostered by an excessive concern for secrecy, short-circuited the process of periodic review and evaluation—both of the substantive desirability of continuing the initiative, and of the decision not to notify Congress.

To describe what happened simply in terms of the process, however, leaves some important questions unanswered. It is true that good organization can help make sound decisions more likely. But organization, at best, is a tool. The real flaw in the NSC's Iran negotiations, as well as in the NSC's deceptions of Congress over Nicaragua, came from errors in judgment. The question, therefore, is: what can an administration do to ensure that people with the appropriate

**At the meeting in Frankfurt, North specifically told the Iranian representatives not what the United States would be willing to do to release the prisoners, but what the Iranians would have to do before the Kuwaitis would release them. See C378. North did not promise then or later to take any affirmative steps on behalf of the United States to seek the release of the Da'wa prisoners. George Cave testified to this effect as well. See Cave Dep., 9/29/87, at 152-53. See also *Id.* at 56.

breadth and depth of judgment are fully involved in the process at the appropriate stages? The majority report seems to want to get at this issue by legislating organization for the executive branch down to the finest detail. We are convinced, however that no one formula will work best for all Presidents.

It is important not to let the record be closed with a naked criticism of the NSC staff, such as the one with which we closed our review of the Second Channel negotiations. The NSC's weakness, and the way the Iran initiative and Contra support programs gravitated toward the NSC, point to issues that go beyond this particular NSC and the specifics of this investigation. The NSC staff operated within a context that was also a part of the problem.

Presidents can use their NSC staffs in a variety of different, and equally valid, ways. One President might prefer a staff that filters and summarizes. Another might want a more active, more politically attuned and more powerful NSC staff. Like the Tower Commission, we do not think it is appropriate to tell Presidents how to arrange the people who work for them. The best organization is the one that works best for the elected official who bears final responsibility. But an administration's style, overall, has to be one that fits together in all of its parts. If the NSC staff is to operate primarily as an honest broker, that imposes responsibilities on cabinet officers chosen for their judgment. If the cabinet officers fail to meet those responsibilities, they end up leaving policy initiation, oversight, substantive review and political review to people who may not have those tasks as their primary strengths.

The Reagan Administration has been beleaguered from the beginning by serious policy disagreements between the Secretaries of State and Defense, among others. That in itself in not unusual. The perspectives of those two departments often produce disagreements, under many Presidents. One reason Presidents need an NSC staff is precisely to help the President benefit from the differences within his administration, and not suffer from them. We have learned in our hearings that President Reagan has been willing to act decisively to settle policy differences when they are presented to him. He has not been as successful, however, in ensuring that all such important differences are brought to his personal attention. In addition, he has not taken a strong hand in settling issues on which policies, personnel conflicts and turf battles merge. One result has been that some people in the Administration have had an interest in seeing the NSC staff play the role of honest broker, and not being an independent source of power. Their interest coincided with President Reagan's own preference for cabinet government, and for a less independently powerful NSC staff than those of his predecessors.

It is ironic that many have looked upon the Iran-Contra Affair as a sign of an excessively powerful NSC staff. In fact, the staff's role in the Iran and Nicaragua policies were the exceptions of the Reagan years rather than the rule. When Robert McFarlane resigned in December 1985, both Chief of Staff Donald Regan and Secretary Shultz were wary of a strong successor. Passing over some widely discussed, and independently powerful people, such as Jeane Kirkpatrick, the President chose McFarlane's deputy, Admiral Poindexter. Press accounts written at the time saw Poindexter's selection in precisely these terms, as a decision to have the National Security Adviser play the role of honest broker.[83] This image of the NSC lasted almost until the moment the Iran arms initiative became public.[84] Poindexter was seen as a technician, chosen to perform a technical job, not to exercise political judgment.

Poindexter is a talented man. In addition to his skills as a naval officer, he is highly intelligent, knowledgeable about international relations, and experienced with procedures in the Reagan White House. He was not the sort of man, however, who normally sought to initiate policy or engage in jurisdictional battles. On the other side of this same character trait, he had little feel for the "people" side of domestic or international political strategy. That would not be a problem, however, as long as he managed to stay in the role of honest broker.

Of all people, White House Chief of Staff Donald Regan surely should have known of Poindexter's strengths and weaknesses. He should not have tried to second-guess everything the National Security Adviser did, but his job in the White House did require him to take note of when issues were likely to cause the President political problems. Even if Regan were not an expert in the substance of the international issues, it was his job to stay on top of the political implications of the NSC staff's activities. That alone should have led him to see red warning flags, and to make a careful check, when North was asked to testify about support for the Nicaraguan democratic Resistance after press accounts and a formal Resolution of Inquiry. He should have had a similar reaction when the NSC never reviewed the decision not to notify Congress about the January 17 finding.

One way of looking at Poindexter's mistakes is to say that they were just waiting to happen. Once the NSC staff had to manage two operations that were bound to raise politically sensitive questions, Poindexter was not well equipped to handle them. It is not satisfactory, however, for people in the Administration simply to point the finger at him and walk away from all responsibility. For one thing, the President himself does have to bear personal responsibility for the people he picks for top office. But the problem here may not have been who was picked. Instead, it may be that a person chosen to do one kind of a job as National Security Adviser suddenly was thrust into a very different kind of a situation. The question,

therefore, is: how did it happen that the NSC came to play so prominent a role in the Iran-Contra Affair?

There is no mystery why the NSC staff became so important for U.S. policy toward Nicaragua. North's powerful personality, and disputes within the Restricted Interagency Group before Abrams became Assistant Secretary of State, both contributed to North's growing power. But the fundamental reason for the NSC's prominence, beginning in 1984, was the Boland Amendment. Once that amendment was passed, the CIA and State Department were all but read out of the picture. The NSC staff was able to operate under the restriction, and it did.

The evolution of the NSC's role in the Iran initiative was more accidental. David Kimche brought Israel's proposal to McFarlane in August 1985, instead of to the State Department, because he knew McFarlane well, because the State Department had rejected similar overtures in the past, and because he knew the issue would have to be decided by the President. The NSC staff was asked for flight assistance, instead of State, in November 1985, for essentially the same reasons. In January 1986, Amiram Nir saw Poindexter and North partly because Nir and North were their respective governments' counterparts on counterterrorism and had worked closely together in that capacity, partly because the hostages made this a counterterrorism issue, partly because the initiative had already started in the NSC, and partly, or mostly, because Secretries Weinberger and Shultz were strongly opposed to the arms sales.

In addition, the CIA was more than happy not to be managing the operation itself. It was content, as former Deputy Director of Central Intelligence John McMahon has said, to play a support role.[85] Clair George, the Deputy Director for Operations, expressed even stronger feelings, as did his whole directorate, because Ghorbanifar was being used as the intermediary. After having issued a burn notice on Ghorbanifar once before, Casey asked George to reevaluate him. The agency reinterviewed Ghorbanifar in late December 1985 and gave him a second polygraph in January 1986.[86] George told North how poorly Ghorbanifar had done, and then told Casey: "'Bill, I am not going to run this guy any more,' which means in our language, 'I will not handle him; he is a bum.'" [87]

There were a number of reasons peculiar to the particular operation, in other words, that explain why the NSC staff ended up running the Iran initiative. It is important to remember, however, that this function was an aberration. But the NSC lacked not only a person at the top who was picked for policy judgment; it also lacked operational experience.* There were people with such experience in the line agencies, but their Secretaries were vehemently opposed to the initiative.

In the best of all textbook worlds, the department secretaries and other political appointees would acknowledge the President's decision and work hard to make sure the decision is implemented professionally. As George Shultz said in his testimony, however, issues never seem to be settled in Washington.[88] Concern was rampant throughout the government that trusting anyone to run a policy he or she opposed vigorously was an open invitation to having the policy undermined, through leaks or otherwise. The situation helps explain why the NSC staff, when running a dangerous operation during which hostages could easily be killed, decided to be secretive.

There can be no question that the NSC denied Secretaries Shultz and Weinberger some information they should have had. However, if one looks at the record presented in testimony, it is also clear both of the Secretaries had many indications of what was happening. Weinberger did not push as hard he might have done to insist on a policy review, but we do not accept the Tower Commission's conclusion that he simply distanced himself from what was going on. On the other hand, the Tower Commission's assessment of Shultz seems more accurate. He does seem to have distanced himself, and then complained loudly afterward about what had happened.

Let us begin with Weinberger. During our hearings, the Secretary of Defense described himself as having been "pretty horrified" at a November 10, 1986 White House meeting, when he heard Poindexter give what the Secretary described as Poindexter's first general exposition and report on the initiative.[89] In contemporaneous notes, Weinberger also said he was surprised to learn that the President had signed a finding for the initiative in January 1986.[90] It would be misleading to treat Weinberger, however, as if he were left in the dark. For example, even though Weinberger did not know the President had signed a finding on January 17, he did attend a meeting at which the finding was discussed the day before, and he did know the Defense Department was shipping weapons to the CIA for Iran in February. He also learned about McFarlane's trip to Tehran from reports even though he had not been told about it in advance by Poindexter, and he knew about the

* However, the NSC played an operational role in a series of risky foreign activities during the Reagan Administration: the raid on Libya, the freeing of the American students on Grenada, and the capture of the Achille Lauro seajackers. Admiral Poindexter pointed out that nobody (Congress and press included) ever complained about the NSC's role in these successful operations. It was not until the problems with the Iran initiative and the Contra assistance program (both highly controversial foreign policy initiatives) that the NSC's operational role was questioned. Poindexter Test., Hearings, 100-8, 7/17/87, at 167-168. This raises a serious question as to whether the NSC should be legislatively prohibited from ever playing an operational role to assist the President with sensitive and risky activities that the State and Defense Departments bureaucracies might be too cumbersome to react to effectively.

October 1986 shipment.[91] When he did not see all of the hostages come out, he could have said it was time to see how the policy was working. In fact, Weinberger said that he did make the point "all through that year" to Admiral Poindexter.

> I talked to Mr. Poindexter so many times, and I don't remember whether the President was present at some of those meetings or not. I think he may well have been, but I am not sure of that. But the continued objection was made all through that year with repeated—my repeatedly calling attention to the fact that it wasn't working.[92]

Weinberger was repeatedly told by Poindexter, however, that the President had made up his mind and it was useless to keep rearguing the point.[93] Weinberger probably could have insisted on a review anyway. Poindexter's past record, however, led others, mistakenly on this one issue, to see him as a person who (a) carried cabinet level messages faithfully and (b) was not an inordinate risk-taker. We have to surmise from Weinberger's behavior, therefore, that he accepted Poindexter's characterization and concluded that the issue was not important enough to him to be worth repeated pushing. Other battles, over arms control for example, must have been of higher priority.

Shultz is more open to criticism than Weinberger, in our view. For one thing, the Iran initiative directly went against Operation Staunch and other State Department programs. He had more reason bureaucratically to insist on an active role, and more solid reasons than Weinberger to think the initiative might be running counter to the positions he and his department were charged with enforcing.

Secretary Shultz submitted a chronology to the Committees that listed an impressive number of occasions on which he was led by Poindexter to think that the United States was not contemplating or engaged in arms sales to Iran.[94] Nevertheless, there are also a significant number of occurrences that would have given a more engaged Secretary, or one who wanted to be more engaged, an opportunity to insist upon being fully informed.

For example, on December 5, 1985 Shultz was briefed by Poindexter on Iran. In that briefing, Shultz complained about the State Department being cut out of distribution on certain reports. Despite the complaint, the reports did not start coming to him.[95] From the very beginning of Poindexter's tenure as National Security Adviser, therefore, Shultz was given a strong signal that he would have to be very aggressive to stay on top of all of the relevant information he would need to know. Then, in January, Shultz all but told the secretive Poindexter that he would let him be the judge of what he thought Shultz should be told about Iran:

> What I did say to Admiral Poindexter was that I wanted to be informed of the things I needed to know to do my job as Secretary of State.
>
> But he didn't need to keep me posted on the details, the operational details of what he was doing. That is what I told him.
>
> Now, the reason for that was—I'm not—this is the gist of what I told him. I don't remember the exact words, but that was about it. The reason for that was that there had been a great amount of discussion of leaks in the Administration, justifiably so. . . . I felt it would probably leak, and then it wouldn't be my leak.[96]

Shultz insisted that he intended and expected to be informed about major issues. But he did leave it to Poindexter to decide which issues were which.

On January 7, 1986, the President held a meeting to discuss Amiram Nir's proposal to resume the arms sales with Iran. Shultz, Weinberger, Meese, Casey, Regan and Poindexter were there. Shultz and Weinberger opposed selling arms to Iran, as they had in past meetings. Unlike other meetings, Shultz said, "it seemed to me that as people around the room talked, that Secretary Weinberger and I were the only ones who were against it."[97]

Then, on January 16, Shultz attended a cabinet meeting at the White House. After the meeting, he was invited to come back later in the afternoon for a meeting about Iran. Shultz said he could not attend because he had another engagement. In our hearings, Shultz made a point of complaining that he did not know the meeting was to discuss what became the January 17 finding.[98] But he must have known, after the January 6 meeting, that arms sales and hostages were on the agenda. Weinberger, Meese, Casey, Sporkin and others attended the meeting, which was held in Poindexter's office. The finding was discussed extensively. Weinberger could have begged off on the same grounds as Shultz, by saying that the President was aware of his view. But the Defense Secretary attended and heard a thorough discussion of the finding. Shultz stayed away, did not send a stand-in, and never asked for, let alone insisted upon, a briefing on what had happened. After this sequence, one could certainly understand how Poindexter got the impression that Shultz did not really care to be informed. If this meeting did not give off every signal of a major, policy event, it is hard to know what would. And if Shultz chose not to come or to inquire afterwards, what should Poindexter have been expected to conclude about how much to tell the Secretary?

On February 28, Poindexter told Shultz that hostages would be released the following week and that Iranians wanted a higher level meeting, but even after the January meeting Shultz did attend, this news did not prompt Shultz to ask about arms. Shultz also

approved the Terms of Reference for McFarlane's trip to Tehran on February 28. The trip was delayed repeatedly. Then, on May 3, Shultz received a cable while he was attending a summit meeting with the President in Tokyo. The cable said that the U.S. Ambassador to Great Britain had learned that a British businessman, Tiny Rowlands, had been approached by Nir to take part in an arms transaction with Iran that had White House approval and included Ghorbanifar and Khashoggi.

> Don Regan . . . told me that the President was upset and this was not anything he knew about, and Admiral Poindexter told me, I think his words were something like "We are not dealing with these people. This is not our deal."
>
> He told Ambassador Price, who called him, that there was, I think his words were, "only a smidgen of truth in it," something like that.[99]

It is puzzling to us how Shultz could have been reassured by what Poindexter told him in Tokyo. The phrases "this [as opposed to something else?] is not our deal" and "smidgen of truth" should invite skepticism.

What is the point of reviewing Shultz's record of disengagement? Shultz and Weinberger left the impression in our hearings, whenever they were asked about the subject, that the main reason to have asked for an NSC review of how the Iran policy was being implemented would have been to reargue the President's basic decision. But surely, that is not the only obligation a cabinet secretary owes to his President. Full NSC members have a responsibility to remain engaged to make sure (1) that the President's policies are being implemented correctly, with a proper eye for consequences not noted by an agency running an operation, and (2) to insist that the President periodically review important policy decisions, so all power is not left in the hands of the people most committed to pushing forward.

If a top official cannot honestly serve his President in this way, raising questions about implementation even when disagreeing with the underlying policy decision, then it is time to think about resigning. Presidents need the judgment and support, even if it is honestly skeptical support, of their top appointees. If the appointees find the policy so repugnant that they can only distance themselves from it, then they are not doing their best to serve. Weinberger did make sure that the Defense Department aspects of the operation were implemented properly. Shultz simply failed to find out about the aspects of the negotiations that directly affected his own department's responsibilities.

Everyone who had a stake in promoting a technician to be National Security Adviser should have realized that meant they had a responsibility to follow and highlight the political consequences of operational decisions for the President. Even if the cabinet officials cannot support the basic policy, they have an obligation to remain actually involved, if they could manage to do so without constantly rearguing or undermining the President's basic policy choice. That is an essential corollary of a system of cabinet government, with a relatively weak National Security Council staff. If the NSC staff is not expected to provide independent judgment, somebody else must do so.

It is at least theoretically possible that the idea of a strong cabinet government, with a weak NSC staff, will not meet any President's needs in today's international climate. That is, with the constant pressure of events and the inevitability of interdepartmental disagreement, it is possible that future Presidents will decide that some important issues over the course of a full term inevitably will require them to have something more than an honest broker as National Security Adviser. If the need is inevitable, Presidents would be well advised to choose people who are known for their independent skills at understanding the strategic politics of international relations, both domestically and abroad. President Reagan certainly reached this conclusion when he picked Frank Carlucci to replace Poindexter, and we expect that General Powell will also turn out to be a person with the requisite sense of judgment. But Presidents should not simply assume that the Iran-Contra affair automatically proves the inevitable need for an independently powerful NSC staff. President Reagan's approach toward governing automatically requires something from the cabinet that was not supplied in this case. The model, in other words, was never given much of a chance.

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Chapter 9
Iran: The Legal Issues

These Committees' hearings and the majority report have trivialized important disagreements over international policy, and the political relationships between the legislative and executive branches. In an attempt to gain partisan advantage, the majority has focused upon legal disputes, trying to portray the Committees' role as that of prosecutor. We have indicated several times that we have some policy disagreements with the Administration's actions of 1984-86. We disagree, for example, with the decision to sell arms to Iran and to withhold notification to Congress for as long as the President did in this case. We also think it was a political mistake for the President not to have confronted Congress over the Boland Amendment in 1984. In neither case, however, do we think the Administration made serious legal missteps. Our reasoning with respect to the Boland Amendment was laid out in an earlier chapter. Here, we examine the major legal points raised by the majority in criticism of the Iran initiative. We conclude that the Administration was in subtantial compliance with the law throughout the Iran initiative.

Introduction

The Iran arms sales involved two different kinds of transactions. The 1985 shipments involved sales, from Israel to Iran, of arms Israel had purchased from the United States. The President gave his verbal approval for these sales,* and the U.S. assured Israel that the weapons could be replenished from U.S. stocks. The August-September 1985 TOW missile sales took place without any direct U.S. participation. A shipment problem in November 1985 brought General Secord into the picture. Ultimately, the CIA also became involved in a minor, peripheral way, because (1) Secord used a CIA proprietary, at commercial rates, to ship the missiles and (2) because CIA personnel became involved in trying to help arrange transshipment through a European country. Because of the CIA's participation, the CIA's General Counsel, Stanley Sporkin, drafted a written Presidential Finding within days of the event that was signed by the President about December 5, 1985. This is the Finding Admiral Poindexter said he destroyed in November 1986.[1] A draft of the Finding has been entered into the Committees' record as an exhibit.[2] The 1986 shipments, in contrast, all involved the shipment of U.S. arms through a commercial cutout, the Secord-Hakim "Enterprise." All of these shipments were adequately described and fully covered by a written Presidential Finding signed January 17, 1986.

The basic law governing most sales of U.S. arms to other countries is the Arms Export Control Act (AECA).[3] Under the AECA, the President is required to notify Congress of covered arms sales, and Congress has an opportunity to pass a joint resolution prohibiting major sales, if it can get the President's signature or a two-thirds veto override vote. The AECA also requires special waivers if a sale is to be made to a country, such as Iran, that has been named by the Secretary of State as one that supports international terrorism.[4] Finally, the AECA requires any country that receives arms under the terms of the act, such as Israel, to notify the President of any proposed transfers to third parties or countries, and to limit such transfers to countries or organizations otherwise eligible to receive arms under the terms of the act. Under this provision, transfers from Israel to Iran would be governed by the same notification and waiver requirements as direct sales or transfers from the United States. Similar restrictions apply to the retransfer of arms given to another country under the Foreign Assistance Act (FAA) of 1961.[5] Under the AECA and the FAA, sales of munitions valued at less than $14 million are not subject to the formal reporting requirements outlined in 22 U.S.C. 2753 (d). Arms sales may also proceed covertly under the National Security Act,[6] with prices set under the terms of the Economy Act.[7] The National Security Act does contain rules requiring notification of Congress,[8] and the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961 limits the use of appropriated funds to support CIA foreign operations, to ones for which the President finds the operation to be important to the national security.[9] The legal issues raised by the arms sales to Iran may therefore be summarized as follows:

(1) Did the arms sales of 1985, from Israel to Iran, violate the terms of the AECA or FAA?

* For the dispute over this point, see Tower, B-19-23. These Committees have developed no important new evidence on the point.

(2) Did the 1985 Israeli sales to Iran violate the requirements for Presidential authorizations or Findings under the terms of the National Security Act and the Hughes-Ryan Amendment?

(3) Did the 1986 sales violate the National Security Act's requirements for notifying Congress?

Our answer to each of these questions is no. We conclude that the Administration was in substantial compliance with the law during each of the Iran transactions.

Export Controls and the 1985 Shipments

All of the arms transfers before January 17, 1986—that is, the transfers of August, September, and November 1985—were accomplished by Israel's shipment of weapons from its own supplies. These weapons were originally obtained from the United States and were sent to Iran with the understanding that the United States eventually would replenish Israeli stocks.

It is reasonable to assume that the weapons Israel shipped to Iran in 1985 were originally supplied under the AECA or FAA. These two statutes do permit the President or the Secretary of State to consent to retransfers, provided that certain conditions are satisfied. Under the Arms Export Control Act, these conditions are that the United States itself must be able to sell weapons to the third country directly; that the third country transferee must agree in writing not to retransfer without U.S. permission; and that Congress must be notified.[10] The Foreign Assistance Act contains provisions similar to the first two above, but no notification provision.[11] It should be noted that while the Letter of Offer and Acceptance[12] Israel signed in receiving arms in the first instance required it to receive written authorization from the U.S. for retransfer of weapons to a third party, neither the AECA nor the FAA require a written authorization. In these instances, Israel received oral authorization for the retransfers. Because each of these transactions involved less than $14 million, compliance with the formal reporting requirements of the AECA and FAA is not required.[13]

The retransfer restrictions of the AECA and FAA were intended to cover situations in which the transferring country, rather than the United States, is the sole source of the retransfer request. The laws seek to ensure that such retransfers foster the national security interests of the United States. But in the case of the Iran arms sales, the Israeli shipments were made with the agreement of American authorities, and Israel was promised and later was given substantially identical replacements. Clearly, the Iran arms sales were premised on U.S. views about America's own national security interests. In short, the substantive purposes of the AECA and FAA were met.

An Alternative Route

The National Security Act provides an alternative legal route to using the AECA or FAA. Like the AECA and FAA, the National Security Act presupposes some kind of Presidential determination. Specifically, the determination must be that an action—in this case a retransfer—would "affect" the national security.[14] If the CIA is involved, the so-called Hughes-Ryan Amendment requires a more emphatic Presidential determination. Instead of saying an activity must "affect" national security, Hughes-Ryan says it must be "important." More significantly, this determination must be made personally by the President, and reported in a "timely fashion" to Congress.

We believe that the terms under which the President may use the National Security Act in fact meet all of the underlying purposes of the AECA and FAA, and that is why Congress has been satisfied to let the one approach be a substitute or alternative route to the other.* The fact is that the 1985 Israeli transactions essentially—and legally—were equivalent to ones in which the United States sold the weapons directly to Iran.

The evidence indicates that Israel participated in the 1985 transactions in reliance on U.S. assurances, provided by the NSC staff with the President's approval, that the U.S. would not oppose the transactions, and that the U.S. would replenish the arms Israel sent to Iran. The same arms could have been supplied lawfully, however, directly from American stocks. Indeed, the transactions of 1986 did proceed directly, under the authority of the National Security Act and the Economy Act. Assistant Attorney General Cooper pointed out in his December 17 memorandum to the Attorney General:

> [I]t is apparent that the real nature of the 1985 transactions was a bilateral sale by the United States to Iran, with Israel serving solely as a conduit or facilitator in the execution of that sale.
>
> We see no reason to treat the legality of Israel's participation differently than we would treat the participation of any other party that served as a conduit in a lawful covert operation. Had the United States consigned weapons from American stocks to Israel for shipment to Iran, Israel's role would have been exactly equivalent to the role that common carriers and public warehouses play in overt transactions. Because, so far as we know, the weapons that Israel shipped to Iran in 1985 and received from the United States were completely fungible, a similar equivalence is presented here. Just as an *illegal* sale of arms to Iran

* There are differences in the formal reporting requirements, to be sure. In some circumstances, we might imagine that such differences could be significant. In this particular retransfer, they were not.

would not be made legal by using Israel as a conduit, so too a *legal* transaction could not be made illegal by Israel being used in the same way.[15]

The Laws Governing Covert Action

We turn now to the laws governing covert operation, which were the ones under which the Administration was operating. In our earlier chapter on the Constitution, we argued that the President has the inherent authority to use special agents and to encourage or order covert activities. Once the President begins using appropriated funds, however—including salaried personnel—Congress can put strings on the use of such funds. Congress can, for example, tie the President's hands in knots by appropriating money for only one specified operation at a time. For any number of important national security reasons, we noted in the Constitution chapter, the Congress has recognized that the President needs a contingency reserve fund to meet changing conditions during the course of a fiscal year. Once Congress gives the President a contingency reserve, there are lines of inherent Presidential authority that Congress may not properly cross. Those lines come into play most importantly in the extremely rare circumstance when the President has legitimate reason to believe that reporting must be withheld. We shall discuss this issue below. For any circumstances outside the extreme, however, Congress has put a number of requirements on the President that seem to us to pass constitutional muster.

For most of the country's history, covert activities were conducted by giving the President a contingency fund, without any additional, explicit statutory authorization. The first law codifying this power was the National Security Act of 1947. That law established the National Security Council and gave it the power, among others, to perform "such other functions as the President may direct . . . ."[16] In the polite language of the post-World War II diplomatic world, in which covert activities were not acknowledged publicly by governments, everyone understood this term to give broad authority to the President to use the NSC as he saw fit. Another title of the same law, however, created the CIA as the government's main body for conducting such activities:

> It shall be the duty of the Agency, under the direction of the National Security Council . . . to perform, such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.[17]

Historically, this language has been understood to authorize a wide range of foreign covert activities, including arms transfers.

Covert Transactions

The position that covert arms sales could proceed without triggering the requirements of the AECA was expressed as the Administration's interpretation of the law in October 1981. In conjunction with one covert transaction that year, Davis R. Robinson, Legal Adviser to the Secretary of State, wrote:

> It seems clear that Congress has not regarded the FAA and the AECA as an exclusive body of law fully occupying the field with respect to U.S. arms transfers. There are several illustrations where Congress, having been made aware of transfers to foreign countries outside that body of specific authorities, has reacted by enacting limited restrictions or reporting requirements rather than by prohibiting such transfers altogether.[18]

Robinson noted that if Congress had thought the AECA and FAA completely covered the field, it would not have passed the Clark Amendment of 1976, prohibiting covert aid to Angola, or the Hughes-Ryan Amendment establishing separate finding and notification requirements for CIA covert operations.

Three days after the Robinson memo was written, Attorney General William French Smith forwarded a copy to Director Casey. Smith wrote:

> We have been advised by the State Department's Legal Adviser that the Foreign Assistance Act and the Arms Export Control Act were not intended, and have not been applied, by Congress to be the exclusive means for sales of U.S. weapons to foreign countries and that the President may approve a transfer outside the context of those statutes.[19]

The Attorney General concurred with this opinion, and Congress was well aware of this fact.

Congressional awareness is shown most clearly in a provision of the Intelligence Authorization Act for Fiscal Year 1986. This provision, which became a new section to the National Security Act, reads as follows:

> Sec. 503. (a)(1)The transfer of a defense article or defense service exceeding $1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant anticipated intelligence activity for the purpose of section 501 of this Act.
>
> (2) Paragraph (1) does not apply if--
>
> (A) The transfer is being made to a department, agency, or other entity of the United States (so long as there will not be a subsequent retransfer of the defense articles or defense services outside the United States Government in con-

junction with an intelligence or intelligence-related activity); or

(B) the transfer--(i) is being made pursuant to authorities contained in part II of the Foreign Assistance Act of 1961, [or] the Arms Export Control Act . . . .[20]

This act makes it clear, beyond any doubt, that Congress intended some covert arms transfers to occur outside normal AECA channels. It was precisely for this reason that it put in a threshold to trigger the reporting requirements under the provisions governing reporting and Congressional oversight of intelligence.

The General Accounting Office agreed with this conclusion. In a March 1987 report on the direct U.S. arms sales to Iran, the GAO said:

Since Congress has explicitly recognized that intelligence activities may include the secret transfer of arms (Intelligence Authorization Act for fiscal year 1986, section 403 [quoted above as section 503 of the National Security Act]), the CIA is authorized by the Economy Act to turn to other agencies for that equipment. Therefore, we believe that the decision to use the Economy Act to provide support for this covert transaction was proper.

