

Title VI of the Intelligence Authorization Act, Fiscal Year 1991: Effective Covert Action Reform or “Business as Usual”?

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Introduction

In August 1991, President George Bush signed the Intelligence Authorization Act, Fiscal Year 1991.¹ This new law has been called the most significant legislative byproduct of the Iran-Contra Affair.² Congress intended that Title VI of the Act³ would strengthen previously existing laws regulating the conduct of covert action.⁴

President Bush expressed concern that several key provisions in the law might unconstitutionally infringe on the executive's powers.⁵ The

1. Pub. L. No. 102-88, 105 Stat. 429. See Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991, 27 WKLY. COMP. PRES. DOC. 1137-38 (Aug. 14, 1991) [hereinafter Signing Statement]. See also *Bush Signs Bill on Covert Intelligence*, S.F. EXAMINER, Aug. 16, 1991, at A24. For legislative history, see H.R. CONF. REP. NO. 166, 102d Cong., 1st Sess., reprinted in 137 CONG. REC. NO. 115, H5904-06 (daily ed. July 25, 1991) [hereinafter H.R. CONF. REP. 166].

2. Pamela Fessler, *Senate Clears Retooled Measure Strengthening Hill Oversight*, 49 CONG. Q. WKLY. REP. 2187, Aug. 3, 1991; see also 137 CONG. REC. H6162 (daily ed. July 31, 1991) (statement of Rep. Barbara Kennelly). "Iran-Contra Affair" is the popular term for the events surrounding two separate covert actions conducted by the National Security Council (NSC) staff during the Reagan Administration. See THEODORE DRAPER, *A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS* 3