Transfers of equipment by the CIA and others, including foreign governments, are governed by applicable laws relating to intelligence and special activities, rather than the Arms Export Control Act, which ordinarily governs overt arms transfers overseas. Consequently, we consider those transfers to be subject to the requirements pertaining to the conduct of intelligence and special activities. As a general rule, those transfers would not be subject to the pricing or reporting restrictions applicable to overt arms transfers conducted under the Arms Export Control Act.[21]

Hughes-Ryan Amendment

The direct statutory regulation of special activities began only recently, in 1974. In that year, Congress passed the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961. As amended by the Intelligence Oversight Act of 1980, Hughes-Ryan reads as follows:

No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. [The following was added in 1980 to replace earlier "timely notification" language.] Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947. [Section 501 is the 1980 Oversight Act.][22]

As pathbreaking as Hughes-Ryan was at the time, its omissions are at least as important as its coverage for analyzing the Iran arms sales. Hughes-Ryan applies only to those covert operations involving the expenditure of appropriated funds by or on behalf of the CIA.

August-September 1985 Transactions

Specifically, the omissions of Hughes-Ryan mean that the Israeli's TOW transfers to Iran in August and September 1985—which did not in any way involve the CIA—did not require a covert action Finding under the terms of the law.* In fact, no written Finding was made at that time. Nonetheless, there is evidence indicating that the August-September and November 1985 shipments were carried out pursuant to the oral authorization of the President. In fact, the Hughes-Ryan Amendment contains no requirement that this Finding be reduced to writing or that it be articulated in any particular form. The main purpose of the Presidential finding requirement is to ensure that the President himself decides, before each such operation, whether the national security justified its being carried out. An oral authorization therefore satisfies the Hughes-Ryan finding requirement.**

We do believe it would be better to reduce covert action Findings to written form, so as to memorialize the undertaking and to avoid any confusion in implementation and notification. Certainly, all of the 1985 arms shipments should have been preceded by a written Finding or Findings. Paying more attention to

* It should be noted that Executive Order No. 12333 on United States Intelligence Activities (Dec. 4, 1981, 46 Fed.Reg. 59941) extended the finding requirements of Hughes-Ryan to the "intelligence community." As we have already pointed out in the Boland Amendment chapter, however, this language, and the earlier language of the Oversight Act of 1980, were crafted deliberately to exclude the NSC, which was the only U S government agency involved in even tangentially in the August-September shipments.

** This is the position taken by Assistant Attorney General Cooper in, Cooper Memorandum, "Legal Authority . . . ", n. 15 *infra*, at 7-8. In the President's National Security Decision Directive (NSDD) 159, dated January 18, 1985, there is a provision stating that the appropriate procedure for Presidential approval of covert actions is a written Presidential Finding. (See Ex. BGS-15, *Hearings*, 100-5.) However, this procedure, having been instituted for the internal use of the President and his intelligence advisers, cannot be considered to be legally binding on the President. Writing about Executive Order 12333, which if anything must have greater binding authority than a classified NSDD, Cooper said: Activities authorized by the President cannot 'violate' an executive order in any legally meaningful sense, especially in a case where no private rights are involved, because his authorization creates a valid modification of, or exception to, the executive order. *Id.* at 14.

formalities could have eliminated a number of legal issues which have been raised. But this criticism of the White House's past administrative practices is not intended to suggest that the shipments themselves did not meet the legal requirements.

November 1985 Transaction

One difference between the summer and the November shipments in 1985 was that the CIA did play a role, albeit a minor one, in November. It should be emphasized that this shipment consisted of a mere 18 HAWK missiles, and the CIA did not pay for their transportation. CIA officials merely referred North and Secord to a CIA proprietary airline, and this airline transported these missiles in a single plane as a strictly commercial transaction with full payment by Secord's enterprise to the airline. No CIA funds financed the shipment. The CIA's only direct role in this shipment was to facilitate overflight clearances from foreign governments. Thus, the CIA provided logistical support for a secret initiative conducted by the NSC staff.

There has been an inordinate amount of attention paid to the CIA's role in the November 1985 shipments. The underlying theory seems to have been (a) that the CIA and others in the Administration knew the November 1985 shipment was illegal and (b) that attempts to "cover up" the 1985 "illegalities" explain the altered chronologies, shredding and other events of November 1986. We consider both the theory and the underlying premise to be unfounded. For one thing, we do not consider the November 1985 shipments to have had legal problems, except possibly ones of a technical, minor sort.

Allegations that the CIA covered up an illegal action have been fueled by the mysterious disappearance of a cable Duane (Dewey) Clarridge allegedly sent to Country 15 on November 22 and one allegedly sent back to him from the same country the next day. The officer sending the second cable has said it informed headquarters that he had learned from Gen. Secord that the flight would contain HAWK missiles.[23] There have been questions about what happened to these cables. Clarridge specifically denies ever having received the second one, and said that so do the Deputy Director for Operations and others in the DDO's office who would normally have received a copy.[24] Clair George, the DDO, confirmed this testimony.[25] Moreover, Clarridge said, he did not think the difference between HAWKs and oil-drilling parts was all that significant from the agency's point of view, since both were embargoed items.[26]

We do not believe that support of this sort rises to the level of a CIA covert action that would require a Finding under Hughes-Ryan. The action, at most, should be treated as being *de minimis*. In any event, there is evidence that the President orally approved this HAWK shipment from Israel to Iran, and a written Finding was made within days. Then-CIA General Counsel, and now U.S. District Judge, Stanley Sporkin, who had as much experience interpreting Hughes-Ryan as any other federal official, testified that when CIA Deputy Director John McMahon told him to draft a Finding to cover the CIA's involvement, Sporkin thought a Finding was not required by law in this instance, even though he agreed it was prudent.[27] According to John Poindexter, who in early December 1985 succeeded Robert McFarlane as Assistant to the President for National Security Affairs, the President signed the Finding, probably on December 5, 1985.[28] By its terms, the Finding ratified the prior actions that the U.S. government took to obtain the release of the American hostages.

The November-December 1985 Finding reflected in written form that the President had been briefed before the shipments on the efforts made to obtain the release of the hostages, and that the President himself had found that these efforts were important to the national security of the United States. Therefore, in both the oral Findings referred to earlier, and the written Finding itself, the President accordingly ratified all prior actions and directed further actions to be taken.

As for the 1986 arms transfers, the President's written Finding of January 17, 1986 clearly and obviously satisfied Hughes-Ryan for all of them. These Findings covered both the U.S. sales to Iran, and the portion of the May 1986 transaction that replenished Israeli stocks for the 1985 transfers.

Timely Notification

Our closing pages on the Constitution contained an extensive analysis of why Presidents have the inherent power, under exceptional circumstances, to defer notifying Congress of a covert operation. Congress wisely recognized this fact when it passed the Intelligence Oversight Act of 1980.

The Oversight Act was an outgrowth of the the proposed intelligence charters of the 1970s, which we outlined in our chapter on the Boland Amendments. In this chapter, we shall concentrate on one aspect of that law, the requirement for Administration reports to Congress about intelligence activities. That law appears in the statute books as a new section 501 of the National Security Act.[29] Under section 501(a), the Director of Central Intelligence or the heads of other agencies or entities involved in intelligence activities,* are required to keep the intelligence committees of Congress "fully and currently informed of all intelligence activities," including "any significant an-

* We showed in the Boland Amendment chapter that the language in the Oversight Act deliberately excluded the NSC from these requirements.

ticipated intelligence activity." However, section 501(a) further provides:

> [I]f the President determines that it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

This is the provision that permits an Administration to limit advance notification to a so-called "Gang of Eight." The law also specifically contemplates a situation, however, in which notifying the Gang of Eight might be too risky. Consider this wording from section 501(b):

> The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, *for which prior notice was not given under subsection (a)* and shall provide a statement of the reasons for not giving prior notice. [Emphasis added.]

While we agree with the majority that the idea of "timely" notification almost always envisioned a short time period, the rare conditions under which prior notification has been withheld could not possibly have been defined in calendar or other precise statutory terms. As a result, the decision not to notify must of necessity rest on Presidential discretion.

The constitutional basis for withholding notification was recognized in, but, of course, does not depend upon, the "preambular" language of section 501:

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods . . . [the intelligence committees are to be kept informed of various intelligence activities].

Thus, section 501 acknowledges that reporting requirements cannot limit the constitutional authority of either the executive branch or the legislative branch, and further recognizes the need to protect sensitive information from disclosure.

The legislative history of the Oversight Act firmly supports our interpretation of its language. Consider the following explanation of the pending conference report on the Oversight Act by Rep. Boland, then the Intelligence Committee chairman:

> When prior notice is not given to the committees *or to the smaller group of eight,* the conference report makes clear that the full Intelligence Committees must receive reports on the covert operation "in a timely fashion."[30]

Clement J. Zablocki, then Chairman of the House Foreign Affairs Committee as well as a member of the Intelligence Committee, pointed out:

> In addition, the legislation makes the fundamental recognition that in extraordinary circumstances advance information on covert operations might be withheld from the Select Committees on Intelligence, provided the President informs the committees in a timely fashion and provides a statement of the reasons for not giving prior notice.
>
> Mr. Speaker, this recognition of the need for limited exceptions to prior reporting of covert operations is fully consistent with the Committee on Foreign Affairs amendment to Hughes-Ryan. I therefore welcome its inclusion in the conference report. Such exceptions are absolutely essential to a strong intelligence community and important for U.S. security.
>
> Such exceptions will also help the American intelligence community to maintain the extraordinary secrecy necessary in intelligence activities and promote cooperation from the intelligence communities of friendly countries.[31]

William Broomfield, Ranking Republican on the Foreign Affairs Committee, observed:

> Henceforth, in extraordinary circumstances affecting vital national interests—the President will be allowed to defer reporting to Congress on CIA covert action operations abroad. The key word here is defer. The President is not excused forever from letting us know about such activities. This is not an abdication of our oversight responsibility. We are just allowing him to postpone his reporting in those rare instances where, for example, prior disclosure would jeopardize the lives of the personnel or the methods employed in a particular covert action activity. As the conference report notes—"If prior notice of a covert operation is not given, the President must fully inform the select committees in a timely fashion and provide a statement of the reason for not giving prior notice."
>
> Is that unreasonable? It seems to me common sense dictates that we allow the President this flexibility so that he can effectively discharge his constitutional responsibility to conduct foreign policy. In this connection, let us not forget that covert action is an important and sometimes vital aspect of foreign policy and has been utilized by

Presidents all the way back to George Washington.

A number of my colleagues have expressed concern about how often a President might invoke the deferred reporting option provided by this measure. A look at the record to date is illuminating in this regard. Since the passage of the Hughes-Ryan Amendment in 1974, there has been only one known covert action that was not reported to Congress prior to its initiation. Our committee was subsequently briefed on that action and learned that the reason for the deferred reporting was because the President felt such prior notification could jeopardize the lives of the personnel involved in that action. Moreover, participants in this successful operation—which we all applauded when we became aware of it—agreed to participate in the action only after being assured that there would be no prior disclosure to Congress.[32]

Essentially the same interpretation was put on the bill by Rep. Les Aspin, who was then a member of the Intelligence Committee. What makes Aspin's statement particularly important is that it came from a member who was unhappy with what he perceived as the bill's "vague" language. After describing, and complaining about, the provision to limit notification to the chairmen, Aspin then went on to note: "There is, second of course, the possibility, and I guess the statutory possibility that the Administration can, in effect, just waive the whole thing".[33]

There can be no question from the legislative history, in other words, that the statute contemplated situations in which the President would not give prior notification. The remaining question is, how long is "timely"? We would maintain that the answer must vary with circumstances. To weigh circumstances requires one to use discretion; that function, therefore, must, belong to the President.

Was 11 months too long for President Reagan to have withheld notification of the Iran arms sales? We think so; he could have purchased what Rep. Henry Hyde has described as some good political "risk insurance" early by coming to Congress and getting Congress on board.* On the other hand, we are also well aware that President Carter withheld notification for about six months in a parallel hostage crisis. In fact, President Carter, in his four years in office, withheld notification two or three times—about the same number of times and for roughly the same kind of waiting period as President Reagan.** In any event, whenever it finally comes time to notify, the President will have to pay a significant political price if Congress is not persuaded by the reasons the President gives for having withheld notice.

Conclusion

We conclude that the Administration was in substantial compliance with the law during each of the Iran arms transactions. The arms sales of 1985 from Israel to Iran did not violate the terms of the AECA or FAA. It is reasonable to assume that the weapons Israel shipped to Iran in 1985 were originally supplied under AECA or FAA. These two statutes permit the President or the Secretary of State to consent to retransfers. In these instances, oral authorization was given for the transfers. Moreover, the formal reporting requirements do not apply because each of these transactions involved munitions valued at less than $14 million. The AECA and FAA seek to ensure that such retransfers foster the national security interests of the United States. The Israeli shipments were made with the agreement of American authorities and were premised on U.S. views about America's own national security interests. The substantive purposes of the AECA and FAA were met.

Moreover, the 1985 Israeli sales to Iran did not violate the requirements for Presidential authorizations or Findings under the National Security Act and the Hughes-Ryan Amendment. The National Security Act provides an alternative route apart from the AECA and FAA under which the Administration was in compliance with the law during the 1985 transactions. The terms under which the President may use the National Security Act meet all of the underlying purposes of the AECA and FAA. Therefore, Congress has been satisfied to let the one approach be a substitute or alternative route to the other.

The Hughes-Ryan Amendment contains no requirement that Presidential Findings be reduced to writing. The November-December 1985 Finding reflected in written form that the President had been briefed before the shipments on the efforts made to obtain the release of the hostages, and that the President himself had found these efforts were important to the national security of the United States. Therefore, in both the oral Findings of 1985, and the written November-December 1985 Finding, the President accordingly ratified all prior actions and directed further actions to be taken. With regard to the 1986 transactions, the President's January 17, 1986, Finding clearly satisfied the Hughes-Ryan Amendment.

* U.S. House of Representatives, Permanent Select Committee on Intelligence, Subcommittee on Legislation, 100th Cong., 1st Sess., *Hearings on H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to the Congress*, April 1 and 8, June 10, 1987, p. 30.

** These examples were discussed previously in the closing section of chapter 4. As was there pointed out, in one of the cases Canadian participation was conditioned on a U.S. agreement not to notify Congress until Americans hidden in the Canadian Embassy were safely out of Iran.

Finally, the 1986 arms sales did not violate the National Security Act's requirements for notifying Congress. Certainly, the National Security Act requires agencies involved in intelligence activities to keep the intelligence committees of Congress "fully and currently informed of all intelligence activities." However, the law specifically contemplates situations in which notifying the appropriate Congressional members might be too risky. The act requires that in instances in which the President has not given prior notice of intelligence operations, he must inform the intelligence committees in a "timely" fashion.

The decision not to notify must rest on Presidential discretion. The reporting requirements of the National Security Act cannot limit the constitutional authority of the President to withhold prior notification of covert activities in exceptional circumstances. In this case, the lives of hostages were at stake such that premature notification was extraordinarily dangerous to the lives of American citizens. We conclude that, in circumstances such as these, the President must have the discretion to determine when notification is "timely." If Congress, after the fact, disagrees with the way in which the President has exercised his discretion, the appropriate remedy is a political and not a legal one.

Endnotes

1. Poindexter Test., *Hearings*, 100-8, 7/15/87, at 18.
2. Ex. SS-4, *Hearings*, 100-6.
3 .22 U.S.C. 2753.
4. 22 U.S.C. 2780
5. 22 U.S.C. 2314.
6. 50 U.S.C. 401 et seq.
7. 31 U.S.C. 1535.
8. 50 U.S.C. 413.
9. 50 U.S.C. 2422.
10. See 22 U.S.C. Sec. 2753(a).
11. See 22 U.S.C. Sec. 2314(e).
12.See Offer and Acceptance Form, Ex. CWW-7, *Hearings*, 100-10.
13. See 22 U.S.C. Sec. 2753(d).
14. 50 U.S.C. 403 (d)(5).
15. Cooper Memorandum for the Attorney General, "Legal Authority for Covert Arms Transactions to Iran," December 17, 1986, pp. 16-17 reprinted as Ex. EM-69, *Hearings*, 100-9.
16. 50 U.S.C. 402.
17. 50 U.S.C. 403.
18. "Memorandum of Law on Legal Authority for the Transfer of Arms Incidental to Intelligence Collection," by Davis R. Robinson, Legal Adviser, Department of State, October 2, 1981, p. 5.
19. Letter from Attorney General William French Smith to William J. Casey, Director of Central Intelligence, October 5, 1981, reproduced as Weinberger testimony, exhibit 1.
20. 50 U.S.C. 415.
21. U.S. General Accounting Office, Report to the Chairmen, Senate and House Select Committees Investigating Iran Arms Sales, "Iran Arms Sales: DOD's Transfer of Arms to the Central Intelligence Agency," March 1987, p. 8.
22. 22 U.S.C. 2422.
23. See Eggleston narrative in Sporkin Test., *Hearings*, 100-6, 6/24/87, at 220.
24. See Clarridge Test., *Hearings*, 100-11, 8/4/87, at 15.
25. George Test., *Hearings*, 100-11, 8/5/87, at 201-03.
26. Clarridge Test., *Hearings*, 100-11, 8/4/87, at 17, 19.
27. Sporkin Testimony to Tower Commission, Jan. 9, 1987, pp. 7-8.
28. See Ex. SS-4 *Hearings*, 100-6; Poindexter Test., *Hearings*, 100-8, 7/15/87, at 12, 17.
29. 50 U.S.C. 413.
30. Congressional Record, September 30, 1980, p. H10044, emphasis added.
31. *Id.* at H10045.
32. *Id.*
33. *Id.* at H10047.

Chapter 10
The Use or "Diversion" of the Iran Arms Sales Proceeds

"What did the President know, and when did he know it?" That was Senator Howard Baker's famous crystallizing question about President Nixon from the Senate Watergate hearings of 1973. Political tensions were heightened in the Iran-Contra Affair when the same question was asked about the so-called "diversion" of funds from the Iran arms sales to the Nicaraguan democratic resistance. The very term "diversion," given currency by Attorney General Edwin Meese's press conference of November 25, 1986, had the sound of illegality.

Beginning with the first public revelations about the Iranian arms sales in early November 1986, reaction in the United States was a mixture of curiosity, puzzlement, and controversy. The Attorney General's press conference added a new dimension to the furor. The prospect that money had been sent to the Contras during the period of the Boland Amendments greatly intensified the scrutiny the Iran initiative received in the media. Speculation ran unchecked. The Attorney General put the amount that might have been diverted at $10 million to $30 million.[1] Members of the Congressional investigating committees suggested that the amount might have been as high as $50 million.[2] Ultimately, the diversion received more scrutiny than any other aspect of the Iran-Contra Congressional investigations.

The evidence is overwhelmingly clear, however, that the President did not in fact know about the diversion, despite Democratic wishes to soft-peddle the point by attacking Adm. Poindexter's credibility. In addition, the use of the word "diversion" itself assumes that the funds belong to the United States. We shall show later in this chapter that the legal questions surrounding the ownership of the proceeds from the Iran arms sales are by no means settled. Before we can reach these points, however, it is first necessary to explain what the diversion was, how it came about, and how much was transferred.

What Was The Diversion?

What has come to be called the diversion was simply a transfer of a portion of the proceeds of the Iranian arms sales to the private Contra resupply operation under the direction of Gen. Secord. The funds came from two different sources. The initial diversion appears to have been from Israeli funds. In late 1985, after the sale of HAWK missiles by Israel to Iran, North informed Secord that the Israelis would not ask for the return of the unused transportation expense and that Secord could use it for other purposes. Secord testified that he used it for the Contra project and so informed North.[3]

After the United States began selling Iran its own arms in February 1986, the transfers took place out of the portion of the Secord-Hakim funds that were left after the so-called "Enterprise" paid the U.S. Government all that it was owed under Economy Act prices,* and after other immediate, operational expenses. This remaining money has been referred to as the "excess," the "profits," or the "residuals," with each characterization resting on a different point of view about the ownership of the funds.

The American arms sales to Iran were carried out under a January 17, 1986, Finding signed by the President. Sales purposely were not organized as a direct government-to-government transfer. Rather, the operation was dependent on middlemen. Col. North, Gen. Secord, Albert Hakim, Adm. Poindexter, Clair George of the CIA, Attorney General Meese, and all others associated with the initial planning of the Iranian covert operation described it in the same manner: the United States would sell arms to Gen. Secord, acting as a commercial cut-out, who would in turn sell the arms to Manucher Ghorbanifar, who would in turn sell the arms to the Iranians. From the American standpoint, the organizational structure was desirable for several reasons. It gave the U.S. Government some distance from the operation, which would provide maximum protection and plausible deniability. It also satisfied the Attorney General's and Secretary Weinberger's legal concerns about proceeding under the terms of the Arms Export Control Act.

The Economy Act established the basis on which the Department of Defense, in February 1986, sold the CIA 1000 TOWs for $3.7 million dollars, or $3,700 per TOW. The price to be paid by the Iranians

*See Chapter 9 for a discussion of pricing under the Economy Act.

was not statutorily limited, however. Ghorbanifar apparently offered $10,000 per TOW as early as August 1985. This price eventually became the purchase price Ghorbanifar paid to Secord in late February 1986. It should be noted that $10,000 per TOW was not an exorbitant price. The replacement cost in 1986 of the TOW missiles utilized in the arms sales was approximately $8,000.* Under these arrangements, there was an obvious surplus. Ghorbanifar had paid Secord, the commercial middleman, the agreed-upon price of $10,000 per TOW, and Secord had paid the CIA the Economy Act price of $3,700 per TOW. The surplus on the February transaction after transportation and other expenses was on the order of $6.3 million.

How Did The Diversion Happen?

The concept of transferring a portion of the excess proceeds from an arms sale to another project was not a new one. Gen. Singlaub explained that he and North had discussed this concept in connection with arms sales to an entirely different country in early 1985.** When the Israeli arms sales to Iran begin in 1985, the U.S. was aware that the Iranians were paying relatively high prices for the arms compared to what Israel had paid for them. This meant that the United States could reasonably conclude that some funds were being put to other uses by Israel.

Secord and North were both aware that the Contras needed money. By late 1985, they had both been involved in obtaining funds and arms for the Resistance. The specific decision to transfer a portion of Iranian arms sales proceeds to the air resupply operation was the result of a number of factors, one of which was General Secord's involvement in both operations.

The first time a possible surplus came to North's attention was after the November 1985 sale of HAWK missiles from Israel to Iran. Secord had been provided with $1 million by the Israelis to cover transportation for the missiles from Israel to Iran. When the Iranians expressed dissatisfaction with the initial delivery, further deliveries were stopped, and Secord had spent only $200,000 of his retainer. Secord testified that the $800,000 surplus was eventually spent on the Contra resupply project.[4] Hence, the initial diversion appears to have occurred with Israeli funds. It set the pattern for the future.

Secord testified that he had not viewed the Iranian operation as generating any profits for him or his partners. His foremost concern, he said, was having sufficient capital reserves to ensure continued operations.[5] When, as it turned out, the sales generated money in excess of that needed for adequate reserves, he was more than receptive to the suggestion that he send the excess funds to the resupply operation. Col. North had a similar divergence of interests. As strong as his commitment was for the success of the Iranian operation, it was equally strong for the Contras. When surpluses were available, he was unmistakably motivated to advise Secord to use them for the Nicaraguan democratic resistance.

According to Col. North's public testimony, the idea of sending the Contras some of the surplus generated by the direct U.S. to Iran arms sales was offered by Ghorbanifar in late January. Earlier that month, or perhaps in late December, North had discussed with Nir the possibility of using excess funds for joint U.S.-Israeli operations, but said that this discussion never involved using the money for the Nicaraguan resistance.[6] North testified that during a January meeting in London, Ghorbanifar spoke with North in a hotel bathroom and specifically suggested using the surplus for the Nicaraguan resistance.[7] North saw an excellent opportunity to get the Khomeini regime, which was openly supporting the Sandinistas, to unwittingly arm the Contras. He thereafter set prices sufficient to create a surplus and encouraged Secord to send all available surpluses to the Resistance. After the end of our hearings, the Committees received an unsworn, unverified, and unverifiable document purporting to show that North first conceived of a diversion to the Contras by early December. An Israeli chronology claimed that North told Israeli supply officials in New York on December 6 that the Contras needed money, and that he intended to use proceeds from the Iran arms sales to get them some. When North was asked about the December 6 meeting, he reiterated that he did not recall discussing the Contras with anyone involved in the Iran initiative before the late January meeting with Ghorbanifar.[8]

We are inclined to believe North in this dispute, largely because his testimony was sworn and he was granted immunity from all charges arising out of the testimony except that of perjury. Ultimately, however, this dispute is of little importance because even if

*U.S. General Accounting Office, Report to the Chairmen, Senate and House Select Committees Investigating Iran Arms Sales, Iran Arms Sales, DOD's Transfer of Arms to the Central Intelligence Agency, March 1987, p. 11. The replacement cost is difficult to calculate with specificity. The basic TOWs sold in February were obsolete and were to be replaced by an improved model.

**Singlaub Test., *Hearings*, 100-3, 5/20/87, at 76. Typical of the majority's tendentious treatment of the evidence in its diversion chapter is how much it tries to make out of the so-called "Singlaub-Studley" plan for transferring arms sales proceeds to anti-communist insurgents. Yet, after a three page discussion of this plan, the majority states: "The Singlaub-Studley plan was not implemented . . ." The majority continues " . . . but the idea of using sophisticated U.S. weapons to finance arms . . . was known to those working to support the Contras before any proceeds from U.S. sales of arms to Iran were first received." A careful reader will note that the majority is thereby admitting that the first diverted funds, those obtained by Israeli sales of arms to Iran, were received before the Singlaub-Studley plan was tabled in December, 1985. One can only wonder why the majority is intent on glossing over this aspect of the history which the majority itself develops, and instead assigning another intellectual patrimony to the diversion.

the idea was expressed in early December, it never went beyond North until after the January London meeting. Poindexter testified that he first heard of the idea when North asked him to authorize it in February.[9] North testified that he first mentioned the idea to the Director of Central Intelligence, William J. Casey, at about the same time, in late January or early February, after the post-finding London meeting.[10] In addition, North and Poindexter both testified that no one else in the U.S. Government was told about a diversion before this time. What that means is that the diversion cannot possibly have been a consideration for people at the policymaking level before North's January London meeting with Ghorbanifar.§

How Much Was Diverted?

The most reasonable calculations show that approximately $3.8 million of proceeds from the Iran arms transactions was spent for the support of the Nicaraguan Resistance.* During the period that the "Enterprise" received income from the Iranian transaction (November 1985 through November 1986), it also had other funds available for support of the Resistance that totaled $3.4 million. Much of this money came from foreign and private domestic donations specifically earmarked for the Contras. During that same period of time, the "Enterprise" spent approximately $7.2 million in support of the Contras. If one subtracts the $3.4 million in non-Iran funds designated for the Resistance, then the remainder of the $7.2 million, or $3.8 million, was the total amount of the diversion.**

Who Authorized The Diversion?

The diversion was authorized by Poindexter. The Committees were careful when taking testimony on this point to make sure that the principal witnesses would testify in private session before they had a chance to hear the crucial public testimony of this particular point. Thus, Poindexter testified in private session, before North's closed session or public testimony, that he had authorized the diversion at North's request.[11] North corroborated this point in his own executive session testimony before he could have known anything about what Poindexter had said.†

Poindexter also testified that he believed he had the authority to make the decision on his own to approve the use of the Iranian arms sales surplus for the Nicaraguan Resistance.†† He said that because he had worked for the President for a number of years, he felt he knew what the President would want to have done in this situation. Poindexter stated that to him, the diversion appeared to involve the use of what could be considered either third-country funds, or private funds, to support the Contras, and that he believed the President favored the use of such private or third-country funds to support them. Therefore, in his view, the President would have agreed to the use of surplus funds in such a manner. However, Poindexter said, because he thought it would be politically (as opposed to legally) controversial to use the funds to support the Contras, he decided not to inform the President of it so the President could truthfully deny knowledge if the diversion were revealed.[12]

The President has stated, however, that he would not have consented to the diversion had he known

§ The Committees have, indeed, received evidence that the January 17 Finding was revised several times in January 1986 to reflect U.S. strategic goals more clearly. In addition, hearing testimony specifically showed that the "commercial cutout" arrangement was designed to mirror the previous Israeli arms sales structure for security reasons, after the U.S. had decided to make direct sales to avoid legal questions under the Arms Export Control Act. In short, both the Finding and the transactions were restructured for reasons unrelated to the diversion, which could still have been accomplished just as readily even if Israel had continued to be either the seller or had been the intermediary.

*The partners in the "Enterprise" also paid themselves $1.2 million in "commissions" out of the Iranian proceeds. That sum can be considered to have been "diverted," but it is hard to see it as an expenditure for the benefit of the Contras and the Committees have not done so.

**The majority's statements about the amount of money diverted represent what appears to be an amusing political compromise. The majority says that "at least" $3.8 million . . . in arms sales profits were used for the Contras. Yet the reader is given no factual basis whatsoever for the conclusion that more than $3.8 million was diverted, a fact apparently indicative of the continuing disagreement between parts of the majority about what the Committee's records show. Since we accept the $3.8 million number as a maximum, the majority view of the Committee actually is that $3.8 million was diverted.

† North Dep., 7/1/87, at 7. The majority purports to show a conflict between Poindexter and North over the question of the time lapse between when North requested approval of the diversion and when Poindexter approved it. Obviously, the majority is conceding here that North did request approval from Poindexter, and that Poindexter gave it. Moreover, even a casual reader of North's testimony will see that North had no specific recollection of how long it was before Poindexter got back to him. North said, *"I don't recall specifically* on this case—*but my normal modus operandi* on making a proposal such as that would be to go over and sit down with the Admiral . . . . Normally the Admiral would like to think about it . . . . (North Test., *Hearings*, 100-7, Vol. 1, 7/10/87, p. 297, emphasis added). Counsel then asked: "Did you—*do you recall haw long* after you first told him about this orally he got back to you?" North responded: *"No, I don't. I guess* it was a matter of weeks—or days or weeks certainly, because by February, we did it." (*Id.* at 298, emphasis added). Curiously, the majority ignores this testimony, which would conflict with its preordained conclusion.

†† North also testified in private session that he assumed until November 21, 1986, that the diversion had the President's approval. On November 21, he said, he learned from Poindexter that it did not. See North Dep., 7/1/87, at 7, 25. Poindexter testified in private session, before North's, that he had specifically decided not to tell North that the President had not approved the decision. Poindexter thus corroborates North on the essential point, although he did not recall the November 21 conversation to which North testified. See Poindexter Dep., 5/2/87, at 72; 7/2/87, at 17.

about it. He has also stated that in his opinion, Admiral Poindexter did not have the authority to make the decision without the President's approval.

The Committees have received no documentary evidence or testimony which shows that any other U.S. Government official approved or in any other way was involved in agreeing to the diversion. Col. North testified that Director Casey knew about, and was supportive of, the diversion, but North did not suggest that Casey's approval was either sought or required.[13]

The President Knew Nothing About The Diversion

The evidence available to these Committees shows that the President did not know about the diversion. The President has made this point repeatedly. The Committees have received sworn testimony supporting the President on this point from four individuals with first-hand knowledge, and from another individual who directly corroborates some of this key testimony. The plain fact of the matter is that the Committees have no testimony or documentary evidence to the contrary.

Poindexter

Adm. John Poindexter stated under oath, in executive session and during the public hearings of the Committees, that he had not told the President about the diversion.[14] He did so even though he knew that he had thereby deprived himself of an important defense against possible criminal prosecution.[15] Poindexter also testified that he was certain that the "April 4" diversion memorandum, the only surviving memorandum that documents the proposed diversion, did not go to the President.[16] The Committees have received no testimony or documentary evidence that contradicts Poindexter's testimony on these points.*

Thompson

The Committees have also received sworn testimony which directly corroborates Poindexter's testimony. Cmdr. Paul Thompson, formerly the NSC General Counsel and assistant to Adm. Poindexter, testified in an executive session deposition as follows:

> Q: Were you ever asked by Admiral Poindexter to do any legal research relating to the question of the use of proceeds of sales of United States weapons?
>
> A: No.
>
> Q: Have I made that question general enough so you would construe it to include any aspect of the law related to a diversion such as the one we believe actually occurred?
>
> A: Yes, that's sufficiently broad. I asked the Admiral that same question myself on November 25th (1986), why he didn't ask me to do legal research on that issue.
>
> Q: What did he say?
>
> A: He said he didn't want me, to involve me in that aspect of the operations.
>
> Q: Did you have any further discussion on that with him?
>
> A: No. Well, I *did.* I asked him whether he told the President or not.
>
> Q: What did he say?
>
> A: No.
>
> *After the questions about researching the law, the deposition turned to who authorized the diversion.*
>
> Q: Did you ask him whether or not he had authorized the diversion?
>
> A: No. I didn't ask him in those concrete terms. I asked him, after I asked if he had told the President and he said no, he went on to say the reason he didn't tell the President he said he felt confi-

*The striking thing about the majority's deeply flawed effort to impeach Poindexter's testimony on the President's knowledge of the diversion is that it not only adduces no evidence to contradict that testimony, it completely ignores directly relevant corroborative evidence (provided by Paul Thompson and presented below).

Lacking hard evidence, the majority baldly speculates that it was "totally uncharacteristic" for Poindexter not to have told the President about the diversion and that therefore, the majority implies but is apparently afraid to state, Poindexter must have done so and lied to the Committees. The majority selectively uses evidence concerning Poindexter's background and character. To suggest that Poindexter was new in the job, and would therefore not have made this decision by himself, the majority states that the "diversion decision" was made "only two months" after Poindexter became National Security Adviser. The reader is not told of Poindexter's directly relevant testimony that he had served first on the NSC staff and then as deputy national security adviser for a total of 5½ years, and therefore felt confident that he knew how the President felt about Contra policy and private and third country fundraising, of which Adm. Poindexter considered the diversion an example. This, he explained, made him confident he knew what the President would approve without being asked (Poindexter Dep., 5/2/87, at 70-71, 75.) The majority also makes a "chain of command" argument, suggesting that Poindexter would be unlikely to have acted outside of that chain. Yet the majority ignores the fact that Poindexter testified under immunity, in private before North appeared, that he alone approved the diversion as a command decision and that he gave this testimony knowing full well, as he said, that he had thereby deprived himself of an important defense against personal criminal liability. (Poindexter Dep., 5/2/87, at 72-75.) Finally, the majority's character argument utterly ignores the fact that Poindexter was clearly the single most secretive witness the Committees heard from, a man for whom keeping secrets from long time colleagues and associates was a matter of habit. In short, Poindexter was just about the most likely witness, from a character point of view, to have made a decision to keep the diversion from the President.

dent the President would approve it. But it was an interesting few moments because he had for himself as the naval officer and as the commanding officer of the ship, whatever you want to call it, he had a standard of what we call inescapable responsibility in the Navy which means you are inescapably responsible for what any member of your staff does. I was unable to tell whether or not he was just generally aware of the diversion and North's knowledge of the diversion or whether he was more extensively aware of it. . . .

Q: But you apparently were concerned enough about it to ask him both why he hadn't told you and whether or not he had ever asked you to do any legal work that might have borne on the subject; am I right?

A: Well, sure. I was—I saw that as a prime reason for his resignation or his request to be transferred and one of my missions was to help him out in all areas, and I was really just asking the question why didn't you ask for my help in this area.

Q: When did the conversation occur, what date?

A: November 25th. . . . [or] . . . during the course of that week . . . I guess it was the 25th.[17]

North

Lt. Col. Oliver North also testified that he had not told the President of the diversion. North testified further that he did not have any indication that the memorandums he had written to seek approval for the diversion had ever been forwarded to the President. (The memorandums were written to Poindexter and not to the President.*) North testified that none of the memorandums returned to him on this subject had any indication that they had been seen or approved by the President. North said:

I did not send them (the memorandums) to the President, Mr. Nields. This memorandum [referring to the April 4 diversion memorandum, exhibit OLN-1] went to the National Security Adviser, seeking that he obtain the President's approval. There is a big difference. This is not a memorandum to the President.[18]

I want to make it very clear that no memorandum ever came back to me with the President's initials on it, or the President's name on it or a note from the President on it. None of these memorandums [seeking approval of the diversion, written to Poindexter]. I do have, as you know, in the files that you have of mine, many, many of my memorandums do have the President's initials on them, but none of these had the President's initials on them.[19]

Col. North admitted at the hearings that he had misled Gen. Secord when he told him that the President was aware of the diversion in order to enhance the General's enthusiasm for the project.[20] North also admitted that he had made a comment about the diversion to Poindexter once as they were leaving a meeting with the President, but stated that he believed the President had not heard the remark.**

Diversion Memorandums

Although their accounts of how the diversion was authorized were consistent, North and Poindexter had different recollections about the extent to which the diversion had been documented. North said he believed he had written five memorandums seeking approval of diversions, but that he had later destroyed them. Poindexter said he did not recall seeing most of these memorandums, although he thought it was possible that he had seen the original of the surviving April diversion memorandum and then had destroyed the section that dealt with the diversion.[21] However, the references to the diversion apparently usually occupied one or two paragraphs in a multipage document. Given the amount of paper normally flowing through the National Security Adviser's office, it

*The majority gives an incomplete account of the testimony of James Radzimski. All available physical evidence and testimony either fails to support or directly contradicts Radzimski's testimony, as the majority correctly notes. But the majority ignores the fact that Radzimski clarified his account of certain key events in his second deposition. Radzimski specifically admitted then that he had no independent recollection of any cover memorandum from Poindexter to the President being part of any April diversion memorandum on the Iran initiative, a point the majority appears to have forgotten. See Radzimski Dep., 8/11/87 at 71-72. Radzimski also admitted that, if any such document had ever existed, three separate actions, involving at least two different secure systems to which different groups of individuals have access, would all have to have been taken to remove all record of its existence. See *Id.* at 73-77. Nor could Radzimski explain why he would have seen, as he claimed, "non-log" NSC documents such as the diversion memorandum which never would have entered the NSC document control system in the first place. The fact is that Radzimski's testimony was not deemed credible by the Committees, and he was therefore not called to testify despite a premature announcement that he would be so called.

**_Id._ Through what is a surprising oversight, to put it mildly, the majority's account of North's testimony about the President's telephone call to him on November 25, as it relates to the diversion, completely omits North's testimony about Earl's statements about that telephone call. North testified that he did not recall having said to Earl that the President had said "It is important that I not know." North continued: "I am sure that what I said (to Earl) was basically what I told you yesterday . . . [I] wouldn't have characterized it the way you have just indicated [Earl testified], I don't believe." (North 7/8/87, at 93). In short, North's first hand account disagreed with Earl's hearsay testimony, and North denied having given Earl the account Earl recalled.

would not be surprising if Poindexter had simply forgotten or overlooked these references.*

In any event, the Committees have no evidence to suggest that *any* of these North memorandums, which were addressed to Poindexter, ended up going to the President. The Committees actually have some documentary evidence supporting the testimony that they did not go to the President. Poindexter's practice on some occasions was to brief the President orally with respect to what he considered to be the key points of lengthy memorandums, such as the one supporting the January 17 Finding.[22] That is probably what he did with the April diversion memo, using the "Terms of Reference" portion that did not contain a reference to the diversion.[23]

Regan and Meese

The case for the view that the President did not know about the diversion does not rest solely on the corroborated, sworn testimony of Poindexter and North. The Committees also have sworn testimony from former Chief of Staff Donald Regan and Attorney General Edwin Meese concerning the President's reaction when he was told of the diversion.

According to Regan's graphic description, the President's reaction was:

> Deep distress, deep distress. You know, the question has been asked, I've seen it in the paper time and time again: did the President know? Let me put it this way. This guy I know was an actor, and he was nominated at one time for an Academy Award, but I would give him an Academy Award if he knew anything about this when you watched his reaction to express complete surprise at this news on Monday the 24th. He couldn't have known it.[24]

At his deposition, Regan testified as follows:

> Q: And do you recall what the President's reaction was [to learning about the diversion]?"
>
> A: Horror again, and—thinking back on it, it is hard to—it is like a person was punched in the stomach. I mean, the air goes out of him, crestfallen. You know, a slumping in the chair sort of thing. A real blow had been delivered here that not only was there this possibility [of a diversion], but that they—people responsible were primarily Ollie North, for whom the President had high regard as a staff person, and the Attorney General told the President that Admiral Poindexter had some type of inkling of this and should have investigated but didn't.[25]

Attorney General Meese testified at his deposition:

> Q: And what was the President's response [to being told about the diversion]?
>
> A: Well, he was very much surprised. I would say shocked, as was Don Regan.
>
> Q: Do you recall what he said, the President?
>
> A: I can't remember exactly, but it was some expression of surprise.[26]

Meese's testimony at the Committees' public hearings on this point was to much the same effect.[27]

Conclusion

From all of this evidence, it is clear the President did not know about the diversion. A contrary conclusion would have to be based on the view that a series of individuals, including the President, decided to engage in a criminal conspiracy to cover up the President's knowledge and then to lie about it in a well-coordinated manner in sworn testimony, much of it given under grants of immunity protecting the witness from use of the testimony against him for anything except a perjury prosecution. The Committees have no evidence of any kind that would lend the slightest support to this contrary view.

Who Else In The Government Knew About The Diversion?

Col. North testified that he told Robert McFarlane about the diversion at the end of the trip to Tehran in May 1986. McFarlane was by then a private citizen, and there is no indication he participated in, planned, or authorized the diversion. McFarlane has corroborated North's testimony on this point. In addition, North testified, and Robert Earl agreed, that Earl knew about the diversion.[28]

North also testified that Director Casey knew about the diversion. Casey denied knowledge of the diversion to Members of Congress shortly before he entered the hospital. In addition, when Director Casey learned that there was a possibility that someone had diverted funds from the Iran arms sales to the Contras, Col. North assured Director Casey and Deputy

*The majority makes a strained effort to fabricate a conflict between Poindexter and North over whether North was told not to create written records of the diversion. To do this, the majority must ignore Poindexter's testimony at his private deposition, given before North's appearance, that he might have seen the diversion memorandum at or about the time it was written. (Poindexter Dep. 5/2/87, at 178-179; see also Poindexter Test., *Hearings*, 100-8, 7/16/87, at 111-113). Further, at the hearings, as the majority also fails to note, Poindexter stated: "I do recall telling (North) when I took the decision the first time that I didn't want anybody else to know about it. I don't recall telling him not to put it on paper, but . . . I thought (Colonel North) understood from earlier discussions with him, to limit the amount of paper that he prepared . . . . (*Id.* at 114, emphasis added). Poindexter testified further that North "probably" prepared *the diversion memorandum at his request.* (*Id.* at 114-115).

Director Robert Gates that the CIA was not involved in the diversion. Finally, Casey tried to alert Poindexter to the possible problems that were presented by such a diversion and suggested he seek legal counsel to deal with the situation. These can either be seen as efforts indicating that Casey did not know about the diversion, or as efforts to convey an understanding to Gates and others suggesting that he did not know about it in order to conceal the fact that he did.

Whether or not Casey knew, and we are inclined to believe that he did, one thing is clear. Casey's knowledge, or lack thereof, is not in any way indicative of what the rest of the CIA may have known about the diversion, since it is quite clear that Casey had information that he shared with no one else there. The Committees have no substantial evidence that other CIA personnel did know about the diversion. The CIA analysts and operatives who were involved in the Iran operation did have reason to know that there was a spread between the cost of the weapons purchased from the Government and the price being charged the Iranians for them. However, their evidence on this point was equivocal and made it difficult for them to know how large this spread was in some of the transactions. In addition, the fact that there were several intermediaries meant that even though they knew there was a potential for a "diversion," in the sense that there would be excess funds, they did not know where the excess funds were going. In this connection, it is important to remember that the National Security Council, not the CIA, actually managed the Iran arms sales operation. Therefore, the CIA did not have reason to follow the details in the way they would have done had they had been managing the transaction themselves. We have no reason to disbelieve the consistent, unequivocal denials of CIA personnel that they did not become aware of any possible diversion of funds to the Contras until very late in the day, and did not know that NSC personnel were involved in the diversion of funds.

Finally, the Committees have no evidence to suggest that other U.S. Government officials were aware of the diversion.

Did The Diversion Cause Or Interfere With The Iran Initiative?

The Iranian government clearly paid higher prices for U.S. weapons than the United States would have charged other governments. From this, some have drawn the conclusion that the diversion must inherently have interfered with the Iran initiative, because better relations between the two countries could not be based on higher than necessary prices for U.S. weapons.* In addition, some have suggested that generating surplus funds for the Nicaraguan Resistance was the main motive for moving ahead with the sales.

The question of motive was considered at length in the previous chapter. What we have just shown about the diversion only strengthens what was said there. In our view, the record supports neither of these positions. Since there is no evidence that the President or any other major U.S. government decisionmaker knew about the diversion through the time of the January 1986 Finding, it would make no sense to argue that their thinking was influenced by this consideration.

The previous chapter also gives the lie to the idea that the diversion, or "overcharging," adversely affected the success of the Iran initiative. If the Second Channel representatives were upset at the prices, negotiations would hardly have proceeded as we have described. In fact, Gen. Secord specifically testified that he was told by Iran that the price was not an important issue for the Second Channel.[29] As we have already noted, the price was not much higher than the replacement cost. In any case, the Iranians were in a war, they needed the weapons, and there was no other place to buy them. As Adm. Poindexter pointed out, the Iranians had already paid Israel essentially the same premium price the United States charged. He therefore did not think they would be concerned about the U.S. price.[30] North's testimony corroborated this point:

> The fact is that we knew that the Iranians would pay even more than we charged, from intelligence that we had gathered. We knew that during the first channel, for example, Mr. Ghorbanifar had a little frolic and diversion of his own going in which he had pocketed at least some for himself, if not for others, a considerable sum. And that even the prices we charged, he further inflated.
>
> And so we judged that risk [the risk to the hostages from overcharging] to be minimum given that they would be—basically pay whatever they could to get these items or weapons from the source that—whatever source they could.[31]

For these reasons, both Poindexter and North rejected the idea that the diversion materially affected the prospect of achieving a new relationship with the Iranian Government.[32] The concern the Iranians expressed about overcharging in connection with the Hawk shipment is not necessarily to the contrary.

*Interestingly, some of the same people who make the argument that the diversion hurt the chance for the Iran initiative's success, also want to say that the initiative had no chance for success in the first place. It is as if they know the policy must be bad for some reason, so why not offer some inconsistent reasons to see if any can be supported.

They were concerned that their own representative, Ghorbanifar, was profiting from the overcharging. This does not mean that the United States could not have continued to charge these same prices, since the Iranians had no practical alternative but to pay them.[33]

Some Legal Questions Growing Out Of The Diversion

The technical legal questions surrounding the diversion appear to us to turn on the issue of ownership.* If the money was rightfully the property of Gen. Secord and Albert Hakim, then it follows that they were free to donate the excess proceeds to the Resistance, or use it in any other legal manner that they wished. They may have felt a moral obligation to use the money as suggested by North, but they would have been under no legal obligation to do so.

If, however, the funds belonged to the United States, it follows that the money should have gone into the Treasury of the United States and could only be sent to the Nicaraguan Resistance under the terms of an authorized disbursement. Sending the money to the Contras would not technically have been a violation of the Boland Amendment even under these conditions, because the funds were not appropriated. But if the funds were technically the property of the United States, then the Executive had no authority to direct how it would be spent, except under an appropriation or some other legal authorization.

Substantial legal arguments can be made to support and oppose each of the conclusions about who owns the Enterprise's funds. In support of the view that the funds belonged to the United States, it can be argued that Secord was acting as an agent of the United States. The facts that the price to Iran for the arms was set in consultation with North, that the United States selected Iran as the ultimate buyer, that the United States anticipated that the sales would trigger Iranian help in the release of American hostages held in Lebanon, that Secord and Hakim represented themselves as spokesmen for the United States at various times, that Secord did not expect to make a profit from his services, and that North and Secord both expected that any surpluses would be used to further U.S. interests, all support the contention that Secord was an agent and that the surplus funds were the property of the United States.[34]

On the other hand, there are substantial facts to support the conclusion that Secord was purely an independent contractor, with his own risks of profit and loss. Secord was never designated formally, in writing or otherwise, as a U. S. agent. Any argument that they were agents has to be based on a theory of constructive trust, rather than from some facts that will show an explicit, written trust relationship. In addition, Secord claims that although North gave him suggestions and he listened, he made all the decisions and therefore had the control.[35]

One relevant fact that would support the conclusion that the United States did not have an automatic claim to the funds would be the fact that the CIA and DOD were paid the full amount the law requires for the arms, and refused to transfer the weapons until full payment was received. That fact would not settle the issue, however, because the price the Defense Department set was based on the knowledge that the first buyer was another Government agency, the CIA. The real question of ownership does not turn on the relationship between Defense and CIA, but between the CIA or NSC, on the one hand, and the Enterprise, on the other.

It does seem relevant, on Secord's side of this argument, that the Enterprise assumed all of the major financial risks of the operation. For example, if the arms were destroyed during the shipment because of an air crash or otherwise, there was no agreement that the CIA would restore to the Lake Resources account the payment previously received. Similarly, if Iran was dissatisfied with the arms and refused to pay—as occurred with the transfer of Israeli arms in November 1985—there was no understanding that the CIA would repurchase the arms for the amount previously paid.[36]

We have not attempted to resolve this legal question of ownership, because it is not within the charter or province of the Congressional Investigation Committees to do so. It is a matter for the courts to decide. We do, however, believe that even if Secord and Hakim were not agents under the technical terms of the law, they nevertheless received the arms sale proceeds only because there was an expectation between themselves and North, based on trust, that they would put the money toward mutually agreed-upon public ends. Whether legally required to do so or not, therefore, they ought to feel some moral obligation to turn the surplus over to the United States, after deducting reasonable costs and compensation for services.

*Three transactions are at issue. In February 1986, Ghorbanifar provided Khashoggi with four postdated checks for $3 million each. Khashoggi deposited $10 million in the Lake Resources account controlled by Hakim and Secord. The CIA then received its contract price of $3.7 million for 1,000 TOWs and certified the availability of the funds to DOD. The certification and payment of the amount to DOD initiated the transfer of the TOWs to the custody of Secord, who arranged for their transportation and delivery to Iran. Thereafter, Iran transferred $7.85 million to the Lake Resources account, which was supplemented by $5 million from Israel stemming from the abortive HAWK missile shipment in November 1985. Khashoggi was repaid $12 million from Lake Resources, leaving a profit for the Enterprise of $6.3 million, less the cost of transportation of the TOWs. The same general method of financing was employed in the transfer of 1,008 TOWs and HAWK spare parts in May 1986, August 1986, and October 1986. The aggregate surplus to the Enterprise in dispute approximates $8.5 million.

Conclusion

The diversion has led some of the Committees Members to express a great deal of concern in the public hearings about the use of private citizens in covert operations in settings that mix private profits with public benefits. We remain convinced that covert operations will continue to have to use private agents or contractors in the future, and that those private parties will continue to operate at least partly from profit motives. If the United States tries to limit itself to dealing only with people who act out of purely patriotic motives, it effectively will rule out any worthwhile dealing with most arms dealers and foreign agents. In the real world of international politics, it would be foolish to avoid dealing with people whose motives do not match those of the United States. Nevertheless, we do feel troubled by the fact that there was not enough legal clarity, or accounting controls, placed on the Enterprise by the NSC.

Whether viewed with foresight or hindsight, and regardless of its legal status, the decision to use part of the proceeds of the Iran arms sales for the benefit of the Contras was extremely unwise. Even if the diversion is determined by the courts to have been legally permissible, it was the result of poor judgment on the part of U.S. Government officials. The decision to proceed with the Iran arms sales was itself fraught with great potential for controversy and disagreement. There was no sound basis whatsoever for adding to the political risks of the operation by bringing into it another hotly debated aspect of American foreign policy.

It was equal folly not to tell the President of the planned use of the proceeds of the arms sales. The question of legality aside, the President should have been given the opportunity to exercise his own good judgment to instruct the participants not to allow the diversion.

The diversion decision was not the first time an unwise operation has been undertaken in the conduct of American foreign affairs, and, unfortunately, it undoubtedly will not be the last. At a minimum, the decision should generate a fuller awareness in the executive branch of the serious negative ramifications of risky and short-range decisions that have not had a full airing in the Presidential office, let alone in the halls of Congress.

The decision also serves to underscore the tremendous pressures placed on the Chief Executive and his staff in carrying out an effective and coherent foreign policy in Central America or elsewhere when Congress unnecessarily and unwisely abuses its power of the purse to manage foreign affairs with an inconsistent on-again, off-again policy. Congress needs to learn that to be an effective participant in the field of foreign affairs, it must afford Presidents from either party the latitude to plan and implement an effective foreign policy based on clear decisions that are free from annual change. When Congress learns this, the world will be more stable for us and our allies.

Endnotes

1. Attorney General's Press Conference of Nov. 25, 1986, pp. 2, 7; Ex. EM-54, *Hearings*, 100-9.
2. Sara Fritz and Doyle McManus, Inquiry Traces Millions in Iran Sales to Contras, The Los Angeles Times, March 7, 1987, at A-1.
3. Secord Test., *Hearings*, 100-1, 5/6/87, at 95-96.
4. Secord Test., *Hearings*, 100-1, 5/6/87, at 95.
5. Secord Test., *Hearings*, 100-1, 5/7/87, at 158, 162.
6. North Test., *Hearings*, 100-7, Part I, 7/10/87, at 296.
7. North Test., *Hearings*, 100-7, Part I, 7/8/87, at 106; 7/10/87, at 295-96; Part II, 7/14/87, at 164-65.
8. *Id.*, at 295.
9. Poindexter Test., *Hearings*, 100-8, 7/15/87, at 35; Poindexter Dep., 5/2/87, at 69-70.
10. North Test., *Hearings*, 100-7, Part I, 7/8/87, at 139.
11. Poindexter Dep., 5/2/87, at 70-71.
12. Poindexter Dep., 5/2/87, at 70-73; Poindexter Test., *Hearings*, 100-8, 7/15/87, at 35-37.
13. North Test., *Hearings*, 100-7, Part I, 7/8/87, at 115, and 7/9/87, at 240, 245.
14. Poindexter Dep., 5/2/87, at 70-71; Poindexter Test., *Hearings*, 100-8, 7/15/87, at 37-38.
15. Poindexter Dep., 5/2/87, at 72-73.
16. Poindexter Dep., 5/2/87 at 232.
17. Thompson Dep., 7/24/87, at 66-68, 70, 71.
18. North Test., *Hearings*, 100-7, Part I, 7/7/87, at 13.
19. *Id.* at 12.
20. *Id.* at 26.
21. Poindexter Dep., 5/2/87, at 178-79; Poindexter Test., *Hearings*, 100-8, 7/15/87, at 44-45.
22. See Poindexter's handwritten notes, Ex. OLN-60, *Hearings*, 100-7, Part II.
23. Poindexter Test., *Hearings*, 100-8, 7/15/87, at 44-45.
24. Regan Test., *Hearings*, 100-10, 7/30/87, at 29.
25. Regan Dep., 7/15/87, at 62.
26. Meese Dep., 7/8/87, at 144.
27. Meese Test., *Hearings*, 100-9, 7/28/87, at 251.
28. Earl Dep., 5/2/87, at 32.
29. Secord Test., *Hearings*, 100-1, 5/6/87, at 134.
30. Poindexter Dep., 5/2/87, at 183-84.
31. North Test., *Hearings*, 100-7, Part II, 7/13/87, at 89.
32. Poindexter Dep., 5/2/87, at 183-84; North Test., *Hearings*, 100-7, Part I, 7/9/87, at 215.
33. North Test., *Hearings*, 100-7, Part II, 7/13/87, at 89.
34. See 3 Am. Jur. 2d, secs. 17-22.
35. Secord Test., *Hearings*, 100-1, 5/7/87, at 250.
36. See Uniform Commercial Code, Sec. 2-401; 2-501; 2-509.

Part V
Disclosures and Investigations

Chapter 11
From the Disclosure to the Uncovering

On Tuesday, November 4, 1986 the *New York Times* carried a front page story disclosing a portion of the Iran initiative.[1] Only three weeks later, on November 25, 1986, the Attorney General of the United States announced that officials of his department had discovered a diversion of funds from that initiative to the use of the Nicaraguan resistance. This chapter describes our view of the events of November 1986.

We reach three principal conclusions. *First,* the President's decisions about how much to disclose were motivated by his effort to balance the need for protection of hostages and secret diplomatic discussions with the public's need for information. *Second,* once the President decided that the Administration did not have a complete picture of the Iran initiative, the Attorney General undertook an aggressive effort to obtain the facts. He then made the information available promptly to the President and to the public. *Third,* the President and the Attorney General discovered and disclosed the essential facts, despite efforts on the part of certain members of the NSC staff and others to cover up certain events, including the diversion. There is no evidence that the President directed, encouraged, or in any way condoned this coverup, a point the majority spares no effort to gloss over. In our opinion, the Attorney General and his associates did an impressive job with a complicated subject in a very short time. Far from being inept, or parties to a cover up, the Department of Justice was responsible for uncovering the diversion of Iran arms sale proceeds to the Contras.

Early November

The Iranian initiative was disclosed for political reasons by high level dissident Iranian religious officials. The *New York Times* report was based on a report from a Lebanese weekly, Al-Shiraa. Its report was in turn based on a politically inspired leak from Iranian dissidents bent on retaliation for efforts by the Iranian Government to curb their support for wide scale terrorism and possibly to reach an accommodation with the United States. At least one of the key dissidents has recently been executed by that Government.*

American officials had learned of the pending disclosure of McFarlane's May trip to Tehran at a secret meeting in Europe a week before the disclosure appeared in the press. Their immediate concern was for the lives of remaining American hostages. They also wanted to continue the secret discussions, as did officials of the Government of Iran. In addition, there were serious questions about the impact of the disclosures on a significant American ally, Israel.

During the week after the *New York Times* story, there were vigorous disagreements within the Administration about what, if anything, the Administration should disclose about the Iran initiative. As the situation was later described by former Chief of Staff Donald Regan:

> I recall discussing with other members of the staff, "The cover is blown here. We have got to go public with it. We have got to tell the Congress, we have got to tell the American public exactly what went on so they were aware of it."
>
> Mr. Smilijanich. What did Admiral Poindexter recommend?
>
> Mr. Regan. [His recommendation was] Absolutely not. It was later reported in local papers here that we had a shouting match . . . [W]e did have a difference of opinion—a strong one. . . . His reasoning was a good one, that Jacobsen had just come out as a hostage, North was preparing to go to London and actually did go to London that first weekend in November—what was it, the 8th or 9th, in through there [to meet with Iranian officials]—and there's a possibility of two more prisoners coming out, two of the original ones, and maybe even the additional three, the later ones. And why blow that chance? We got to keep the lid on this, we got to deny it, we're endangering their lives.
>
> And then I might add here, a very dramatic thing happened. I recall it vividly. Jacobsen had a Rose Garden ceremony welcoming him back. He had said in his remarks he had cautioned the media about discussing this. On the way back, as the President and he were mounting the steps to

*For more details see asterisk in Chapter 8, at 520.

77-026 O - 87 - 19

the colonnade to go back into the Oval Office, there were shouted questions from the media about, "What are you going to do about the hostages, what about the others that are there?" And Jacobsen turned and very emotionally said, "For God's sake, don't talk about that, that is exactly what I have been saying, you are endangering lives of the people I love, these are my friends." That made quite an impression on the President. And even though that same day I urged him again to get this story out, he said, "No, we can't Don,' he said, "We can't endanger those lives." And he didn't.[2]

Regan's testimony shows the Administration's concern for the hostages. North's notes of a meeting with Iranian representatives on November 7, three days after the New York Times story, show both the desire to continue the negotiations and a concern for the hostages:

—"Holding to no comment—
—We recog.(nize) that public statement, RR admitting mtgs. w/ [2d Channel] wd be dangerous for you and Speaker
—Need to know WTF going on
•Press release
•[Second Channel] told in Frankfurt 2 host (two hostages)."

November 10-20

Public pressure for an account of the Administration's dealings with Iran led during November to meetings, a speech and press conference by the President, and testimony by various Administration officials before Congressional committees. Questions were raised both inside and outside the Administration about the Administration's compliance with civil statutes governing Executive-Legislative branch relations in the conduct of covert activities and arms transfers. The President and his advisers continued to grapple with the question of how to balance the diplomatic concerns just described with the need for public disclosure.*

According to Regan's notes of a November 10 meeting, the President opened the discussion with a statement to the effect that "as a result of media, etc. must have a statement coming out of here. . . . Some things we can't discuss because of long term considerations of people with whom we have been talking about the future of Iran." [3]

At that same meeting, Poindexter made a presentation on the history of the Iran initiative, that omitted or misstated certain facts. Poindexter also noted correctly the fact that the Iranians wanted to continue contacts despite news reports.[4] Poindexter noted that North had met with Iranian representatives the previous weekend, that "Iranians happy with our no comment. Raf will have to speak out due to world press comments." [5] At a later point, the President noted: "We should put out statement . . . but cannot get into q & a re hostages so as not to endanger them." [6]

In the period between November 10 and November 21, the Administration continued to try to balance its concern for the hostages and the Iranian initiative with the need for public disclosure. The President addressed the nation on November 13, and then agreed to answer questions concerning this matter on November 19. The drafting of the speech, and the Presidential press conference preparation on these issues, were done by the National Security Council staff acting under Admiral Poindexter's direction. Some of the information provided during those events was incorrect. However, the speech, and the President's answers at the press conference, provided basic information concerning the initiative from the President's point of view while attempting to withhold certain information in order to protect diplomatic sensitivities such as the role of the Israeli Government.[7]

There is evidence that the President and most responsible Administration officials were trying to keep the public record accurate. For example, the White House issued an immediate correction with respect to one factually incorrect statement the President made at the November 19 press conference. Regan testified that this inaccurate statement resulted from the President's confusion about what information could be revealed without causing national security problems.[8] By this time, however, Secretary Shultz had concluded—based on the November 13 speech and November 19 press conference answers—that the President was being misled on some key facts by certain members of the NSC staff, and sought a meeting with the President to explain this to him in detail. The meeting occurred on November 20.

During Shultz's meeting with the President, they reviewed what Shultz believed were a number of inaccurate or misleading statements the President had made concerning the Iran initiative.* The State De-

*It is interesting to note that while the President and his staff were wrestling with the question whether to disclose the mission and thereby jeopardize the hostages, the leader of the Government of a close ally in that part of the world had a senior aide call North to ask the President and Poindexter to flatly deny that there had been an operation such as the one reported about McFarlane in Tehran. Earl Dep., 5/30/87, p. 74-75.

[7] Regan Test., *Hearings*, 100-10, 7/30, at 23-25. The majority's effort to show that the President made inaccurate statements at his press conference completely ignores the fact that Israel's involvements in U.S. sales of arms and direct sales of arms were then regarded as diplomatic secrets which should be concealed to protect Israel's security. Several of the President's other arguably inaccurate statements made then were clearly based directly on information given to the President by certain members of the NSC staff.

*The majority makes much out of the Secretary's "battle royal" with the NSC to get out the true facts. It is worth noting in this connection how much of the disagreement at the time rested on matters such as differing interpretations of intelligence reports, stra-

partment briefing paper prepared for this occasion went through these matters in considerable detail, including comments on such matters as the legality of various arms transactions, possible political connections which might be drawn between Iran and Nicaragua, and so on.[9] The points in Shultz's briefing paper were designed to give the President what Shultz believed to be a more accurate picture of the political history and rationale for the Iran arms deal. Shultz described the meeting as "a long, tough discussion, not the kind of discussion I ever thought I would have with a President of the United States. But it was bark off all the way." [10]

Testimony and Chronologies

The need for additional, detailed information on the Iran initiative was intensified by the need to testify before the Intelligence Committees on November 21. It became clear that the Administration had only an incomplete "institutional memory" on the origin and conduct of that highly compartmented initiative and that different participants had conflicting memories of certain key 1985 events.

The events surrounding the creation of false and misleading chronologies have been discussed in detail during the hearings and there is no need to review the matter here. These chronologies misstated the fact of the President's authorization for the 1985 arms shipments, the Israeli participation in those shipments, and contemporaneous knowledge by United States Government officials of the nature of those shipments. It is sufficient to note that the preparation of these materials was almost exclusively the work of then present and former members of the NSC staff, particularly North and McFarlane. Their false presentation of these events appears to have been acquiesced in, either knowingly or unknowingly, by Casey and Poindexter.

The later versions of the chronologies, and the discussions of draft Congressional testimony, led some Justice Department officials to realize that they did not know some of the significant facts about the initiative. (The Department had been involved only tangentially in the initiative and in responding to issues raised by the public disclosure.) The Department officials also realized that certain other facts concerning the 1985 arms sales were disputed among the participants. In response to these Justice Department concerns, Casey altered the draft testimony he had prepared for November 21 to omit false statements that might otherwise have been made.*

Justice Department Investigation

On the late evening of November 20, 1986, Justice Department officials alerted Attorney General Meese about the factual dispute between various participants in the Iran initiative on certain key events surrounding the 1985 arms sales. They indicated "that a lot of people had different recollections and that the situation was pretty well fouled up because of that." [11] There was no suggestion of intentional wrongdoing, and Meese did not think that was the situation described to him then. The majority report agrees.**

On the morning of November 21, Meese suggested to President Reagan that the President should authorize Meese to conduct an investigation to pull together an account of all the facts. The reason was to support a review of the initiative at a meeting of the National Security Planning Group scheduled for Monday, November 24, 1986. Accordingly, the investigation was conducted over the weekend of November 21-24, 1986.[12]

At that time, the Attorney General had no reason to believe that any crime had been committed.† The simple fact is that the statutes that might possibly have been bypassed by the arms sales were not criminal statutes.†† For those who would argue that the investigation should have been a criminal one from the first, it is worth noting that a Justice Department Criminal Division memorandum—prepared independently and dated November 22, 1986—reviewed these

tegic motives and similar matters of judgment. Only with hindsight is it clear that concerted efforts to slant the facts, rather than honest differences of recollection or judgment, were involved in many cases. This is a fact that a dispassionate student of events would be well advised to consider.

*The majority are at some pains to show that North attempted to falsify this Casey testimony. North claimed his proposed changes were a reaction to CIA drafts, and that he and Casey made changes to remove affirmatively untrue statements before the Department of Justice intervened. We are uncertain whether to believe North on this point or not, but note that exhibits OLN-28, OLN-29, and OLN-30 tend to support his version of events.

**"Cooper did not know who was right or wrong. (Maj. Rept., Ch. 19)." The majority states that Meese had been apprised of the specifics of this dispute earlier on Nov. 20 by Deputy Attorney General Burns after Burns had been informed of the problem by State Department Legal Adviser Abraham Sofaer. The facts are otherwise. Meese and Burns spoke on an unsecured car telephone line while Meese was en route to the airport. Burns was very general in describing the problem while Meese was equally general in assuring him that as a result of the meeting he had just left problems had been resolved. (Meese Dep., 7/8/87 at 174-175) Meese was not given specific information showing the inaccuracy of the proposed testimony at that point. In any event, within a few hours, Justice Department officials who stayed involved in the process discovered the conflict and informed Meese, who decided that the Casey testimony should be altered. See Meese Test., *Hearings*, 100-9, 7/28/87, at 266-267.

†The Attorney General has extensive criminal investigation and prosecution experience. See Meese Test, *Hearings*, 100-9, 7/28/87, at 263.

††Indeed, the Attorney General discussed the matter with FBI Director Webster on Friday afternoon and both agreed it would be premature to involve the FBI in an investigation at that point.

statutes and reported no basis for criminal prosecution based on information then available.***

The Attorney General's brief investigation received exhaustive scrutiny during the course of the hearings, both during his own testimony and that of Assistant Attorney General Charles Cooper. That investigation has been criticized on a number of points. We think the criticisms are without merit. The Attorney General assembled a team of competent attorneys, two of whom in addition to him had been confirmed for their jobs by the United States Senate, and all of whom had directly relevant responsibilities within the Department of Justice for national security matters, to conduct the fact finding inquiry.[13]

On November 21, the Attorney General personally requested that the National Security Council make available to his staff all relevant documents concerning the Iran initiative.[14] The investigating team proceeded to interview all material witnesses with respect to the 1985 arms sales.[15] Witnesses were repeatedly instructed by then that the President's interests would be best served if the Attorney General were given a full and accurate account of what happened.[16] Yet McFarlane, North and Poindexter made false, misleading, or inaccurate statements to, and concealed directly relevant information from, the Attorney General and his representatives. Despite this, the Attorney General's investigation uncovered "the essential facts that are still the essential facts today."[17] Although the Committee majority makes much of its purported discovery of "the Enterprise," that network of shell corporations and secret bank accounts really represents the mechanics of the diversion the Attorney General discovered, and little else.

In the course of the review of documents on November 22, Justice Department officials discovered a memorandum that showed a plan that part of the Iranian arms sales proceeds were to be used to support the Nicaraguan Democratic Resistance, but provided no evidence that the plan had been carried out. They immediately arranged to interview North the next day, Sunday, and waited until the end of that interview to confront North with the memorandum. Meese specifically testified to North's surprise on being shown the memorandum. After North had confirmed that a diversion of funds had in fact occurred, the Attorney General and his associates undertook to determine who knew about, and who might have authorized, such a diversion.*

We think that the suggestion that the Attorney General's investigative procedures changed in some irregular manner after the discovery of a possible diversion is particularly unfair. We encourage any reader who is interested in this issue to review the colloquy on this subject between the Attorney General and Senator Mitchell in which Senator Mitchell raised this issue and then dropped it after the Attorney General directly challenged him for doubting Meese's testimony about it.**

***Meese Test., *Hearings*, 100-9, 7/28/87, at 200. The majority makes a halfhearted effort to imply that the FBI or the Criminal Division of the Department of Justice should have been called in earlier than they were, possibly even as early as November 21. The majority's reasoning ignores the following points. The "facts" on which the majority relies, such as the Casey testimony and possible Arms Export Control Act violations were not criminal in nature, at least so far as could reasonably be determined at the time. Even more importantly, the majority utterly ignores the fact that the Attorney General specifically testified that he had consulted former FBI Director Webster and the FBI top leadership after the disclosures occurred and had been assured that their view was that Meese had acted properly; Webster also took this position at his confirmation hearings. See Meese Test., 7/28/87, pp. 281-282, 291-292). Finally, the majority ignores the fact that the head of the Criminal Division, also a political appointee, testified that his concerns about Criminal Division involvement, which were not expressed to the Attorney General at the time, were based on existing Criminal Division court actions unrelated to the Iran initiative and to management issues, not matters of propriety or judgments about evidence of criminal conduct. See Weld Dep., 7/16/87 at 13-20.

*The allegation has also been made that Department officials disregarded other "evidence" which came to their attention concerning the possibility of such a diversion, such as the use of Southern Air Transport in both the Iran and Contra operations. The question is moot because the Justice Department in fact quickly discovered the first hard circumstantial evidence that members of the NSC staff had been involved in a diversion, the diversion memorandum itself. However, a close examination of this alleged "evidence" shows that it was speculation communicated in a vague, general way which related to a physical or political connection rather than to evidence of financial diversion. See Sofaer Dep., 6/18/87 at 68-70; Meese Test, *Hearings*, 100-9, 7/28/87, at 270-71, 277; 7/29/87, at 414-415. Although there was some speculation by officials at the Department of State and the Central Intelligence Agency (based on price differentials) about some type of a diversion, there was no evidence to suggest that the funds had gone to Nicaragua, or that the disposition of any surplus was being directed by certain members of the NSC staff. The majority attempts to bootstrap the fact that some of this vague information may have been conveyed to the Attorney General into an attack on the truthfulness of the Attorney General's account of his meeting with Director Casey on November 22. The members of the majority are much bolder in a report which the Attorney General never saw before it went into print than they were when he testified and therefore could respond to similar cheap shots. Suffice it to say that the Attorney General has consistently and credibly recounted events at this meeting where appropriate in his testimony in various forums, including our public hearings. See Meese Tower Board Test, 1/20/87, at 32-33; Meese Dep., 7/8/87 at 121-123; Meese Test., *Hearings*, 100-9, 7/28/87, at 113-115) He testified he made a deliberate decision to protect his investigation by not asking Casey for information before confronting North; in our view, this was a correct and successful decision. See Meese Test., *Hearings*, 100-9, 7/28/87, p. 278.

**Meese Test., *Hearings*, 100-9, 7/29/87, p. 331-334. The majority ignores the fact that virtually all of the interviews involved lasted only a few minutes, took place hurriedly between other meetings, and involved only a couple of basic questions: who knew of the diversion and who authorized it. (See Meese Test., 7/28/87, p. 280) The majority also ignores the fact that Meese's accounts of these meetings have been corroborated in substance by the living participants who have been questioned by the Committees. The majority's sporadic efforts to suggest conflicts are strained, to put it mildly. A classic example of the majority's reaching is their statement "Meese met alone with Regan and the President."

The Attorney General's November 25 press conference report was based principally on admissions made to him on November 23 by North. At the press conference, the Attorney General repeatedly made clear that there were a large number of matters on which his information was uncertain and subject to additional review and correction.[18] At that time, Justice Department officials were not aware of any document shredding or altering by North and others. As McFarlane testified, although he did not participate in the shredding he did not inform Meese that North had told him it might occur.[19] Similarly, Justice Department officials had no immediate way to determine that several of these officials gave them misleading or inaccurate answers to their questions. The majority's pointless cavilling about this press conference is very much indicative of the quality of their work in this area. As noted, despite this attempt at a coverup by certain NSC officials, the Attorney General's investigation turned up the facts that are still the essential ones today.

There is no evidence that the President directed, encouraged, or otherwise in any way condoned a coverup. We reject as completely unsupported by the record any suggestion that the Attorney General or his staff ignored signs of potential criminal behavior or consciously sought not to obtain information in an effort to assist or protect the President. After intense scrutiny, by two Congressional committees with a very large staff, it is clear that the Attorney General and his staff conducted themselves honorably and disclosed to the President and the public their findings without regard to any political damage which would ensue.*

*On December 4, 1986, at the request of the Attorney General, a motion was filed with the Special Division of the Court of Appeals for the District of Columbia Circuit seeking the appointment of an Independent Counsel.

Endnotes

1. Ihsan A. Hijazi, "Hostage's Release Is Linked to Shift in Iranian Policy," New York Times, November 4, 1986, A1, A10.

2. Regan Test., *Hearings*, 100-10, 7/30/87, at 21-22.

3. Regan notes of November 10 meeting, Ex. DTR-41-A, p. 1, *Hearings*, 100-10.

4. Regan Test., *Hearings*, 100-10, 7/30/87, at 23.

5. Ex. DTR-41A, p. 5, *Hearings*, 100-10.

6. Ex. DTR-41A, p. 9, *Hearings*, 100-10.

7. See p. 562.

8. Regan Test., *Hearings*, 100-10, 7/30/87, at 24-25.

9. Ex. GPS-45, *Hearings*, 100-9.

10. Shultz Test., *Hearings*, 100-9, 7/23/87, at 44.

11. Meese Test., *Hearings*, 100-9, 7/28/87, at 267.

12. It is noteworthy that Judge Sofaer, on whose suspicions and speculation the majority narrative relies extensively, often without describing them as such, testified that he began to suspect a coverup on the afternoon of November 20. (Sofaer Dep., 6/18/87, at 41-42). This seems as good an indication as any that the Attorney General acted in a timely fashion. The majority's innuendo that the Attorney General did not move aggressively on this matter is utterly belied by the fact that, for example, one of his staff spent until dawn on November 22 reviewing intelligence reports. See Cooper Test., *Hearings*, 100-6, 6/25/87, at 24-27 and passim.

13. See Meese Test., *Hearings*, 100-9, 7/28/87, at 281.

14. *Id.* at 268.

15. Ex. CJC-1, *Hearings*, 100-6; Ex. EM-42, *Hearings*, 100-9.

16. Meese Test, *Hearings*, 100-9, 7/28/87, at 269.

17. Meese Test., *Hearings*, 100-9, 7/28/87, at 201, quoting Secretary Shultz.

18. Meese Test., *Hearings*, 100-9, 7/28/87, at 269, "at least 40 instances."

19. McFarlane Test., *Hearings*, 100-2, 5/11/87, at 180-81, 183.

Chapter 12
NSC Involvement in Investigations

Introduction

The majority chapter entitled "NSC Involvement in Criminal Investigations and Prosecutions" raises questions about the connection between the work of the National Security Council and traditional law enforcement activities. Unfortunately, the majority combines carelessly assembled information about matters which any fair-minded person would conclude raise no important issues, with scattered and conclusory judgments about matters where real questions of judgment exist.

Because of the necessity for accurate and timely information about threats to persons or property posed by those who may wish to cause harm for reasons connected to the foreign policy of the United States, the national security community must sometimes be involved in pending criminal investigations undertaken by domestic law enforcement agencies. The real question is not whether but when and how much involvement is appropriate. To answer this question requires a close examination of the reasons for such involvement and the manner in which such involvement is responded to by law enforcement officials.

The record of the various investigations discussed by the majority shows that law enforcement agencies outside the NSC, from the Department of Justice, to the FBI and Customs Service, responded in an appropriate manner to requests for investigations prompted by such reasons. In addition, the record of several of the investigations in which NSC personnel became involved reveals that NSC involvement in these activities, at least at their preliminary stages, was appropriate. However, their involvement in others was questionable at best.

The circumstances of each case will determine whether such involvement was appropriate. We encourage each reader to examine the facts of each investigation carefully to make this determination. In order to set the record straight, we provide a brief review of the investigations related to the Iran-Contra affair in which the NSC staff was involved.

Basically, the majority alleges that certain Administration officials, particularly Colonel North, became improperly involved in a number of investigations relating to Contra activities. However, the majority's highly critical analysis is based on a flawed methodology. In view of the majority's intent to show that Col. North acted improperly, it is noteworthy that the majority in most cases declined to ask Col. North himself, during six days of public testimony, about these allegations against him. During the Committees' investigation, the majority obtained information on these matters from witnesses who were in contact with North, but North was never asked to give his side of these events. The majority uses selected entries from North's written notes of conversations and meetings, but even though these entries are often abbreviated and cryptic, the majority declined to ask North to explain them. Instead, the majority attempted to interpret what these notes "suggest." In light of this flawed methodology, the majority's conclusions regarding purported interference with various investigations cannot be considered objective. Moreover, the following brief discussions of several of these investigations demonstrate some additional problems.

Miami Neutrality Act Investigation

The majority has analyzed a charge that a Miami investigation of an alleged conspiracy by a pro-Contra group to violate the Neutrality Act was impeded by officials of the Department of Justice. The majority has concluded that the investigation was not aggressively pursued. However, a review of the facts clearly shows that the charge of interference was based on one witness's testimony, which was contradicted by all of the other witnesses. Further, any delays in the investigation were caused by legitimate problems.

David Leiwant, an Assistant U.S. Attorney in Miami, has claimed that he overheard one side of a telephone conversation on April 4, 1986, between U.S. Attorney Leon Kellner in Miami and someone at the Department of Justice, in which Kellner was advised that the Department wanted him to go slow on a pending investigation of possible Neutrality Act violations. According to Leiwant, after the phone conversation ended, U.S. Attorney Kellner stated that the Justice Department wanted the investigation to go slow and to be kept quiet. Kellner reputedly made these statements with a sneer, suggesting that he would ignore these requests.[1]

Leiwant's account of this incident is unsupported by any other evidence. In fact, every other person who was present at the meeting when the telephone conversation allegedly took place denies Leiwant's version of events. In addition to Leiwant, five people were present at this meeting in U.S. Attorney Kellner's office on April 4, 1986—Kellner, Chief Assistant U.S. Attorney Richard Gregorie, Executive Assistant U.S. Attorney Ana Barnett, Special Counsel Lawrence Scharf, and Assistant U.S. Attorney Jeffrey Feldman, who was handling the investigation. All have denied Leiwant's claim that Kellner received a telephone call from the Justice Department instructing Kellner to go slow.[2]

Leiwant has speculated that the alleged Justice Department call may have come from D. Lowell Jensen, Stephen S. Trott, or Mark M. Richard,[3] but each of these three officials denies any such conversation and further denies knowledge of any attempt to impede this investigation.[4]

Leiwant himself concedes: "I was listening to it [the alleged telephone conversation] with half an ear. . . ." [5] Also, he is certain that he never heard Kellner tell Feldman to go slow.[6]

It is noteworthy that Leiwant failed to discuss with his superiors this disturbing telephone conversation which he purportedly overheard.[7] Instead, Leiwant began to discuss this matter with outsiders, even though he had neither requested nor received the required departmental approval to disclose anything about this ongoing investigation.[8] Within days of the April 4, 1986, meeting, Leiwant called two Washington Post reporters in Washington, D.C. According to his testimony, he mentioned to both of them that he might have information about the Contras and Nicaragua. Since they were not very interested, he purportedly did not say much.[9]

Then, in August 1986, Leiwant leaked his allegation to John Mattes, a defense attorney who represented Jesus Garcia, the informant who provided early information about the alleged Neutrality Act violations. Mattes' client was awaiting sentencing on a federal conviction, and he could have benefited if his information led to new indictments.[10] Then, Leiwant told two investigators from the Senate Foreign Relations Committee. Later, Leiwant told his story to U.S. Senator John Kerry.[11] The publicity generated by Leiwant's actions led to these Committees' inquiry.

Leiwant has alleged the Neutrality Act investigation was proceeding too slowly.[12] Similarly, the majority has claimed that the investigation was not aggressively pursued. These allegations ignore several important factors.

Assistant U.S. Attorney Feldman, who was assigned to handle the investigation, was relatively inexperienced. Moreover, the information his investigation was eliciting was disorganized and, in some respects, unreliable. Feldman himself described the case as a "confused mess." [13] For instance, a polygraph of Jesus Garcia, the convicted felon who provided early information about the reported conspiracy, was inconclusive and showed deception on an important issue. Garcia later admitted he had lied about that issue.[14] One of the two FBI agents assigned to the investigation testified that Garcia provided inaccurate information,[15] and the other agent testified that Garcia did not have a great deal of credibility.[16]

Another example of evidentiary problems was the information provided by witness Jack Terrell. Most of Terrell's information was found to be based on hearsay rather than his direct observation.[17] Feldman's superiors felt that the investigation needed additional work, and that the case was not sufficiently developed to be presented to a grand jury.[18]

Furthermore, the delay in the progress of the investigation was affected by the press of other investigations.[19]

In this regard, it is noteworthy that the Miami U.S. Attorney's Office is recognized as one of the busiest in the nation, with limited resources to apply against an ever-increasing criminal caseload.

Southern Air Transport Investigation

The majority also raises questions, in another chapter of their report, about the handling of an FBI/Customs investigation of Southern Air Transport. The FBI, at least, began an investigation of Southern Air Transport for possible violations of the Neutrality Act after the shootdown of the Hasenfus aircraft. However, Southern Air Transport also provided the air transportation services for most of the Iran initiative. This initiative continued after the Hasenfus shootdown and in fact produced one hostage in early November 1986, after a shipment of arms involving Southern Air Transport.

Whatever the reader concludes about the propriety of the actions of the NSC staff in requesting a delay, the record is clear that the Department of Justice and FBI officials who granted it acted entirely properly. They were told that the delay was required for the purpose of protecting the Iran initiative. They checked to determine whether the ongoing investigation would be impeded, and were told it would not be. They granted a delay conditioned on the conclusion that the ongoing investigation would not be affected, and asked that it be resumed promptly, as it was.[20] The Attorney General specifically testified that when he was asked to grant a delay, he was not told of any connection between White House officials and Southern Air Transport's work in the Contra resupply operation, or of Southern Air Transport's involvement in this operation.[21]

Instigation of Investigations

The majority claims: "North attempted to exploit his contacts with the FBI to attempt to instigate or

intensify investigations of people and organizations perceived as threats to the Enterprise. He was ultimately assisted in this effort by Richard Secord and Glenn Robinette." [22]

These statements by the majority are false, as we shall show below. The first instance cited by the majority appears to have been based on a good faith but mistaken belief about FBI jurisdiction. The other two instances cited by the majority, where the FBI became involved in a matter in which North had an interest, were based on either legitimate human concerns or a legitimate desire to protect the life of the President of the United States. In the latter instance, it is abundantly clear that North did not "instigate or intensify" any investigation at all.

In the first instance cited by the majority, North appears to have suggested, in conversation, an FBI investigation of certain individuals based on a suspicion that a foreign government was secretly financing or supporting a lawsuit against various United States citizens, a matter about which it would have been legitimate for North to inquire for national security reasons and, which if true, might have constituted a fraud on the courts of the United States. North, a nonlawyer, was flatly told that the FBI did not have the legal authority to investigate such a matter, and did not pursue the request.

The second instance discussed by the majority is based on North's request for an investigation of vandalism and harassment directed against him. The FBI investigation occurred in May and June, 1986. North requested the investigation because of incidents of vandalism that had been directed against him at work and at home which he believed might be related to the actions of foreign intelligence sources. There is no doubt that the incidents of harassment in fact occurred, and the FBI appears to have concluded that they might have been associated with the dates of ". . . Congressional votes on Contra aide (sic) . . ." [23] They, together with threats against North's life which occurred at about this time, were sufficient to motivate North to have a sophisticated security system installed around his home at precisely this time.[24]

While North may have been completely wrong about the source or nature of the vandalism which was being directed against him, we do not find anything in the record to suggest that North's conduct was based on anything other than a good faith belief that this harassment might have been based on such actions. Given North's position in government, and the nature of his official duties, this possibility could not be completely discounted. We therefore see nothing improper in North's having asked the FBI to investigate even though some of the persons who were to have been interviewed for information might have been connected to or involved in political opposition to North's Contra activities, since such persons were logical sources of information necessary to a proper investigation. The FBI, in turn, appears to have acted to determine whether there was any possibility that North's concerns might have a reasonable basis and then to have dropped the matter.

But it is the third instance cited by the majority which we find particularly egregious. This instance concerns an FBI investigation of Jack Terrell based on the possibility that Terrell had threatened the life of the President. The majority snidely suggests that North was responsible for using the FBI to investigate Terrell. They say: "North ultimately hit on a better formula [for having such investigations conducted], with Secord's assistance." [25] The facts clearly show just the opposite, and the majority has so clearly disregarded the facts we are forced to question its motives.

Significantly, it was the FBI which first independently obtained information about a possible threat against President Reagan. This information came from a classified source in mid-1986.[26] The FBI concluded that the threat "probably" came from Jack Terrell, a mercenary who had been associated first with Contra forces, and then with pro-Sandinista forces.[27] The FBI therefore sent a request to various federal law enforcement and national security agencies, including the NSC, specifically asking them for information concerning Terrell, according to testimony by FBI Executive Assistant to the Director Oliver B. ("Buck") Revell.[28] The majority completely omits to mention that the FBI asked the NSC for information concerning Terrell. By coincidence, North was aware that Terrell was assisting the plaintiffs in a lawsuit against Secord and others and that Glen Robinette was involved as an investigator for Secord in that lawsuit. However, North and Robinette had never previously discussed Terrell, according to Robinette.[29] North called Robinette and asked if he had any information about Terrell. Robinette said yes, and North asked him to provide it to the FBI. North did not ask Robinette to limit his cooperation with the FBI, or to withhold any information from them, according to Robinette.[30] Robinette thereafter met with the FBI and assisted them in establishing surveillance of Terrell.* In any event, the FBI shortly thereafter discontinued contact with Robinette and surveilled Terrell until it concluded that he was not a threat to the President.**

*Robinette specifically denied that he was asked to wear a "wire" for surveillance purposes; as a former electronic surveillance specialist, he was certain he would have remembered such a request (Robinette Dep., 11/5/87, at 34-36.)

**Revell Dep., 7/15/87 at 32, 36. When interviewed by the FBI in connection with the Terrell matter, North disclosed Robinette's activities for Secord in connection with the Florida civil lawsuit brought by Honey and Avirgan in which Secord was a defendant (7/25/86 FBI Report of 7/22/86 interview of North, at 2.) North acknowledged his involvement in U.S. Nicaraguan policy, but denied Secord "works for him." In short, North appears to have

In all of this, we are unable to discern anything that resembles a politically motivated effort on North's part to harass Terrell. The FBI's information concerning the threat was real, obtained independently of North, and pursued with national security agencies in the normal manner. The fact that North knew of Terrell by reputation is nothing but coincidence, and we think it is extraordinarily unfair to imply that Colonel North or General Secord acted in this instance in any manner inconsistent with their obligations as citizens or employees of the United States. We think it is unfortunate that the majority is so bent on pressing the thesis of this chapter that they have included misleading information about this incident in an effort to try to reinforce it. Clearly, the majority would not want to suggest that anyone who had potentially useful information about a threat to the life of the President should withhold it for fear of later being accused of political harassment.

The "Reward a Friend" Investigation

The majority has alleged that North and other government officials tried to influence the sentencing of a former official in a Central American country, who had pleaded guilty to two felony counts in the United States. The official had allegedly provided assistance as a "friend of the U.S." in Central America. Yet, the only purported result of government support of the official was his reassignment to a minimum security prison.[31] Such reassignments are commonly requested and granted.

truthfully disclosed the associations and bias of Robinette, the information source North provided here. North's other reported statements, which the Committee did not ask him about during the hearings, appear to relate to the Neutrality Act issues and were not relevant to the FBI's investigation of Terrell. *Id.* North denied responsibility for "funding, arming, or administrating Contra programs." *Id.* at 3. North stated that he was not involved with any covert operations being run in the United States. *Id.*

This official had previously received official recognition for his services to the U.S. in the region. The majority notes that North was concerned that if the official was dissatisfied with his sentencing in 1986, he would "break his longstanding silence about the Nic[araguan] Resistance and other sensitive operations." [32] The majority further notes that North wanted "to keep the official from feeling like he was lied to in the legal process and start spilling the beans." [33] The majority is unable to concede that the official, assistance to the U.S. may have involved legitimate intelligence operations. Instead, the majority boldly asserts that the NSC staff's "ultimate motive appears to have been a desire to prevent disclosure of certain questionable activities." Significantly, the majority never asked North to address the issue of the official's assistance to the U.S. Accordingly, the majority's suggestion of a cover-up of "questionable activities" should be recognized as pure speculation.

The Fake Prince

The majority's main allegation regarding the "fake prince" is that in 1985 Col. North interfered with the FBI's bank fraud investigation of this "Saudi prince," because North was attempting to develop this individual as an asset in the Iran initiative and in Contra activities. (The "prince" was ultimately discovered to be an Iranian imposter.) North allegedly interfered because during an FBI interview he requested that an upcoming FBI interview of the "prince" be delayed for several days, so as not to interfere with the "prince's" intended donation to the Contras. However, the FBI report notes: "In no way does North want to interfere with a criminal prosecution of the prince . . ." [34] And the majority concedes that North subsequently "backed down" on this request. Moreover, this alleged "interference" had no effect on the prosecution of the "prince" for bank fraud. Following a plea of guilty, the "prince" was imprisoned.[35]

Endnotes

1. Leiwant Dep., 6/2/87, at 12-14, 30.
2. Kellner Dep., 4/30//87, at 18-20; Gregorie Dep., 7/17/87, at 19, 20; Barnett Dep., 7/17/87, at 38-42; Scharf 7/17/87, at 15-17; Feldman Dep., 4/30/87, at 68-70.
3. Leiwant Dep., 6/2/87, at 11, 39.
4. Jensen Dep., 7/6/87, at 58, 59; Trott Dep., 7/2/87, at 9; Richard Dep., 8/1/87, at 92, 93.
5. Leiwant Dep., 6/2/87, at 13.
6. Leiwant Dep., 6/2/87, at 30, 31.
7. Leiwant Dep., 6/2/87, at 44, 45.
8. Leiwant Dep., 6/2/87, at 29.
9. Leiwant Dep., 6/2/87, at 33-36.
10. Feldman Dep., 4/30/87, at 5, 6, 10.
11. Leiwant Dep., 6/2/87, at 26-32.
12. Leiwant Dep., 6/2/87, at 26, 27.
13. Feldman Dep., 4/30/87, at 68.
14. Feldman Dep., 4/30/87, at 10, 17, 18.
15. Currier Dep., 5/5/87, at 13, 14.
16. Kiszynski Dep., 5/5/87, at 12.
17. Feldman 4/30/87, at 37, 38.
18. Gregorie Dep., 7/17/87, at 31-33; Feldman Dep., 4/30/87, at 81-83; Kellner Dep., 4/30/87, at 46.
19. Kellner Dep., 4/30/87, at 117, 118; Gregorie Dep., 7/17/87, at 39, 42, 44.
20. See Memorandum from William Webster to Mr. Clark, October 31, 1986, regarding Southern Air Transport, cited at Meese Test., *Hearings*, 100-9, 7/28/87, at 274.
21. Meese Test., *Hearings*, 100-9, 7/28/87, at 237-274.
22. Majority Report, typescript, Chapter 5, at 44.
23. FBI file 246-967, p. 2 of 6/11/86 WFO teletype to FBI Director.
24. See the testimony of Glenn Robinette, Robinette Test., *Hearings*, 100-6, 6/23/87, at 1-52, passim.; North Test., *Hearings*, 100-7, Vol. 1, 7/8/87, at 126-32.
25. Majority Report typescript at 47, Ch. 5.
26. Revell Dep., 7/15/87, at 25-26.
27. Revell Dep., 7/15/87, at 26, 31.
28. Revell Dep., 7/15/87, at 26.
29. Robinette Dep., 11/5/87, at 33.
30. Robinette Dep., 11/5/87, at 33-34.
31. Richard Dep., 8/19/87, at 130.
32. North PROF note to Poindexter, 9/17/86.
33. North PROF note to Poindexter, 9/17/86, Ch. 5, at 33.
34. FBI Interview Memorandum, 7/18/85, Ex. OLN-264, North Test. *Hearings*, 100-7, Part II.
35. Memorandum of Interview of Nicholas Harbist, 5/22/87.

Part VI
Putting Congress' House in Order

Chapter 13
The Need To Patch Leaks

Throughout the majority report, much is made of the Administration's concern for secrecy. That concern is portrayed almost exclusively, if not exclusively, as the desire of some lawbreakers to cover the tracks of their misdeeds. We agree that the National Security Council staff, under Admiral Poindexter, let its concern over secrecy go too far. We should not be so deceived by self-righteousness, however, that we dismiss the Admiral's concern as if it had no serious basis. Our national security, like it or not, does depend on many occasions on our ability to protect secrets. It is easy to dismiss the specific Iran arms sales decisions about executive branch compartmentalization, and about withholding information from Congress for almost a year, as having been excessive. Everyone on these Committees would agree with that conclusion. But unless we can understand the real problems that led the NSC staff to its decision, future Administrations will once again be faced with an unpalatable choice between excessive secrecy, risking disclosure or foregoing what might be a worthwhile operation.

Time after time over the past several years, extremely sensitive classified information has been revealed in the media. Predictably, both Congress and the Administration have blamed each other. In fact, both are culpable. It is important for these Committees to recognize this truth forthrightly. As Secretary Shultz said, quoting Bryce Harlow, "trust is the coin of the realm." [1] But trust has to be mutual. Some people on these Committees seem to want to bring criminal prosecutions against former Administration officials for not speaking candidly to Congress. It is true that the business of government requires the Administration to be considered trustworthy by Congress. But so too must Congress prove itself trustworthy to the Administration.

We do not mean, by our focus on congressional leaks, to suggest that we turn our eyes from the same problem in the executive branch. Executive branch leaks are every bit as serious as legislative branch ones. But as long as there is a consensus on this point, we do not feel a need to dwell on it here. At the end of this chapter, we will recommend legislation to help address the issue of executive branch leaks along with our suggestions for the legislative branch.

There is much less consensus in Congress, however, about leaks from the legislative branch. Those problems are real. As Representative Hyde wrote in a recent article, the fact that the executive branch leaks more, does little to get Congress off the hook.

> *Proven* Congressional transgressions admittedly are relatively rare, but so are proven executive-branch leaks. In truth, only a handful of leaks ever have been definitively traced to their source, so lack of proof establishes nothing. A partial Senate Intelligence Committee study often quoted by Mr. Beilenson reportedly found that journalists referenced congressional sources only 8–9 percent of the time, but cited Reagan Administration officials 66 percent of the time. Reporters may not be entirely candid about their sources. But generously assuming that Congress has 2,500 people with clearances as opposed to 2.2 million in the executive branch and the military, reliance on the Senate study forces us to conclude that Congress maintains just over 0.1 percent the number of executive branch clearances, but is responsible for 8–9 percent of the leaks on national security issues. Specifically, on average, a cleared person in Congress is 60 times more likely than his counterparts to engage in unauthorized disclosures.[2]

We believe that these problems—rather than a desire to cover up a supposed lawlessness whose existence we do not concede—contributed significantly to the Administration's posture in 1985–86.

Protecting Secrecy in the Early Congress

To put the issue in perspective, it is worthwhile to consider how the country's Founders dealt with the problem. Those hardheaded realists understood that breaches of security during that perilous revolutionary period could mean the difference between life and death. Consequently, only five members of the Second Continental Congress sat on the Committee of Secret Correspondence, the foreign intelligence direc-

torate that was mentioned in our earlier historical chapter.

The Continental Congress was especially careful about protecting sources and methods. For example, the names of those employed by the Secret Correspondence Committee were kept secret, as were the names of those with whom it corresponded. Even then, there was concern about Congress keeping a secret. As a result, when the Committee learned that France would covertly supply arms, munitions and money to the revolution, Ben Franklin and another Committee member, Robert Morris, stated: "We agree in opinion that it is our indispensable duty to keep it a secret, even from Congress. . . . We find, by fatal experience, the Congress consists of too many members to keep secrets."*

To underscore the importance of protecting sensitive information, the Continental Congress on November 9, 1775, adopted the following oath of secrecy which should still be in effect today:

> Resolved That every member of this Congress considers himself under the ties of virtue, honour and love of his country, not to divulge, directly or indirectly, any matter or thing agitated or debated in Congress before the same shall have been determined, without the leave of the Congress, nor any matter or thing determined in Congress, which a majority of the Congress shall order to be kept secret. And that if any member shall violate this agreement, he shall be expelled this Congress, and deemed an enemy to the liberties of America, and liable to be treated as such, and that every member signify his consent to this agreement by signing the same.[3]

This oath was not taken lightly and no less a revolutionary figure than Thomas Paine, the author of "Common Sense," was fired as an employee of the Continental Congress for disclosing information regarding France's covert assistance to the American Revolution. Interestingly, Congress then resorted to its own covert action and passed a blatantly false resolution repudiating Paine's disclosure.[4] Obviously, the Founding Fathers realized that there are some circumstances when a well-intentioned "noble lie," as Plato put it, is a necessary alternative to the harsh consequences of the truth. They also believed in punishing leakers, a practice their modern counterparts in both the executive and legislative branches need to emulate more consistently.

Let us move forward in history now, to the early years of the Constitution. President Washington learned quickly that once information is shared with Congress, it is up to Congress—often the opposition party in Congress—to decide when or how it will be made public.

> During the time the Federalists controlled the House, they enforced a rule that excluded the public during any debate concerning material sent to the House by the President "in confidence." After the Republicans gained control, they changed this rule to allow the majority to vote for public debate on confidential communications on an ad hoc basis. Soon thereafter, the House voted to lift an injunction of secrecy they had placed on some letters sent by the President "in confidence." A similar rebellion of sorts took place in the Senate after the Jay Treaty was conditionally ratified. The President wanted the treaty kept secret until all negotiations were complete. The Senate voted, however, to rescind its injunction of secrecy, although it continued to enjoin "Senators not to authorize or allow any copy [to be made] of the said communication . . . ." Both Senators Pierce Butler of South Carolina and Stevens T. Mason of Virginia smuggled copies out of the Senate chamber, apparently before the secrecy injunction was lifted, and on the same day that the Government planned to make the treaty public, the Republican Aurora beat it to the punch by printing an abstract of the terms.[5]

The Leaky 1970s

Some things never change and as we celebrate our constitution's bicentennial, Congress is still prone to unauthorized and sometimes damaging disclosures. The worst period in recent history was during the 1970s, when the legitimacy of the CIA and covert operations were under attack. What follows are some examples of alleged congressional leaks during that period. Rather than rely on classified material, we have chosen here to protect still secret information by relying on accounts from secondary sources. The inclusion of this material is not meant to confirm or deny the veracity of the specific disclosures alleged. We begin with a 1972 example from Arthur Maass' book, *Congress and the Common Good.*

> On April 25, 1972, Senator Mike Gravel (D. AK) asked unanimous consent to insert in the *Congressional Record* excerpts from a top-secret National Security memorandum. The 500-page document concerning policy options in the Vietnam War had been prepared for Richard Nixon in 1969 by the National Security Council staff under Henry A. Kissinger. The senator's normally routine request was blocked temporarily by minority whip Robert P. Griffin (R. MI). The Senate met on May 2 and 4 in closed executive sessions to consider Gravel's request, but no decision was

*For an earlier discussion of this committee, including this quotation, see supra, ch. 3, p. 470.

reached. Then on May 9, Gravel, without advance notice, read into the *Record,* during debate on the annual State Department authorization bill, excerpts from the memorandum dealing with proposals to mine North Vietnamese ports, an action that had been announced by the President on the previous day. Senator Griffin, who entered the chamber during Gravel's statement, criticized him for acting before the Senate had disposed of the question. The Senator responded: "I have an obligation to the American people . . . to let the American people have the information that he [Richard Nixon] has."

Congressman Ron V. Dellums (D.CA) then obtained from Gravel a copy of the full document which he placed in the *Congressional Record* on May 11, by simply asking unanimous consent to extend his remarks in the *Record* without giving any hint of their contents.[6]

Maass' book followed this example with two others from the committees that investigated the CIA.

In January 1976, the House Intelligence Committee, under Chairman Otis G. Pike (D. NY) sought to make public a report containing information that the White House considered to be top secret. The House intervened, voting 246 to 124 to block the committee from releasing its report until the President certified that it did not contain information that would adversely affect the nation's intelligence activities. Whereupon Daniel Schorr of CBS *News,* having obtained a copy of the report presumably from a House member or staffer, gave it to the *Village Voice,* which published it, thereby frustrating an overwhelming majority of the House. Schorr was subsequently fired by CBS and became a cult hero on the college lecture circuit, commanding top fees for one-night stands.

. . . The Senate Intelligence Committee chairman, Frank Church (D. ID), went to the full Senate in November 1975 for approval of release of the committee's report on CIA involvement in assassination attempts against foreign leaders. The report included secret information that the President believed should not be made public. The Senate met in executive session, that is, secret session, and when considerable opposition to release of the report developed, more opposition than Church had anticipated, he and the Democratic majority adjourned the session without a vote, and the committee released the report on its own authority.[7]

It is clear that leaks during this period were often motivated by an animus toward the CIA's mission in general or as a way of killing individual operations. The same Daniel Schorr who leaked the *Pentagon Papers* to the *Village Voice* wrote about leaks in a 1985 *Washington Post* article. "*The late Rep. Leo Ryan,*" Schorr wrote, "told me (in 1975) that he would condone such a leak if it was the only way to block an ill conceived operation."[8] In fact, wrote former Director of Central Intelligence William Colby, "every new project subjected to this procedure [informing eight congressional committees] leaked, and the 'covert' part of CIA's covert action seemed almost gone."[9]

The Still Leaky Congress During the Reagan Years

By the late 1970s, the House and Senate had formed intelligence committees, reducing the number of committees to which intelligence agencies had to report. That clearly improved the situation, but it did not cure all problems. Senator Joseph Biden, then a member of the Select Committee on Intelligence, sounded a bit like the late Leo Ryan in a 1986 Brit Hume article from *The New Republic.* Biden reportedly said he had "twice threatened to go public with covert action plans by the Reagan administration that were harebrained."[10]

In 1984, according to an article by Robert Caldwell, CIA officials briefed the same Senate Select Committee on Intelligence about information indicating that the Government of India was considering a preemptive strike against Pakistan's nuclear facility. When word of the briefing leaked, the operation was halted. According to Caldwell, the leak showed India that it had a security breach at a high level. The breach was discovered and a French intelligence ring was put out of business.[11]

The Senate Select Committee on Intelligence was one of the bodies to which the President would have had to report the Iran arms sales. Of course the President could have limited the report to the committee chairmen and ranking minority members as well as the party leaders of the House of Representatives and Senate. The problem with this scenario is that some senior members of the committee have been suspected of leaking, as was discussed in the Committees' hearings.[12] The House committee has also been the source of some damaging disclosures. Bob Woodward's book, *Veil,* describes one incident that allegedly happened after members of the committee had sent a secret letter to President Reagan to protest an operation about which Director Casey had just briefed them.

Representative Clement J. Zablocki, the chairman of the House Foreign Affairs Committee and a member of the House Intelligence Committee, had reviewed the . . . finding and the letter to Reagan. The sixty-nine-year-old lawmaker leaked

> to *Newsweek* that the letter to Reagan about the yet unnamed operation in Africa was a plan to topple Qaddafi . . . .
>
> *Newsweek* reporters went back to House Foreign Affairs Chairman Zablocki after the Libya plan was denied. Zablocki went to House staff members, tipping them that he had been a source for *Newsweek*. He was set straight, but the House Intelligence Committee chairman, Edward Boland, decided to take no action against Zablocki, since leaks were epidemic.[13]

Complaints and investigations about subsequent incidents involving the House committee so far remain at the informal stage.

To complete this picture of the world about which Poindexter had to make judgments: on November 3, 1985—in the weeks just before the November arms transaction—a *Washington Post* article by Bob Woodward broke a story about a "CIA Anti-Qadhafi Plan Backed."[14] Director Casey responded to this article with a blistering letter to the President about executive and legislative branch leaks. *The Washingtonian* magazine, accurately in our view, linked the atmosphere in the White House immediately after this leak to the decision not to notify Congress about the Iran arms sale.[15]

It may be that not all these reported details about named Members of Congress are true. True or not, they fit in with a real pattern. As such, they form part of the background Director Casey and Admiral Poindexter had to consider in November 1985. It seems clear, with 20/20 hindsight, that Casey and Poindexter overreacted. They may even have used the *Post* story as a convenient peg in their ongoing battle over secrecy with Secretary Shultz and others. But even if they did overreact, it is irresponsible to dismiss their fears as being simply irrational, power hungry or nefarious.

Yes, some foreigners—Ghorbanifar, the Israelis, Khashoggi, the first and second Iranian channels—did have to know what was going on. That is the nature of any secret international dealing. The issue is how much should be told to anyone who did not have a need to know to complete the operation successfully. The simple fact is, we had no way of knowing whether our sources in Iran were endangering their lives by dealing with us. Judging from the thousands executed in the early days of the Khomeini regime and the recent execution of Mehdi Hashemi, the threat seemed real enough.[16] Nor could we know whether the slightest misstep might get the hostages killed. Certainly, such threats against the hostages lives have been a part of the hostage takers' media events, and Kilburn's death was real. Given the track record, no one in Congress or the executive branch can afford to be smug about these concerns. Trust is a two-way street, and each end of Pennsylvania Avenue had good reasons to doubt the other.

Problems In These Committees

Past leaks contributed to decisions that in turn led to these investigations. The leaks did not stop, however, when the committees started to work. The Committees began with every good intention. Recognizing that it was dealing with highly sensitive information, the leadership made a concerted effort to prevent leaks. The complexity and short time frame of the probe, however, led to a decision not to compartmentalize sensitive information. Consequently, everyone on the joint staff of some 165 people had multi-compartmented clearances and access to the highest levels of classified material. The same access held true, of course, for the 26 members of the two Select Committees. Given the number of people with access to these secrets, it is surprising there were not more revelations.

We are reluctant to identify leaks with too much precision, because confirmation may help adversaries sort out the ones we consider harmful. Suffice it to say that the types of leaks included misleading the media on the nature of a witness' secret testimony several days before he appeared as a public witness as well as revealing intelligence collection methods, the identities of undercover personnel, and the names of a number of countries which, in one way or another, were trying circumspectly to be helpful to the United States in a variety of foreign policy undertakings. Needless to say, these disclosures, and others, are causing these and other countries to have serious reservations about future cooperation with the United States. That turn of events should give us real pause. This is a highly interdependent world. It no longer is possible for the United States to go it alone, whether to combat terrorism or contain Soviet/Cuban expansionism in Central America.

Consider one example. On Friday, May 29, the Committees took testimony in closed executive session from "Tomas Castillo," the former CIA station chief in a Central American country. At the end of Castillo's testimony, the following colloquy took place:

> Mr. RUDMAN. I just want to make one comment. It is my understanding that the [declassified] transcript is going to be made available sometime tomorrow to the press.
>
> Chairman HAMILTON. That is correct.
>
> Mr. RUDMAN. It is also my understanding that under the rules of Congress and the Intelligence Committees that it would be inappropriate for any members or staff or anyone else to comment

on these proceedings without specific permission in some way from the chairman.

Chairman HAMILTON. That is correct. Under the rules of the House Committee at least, you cannot release classified information without a vote of the committee and in the Senate my understanding is it is a similar procedure.

Chairman INOUYE. That is correct.[17]

Despite these explicit statements, articles appeared in May 30 newspapers with May 29 datelines accurately summarizing the testimony, and quoting named members of the Committees giving broad characterizations of the testimony.* The declassified transcripts were not available until Sunday night, May 31. There were no Committee votes in the interim.

Some of these revelations by staff and Members, as well as current and former Administration officials, occurred during intense questioning and cross examination of witnesses and appeared to be inadvertent. Such mistakes, however, suggest in retrospect that this nation's security interests would have been much better served had we decided to take more testimony in closed session. Potentially damaging slips of the tongue could then have been redacted before a transcript was made available to the public.

As a consequence of this probe, and that of Judge Walsh, this nation's intelligence community could be facing the same situation it confronted more than a decade ago after the Church and Pike Committees investigations. Leaks from those inquiries seriously debilitated our overall intelligence capabilities and it took us over a decade to repair the damage. A rerun of that sorry chapter would have grave national security implications, coming on the heels of a series of very damaging spy scandals epitomized by the Walker family case.

What happened to Castillo's testimony, which was open to all Committee members and many staff, contrasts sharply with the executive session deposition of Admiral Poindexter on May 2, 1987. The two select Committees recognized that the Admiral's testimony on the diversion of funds was the pivotal, and potentially most explosive political question of this whole investigation. As a result, extraordinary steps were taken to protect the information. Specifically, only three staff attorneys and no Members of either Committee participated in the secret questioning. The success of these procedures speaks volumes on how to protect secrets. In the final analysis, as Chairman Hamilton noted in a perceptive article on protecting secrets that appeared in the September 4, 1985 *Congressional Record*, "Leaks are inevitable when so many people handle secrets."[18] The most effective way of ensuring secrecy is to restrict access to sensitive information to just a handful of responsible people.

*See, for example, R.A. Zaldivar and Charles Green, "CIA station chief wasn't renegade, congressmen say," *The Miami Herald*, May 30, 1987, p. 16A; Fox Butterfield, "Ex-C.I.A. Officer Tells of Orders to Assist Contras," *The New York Times*, May 30, 1987, p. 7; *Associated Press*, "Contra role told by ex-CIA agent," *Chicago Tribune*, May 30, 1987, p. 5. Interestingly, *The Washington Post*, the same newspaper that publishes Bob Woodward's intelligence disclosures, distinguished itself from the others this day by refusing to publish certain classified information. The *Post* also gave no details about Castillo's testimony and quoted Sen. Rudman refusing to give information. Dan Morgan, "Higher-Level CIA Officials May Be Subpoenaed on Contra Aid," *The Washington Post*, May 30, 1987, p. A9.

Endnotes

1. Shultz Test., *Hearings*, 100-9, 7/23/87, at 52.
2. Henry J. Hyde, "How To Reduce The Leaks, Case for a Joint Intelligence Committee," The Washington Times, October 12, 1987, pp. D1, D4.
3. U.S. Central Intelligence Agency Bicentennial Publication, Intelligence in the War of Independence, published by the Nathan Hale Institute (1976), p. 14.
4. Edward F. Sayle, The Historical Underpinnings of the U.S. Intelligence Community, reprinted by the Intelligence Publishing Groups Inc., from 1 Journal of Intelligence and Counterintelligence (1986).
5. Sofaer, War, Foreign Affairs and Constitutional Power at 96-97.
6. Arthur Maass, Congress and the Common Good (1983), p. 241.
7. *Id.* at 243.
8. Daniel Schorr, Cloak and Dagger Relics, The Washington Post, November 14, 1985, A23.
9. William Colby, Honorable Men (1978), p. 423.
10. Brit Hume, Mighty Mouth, The New Republic, September 1, 1986, p. 20..
11. Robert J. Caldwell, "Button the loose lips in Congress," The San Diego Union, July 26, 1987, pp. 1,8.
12. Meese Test., *Hearings*, 100-9, 7/29/87, at 350-51.
13. Bob Woodward, Veil: The Secret Wars of the CIA 1981-1987 (1987), pp. 158, 160.
14. Bob Woodward, CIA Anti-Qadhafi Plan Backed, The Washington Post, November 3, 1985, pp. A1, A19.
15. Barbara Matusow, "Woodward Strikes Again," The Washingtonian (Sept. 1987), pp. 114, 234.
16. See Chapter 8 of the Minority Report, "The Iran Initiative," at p. 520.
17. Castillo testimony, May 29, pp. 85-86.
18. Hon. Lee H. Hamilton, Protecting Secrets, Congressional Record, September 4, 1985, pp. E3855-56.

Part VII
Recommendations

Chapter 14
Recommendations

The majority report reaches the conclusion, accurately in our opinion, that the underlying cause of the Iran-Contra Affair had to do with people rather than with laws.* Despite this laudable premise, the majority goes on to offer no fewer than 27 recommendations, most involving legislation and several of them multifaceted. Some of the recommendations unfortunately betray Congress' role in the legislative-executive branch struggle by proposing needlessly detailed rules for the organization of the executive branch. At the same time, the majority recommendations barely touch the problem of leaks, and say nothing at all, to no one's surprise, about Congress' misuse of massive continuing appropriations resolutions to conduct foreign policy.

We do not intend here to give a detailed critique of the majority recommendations. We do believe that requiring the President to notify Congress of all covert operations within 48 hours, without any exceptions, would be both unconstitutional and unwise.** Many of the remaining recommendations seem to us to be unconscionably meddlesome. No good reasons are offered for prohibiting military officers, such as General Powell, from being National Security Adviser. No good reasons are offered for having the National Security Council produce regular staff rosters for Congress. And so forth, and so on. It all strikes as more of the same: an attempt to achieve grand policy results by picking away at the details.

In the spirit of offering recommendations, however, we are pleased to present some of our own.

Recommendation 1: Joint Intelligence Committee

Congress should replace its Senate and House Select Committees on Intelligence with a joint committee.

Congress has realized that limiting the number of people with access to sensitive information can help protect the information's security. The House and Senate took worthwhile first steps to limit the number of Members and staff engaged in intelligence oversight by establishing Select Committees on Intelligence. Unfortunately, as we have seen, security still is not tight enough. The time has now come, therefore, for taking the next logical steps.

Given the national security stakes involved, Congress and the Administration must find a remedy for restoring mutual trust. One major step in that direction can be taken by merging the existing House and Senate intelligence committees into a joint committee, along the lines of legislation (H.J. Res. 48) sponsored by Representative Henry Hyde and a bipartisan group of 135 cosponsors (see Appendix C). Such a committee need not have the 32 Members (plus four ex-officio) and 55 staff now needed for two separate committees. Fewer Members, supported by a small staff of apolitical professionals, could make up the single committee. In recognition of political reality, the majority-party membership from each House would have a one vote edge.

A joint intelligence panel would drastically diminish the opportunities for partisan posturing and substantially reduce the number of individuals with access to classified and sensitive information. This would not only minimize the risk of damaging unauthorized disclosures but would also significantly increase the likelihood of identifying leak sources—something that rarely occurs now because so many people are in the "intelligence information loop." Furthermore, with the possibility of discovery so much greater, potential leakers would be strongly deterred from unauthorized disclosures.

To achieve both efficiency and secrecy in congressional consideration of intelligence matters, a Joint Intelligence Committee must have legislative as well as oversight jurisdiction. Otherwise, the two Houses would not give the Joint Committee the deference the two existing intelligence committees enjoy. Neither would the intelligence agencies have the budget-based incentives to cooperate with the Joint Committee as they have now with the two select committees. Inadequate jurisdiction might also prompt the various committees in each House with historical interests in intelligence to reassert themselves. That could trigger increased fractionalization of the congressional oversight process, with the concomitant proliferation within the Congress of access to sensitive intelligence information.

* See Chapter 8 in the Minority Report at 532-536.

** See the Minority Report, Chapter 4 at 477-478, and Chapter 9 at 543-545.

Recommendation 2: Oath and Strict Penalties for Congress.

To improve security, the Joint Intelligence Committee (or the present House and Senate committees) should adopt a secrecy oath with stiff penalties for its violation.

Creating a joint committee will not by itself guarantee the security of intelligence information. Also essential is committee self-discipline. Earlier, we pointed out how the reputations of the Senate and House Intelligence Committees have been sullied by leaks from Members or staff. As the importance of congressional oversight, and the reputation for leaking, both grow, foreign intelligence agencies are discouraged from unguarded cooperation with the United States. Change is therefore urgent both to stanch the flow of leaks and to symbolize to foreign countries that Congress is serious about preserving the confidentiality of secrets.

One significant change that would help further both goals would be to require an oath of secrecy for all Members and staff of the intelligence committees. Such an oath would not be an American novelty. As we have already noted, the Continental Congress' Committee on Secret Correspondence required all of its members and employees to pledge not to divulge, directly or indirectly, any information that required secrecy.

The proposed oath should read: "I do solemnly swear (or affirm) that I will not directly or indirectly disclose to any unauthorized person any information received in the course of my duties on the [Senate, House or Joint] Intelligence Committee except with the formal approval of the Committee or Congress."

The Committee Rules should be amended to compel permanent expulsion from the committee of any member or staff person who violates his or her oath. While proceedings remain pending, the accused would be denied access to classified information. The rules of the House and Senate should also be amended to provide that the Intelligence Committee would be authorized to refer cases involving the unauthorized disclosure of classified information to the Ethics Committees. The rules should make it clear that the Ethics Committees may recommend appropriate sanctions, up to and including expulsion from Congress.

This approach is well within the Constitution's expulsion power and the power of each House to set rules for its own proceedings. The power of each House of Congress to expel Members for misbehavior by two-thirds vote is virtually uncircumscribed.[1] Historically, fifteen Senators and four Representatives have been expelled. Fourteen of the Senators were expelled for supporting the Confederate secession. The fifteenth, Senator Blount, was for conspiring with Indian tribes to attack Spanish Florida and Louisiana. The House and Senate also have considered and refused expulsion on twenty-four occasions for charges as varied as corruption, disloyalty, Mormonism, treasonable utterances, dueling, and attacking other Members of Congress. Expulsion decisions of Congress are probably beyond judicial review.[2]

Any set of recommendations that limits itself to Congress would not be adequate to respond to the problem of leaks. Therefore, we recommend a more balanced approach that would stiffen the penalties for others who participate in this activity.

Recommendation 3: Strengthening Sanctions

Sanctions against disclosing national security secrets or classified information should be strengthened.

Current federal law contains many provisions prohibiting the disclosure of classified information, but each of the existing provisions has loopholes or other difficulties that make them hard to apply. The section that covers the broadest spectrum of information, "classified information," only prohibits knowing, unauthorized communication to a foreign agent or member of a specified Communist organization.[3]

Another set of provisions contains no such limit on the recipient of the information, but applies only to information related to the national defense.[4] For some specified information, unauthorized disclosure or transmission is criminal under any circumstances.[5] The transmission of other "information relating to the national defense" to an unauthorized person is also illegal if a person has reason to believe the information would be used to injure the United States or to benefit a foreign nation. The problem with these provisions is that they cover only "information relating to the national defense" rather than the full range of national security information whose secrecy the government has a legitimate reason to protect.[6]

A third set of provisions in current law is limited to nuclear weapons production.[7] A fourth is limited to information about ciphers or communications intelligence.[8] This is the law that the National Security Agency Director, General William E. Odom, believes should be applied more vigorously against both federal employees and the press.*

---

* The following is quoted from Molly Moore, "Prosecution of Media for Leaks Urged," The Washington Post, Sept. 3, 1987, p. A4:

"I don't want to blame any particular area for leaking," said Odom, who added, "There's leaking from Congress . . . there's more leaking in the administration because it's bigger. I'm just stuck with the consequences of it.

Leaks have damaged the [communications intelligence] system more in the past three to four years than in a long, long time.". . . .

Odom said he has encouraged the administration to use an obscure law that prohibits disclosures of "communications intelligence." Odom said he has referred several cases involving news leaks to the Justice Department since 1985 but said the department has declined to prosecute any of them. The department said it has not prosecuted any so far . . .

Finally, a fifth provision—also limited in the information it protects—makes illegal the disclosure of agents' identities. This law is also restricted to disclosures by someone who (a) has authorized access to the identity from classified information or (b) is engaged in a "pattern of activities intended to identify and expose covert agents" with reason to believe the publicity would impair the foreign intelligence activities of the United States.[9] The latter limitation means that the agent disclosure law does not cover most normal press disclosures, such as the ones we mentioned earlier about reports based on these committees' work, because they are not normally part of a pattern or practice of identifying covert agents.

In order to close these loopholes, Rep. Bill McCollum has introduced a bill (H.R. 3066) co-sponsored by all the other Republican members of the House Iran Committee. The bill is limited to current and past federal employees in any branch of government. For these people, the bill would make it a felony knowingly to disclose classified information or material (not just specific national defense information) to any unauthorized person, whatever the intent.

Another approach that would supplement the McCollum bill would be to introduce substantial civil penalties for the knowing disclosure of classified information to any unauthorized person. The penalties might range from administrative censure to a permanent ban on federal employment and a fine of $10,000. The advantage of giving the Justice Department the option of using a civil statute would be (a) that the standard for proof would be the preponderance of evidence rather than proof beyond a reasonable doubt and (b) the law could stipulate that contested violations should be heard in secret, without a jury. These procedures should not encounter constitutional difficulties in light of the Supreme Court's broad endorsement of controls on the disclosure of classified information in *Snepp* v. *U.S.*[10]

Recommendation 4: Gang of Four

Permit the President to notify the "Gang of Four" instead of the "Gang of Eight" in special circumstances.

Representative Broomfield has introduced a bill that, among other things, would permit the President on extremely sensitive matters to notify only the Speaker of the House, House Minority Leader, Senate Majority Leader and Senate Minority Leader. Under current law, limited notification means notification of these four plus the chairmen and ranking minority members of the two intelligence committees. On the principal that notifying fewer people is better in extremely sensistive situations, we would be inclined to support legislation along these lines that would ratify what has already come to be an informal occasional practice.

Recommendation 5: Restore Presidential Power to Withstand Foreign Policy by Continuing Resolution

Require Congress to divide continuing resolutions into separate appropriations bills and give the President an item veto for foreign policy limitation amendments on appropriations bills.

The way Congress made foreign policy through the Boland Amendment is all too normal a way of doing business. Congress uses end of the year continuing resolutions to force its way on large matters and small, presenting the President with a package that forces him to choose between closing down the Government or capitulating. Congress should give the President an opportunity to address the major differences between himself and the Congress cleanly, instead of combining them with unrelated subjects. To restore the Presidency to the position it held just a few Administrations ago, Congress should exercise the self-discipline to split continuing resolutions into separate appropriation bills and present each of them individually to the President for his signature or veto. Even better would be a line-item veto that would permit the President to force Congress to an override vote without jeopardizing funding for the whole government.

"Generally, when I'm with a group of journalists, I can usually see two or three people who fall in the category of those who probably could be successfully prosecuted," Odom told the reporters.

The following material, from the same press briefing, is from Norman Black, "Gen. Odom blames leaks for 'deadly' intelligence loss," Associated Press dispatch published in The Washington Times, Sept. 3, 1987, pp. 1, 12:

Asked to provide examples, Gen. Odom said he didn't want "to get specific right now and compound the things, but a number of sources have dried up in some areas which you are all familiar with, in the past year or two.

A number of years ago there was a case that had to do with a Damascus communication. . . . It was a leak. It attributed this thing to an intercept. And the source dried up immediately," Gen. Odom said.

Asked then about Libya, he replied, "Libya, sure. Just deadly losses."

Endnotes

1. See In re Chapman, 166 U.S. 661, 669-670 (1897).
2. See *Powell* v. *McCormack*, 395 U.S. 486, 507 n. 27, 548–549 (1969).
3. 50 U.S.C. 783.
4. 18 U.S.C. 793 (d) and (e) and 794.
5. See *New York Times* v. *Sullivan*, 403 U.S. 713, 737-40 (1971); *U.S.* v. *Morison*, 604 F. Supp. 655 (1985).
6. *Gorin* v. *U.S.*, 312 U.S. 19, 28 (1941); *U.S.* v. *Dedeyan*, 584 F. 2d 36 (4th Cir., 1978).
7. 18 U.S.C. 2274, 2277.
8. 18 U.S.C. 798.
9. 50 U.S.C. 421.
10. 444 U.S. 507 (1980).

Part VIII
Appendixes

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September 25, 1987

Representative Lee H. Hamilton
Chairman
House Select Committee to Investigate Covert Arms
Transactions with Iran
United States Capitol
Washington, D.C. 20515

Representative Dick Cheney
Ranking Minority Member
House Select Committee to Investigate Covert Arms
Transactions with Iran
United States Capitol
Washington, D.C. 20515

To the Chairman and Ranking Minority Member of the Committee:

The enclosure to this letter, entitled "Reporting Obligations and Funding Restrictions Affecting Intelligence Departments, Agencies and Entities of the United States," is submitted to your Committee through the U.S. Senate Select Committee on Intelligence. I have prepared the enclosed statement in reply to your letter of September 3, 1987 (Enclosure 1).

That letter requested my observations and recollections of the legislative history of intelligence law that:

- "might be helpful to the Committee in its evaluation of whether any laws were violated by members of the executive branch in the Iran/Contra affair"; and/or

- "relate to the concept of an 'intelligence agency' or 'intelligence entity' as traditionally understood by Congress or the Chief Executive."

In preparing a response to your letter, I have reviewed my records pertaining to the legislative history of both enacted intelligence legislation and executive orders for the period 1974-1984. Based upon this review and my experience as the longest continuously-serving consultant to the Senate Select Committee on Intelligence in the period 1976-1984, I have prepared Enclosure 2.

My review of pertinent records brought to my attention a related issue: whether authorizations for covert activities to be conducted under the direction of the National Security Council should be subject to a preceding legal opinion respecting the conformity of the proposed activity to United States law.

In 1974 I reviewed the legal authority for the conduct and control of foreign intelligence activities of the United States, under sponsorship of the Intelligence Panel of the Murphy Commission, with the cooperation of the NSC staff and general counsels of the various intelligence agencies.

At that time I posed for the Commission's Intelligence Panel a set of issues relating to legal authority and accountability. In particular, I invited the Commission to consider whether the National Security Act of 1947 should be amended to require, before NSC authorization of covert activities, an opinion as to the activity's legality under the laws of the United States and obligations of the United States under international law.

Enclosure 3 provides a copy of the Murphy Commission Intelligence Issues Paper, "Legal Authority for the Conduct and Control of Foreign Intelligence Activities," as revised on November 22, 1974. See in particular pages 18 to 22, Issue #10 at pp. 21-22, and Appendix 2.

The Chairman of the Intelligence Panel and the Commission, Ambassador Robert D. Murphy, did not favor my proposal to establish a Legal Adviser to the National Security Council, both because the Attorney General was the principal legal adviser to the President and because of possible impairment of presidential freedom of action respecting U.S. covert activities.

The National Security Council is by statute responsible for the direction of CIA's performance of "such other functions and duties related to intelligence...." Had a system of mandated legal review and an NSC Legal Adviser been established in the 1970s, it is entirely possible that the need for your Select Committee would not have arisen.

I am pleased to learn that the present Special Assistant to the President for National Security Affairs, Mr. Frank Carlucci, has established the position of Legal Adviser to the NSC in January 1987. This initiative assures the availability to the NSC of a legal officer. It does not by itself mandate legal review of proposed covert activities prior to Presidential finding and NSC direction.

Intelligence activities of the United States can and must be conducted under the rule of law in a democratic society. I trust that the enclosed review of intelligence laws and Congressional oversight practices will assist your Committee as it completes a difficult task.

Respectfully submitted,

William R. Harris

William R. Harris
16641 Marquez Terrace
Pacific Palisades, CA. 90272

Enclosure 1, Letter from Rep. Hamilton and Rep. Cheney to William R. Harris, Sep. 3, 1987.

Enclosure 2, William R. Harris, "Reporting Obligations and Funding Restrictions Affecting Intelligence Departments, Agencies, and Entities of the U.S." Sep. 25, 1987.

Enclosure 3, William R. Harris, "Legal Authority for the Conduct and Control of Foreign Intelligence Activities," Issues Paper, Commission on the Organization of the Government for the Conduct of Foreign Policy, November 22, 1974.

THE RAND CORPORATION
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September 25, 1987

Senator David L. Boren
Chairman
Senate Select Committee on Intelligence
SH-211 Hart Senate Office Building
Washington, D.C. 20510

Senator William S. Cohen
Vice Chairman
Senate Select Committee on Intelligence
SH-211 Hart Senate Office Building
Washington, D.C. 20510

To the Chairman and Vice Chairman of the
Senate Select Committee on Intelligence:

By letter of September 3, 1987, the Chairman and Ranking Minority Member of the House Select Committee to Investigate Covert Arms Transactions with Iran requested my assistance regarding:

- Legislative history of intelligence laws that might "be helpful to the Committee in its evaluation of whether any laws were violated by members of the executive branch in the Iran/Contra affair."

- "[A]ny observations or recollections that relate to the concept of an 'intelligence agency' or 'intelligence entity' as traditionally understood by Congress or the Chief Executive..."

Between January 1976 and December 1984 I served as a consultant to the Senate Select Committee on Intelligence and its predecessor committee. In that capacity, I reviewed and sometimes revised drafts of the oversight charter of the Committee (S. Res. 400 in 1976) and intelligence legislation including the Intelligence Oversight Act of 1980 (50 U.S.C. sec. 413). Drafts of legislation were prepared in unclassified form, but as work product of the Intelligence Committee. Accordingly, I am transmitting to you my response to the House Committee in conformity with my secrecy agreements with your Committee executed in 1977 and 1984, and in accordance with Committee Rules.

Please advise me if and when you release the accompanying letter to the House Select Committee to Investigate Covert Arms Transactions with Iran.

Respectfully submitted,

William R. Harris

William R. Harris
16641 Marquez Terrace
Pacific Palisades, CA. 90272

Encl: Ltr. to Rep. Hamilton and Rep. Cheney w/ Encl.1, 2, and 3.

U.S. HOUSE OF REPRESENTATIVES

SELECT COMMITTEE TO INVESTIGATE
COVERT ARMS TRANSACTIONS WITH IRAN
UNITED STATES CAPITOL
WASHINGTON, DC 20515
(202) 225-7902

September 3, 1987

Mr. William R. Harris
The Rand Corporation
1700 Main Street
Santa Monica, CA 90406-2138

Dear Mr. Harris:

We understand that you participated in the deliberations and forging of events that culminated in the 1980 Intelligence Oversight Act, as a consultant to the Senate Select Committee on Intelligence.

We further understand you played a role in the drafting of President Carter's Executive Order governing the intelligence community. We believe your expertise in these intelligence law matters might be helpful to the Committee in its evaluation of whether any laws were violated by members of the executive branch in the Iran/Contra affair.

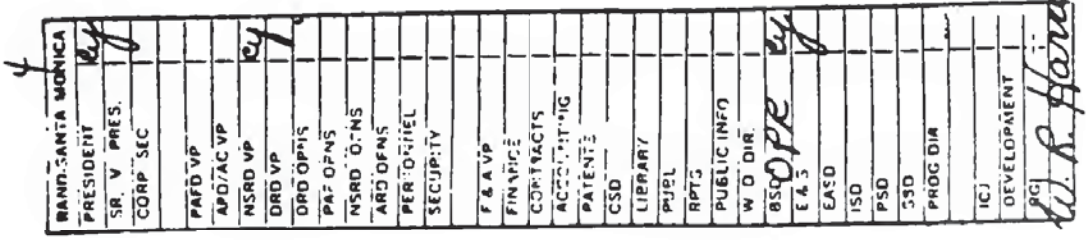
In particular, we would be grateful for any observations or recollections that relate to the concept of an "intelligence agency" or "intelligence entity" as traditionally understood by Congress or the Chief Executive. A letter to the Committee addressing these and related issues regarding the history, intent, or scope of the IOA and President Carter's Executive Order would be much appreciated.

Sincerely,

Lee H. Hamilton

Dick Cheney

DC/ts



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REPORTING OBLIGATIONS AND FUNDING RESTRICTIONS AFFECTING INTELLIGENCE DEPARTMENTS, AGENCIES, AND ENTITIES OF THE UNITED STATES

Prepared Statement

of

William R. Harris

In reply to a request of the U.S. House Select Committee to Investigate Covert Arms Transactions with Iran

September 25, 1987

The views expressed are those of the author in his individual capacity. They neither represent the U.S. Senate Select Committee on Intelligence nor The RAND Corporation, with regard to the issues considered.

REPORTING OBLIGATIONS AND FUNDING RESTRICTIONS AFFECTING INTELLIGENCE DEPARTMENTS, AGENCIES, AND ENTITIES OF THE U.S.

INCLUSION OF THE NATIONAL SECURITY COUNCIL AND STAFF WITHIN THE SCOPE OF CONGRESSIONAL INTELLIGENCE OVERSIGHT UNDER S. RES. 400 (1976), H. RES. 658 (1977), AND EXECUTIVE ORDER 12036 (1978).

The Senate established, by S. Res. 21, the Senate Select Committee on Government Operations with Respect to Intelligence Activities (the Church Committee) in January 1975. This Committee conconducted broad-ranging investigations and drafted proposed intelligence oversight legislation that resulted in establishment of the present Senate Select Committee on Intelligence in May 1976.

Preceding S. Res. 21, President Ford signed into law P.L. 93-559, including as Sec. 662 of the Foreign Assistance Act of 1961 [22 U.S.C. 2422] the Hughes-Ryan Amendment. This required a presidential finding ("important to the national security") preceding any expenditure of funds for covert operations of the Central Intelligence Agency. It did not specify any reporting duty of the NSC or its staff. It did require the President to report each "finding" to the "appropriate" committees of the Congress "in a timely fashion...."

This resulted in reporting of presidential findings to the full membership of the House and Senate Armed Services Committees, to the Defense Subcommittees of the Appropriations Committees, and to the House Foreign Affairs Committee and the Senate Foreign Relations Committee. [See Gary J. Schmitt, "Congressional Oversight of Intelligence," Spring 1985.] Subsequent to the establishment of the Senate and House Intelligence Committees in 1976 and 1977, respectively, the "appropriate" committees included more than 150 members.

My records indicate that in 1975, a staff attorney of the Senate Select Committee on Government Activities with Respect to Intelligence Activities, Ms. Martha Talley, prepared for the Committee a draft "Intelligence Oversight Act of 1975." The committee's draft legislation was not introduced in that year, but is indicative of the scope and intent of the oversight legislation that the Senate approved (S. Res. 400) the following year.

The draft Intelligence Oversight Act of 1975 contained both proposed amendments to Senate rules (sec. 4 through 10) and proposed legislation (sec. 11ff.). Proposed Section 6(a)(1)(B) [Sec. 3(a)(2) of S. Res. 400] provided jurisdiction over intelligence activities of all other departments and agencies of the Government...."

The scope of proposed legislative oversight reflected the experience of a committee responsible for investigating intelligence activities of the entire government. The committee did in fact

investigate intelligence activities of the Postal Service, the Internal Revenue Service, and other agencies outside the intelligence community whose activities raised issues of legality or propriety.

The analysis of Section 6 prepared by Ms.Talley for the Committee in 1975 indicated:

> "The Committee would have oversight and legislative jurisdiction of intelligence activities engaged in by the following agencies, their successors, employees, subcontractors, and proprietaries:
>
> "...
>
> "7. National Security Council, and its subcommittees, panels and working groups with authority to deal with intelligence, counterintelligence, internal security, and related matters".

My records indicate that Senate Select Committee completed a revised Staff Draft S. Res. ___ on December 31, 1975, to establish a Senate Committee on Intelligence. Sec. 8 retained government-wide jurisdiction and proposed (per the suggestion of a Senator who served on the Joint Committee on Atomic Energy) a duty of "each department, agency, or instrumentality of the government" to keep the Committee "fully and currently informed with respect to all intelligence and counterintelligence policies, programs, and activities which are the responsibility of, or are planned, supervised, financed, or carried out by, such department, agency, or instrumentality...."

The "currently and fully informed" standard was derived from Section 202 of the Atomic Energy Act of 1946 [42 U.S.C. 2252].

In January 1976 the Office of the U.S. Senate Legislative Counsel prepared a redraft of S. __, titled the "Intelligence Oversight Act of 1976." Section 6(a)(1)(B) retained jurisdiction over the "intelligence activities of all other departments and agencies of the government...." This language was retained in Sec. 3(a) of S. Res. 400. Sec. 13, which, as later modified, became Sec. 11 of S. Res. 400, proposed a duty for the head of each department or agency of the United States to keep the Senate intelligence oversight committee -

> "fully and currently informed with respect to all intelligence activities which in any respect are the responsibility of or are planned, supervised, financed, or engaged in by such department or agency."

The above-quoted language, preserving the exact language of Sec. 11(a) of the draft Intelligence Oversight Act of 1975, appeared unworkable to representatives of intelligence agencies in early 1976. In early 1976, the Special Counsel to the Director of Central Intelligence, Mitchell Rogovin, proposed alternative reporting language in a meeting with William R. Harris, a Consultant to the Senate Committee. My records indicate that the Rogovin-Harris substitute read:

> "...it shall...be the duty of the head of each department and agency of the United States to keep the Committee on Intelligence Activities fully and currently informed with respect to intelligence activities which are the responsibility of such department or agency."

This language retained a reporting duty for each department or agency of the United States, without restriction to agencies of the intelligence community. It was later amended by Senatorial initiative to add the phrase "including any significant anticipated activities...." before its introduction on March 1, 1976 (with 19 co-sponsors) as S. Res. 400.

On April 9, 1976, the Senate Rules Committee favorably reported S. Res. 400, and on May 19, 1976, the Senate considered, amended and approved S. Res. 400 by a vote of 72 to 22.

> Sec. 11(a) provided: "It is the sense of the Senate that the head of each department and agency of the United States should keep the select committee fully and currently informed with respect to intelligence activities, including any significant anticipated activities, which are the responsibility of or engaged in by such department or agency;..."
>
> Sec. 14(a) defined "intelligence activities" to include intelligence, counterintelligence, covert or clandestine activities (without specific restriction to an intelligence agency's sponsorship), and internal security intelligence.
>
> Sec. 14(b) included in the definition of "department or agency" any federal organization, including any "committee, council, establishment, or office within the Federal Government."
>
> [For parallel definitions adopted by the House Permanent Select Committee on Intelligence, see H. Res. 658 of July 14, 1977, Rule XLVIII, sec. 10(a) and (b)].

Despite misgivings on constitutional and other grounds, "[p]rior notice to the Intelligence Committees of significant covert actions programs has been the practice since 1976..."

[See prepared statement of William G. Miller, former Staff Director, Senate Select Committee on Intelligence, Sep. 22, 1983, HPSCI Hearings, Comm. Print, 1984].

On July 14, 1977 the House of Representatives established the House Permanent Select Committee on Intelligence, adopting H. Res. 658 by a vote of 247 to 171. The House Committee jurisdiction paralleled that of the Senate Committee, without restriction to agencies of the intelligence community.

The following month staff assistants of the President asked the staff of the Senate Select Committee on Intelligence to review a draft Executive Order on intelligence activities. With amendments, some suggested by the Committee staff, this became President Carter's Executive Order 12036 of January 24, 1978.

Section 3-4 of E.O. 12036 [43 F.R. 3674 at 3689-90] provided for reports to the intelligence committees of Congress. It applied to the "Director of Central Intelligence and heads of departments and agencies of the United States involved in intelligence activities." It utilized the "fully and currently informed" standard of the Atomic Energy Act and S. Res. 400 of 1976. It included a duty to report on significant anticipated activities "which are the responsibility of, or engaged in, by such department or agency."

In sum, the legislative history of enabling resolutions of 1976 and 1977 for the present intelligence oversight committees of Congress indicate legislative intent that <u>any</u> head of a department, agency or institution that is involved in intelligence activities report to these committees. The initial draft of 1975 explained an intent to include the National Security Council within the purview of the reporting duties.

Executive Order 12036 of January 1978 applied to all departments and agencies of the United States, and impliedly would cover the National Security Council staff were it to have proposed to engage in "significant anticipated activities" during application of this Executive Order in 1978-1981.

<u>EXCLUSION OF THE NATIONAL SECURITY COUNCIL AND STAFF FROM THE SCOPE OF MANDATORY REPORTING DUTIES UNDER THE INTELLIGENCE OVERSIGHT ACT OF 1980.</u>

In 1978 the Senate Select Committee on Intelligence, through a subcommittee chaired by Senator Walter Huddleston, introduced draft legislation that, were it enacted, would have reduced the scope of mandatory reporting to heads of departments, agencies or other entities of the intelligence community. On February 9, 1978, Senator Huddleston and 19 co-sponsors introduced S. 2525, the National Intelligence Reorganization and Reform Act of 1978. Representative Boland introduced S. 2525 in the House as H.R. 11245 on March 2, 1978.

As a proponent of streamlined, mission-oriented legislative charters, I did not actively participate in drafting the 263-page 1978 charter legislation (S. 2525) or the initial 172-page 1980 charter legislation (S. 2284). Section 151(g) of S. 2525 required reports to the intelligence oversight committees by the "head of each entity of the intelligence community...."

The 1978 Senate charter legislation (S. 2525) introduced the concept of an "entity" of the intelligence community, but did not include the term in its definitions. Sec. 104(16) did define the "intelligence community" without any express inclusion of the NSC or its staff, and impliedly exempted that Council and staff from mandatory reporting.

A limitation of mandatory reporting duties to the head of each "entity of the intelligence community" remained in the provisions of S. 2284, the National Intelligence Act of 1980, introduced by Senator Huddleston, Chairman of the Subcommittee on Charters and Guidelines, on February 8, 1980. See Section 142(a). Rep. Boland introduced a companion bill, H.R. 6588 in that same month.

As opposition to detailed legislative charters developed in the executive branch (objecting to reporting other than "in a timely fashion") and in the Congress, the Senate Select Committee Staff Director approved my review of the 172-pages for the purpose of abbreviation and simplification consistent with protection of civil rights and safeguards. I consulted with Keith Raffel, John Elliff, and others of the Committee staff between February 14 and March 19, 1980, first to make technical changes in S. 2284 as drafted, and second, to produce streamlined charter legislation.

It was during the first phase of review in late February 1980 that I identified the failure of S. 2284's oversight provisions to provide for mandatory reporting of NSC intelligence activities. I proposed to extend the reporting duties of Section 142(a) beyond the head of each "entity of the intelligence community," for the express purpose of including the National Security Council and its staff within the scope of reporting duties respecting intelligence activities, including "significant anticipated intelligence activities...."

Neither Mr. Keith Raffel nor Mr. John Elliff, who had participated in the work of the Subcommittee on Charters and Guidelines, favored express inclusion of the National Security Council in the reporting duties under Sec. 142(a) of S. 2284. Neither claimed that the NSC was covered by the phrase "intelligence community." It is clear from the pertinent text on Congressional oversight of intelligence activities that neither the NSC nor its staff was covered. In particular, section 103(12) defined "intelligence community" and "entity of the intelligence community" to mean --

(A) the Office of the Director of National Intelligence;
(B) the Central Intelligence Agency;

(C) the Defense Intelligence Agency;
(D) the National Security Agency;
(E) the offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs;
(F) the intelligence components of the military services;
(G) the intelligence components of the Federal Bureau of Investigation;
(H) the Bureau of Intelligence and Research of the Department of State;
(I) the foreign intelligence components of the Department of the Treasury;
(J) the foreign intelligence components of the Department of Energy;
(K) the successor to any of the agencies, offices, components, or bureaus named in clauses (A) through (J); and
(L) such other components of the departments and agencies, to the extent determined by the President, as may be engaged in intelligence activities."

Specific requirement of reporting by the National Security Council raised constitutional issues relating to "executive privilege" and separation of powers. It was my position that, unless the mandatory reporting duties included the NSC and its staff, there was a foreseeable risk of the NSC managing covert operations through the NSC staff itself, without a specific duty to report on such activities to the oversight committees of the Congress. The Charter and Guidelines Subcommittee staffers indicated that the President would not authorize this change in customary practice, precisely because, upon discovery, the Congress would enact legislation requiring mandatory reporting by the National Security Council or the President regarding its activities.

At this point (on a day in February 1980 that I cannot ascertain from my records), I took the issue to the staff director of the Senate Select Committee, William G. Miller. Any change of the nature I was proposing would reopen constitutional issues of concern to the Attorney General and the Counsel to the President. Mr. Miller reminded me that both Vice President Mondale and David Aaron, the Deputy Special Assistant to the President for National Security Affairs, served with the Committee. The President would not permit, I was advised, the conduct of covert operations by the NSC staff itself. I reminded the staff director that intelligence charters must be designed to function under changed and partly unforeseen circumstances, well beyond the service of officials who knew the precise reasons for legislative action. The staff director decided to leave sec. 142(a) as it stood. Hence, I did not reiterate my proposed redraft when I summarized a set of possible amendments to S. 2284 on March 4, 1980.

I did recommend providing the President additional flexibility,

under "extraordinary circumstances," to delay from 48 hours to 30 days notice to the full oversight committee membership, so long as prior notice were provided the leadership and committee chairmen and vice chairmen (sec. 125 of S. 2284). This was a proposed amendment that was not adopted.

On March 17, 1980 Representative Aspin introduced H.R. 6820, a much abbreviated intelligence bill. It retained the provisions of S. 2284, effectively exempting from mandatory reporting duties the NSC staff, even if they were engaged in intelligence activities. Sec. 102(a) stated:

> "The head of each entity of the intelligence community shall keep the intelligence committees fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, that entity."

On March 19, 1980 Keith Raffel, William R. Harris, et al., of the SSCI staff completed a streamlined, simplified National Intelligence Act of 1980. Labeled "Draft C" (expectably following drafts "A" and "B"), it covered in 30 pages much of what S. 2284 initially covered in 172 pages. It retained the concept "entities of the intelligence community," and once again excluded the National Security Council and Staff from its list of "entities" [sec. 101(b)(1 through 12)]. This draft provided an impediment to, if not a guarantee against potential unreported, self-executed NSC covert operations: Section 103(b) provided that special activities be "conducted only by the Central Intelligence Agency," except when the President determined that another agency should support an activity. Whatever the merits of streamlined intelligence charters might have been, the consensus in support of any charters legislation had disintegrated during the earlier drafting of detailed charters (S. 2525, and S. 2284).

On April 12, 1980 the House Committee on Foreign Affairs provided for consolidated reporting of presidential findings, and favorably reported H.R. 6942. This retained the Hughes-Ryan Amendment, but reduced the reporting requirement from eight to the two intelligence committees of Congress.

On April 17, 1980 the Senate Committee on Foreign Relations held hearings on the role and accountability of the Special Assistant to the President for National Security. Whatever concerns the Foreign Relations Committee had did not result in legislation to require reports to the Congress on activities of the National Security Council or its staff.

On April 17, 1980 the Senate Select Committee reissued a revised draft of S. 2284. Shortly thereafter, the executive branch submitted to the Senate Select Committee a document labeled "Agreed SSCI-Executive Branch Condensation of S. 2284." This document generally reflected agreements, but also set forth

executive branch preferences for legislative charters where issues remained unresolved. Section 132 retained a mandatory reporting duty for "the head of each entity of the intelligence community...."

Of some interest, section 111(c) of the so-called "Agreed SSCI-Executive Branch Condensation" specified that the Title not be construed to prohibit any department or agency from collecting, processing, or disseminating information if otherwise authorized to do so. Hence, the understanding of the executive branch (which had an interagency committee on intelligence charters in operation throughout enactment of the Intelligence Oversight Act of 1980) and the Senate Committee that drafted the legislation was that duties imposed by this Title not be applied to other entities of the federal government merely because they collected, processed, or disseminated intelligence information under other existing authority. Hence, the National Security Council, authorized by the National Security Act of 1947 to evaluate the quality of intelligence and otherwise authorized by the President, did not become an "intelligence entity" merely by reason of collecting, processing, or disseminating information.

The Senate Select Committee considered S. 2284 in executive session on April 30, and thereafter on May 1, 6, and 8, 1980. Senator Inouye proposed an amendment restricting prior reporting of significant anticipated covert activities under "extraordinary circumstances" as determined by the President. [See 50 U.S.C. sec. 501(a)(1)(B)]. Senator Wallop and Senator Moynihan proposed further reporting on significant intelligence failures. [See 50 U.S.C. sec. 501(a)(3)]. See S. Rpt. 96-730 for a summary of these amendments.

On May 8, 1980 the Senate Select Committee on Intelligence unanimously approved S. 2284 as amended, containing primarily the provisions for legislative oversight and provisions to protect the identities of agents. On May 15, 1980 the Committee issued S. Rpt. 96-730, to accompany S. 2284, the Intelligence Oversight Act of 1980. This report indicated that "references to 'any' department, agency, or entity in subsection (a) impose obligations upon officials to report only with respect to activities under their responsibility, subject to the procedures established by the President under subsection (c)." [S. Rpt. 96-730, May 15, 1980, p. 7].

On June 3, 1980 the Senate took up consideration of the Intelligence Oversight Act of 1980, S. 2284. A colloquy on the Senate floor represented concerns of the Counsel to the President, Lloyd Cutler, and General Counsel of CIA, Daniel Silver, that diverging executive-legislative views on executive privilege and on mandatory reporting be contained in the floor debate. The Senate adopted the Intelligence Oversight Act by a vote of 89-1.

The Senate's provisions for legislative oversight [what became subsections 501(a) through (d)] were not contained in the House

Bill, H.R. 7152. In the September 1980 Conference, members of the House Intelligence Committee (Rep. Boland and others), the House Armed Services Committee (Rep. Price and others), and the House Foreign Affairs Committee (Rep. Fascell and others) agreed to the Senate provisions for Sec. 501, with a supplementing amendment [sec. 501(e)]. This amendment indicated that duties to protect intelligence sources and methods did not authorize the withholding of reports to the intelligence committees of the Congress. See the House Conference Report 96-1350, on S. 2597.

The Senate (on Sept. 19th) and the House (Sept. 30th) agreed to the Conference Report. President Carter signed the Intelligence Authorization Act for FY1981, on October 14, 1980. Title V, the Intelligence Oversight Act of 1980 [P.L. 96-450, 94 Stat. 975], provides in Sec. 501(a) [50 U.S.C. 501(A)]:

> "The Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --
>
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives...fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity....
>
> (2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees....
>
> (3) report in a timely fashion...any illegal intelligence activity...."

Notwithstanding efforts in 1980 to broaden its scope of coverage, what became Section 501(a)(1) of the Intelligence Oversight Act of 1980 did not represent a legislative effort to include operations of the National Security Council or its staff within the mandatory reporting duties of this subsection. Sec. 501 of the Intelligence Oversight Act did not prohibit the conduct of "special activities" by the staff of the National Security Council. A precursor draft (Draft "C" of March 19, 1980) that would have prohibited covert operations other than by CIA except by Presidential determination, was not enacted.

Over a three year period from the initial drafting of S. 2525 in late 1977 through enactment of the Intelligence Oversight Act on October 14, 1980, the linked reference to "department, agency, or entity" engaged in intelligence activities developed a meaning widely understood in the executive and legislative branches. This phrase of legislative art applied exclusively to the intelligence agencies or specialized intelligence collection components of the U.S. intelligence community. This definition did not include within its scope other entities of government that supervised the intelligence "entities" or summarized and disseminated their products. Indeed, the legislative history of the Intelligence Oversight Act of 1980 applies only to such of an "entity" activities as are "under their responsibility, subject to the procedures established by the President under subsection [501](c)." [S. Rpt. 96-730, May 15, 1980, p. 7].

SCOPE OF "DEPARTMENT, AGENCY, OR ENTITY" INVOLVED IN INTELLIGENCE ACTIVITIES SUBSEQUENT TO THE INTELLIGENCE OVERSIGHT ACT OF 1980.

EXECUTIVE ORDER 12333 (1981)

On December 4, 1981 President Reagan implemented section 413 of the Intelligence Oversight Act of 1980, by signing Executive Order 12333 [46 F.R. 59941], "United States Intelligence Activities."

Section 3.1 provided for the implementation of Congressional oversight. It established "[t]he duties and responsibilities of the Director of Central Intelligence and the heads of other departments, agencies, and entities engaged in intelligence activities to cooperate with the Congress in the conduct of its responsibilities for oversight of intelligence activities .... "

Section 3.4(e) defined "intelligence activities" to mean "all activities that agencies within the Intelligence Community are authorized to conduct pursuant to this Order." Section 3.4(f) specified agencies or organizations of the "Intelligence Community," excluding from the listing the National Security Council and its staff. It is notable that the Executive Order followed the established scope of the Intelligence Oversight Act of 1980, and also notable that the principal coordinator of the Executive Order, Kenneth DeGraffenreid, came to the NSC staff from staff work at the U.S. Senate Select Committee on Intelligence, where he served during enactment of the Intelligence Oversight Act.

SEC. 801(A) OF THE INTELLIGENCE AUTHORIZATION ACT FOR FY1984 AND SUBSEQUENT INTELLIGENCE AND DOD AUTHORIZATION ACTS

The Intelligence Oversight Act of 1980 and the 1981 Executive Order implementing it define intelligence activities of departments, agencies or entities with exclusive regard to entities of the "intelligence community." This establishes a presumption

that only "intelligence community" entities are intended to be covered by other intelligence-related legislation utilizing this phrasing. But the presumption may be rebutted by evidence of actual legislative intent to the contrary.

The October 20, 1983 amendment (Boland) to the Intelligence Authorization Act for FY1984 [P.L. 98-215, sec. 801(a)] prohibited obligating or expending funds for the Central Intelligence Agency "or any other department, agency, or entity of the United States involved in intelligence activities" for covert assistance to military operations in Nicaragua. [Roll Call 403, Cong. Rec. p. H8426].

The Intelligence Authorization Act for FY1984, Sec. 108 [P.L. 98-215] authorized not more than $24 million to CIA, DOD "or any other agency or entity of the United States involved in intelligence activities which 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...."

The specific legislative history of these or subsequent Boland Amendments is not known to me. Consequently, I would not seek to evaluate whether the presumption of a limitation to entities of the "intelligence community" as defined in Executive Order 12333 has been rebutted by the specific legislative history of these Acts of Congress.

Acts of Congress requiring evaluation of legislative intent include: Sec. 106 of Title I of the Intelligence Authorization Act for 1987 [P.L. 99-569] providing that funds available to the [CIA, the DOD] "or any other agency or entity of the United States involved in intelligence activities may be obligated and expended during fiscal year 1987 to provide funds, material...."; and Sec. 9045 of the DOD Appropriations Act for FY 1987 [P.L. 99-591] prohibiting expenditure of funds available to CIA, DOD "or any other agency or entity of the United States involved in intelligence activities...."

INTELLIGENCE AUTHORIZATION ACT FOR FY1985, TITLE VIII, SEC. 801

Sec. 801 of Title VIII of the Intelligence Authorization Act for FY1985 provided, without regard to the agency or entity sponsoring the activity that: "No funds authorized to be appropriated by this Act or by the Intelligence Authorization Act for fiscal year 1984 [Public Law 98-215] 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...." This prohibition is not in any way limited to entities of the intelligence community.

Similarly, section 2907 of Title IX of P.L. 98-369 [98 Stat. 1210, 22 U.S.C. 2151] prohibits the mining of ports or terri-

torial waters of Nicaragua, without limit to an entity of the intelligence community.

SENATE EXERCISE OF INTELLIGENCE OVERSIGHT ACT JURISDICTION JURISDICTION IN 1984 OVER THE BUREAU OF VERIFICATION AND INTELLIGENCE, U.S. ARMS CONTROL AND DISARMAMENT AGENCY

This review of legislative history relating to "departments, agencies, and entities" involved in intelligence activities would be incomplete without noting the practices of the intelligence oversight committees since enactment of the Intelligence Oversight Act in 1980. The two oversight committees have a special stake in the Intelligence Oversight Act of 1980, particularly because it treats their access to the information required for effective legislative oversight.

To the best of my knowledge, in the period 1980 through 1983 the intelligence oversight committees treated Section 501(a)(1) as if it covered only entities within the intelligence community, as defined in President Reagan's Executive Order 12333 (1981).

In the spring of 1984 the Senate Select Committee on Intelligence, whose staff had drafted section 501(a) of the Intelligence Oversight Act, first applied that section to an "entity" outside the intelligence community. During preparation of the Intelligence Authorization Act for FY1985, the Committee reviewed the requirements and capabilities of the Bureau of Verification and Intelligence of the U.S. Arms Control and Disarmament Agency (ACDA).

On behalf of the Chairman of the Budget Subcommittee (Senator Wallop) of the SSCI, in the spring of 1984 I reviewed the legislative history of the Intelligence Oversight Act of 1980, and prepared a letter to the Director of ACDA, advising the Director of the Committee's assertion of jurisdiction under the Intelligence Oversight Act of 1980. To the best of my knowledge, after review of my proposed assertion of oversight jurisdiction by the staff director, the Committee Chairman, Senator Goldwater, signed the letter to the ACDA Director in the spring of 1984.

Predictably, the Director of the Arms Control Intelligence Staff of CIA objected informally to the assertion of oversight jurisdiction, on the grounds that ACDA was not a part of the "intelligence community" as specified in E.O. 12333. There was, however, a statutory basis for the assertion of juriadiction. Section 37 of the Arms Control and Disarmament Act (the Derwinski Amendment of 1977) provides the Director of ACDA legal responsibility for verification of compliance and noncompliance with arms control agreements. The Bureau of Verification and Intelligence performs statutorily-required intelligence assessment functions under Section 37 of the Arms Control Act. The Director of ACDA accepted the Senate Select Committee's assertion of oversight jurisdiction in 1984.

CONCLUDING REMARKS

In the period 1975-1978, Congressional investigations of intelligence activities encompassed entities of the entire federal government, and proposals for mandatory reporting to the Congress mirrored that broad jurisdictional concern.

Commencing in 1978, the intelligence oversight committees adopted the procedure of enacting separate intelligence authorization acts for all entities of the "intelligence community" engaged in national intelligence or counterintelligence. Concurrently, from 1978 onwards, draft legislation proposing mandatory self-reporting by heads of intelligence departments, agencies, or entities encompassed expressly specified departments and agencies and other "entities" that performed classified missions within the "intelligence community." Proposals in 1980 to extend the scope of "entities" to include the National Security Council and its staff were expressly rejected in the course of streamlining what became the Intelligence Oversight Act of 1980.

This legislative history establishes a presumption that parallel or subsequent legislation including the phrase "departments, agencies, or entities" engaged in intelligence activities applies to entities of the "intelligence community" and not the National Security Council or its staff. But the presumption may be rebutted by any specific legislative history of a later Act of Congress if that legislative history indicates unequivocal intent to prohibit the expenditure of any federal monies by any entity of the federal government. I am simply not aware of the precise legislative history of restrictive legislation that originated in the House of Representatives in 1983 and later years.

Whatever the specific findings may be regarding the scope of legislative restrictions in 1984 and thereafter, a general principle must apply to all intelligence activities conducted in a democratic society: Intelligence activities and related covert activities conducted in the national security interests of the United States, must be conducted under and subject to the rule of law. I trust that the foregoing review of intelligence laws and Congressional oversight practices will assist your Committee as it completes a difficult task.

Respectfully submitted,

William R. Harris

John Norton Moore
824 Flordon Drive
Charlottesville, Virginia 22901

August 4, 1987

The Honorable Daniel K. Inouye
Chairman, The Select Committee on the
Secret Military Assistance to Iran &
the Nicaragua Opposition
SH-722 Hart Senate Office Building
Washington, DC 20510-1102

Dear Chairman Inouye:

During the course of the Iran-Contra hearings Lieutenant Colonel Oliver North apparently inadvertently created the impression that I had provided him with legal advice concerning the constitutionality and scope of the so-called "Boland Amendment" that has been at the center of the hearings, although he seems to have implicitely corrected this in later testimony. Since I had not provided any such legal advice, I immediately called his counsel and sent a letter to correct this apparent misimpression. Enclosed is a copy of the letter that I would appreciate your making part of the hearing record.

As a national security lawyer -- indeed one who has sought to pioneer the new field of national security law -- I have long urged the establishment of a strong legal office in the National Security Council (NSC) staff, with involvement in all activities of the NSC. When the Tower Commission was appointed I wrote a letter to Chairman Tower urging establishment of such an office. It was a matter of great satisfaction for me to see that the Commission recommended such an Office, that the President singled this recommendation out as one of the recommendations he believed most important to the Nation, and that Assistant to the President for National Security Affairs, Frank C. Carlucci, has moved vigorously and effectively to implement this recommendation. This is, I believe, one of the most important structural changes in the national security process to emerge from the Iran-Contra affair and I hope that your Committee will endorse this change.

As I am sure the Committee is aware, there is a great difference in lawyering roles in being consulted for legal advice prior to events and a variety of lawyering roles, including public comment on the law, after events have transpired. Prior to events, effective lawyering should provide, among other things, advice that prevents persons acting in good faith from having future legal problems and advice that includes the creative potential of legal-system options for serving the national

interest. In contrast, after events have transpired, lawyers have an obligation to work for due process in protecting individuals who have acted in good faith, and in educating the public about important issues. In this latter connection, it is noteworthy that the hearings produced diametrically opposed interpretations of the applicable "Boland Amendment" from public servants, all of whom seem to have conscientiously sought to serve the nation. Surely a major lesson of the Iran-Contra affair has been the great need for the structural change that has now been made of a strong legal office in the NSC to provide legal advice in advance as to significant NSC activities.

Sincerely,

John Norton Moore

JNM:kww

Enclosure: as stated

cc: Mr. Brendon Sullivan
Mr. Eugene C. Thomas, President,
American Bar Association
Richard A. Merrill, Dean, University of Virginia
School of Law

John Norton Moore
824 Flordon Drive
Charlottesville, Virginia 22901

July 9, 1987

Mr. Brendon Sullivan
Williams & Connally
17th and Eye Street, N.W.
Washington, D.C. 20003

Dear Mr. Sullivan:

It has come to my attention that your client, Lieutenant Colonel Oliver North, may have inadvertently created the impression by his testimony this morning that I have provided him with legal advice regarding the constitutionality and scope of the so-called "Boland Amendment" that has been at the center of the current Iran-Contra controversy. This may have been implicitly corrected this afternoon, when I am told he testified that he had received legal advice on this issue only from the present Counsel to the President's Intelligence Oversight Board, but I would appreciate your correcting the record should any doubts remain.

As you are no doubt aware, I served as a Special Counsel for the United States in the *Nicaragua* case before the International Court of Justice. Subsequently, in my personal capacity, I have written and spoken widely about the war in Central America, including a book, *The Secret War in Central America* (published by University Publications of America earlier this year), and several addresses on the legal issues delivered before members of the press and congressional staff at the White House.

There have, of course, been a multiplicity of "Boland Amendments" concerning Nicaragua dating back to December 1982. On more than one occasion in years past when I have been asked to address some of the legal issues involved in the Central American controversy I have expressed the view that I did not believe U.S. support for the Contra program conflicted with the "Boland Amendment"-referring at the time, of course, to earlier versions and events then known. Certainly this is reflected in my published writings and is a conclusion concerning these earlier "Boland Amendments" that seems well supported by the record. I have been told that Colonel North was frequently called upon to address similar audiences, and although I don't recall encountering him in that context, it is quite possible that he heard me express such views on the "Boland Amendment," and he is likely to be familiar with my published writings. He may also have been familiar with my Opinion Editorial "Government Under Law and Covert Operations" published in the

Washington Times on February 24, 1987, in response to the Iran-Contra controversy that does make the point that the scope of the 1984-85 "Boland Amendment" has been embroiled in a dispute.

For the record, however, prior to the public disclosure of the current Iran-Contra controversy late last year I had not even had occasion to examine the 1984-85 "Boland Amendment," and thus I am certain that I did not provide Colonel North or anyone else with a "legal opinion" about its constitutionality or whether it encompassed the National Security Council. The first time I have had occasion to even preliminarily review the range of domestic legal issues involved in the Iran-Contra affair was during the writing of an opinion editorial on the issues after the affair had become public.

Although the "Boland Amendment" at issue in the current controversy seems to me, on the basis of a preliminary review, to contain relevant ambiguities--and at least one separation-of-powers constitutional scholar whose judgment I respect has expressed doubts to me about the constitutionality of at least certain interpretations of the amendment--I have not at this time personally taken a definitive position on these important issues which would, of course, among other things require a careful review of the legislative record. I have, however, on numerous occasions expressed my view in response to media inquiries, after the Iran-Contra affair had become public, that the relevant "Boland Amendment" may well be ambiguous, and to the extent that it is, well recognized principles of due process and separation of powers would require that it be interpreted to protect Executive Branch flexibility.

Thus, while I had not had occasion to review the pertinent "Boland Amendment" prior to the Iran-Contra affair becoming public knowledge, and have still not had an occasion to do a careful legal analysis of that amendment and its voluminous legislative history, it is my preliminary judgment on reviewing that amendment that it may well be ambiguous in several key respects. It is also my judgment that there are strong policy reasons why any significant ambiguity should be construed in favor of continued Executive Branch authority. Certainly, when Congress does act in an area of sensitive presidential power, such as the conduct of covert activities, it must do so clearly. Any other conclusion does a serious disservice to separation of powers and the dedicated men and women who serve to implement foreign policy in the Executive Branch.

I have no doubt but that Colonel North's reference to me this morning was a consequence of misunderstanding, and I have no desire to add to his burdens at this difficult time. But as a lawyer, I am sure you can appreciate my concern that an inaccurate impression not be left that I have participated in providing legal counsel to Colonel North on the "Boland Amendment" or any other national laws involved in the Iran-Contra affair.

It would not be inaccurate for Colonel North, or any other individual, to note that on numerous occasions, including in my recent book *The Secret War in Central America*, I have publicly expressed my conviction that United States assistance to the Contras is consistent with the norms of international law as reflected in the United Nations and Organization of American States Charters. This is premised upon a factual recognition of covert Nicaraguan armed aggression against El Salvador and other democracies in the region dating back to at least 1980--a conclusion affirmed on several occasions by both the House and Senate Intelligence Committees. This armed aggression--which predated by well over a year the United States decision to provide similar assistance to the Nicaraguan opposition in an effort to deter the ongoing effort to overthrow the government of El Salvador--violates article 2(4) of the United Nations Charter and numerous other prohibitions against aggression. It gives the United States a right of collective defense under Article 51 of the United Nations Charter and, indeed, may create a legal obligation under Article 3 of the Rio Treaty to assist El Salvador to meet the armed attack.

Enclosed is my Opinion Editorial "Government Under Law and Covert Operations," as well as a just completed piece "The Iran-Contra Hearings and Intelligence Oversight in a Democracy." This latter piece raises important issues that, I believe, should be addressed as to whether the current public hearings are the most appropriate mechanism for intelligence oversight of covert operations.

It is important to keep in mind that the views I have expressed over the years on these subjects are my own, and in particular should not be attributed to the United States Government, the American Bar Association, the University of Virginia School of Law, or any other organization with which I am or have been affiliated.

Thank you for your assistance.

With best wishes,

Sincerely,

John Norton Moore

John Norton Moore

JNM/sb

Enclosures: (1) "Government Under Law and Covert Operations" published as "The Rule of Law for the Covert"
(2) "The Iran-Contra Hearings and Intelligence Oversight in a Democracy"

cc: Mr. Eugene C. Thomas, President, American Bar Association
Dean Richard A. Merrill, Dean, University of Virginia School of Law

Government Under Law and Covert Operations

by

John Norton Moore*

The level of rhetoric about law violation in the Iran-Contra affair has been high. Some of the public debate has even assumed criminal violation, with prominent members of Congress speculating as to length of sentence and calling for Presidential pardons. Yet the discussion has been as void of specifics about such violations as it has been pregnant with allegations.

Without knowing all the facts and the full context of actions it is not possible to make responsible legal judgment. It is important, however, that the debate proceed in a more complete context of assumptions about government under law. Both the important principle of due process and real-world complexities of the rule of law for covert operations suggest that the level of rhetoric should be restrained as we focus more clearly on the enduring issues.

First, no one involved in the Iran-Contra affair should be presumed guilty of law violation--much less criminal violation--until found guilty by a court of law. Just as our democratic system requires that government officials operate within the law it also provides that they be accorded a presumption of innocence until a duly constituted court finds otherwise. Similarly, it should be clearly understood that appointment of an independent counsel does not demonstrate law violation. The Ethics in Government Act, which Congress courageously did not apply to itself, has an extraordinarily loose standard for the appointment of such a counsel. This has been borne out by most such counsel reporting that no law violations have occurred within their mandate. It should also be understood that there is a major difference between civil and criminal responsibility. Criminal responsibility flows only from violation of clearly applicable pre-existing criminal statutes. Indeed, if individual criminal--or even civil--responsibility flowed inexorably from all nonconformance with statutes the members of Congress would be guilty of multiple offenses as they repeatedly ignore their own budget act.

Most importantly, the structure of law as it applies to covert operations is highly technical and complex and the public debate has been as simplistic as the law is complex. For example, the public discussion of legal issues has assumed that the Arms Export Control Act applies to presidentially authorized special activities. Special activities, however, for reasons of their extreme sensitivity and secrecy, have their own legal structure and it may well be that this

and many other laws enacted for quite different settings do not apply to such activities. Given the strong constitutional underpinnings of special activities as presidentially directed, if particular statutory restrictions are constitutionally valid at all, certainly they would need to be unambiguous in their application. Similarly, much of the public discussion has assumed that the failure to provide notice to the intelligence committees constitutes a violation of the shall inform "in a timely fashion" language of the Intelligence Oversight Act of 1980. But this ambiguous language papered over a serious underlying constitutional dispute between Congress and the Presidency as to whether the President must notify Congress of all special activities. Moreover, Congress conceded by the Act that not all such activities must be reported in advance and in that setting the more reasonable interpretation of "timely" would seem to relate functionally to the reason for great secrecy rather than a mechanical passage of time. The Carter Administration seems to have interpreted the Act this way as it spent months planning the Iran hostage rescue operation with no reporting under the Act. These Executive Branch concerns about reporting all special activities in advance to committees of Congress reflect enduring policy concerns about the ability of Congress as an institution to maintain secrecy. This institutional concern has been shared by the constitutional framers, George Washington as our Nation's first President, and by numerous administrations since, both Democratic and Republican. Moreover, a policy requirement for extraordinarily sensitive covert operations is to hold knowledge to the smallest possible group whether in or out of Congress. Informing members of Congress of all such operations not only increases the absolute number of persons with information but may also have a multiplier effect as Executive Branch personnel associated with Congressional relations become involved. Whatever the policy wisdom of not reporting, certainly the failure to report under the ambiguous Intelligence Oversight Act is not a legal scandal, and it is probably within the President's power both as a matter of statutory and constitutional law. To the same effect, most of the numerous "Boland Amendments" limiting assistance to the Contras clearly do not apply to the activities in question and the one that may be applicable has been embroiled in a dispute as to whether it applied to activities of the National Security Council and, more importantly, is by its terms fact-sensitive, including whether particular funds were available to an agency or entity of the government within the meaning of the law. Whatever the policy wisdom of proceeding in the face of legal ambiguity (as well as other policy issues in linking the Iranian and Contra operations), policy shortcomings do not show that those who

acted did so illegally. Whatever the final resolution of a host of technical legal issues raised by the affair, due process suggests that the professional reputation of our public servants not be lynched by a post-Watergate mob that convicts of criminal violation when there may be no law violation, civil or criminal. We should remember that the essence of McCarthyism is the unfounded allegation.

Second, whatever the final resolution of legal and policy issues in this case, the Administration should take this occasion to appoint a full-time general counsel to the National Security Council staff. After years of criticism by international lawyers who urged the addition of legal experts to the National Security Council, Dr. Zbigniew Brzezinski added an excellent lawyer to the staff who served about half-time as a legal specialist and that legal presence has been continued and augmented under the Reagan Administration. There should, however, be a clearly designated full-time general counsel on the staff with an office of one or two national security law specialists and that office should operate under procedures that ensure its involvement in all national security activities, overt and covert. It is simply a fiction that all national security issues, particularly those arising in crisis management settings, will inevitably be reviewed by general counsel in the major departments. The absence of full involvement of knowledgeable lawyers in national security decisions has for years harmed our national foreign policy under both Democratic and Republican administrations. Such involvement is not required solely to prevent illegal actions, as important as that may be, but also to provide relevant policy advice on associated political and implementation issues. If such an enhanced presence were needed two decades ago, it is now imperative given the extraordinary growth of national security law over the last two decades. In the future any foreign policy makers who do not seek legal counsel before a significant new activity have only themselves to blame for subsequent legal problems.

Third, our Nation is likely to have no ability to conduct covert operations if it conducts its post-mortem of failed operations as the Iran affair has been handled. It is understandable, and probably desirable, once the public concern about the Iran-Contra affair had reached the level of hysteria, that the Administration request appointment of an independent counsel and Congress establish special Senate and House Committees to investigate. For the future, however, we should use the capable mechanisms established by law during the 1970s' sweeping reorganization of intelligence oversight. That is, allegations about illegality and other improprieties in special operations should be investigated solely by the Senate and House Select Committees on Intelligence, the President's Intelligence

Oversight Board, and the Attorney General. Following such investigations any illegal conduct should be made known to the American people. In the meantime, an Adminstration and the Congressional Committees should "neither confirm nor deny" allegations about special activities. We cannot expect as a Nation to retain the ability to conduct covert operations if allegations about such operations, perhaps leaked by our adversaries, can trigger a public orgy of self-flagellation. That is, a pattern of public disclosure and multiple investigations about the specifics of special activities, triggered simply by allegations of policy mistakes or legal impropriety, would cripple our ability as a Nation to have options that may sometimes be needed to avoid either war or capitulation to a ruthless enemy with no such constraints. There is an additional reason that public debate is not the appropriate forum to reach conclusions about covert operations. By the nature of such operations an Administration is usually not able to disclose the detailed information and precise context in which it acted without disclosing intelligence sources and methods or betraying those who have trusted us perhaps at great personal risk. Thus, inevitably public debate about special activities is a struggle in which the American government as a whole must defend itself with both hands tied behind its back. The result is likely to be not an informed public but a misinformed public condemning its leaders on partial information.

Finally, and perhaps most importantly, we must understand and deal with an underlying structural problem of enhanced Congressional activism triggering unintended confrontations with the Presidency during national security crises when the Nation can least afford to be immobilizing itself. In significant measure this structural weakness contributed to escalation of the Iran-Contra affair rather than damage limitation. During the 1950s and 1960s Congress acted with the Presidency to deter potential adversaries, in resolutions such as the 1962 Cuban Resolution. In a post Vietnam-Watergate setting, however, Congress has more frequently sought to constrain American actions. Frequently these constraints, which have hugely multiplied in the last two decades, have undermined rather than enhanced deterrence. Certainly the to-date double reversal of Congress on support for the Contras is not a stable basis for a coherent American policy or credible deterrence. Even more seriously the pattern of Congressional activism has fueled potentially catastrophic constitutional confrontations with the Presidency as Congress has aggressively embodied in legislation, such as the War Powers Act and the Intelligence Oversight Act, its views of appropriate Congressional powers. Yet in each case its view differed

from the Presidential view and the President cannot, either as a matter of effective conduct of the Presidency or consistency with his oath to uphold the Constitution, simply acquiesce in what may be felt by the Executive Branch to be a usurpation of separation of powers. In this setting it is not surprising that strongly committed Executive Branch officials, however mistakenly, might seek to interpret ambiguities in favor of Presidential prerogative and stable policy. Nor is it surprising that real-world inadequacies and ambiguities for protecting secrecy in current oversight mechanisms for sensitive special activities would encourage a risky policy choice in withholding prior notice from Congress. Most dangerously, a continuation of Congressional activism in legislating Congress's version of separation of powers in foreign policy--legislation that constitutionally cannot alter the underlying constitutional reality--may some day trigger a direct constitutional clash between Congress and the President in a national security crisis when the Nation has no margin for error. Surely government under law requires a more sensitive accommodation of separation of powers in foreign affairs than Congress writing its own ticket. Congress should, as part of the general introspection from the Iran-Contra affair, reflect on its own contributing role. At minimum our Nation needs a more effective legal structure to protect our most sensitive categories of national security information from either Congressional or Executive Branch leaks. Such reform could enhance broadened participation both in policy formulation and oversight of sensitive special activities. More broadly, Congress and the President should establish a joint Executive-Congressional Commission appointed half by the President and half by Congress to explore non-binding guidelines--as opposed to rigid statutory constraints--that both branches might accept across a spectrum of foreign policy process issues, from the war powers to intelligence oversight reporting, to encourage the Congressional-Executive consensus on procedures for interbranch coordination our Nation must have for an effective foreign policy. No governmental task is more imperative for our national security.

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*John Norton Moore is Walter L. Brown Professor of Law and Director of the Center for Law and National Security at the University of Virginia School of Law. Formerly he served as Counselor on International Law to the Department of State and Chairman of the American Bar Association Standing Committee on Law and National Security.

The Iran-Contra Hearings and Intelligence Oversight in a Democracy

by
*John Norton Moore**

From George Washington to Ronald Reagan American presidents have understood the importance of intelligence. Following the surprise attack at Pearl Harbor and the American involvement in global war, the nation built and has maintained a strong foreign intelligence capability. Without such a capability, verification and thus arms control would be virtually impossible, enhanced fear of surprise attack would reduce stability and require higher arms expenditures, the nation would be largely defenseless against foreign intelligence operations, the national defense effort would be blinded, and the nation would lose a range of options between diplomacy and war.

But just as our democracy requires an effective foreign intelligence capability, so too it requires careful oversight of that capability. Covert activities, particularly, must be undertaken only after a careful vetting to ensure that they are truly in the national interest and are authorized according to law. Intelligence failures, such as the recent Iran-Contra affair, must receive careful review so that the same mistakes will not be repeated. And any allegations of illegality or impropriety, of course, must be promptly investigated.

Intelligence oversight, however, is not like oversight of the social security program or the Department of Agriculture that can proceed fully in the open. Rather, it must respect the requisite secrecy of the intelligence process. Failure to do so can severely harm the nation's capabilities in intelligence.

No one can review the evidence to date in the Iran-Contra affair without understanding that serious mistakes were made, particulary, the repeated--but understandable--mistake made by virtually all the democracies to seek to bargain with terrorists for the release of hostages seized just for that purpose by radicals who trample both democracy and human rights. That mistakes were made, however, does not justify further mistakes in our process of oversight.

In my judgement the nationally televised Iran-Contra hearings are--and will be regarded by history--as a serious mistake in efforts at intelligence oversight. The motivation of the hearings and the professionalism of the distinguished panel of some of the Nation's most able legislators is not in doubt and is not the issue. Rather, the issue is whether publicly televised oversight hearings are the best form of oversight of covert operations taking into account both the need for effective intelligence and effective oversight. The answer is a clear no.

The Iran-Contra hearings are a bad precedent in intelligence oversight for at least five reasons. First, to publicly reveal the details of failed American intelligence operations--of which the Iran-Contra affair is not the first and will not be the last--will have a severe chilling effect on the ability of the nation to carry out intelligence functions in the future. Will other nations be willing to cooperate with the United States in secretive operations if they believe such operations can become public knowledge? Will vital sources of human intelligence become more difficult for the United States to recruit? Will foreign intelligence services be as willing to share information with the United States or to suggest possible opportunities for United States intelligence? The answer to all these and other such questions is surely negative for effective American intelligence if other nations perceive that our process--or even possible process--of oversight review of failed intelligence is to hold nationally televised hearings relishing in the details of all aspects of the operations.

Second, because of the difficulty of fully discussing covert operations publicly--or they would not need to be covert--and the inevitable need to protect sources and methods, any public debate is likely to be distorted and one-sided in which the intelligence community--and the Executive branch as a whole--may well be unable to fully present the case for their actions. For this inescapable reason it is as likely that public debate about failed intelligence operations will misinform as that it will inform. The broadside against the President's Intelligence Oversight Board that emerged during the hearings is a good example. The Board was created in the wake of the Church Committee hearings as a mechanism for ensuring intelligence community compliance with law, and particulary in recent years it has had an important impact. Moreover, it seems to have been the only entity within the United States Government to have even raised the legal issues during continuation of the failed operations. For its effort, however, it and its legal counsel were publicly pilloried (and not on the merits but

on an attack against the counsel's credentials). Even more wrongly, the Nation has been presented with a distorted view of an important check in the process of intelligence oversight.

Third, the hearings, while nominally in pursuit of legislative oversight, in many respects have the appearance of a clockwork orange trial by grand inquisitors for the titillation of a national audience. While the constitutionally permitted purpose of Congressional hearings is solely to support legislative function, the overall hearings give a strong impression of greater interest in demonstrating individual impropriety or wrongdoing. As such, the hearings are dangerously close to an abuse of Congressional power. Even more importantly, no court yet conceived has thought of interrogation of those called before it by multiple accusers, some with what could be regarded in other settings as a conflict of interest in demonstrating wrongdoing. Nor does due process permit preparation of the accusers case in secret or denial of the right to cross-examine or make a full statement. Even more importantly, the interrogation proceeds in an atmosphere of prejudgment about the law. And the judging panel reveals startling asymmetries in knowledge of the legal complexities of the case and opinions about the law. Many simply assume that shredding of intelligence documents proves criminality. Others make the assumption, without legal analysis, that one or more of a confusing array of Boland Amendments has been violated. Yet shredding does not prove criminality, and there are very fundamental legal issues concerning the relevant Boland Amendments, most particularly whether their real ambiguities concerning scope of applicability were intended by Congress to prohibit efforts at third nation or private support for the Contras and whether any ambiguities should be and would be interpreted in favor of continued Presidential power. Despite an absence of findings about the law, judgments about witnesses are solemnly delivered before a national television audience with no opportunity for rebuttal. Despite the professionalism and integrity of the Iran-Contra hearing panel and staff, nationally televised hearings such as this one do present pressure for personal or partisan advantage to which lesser legislators might succumb. If failed intelligence operations are in the future to be tried by this new televised star chamber, then we will inevitably destroy the careers of fine Americans whose crime has been to misread an ambiguous stream of congressional pronouncements or, indeed, even to do their investigative duty as required by the law. As the Nation bitterly learned in the McCarthy Committee hearings, trial by adversary televised congressional hearings may destroy the reputations of fine

Americans at little gain in legislative knowledge. It is a precedent we should carefully review and that Congress should limit.

Fourth, if the Iran-Contra hearings are to provide broader legislative investigation of compliance with legal constraints on private sector support for competing factions in the Central American War, then they should do so on an even-handed basis. It is inevitable that an inquiry focusing solely on support for the Contras, and ignoring the extraordinary efforts by and on behalf of the Sandinistas and the FMLN guerrillas in El-Salvador, will have the appearance of an ideological imbalance. If one is a fit subject for a publicly televised national inquiry, it is hard to imagine the grounds on which contending efforts are to be ignored in such an investigation, if, of course, there is a genuine legislative purpose in such hearings as opposed principally to a focus on allegations of individual wrongdoing.

Finally, the displacement of the normal intelligence oversight mechanisms established after the Church Committee hearings can only weaken those mechanisms that must do the important job of intelligence oversight on a day to day basis. This objection also applies to investigation of failed intelligence operations by an independent counsel. Our current intelligence oversight mechanisms are workable and include the bipartisan House and Senate select committees on intelligence, the Attorney General, and the President's Intelligence Oversight Board. If we are to strengthen these agencies in their oversight role they must be permitted to conduct the review of failed operations and investigation of any illegalities or improprieties. As long as that review includes review by a bipartisan Congressional entity, there cannot be any serious concern that an Administration will simply cover up its own failures. The public need to know can be fully met by issuance of public reports where evidence of illegalities or other improprieties should be revealed. And certainly legislative facts needed for the legislative process can be assembled in the existing bipartisan select committees as well as in a public ad hoc committee. For the future, American Presidents should simply neither confirm nor deny allegations concerning covert operations and should refer allegations of improprieties or illegalities in such operations to the normal oversight mechanisms. And Congress, which fully participates in that process, should endorse it as the appropriate mechanism.

No other Nation seems to have had the poor judgement to review its intelligence failures completely in public. The Federal Republic of Germany has a small Parliamentary Oversight Committee

to provide intelligence oversight. Other democracies have similar effective yet secret processes. Nothing inherent in democracy or our desire for effective oversight requires that we periodically publicly cannibalize our intelligence processes or subject those who have served the nation to trial by television (the Tower Commission may well be correct that even our two select committees should be consolidated).

Underlying the mistake in investigating the Iran-Contra failure by public ad hoc Congressional Committee is a more pervasive problem. The framers intended that checks and balances apply to all branches, Congress included. While it is not clear in the Iran-Contra hearing that Congress has overstepped its legal bounds, it is dangerously close to usurping both executive functions in intelligence and judicial functions in assessment of any individual wrongdoing. Yet there seem to be few real-world checks on growth of legislative power in the foreign affairs field, and elsewhere Congress has passed laws, such as the War Powers Resolution, that are, at least in part, clearly unconstitutional. The growing confrontation across a broad range of foreign policy issues between Congress and the Presidency is increasingly harming the foreign policy effectiveness of the Nation. The problem is serious for effective American foreign policy and is getting worse. As one possible remedy I believe that the Congress and the President should establish a Congressional-Executive Commission, half appointed by Congress and half by the President, to review the full range of issues in Congressional-Executive coordination in foreign policy. Such a Commission should review not only the constitutional underpinnings and legal issues but issues of appropriate constraints on the exercise of Congressional power, particulary issues of effectiveness and effect on deterrence, and modalities of enhancing consensus between Congress and the President on a bipartisan basis. Whatever the resolution of the broader range of issues we should abandon the sad precedent of review of failed intelligence operations by public ad hoc Congressional Committee.

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*The writer is Walter L. Brown Professor of Law at the University of Virginia School of Law and a former United States Ambassador.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant [illegible]

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[illegible]

The Honorable Lee H. Hamilton
Chairman
Select Committee to Investigate Covert Arms
Transactions with Iran
U. S. House of Representatives
Room H-419 Capitol
Washington, D.C. 20515

Dear Mr. Chairman:

In a letter to the Attorney General of September 23, 1987, you solicited suggested changes in "law, policy or procedure" which might help avoid another Iran/Contra situation. We appreciate this opportunity to comment and to suggest a change which is not new, but which is especially propitious in view of the Iran/Contra matter and investigation.

The Congress should take one step which would decrease the likelihood of a recurrence. We believe that the creation of a joint Congressional Intelligence Committee, such as that proposed in both the 99th and 100th Congresses by Congressman Henry J. Hyde, would go far toward eliminating the environment which might contribute to a future Iran/Contra situation.

Reducing the total number of persons with access to classified information and storing that information in a single, secure repository would strengthen Executive branch confidence in the Congress' legislative role in the intelligence process. Congress, in turn, would clearly benefit from this increased confidence by the receipt of timely and detailed reports of intelligence activities, and a renewed ability for in-depth cooperation.

Aside from the establishment of a joint intelligence committee, the Department believes that the introduction of any other legislative measures is unnecessary. I hope you would agree that the Iran/Contra matter was an exceptional situation which lends scant support to the proposition that a massive revision of the intelligence statutes is required.

In addition, attempts to effect a wholesale revision of these statutes would require tremendous time and effort with no guarantee of beneficial results, as this is an area of constitutional law which remains uncertain at the core. In contrast, the creation of a joint intelligence committee is a practical measure which could be implemented swiftly and with obvious positive results. The Department of Justice is prepared to assist in whatever way we can in working with the Congress to establish such a committee.

Sincerely,

John R. Bolton
Assistant Attorney General

77-026 O - 87 - 21

Lawrence L. Tracy
[redacted]

November 6, 1987

/S/

Representatives Lee H. Hamilton (D-IN) and
Dick Cheney (R-WY), Select Committee to
Investigate Covert Arms Transactions
with Iran, H-419, The Capitol,
Washington, D.C. 20515

Dear Sirs:

I write this letter to shed light on what I believe may be a relevant portion of your report on the "Iran-Contra" hearings--the work of the Office of Public Diplomacy for Latin America and the Caribbean at the Department of State. During the final days of the hearings, Congressman Dante Fascell (D-FL.) made a number of references to the Office, and later, with Congressman Jack Brooks (D-TX.), sponsored a report by the General Accounting Office (GAO) which made serious and erroneous accusations about the Public Diplomacy Office. As a former member of the Office, I want to set the record straight, and thereby help you in the preparation of your final report. Although I am currently doing consulting work for the Department of Defense, no one in the Administration has asked me to write this letter, and I have not cleared it with anyone in government.

Let me first establish my bona fides to comment on the GAO Report and the Office of Public Diplomacy. I was an army Colonel, assigned to the Office of the Deputy Assistant Secretary of Defense for Inter-American Affairs from June 1980 until December 1982. I was then assigned, at the request of the Department of State, to the recently-created Office of Public Diplomacy, where I served as Senior Defense Advisor to Ambassador Otto Reich until my retirement from active duty and departure from government in May 1986. During the 20 months that I was at the Department of State, I gave over 300 speeches on Central America, created the display of captured weapons and documents that President Reagan opened on March 10, 1986, and was the principal author of the Administration's two most widely-distributed publications, The Soviet-Cuban Connection in Central America and the Caribbean (the "Blue Book") and The Challenge to Democracy in Central America (the "Silver Book"). I also developed the now-famous slide presentation that Lt.Col Oliver North and others in government used extensively to brief the public.

The GAO Report, or Legal Opinion, makes the very serious charge that the Office of Public Diplomacy engaged in "prohibited, covert propaganda activities designed to influence the media and the public to support the Administration's Latin American policies". The evidence supporting this accusation is dubious, the methodology of the "investigation" questionable, and it is surprising that two experienced Congressmen would endorse such a flawed analysis. I will address the glaring errors of the report below, but I would first

like to comment on the dangerous underlying assumption of the GAO finding, which appears to be that the Executive Branch has no right to inform the public of developments in the foreign policy sphere.

In a democracy, it is a fundamental responsibility of the elected leaders of the nation to keep the electorate informed of the dangers facing the country and the responses being taken by these elected leaders to solve such problems. If an Administration disseminates false information to the public, that is indeed propaganda, and the Congress and the media have a solemn responibility to do all in their power to put an end to such dishonest practices. But an intensive effort to inform the public is both a right and an obligation of any Administration, and it has been exercised frequently in the past. The GAO Report appears to be an attempt to limit this inherent right/duty of the Executive Branch.

An excellent example of an intense public diplomacy campaign carried out by the Executive Branch on a foreign policy problem was that conducted by the Carter Administration on the Panama Canal Treaty. President Carter felt deeply about the issue, and decided to go directly to the American people with his side of the controversial issue. It was a political success. Although many in this country disagreed with the Carter policy, I do not recall anyone in Congress calling on the GAO to investigate a "propaganda" effort. The public was well-served by the national debate that ensued, for the American people came to understand both the costs and the benefits of the Treaty, and were better able to advise their representatives in Congress of their position on the issue. That is the essence of democracy.

It was for the same objective--increasing public awareness of a critical issue--that the Public Diplomacy Office was formed in July 1983. It was clear to those of us working in Central American affairs that the public was not well-informed on the area, had little knowledge of U.S. policy objectives in Central America, and little awareness of the threat posed to U.S. security interests by Soviet expansionism in the region. It was concluded that we in the government were at fault, for we had failed to develop the means by which we could communicate the issue of Central America clearly to the American people. Hence the decision to create an inter-agency organization that would draw talent from throughout the Reagan Administration, with a presidential mandate to get the story to the American people of what was happening in Central America. The decision was made to place the organization in the State Department.

The Public Diplomacy Office did not engage in "prohibited, covert propaganda activities", as the GAO alleges, but did indeed carry out an aggressive campaign to increase public knowledge about Central America. As the debate over aid to the "Contras" intensified, so did our efforts to let the public know who these young Nicaraguans were, why they were fighting, and what the consequences could be for U.S. security if the Soviet Union succeeded in establishing a "Cuba" in Central America. Even critics of the Administration acknowledge that the Office performed effectively, and I am proud of the role I played in helping to educate the public of the dangers faced by this country because of Soviet ambition and Sandinista duplicity.

Given the criticism of the Office by the GAO, perhaps we did too good a job, as there are apparently some in Congress who wish to keep the public in the dark. Having travelled throughout this country speaking on Central America, I can assure you that the American people want more, not less, information about a region they know intuitively could soon become a battlefield for their sons. The respected Roosevelt Center for American Policy Studies, in its 1987 study, Trouble at our Doorstep, found that the American people believe that neither the government nor the media are providing them with sufficient information upon which they can make common sense judgements about Central America.

The Congress has been unswerving in its declarations that U.S. interests cannot be permitted to be threatened by a permanent Soviet military presence in Central America. Having served in Vietnam, I certainly do not want to see young Americans fight and die in Central America in the future because the Congress is unwilling to send arms to young Nicaraguans who are willing to fight for their country, and thereby fight our battle for us.

The GAO Report apparently was inspired by the discovery of a memo written in March 1985 by Jonathan Miller of our Office to Pat Buchanan in the White House, in which Miller spoke of a "White Propaganda" campaign. Among the triumphs for the Office, according to the memo, were the placing of an article by Dr. John Guilmartin of Rice University in the Wall Street Journal, and arranging a favorable story on the "Contras" by Fred Francis of NBC. The GAO concluded from this memo, apparently without checking with either Guilmartin or Francis, that this constituted "covert propaganda".

Had the GAO looked beyond the memo, the investigators would have discovered that Dr. Guilmartin, as Lt. Col. Guilmartin, had been one of the United States Air Force's leading authorities on helicopter doctrine and tactics, and that any newspaper would have been happy to publish his expert opinion on the military implication of the delivery of Mi-24 HIND D gunships by Moscow to the Sandinistas. As a consultant to the Public Diplomacy Office, he had done a superb study for us on the subject, and submitted the Op-Ed piece to the Journal on his own, with no help asked or required from us. The allegation that we helped Fred Francis establish contacts with "Contra" leaders is laughable. Fred is one of the best connected reporters in Washington, with far better and more extensive contacts with the the "Contra" leadership than anyone in the Public Diplomacy Office. He required no help from us.

Why did Miller include such statements in his now-celebrated memo to Buchanan? He was probably exaggerating our accomplishments in an effort to curry favor for the Office with the White House, not an uncommon tactic in the bureaucratic battles of Washington. Jonathan has a sardonic sense of humor, and he may have been "just kidding", as he told Ambassador Reich in October 1987 (See Washington Post, October 11, 1987). Certainly, a memo of this nature could be perceived as a "smoking gun", but it should have been the beginning, not the end, of the investigation trail. The GAO appears to presume guilt, then looks for "facts" to fit the a priori assumption.

Media accounts claim that the State Department and Secretary of State George Shultz were not happy with the Public Diplomacy Office because it supposedly took orders from the National Security Council, not the Department Of State. The Office was an inter-agency creature, and certainly had close, almost daily contact with the NSC. But we worked within the State Department, and no one in the Office ever had any doubt but that we worked for George Shultz.

There was probably resentment on the part of some in the Department about the creation of the Office, for it implied that the traditional means of informing the public about foreign affairs--the domain of the State Department's Bureau of Public Affairs--had been found wanting. At the working level, however, we found little hostility, and in fact the Foreign Service Officers working the Central American issue were happy to see an intensive campaign mounted to tell the public the truth about Nicaragua, and of Soviet and Cuban efforts to neutralize the United States by creating a state of perpetual crisis in the Western Hemisphere. It is doubtful that Otto Reich would have been appointed to the prestigious and critical post of Ambassador to Venezuela if he had displeased the Secretary of State by doing an end run to the NSC. Shultz, in fact, made it a point to swear Otto in as Ambassador to Venezuela personally, somewhat of a rarity for the Secretary.

In closing, let me say that it would be a setback for our form of participatory democracy if a future President of either party is precluded from telling the American people what threats his Administration perceives, and what responses are being taken to meet these challenges. I hope your Committee encourages, rather than discourages, the maximum flow of information to the public about Central America. Legislative muzzling of the Executive Branch will weaken our democracy, which must be based on an informed and articulate electorate.

Sincerely,

Lawrence L. Tracy

Lawrence L. Tracy
Colonel, U.S. Army (Ret.)

U.S. HOUSE OF REPRESENTATIVES
SELECT COMMITTEE TO INVESTIGATE
COVERT ARMS TRANSACTIONS WITH IRAN
UNITED STATES CAPITOL
WASHINGTON, DC 20515
(202) 225-7902

July 23, 1987

MEMORANDUM

TO: Chairman Hamilton
John Nields

FROM: Robert A. Bermingham

RE: Allegations Re: Contra Involvement With Drug Smuggling

Synopsis

Our investigation has not developed any corroboration of media-exploited allegations that U.S. government-condoned drug trafficking by Contra leaders or Contra organizations or that Contra leaders or organizations did in fact take part in such activity. The Select Committee on Narcotics Abuse and the Crime Subcommittee of the Judiciary Committee have been conducting investigation in this area, but, to date, have not developed concrete evidence. The Crime Subcommittee and the Senate Foreign Relations Committee are continuing their inquiries, as is the Special Counsel. It is recommended that after coordination with Chairman Innouye, the Joint Committee issue a statement to the above effect and pledge cooperation with the Senate and House ongoing investigations.

Details

During the course of our investigation, the role of U.S. government officials who supported the Contras' and the private resupply effort, as well as the role of private individuals in resupply, were exhaustively examined. Hundreds of persons, including U.S. government employees, Contra leaders,

representatives of foreign governments, U.S. and foreign law enforcement officials, military personnel, private pilots and crews involved in actual operations were questioned and their files and records examined. Despite numerous newspaper accounts to the contrary, no evidence was developed indicating that Contra leadership or Contra organizations were actually involved in drug trafficking. Sources of news stories indicating to the contrary were of doubtful veracity. There was no information developed indicating any U.S. government agency or organization condoned drug trafficking by the Contras or anyone else.

The scope of our investigation does not specifically include determining whether the Contras have been independently or individually involved in drug trafficking. The Senate Foreign Relations Committee, particularly Senator Kerry; the House Select Committee on Narcotics Abuse and Control under Rep. Rangel; and the Crime Subcommittee under Rep. Hughes of the Judiciary Committee, have been looking into this specific subject for some time. They have travelled to Central America, interviewed witnesses there and in Miami and have held hearings. Rep. Rangel is quoted in the Washington Post, 7/22/87, as stating his investigation, which started in June of 1986 and includes reams of testimony from hundreds of witnesses, developed no evidence which would show that Contra leadership was involved in drug smuggling. His Committee is to give its information to the Crime Subcommittee of the Judiciary Committee which will continue to investigate whether U.S. government officials deliberately ignored drug dealing by individuals who carried supplies to the Contras. The Judiciary has engaged a Miami-based investigator.

DEA and Justice have issued statements disclaiming any concrete evidence of such activities by U.S. government officials, Contra leaders or Contra organizations.

Dave Faulkner, Investigator, Senate Select Committee, advised that the Senate investigation was also substantially negative with regard to Contra drug smuggling. On 7/21/87, Faulkner and the writer conferred with Hayden Gregory, Counsel, of the Crime Subcommittee of the Judiciary. He confirmed that his committee has been and continues to investigate the question of U.S. government-sponsored Contra organizations being involved in drug smuggling. His investigation, including interviews in Central America and Miami of many of the persons named in the newspapers as suspects, has been inconclusive to date. He confirmed that several of those involved have also been questioned or deposed by the ongoing investigation by

Senator Kerry. Gregory confirmed the newspaper account that Representative Rangel's committee is deferring to the Judiciary in this matter. He also stated he has, to date, developed no pertinent information above the level of "street talk".

During the course of our investigation, we examined files of State, DoD, NSC, CIA, DEA, Justice, Customs and FBI, especially those reportedly involving newspaper allegations of Contra drug trafficking. We have discovered that almost all of these allegations originate from persons indicted or convicted of drug smuggling. Justice has stated that such persons are more and more claiming, as a defense, that they were smuggling for the benefit of the Contras in what they believed was a U.S. government-sponsored operation. Typically, they furnish no information which can be corroborated by investigation. In addition to the above-mentioned negative file reviews, interviews with employees of these U.S. agencies have also been negative.

Contra leaders have been interviewed and their bank records examined. They denied any connection with or knowledge of drug trafficking. Examination of Contra financial records, private enterprise business records and income tax returns of several individuals failed to locate any indication of drug trafficking.

It is known that the Special Counsel is looking into this area and that the FBI has pending investigations regarding similar allegations.

Conclusion

It is felt that additional investigation of these allegations is unwarranted in view of the negative results to date, the questionable reliability of the accusers, the fact that two Congressional committees are already deeply involved in such investigations and that the matter is currently under investigation by the Special Counsel.

REPRESENTATIVES	SENATORS
Dick Cheney	James A. McClure
William S. Broomfield	Orrin G. Hatch
Henry J. Hyde	
Jim Courter	
Bill McCollum	
Michael DeWine	

Members, House Select Committee to Investigate Covert Arms Transactions with Iran

Members, Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition

Section III
Supplemental and Additional Views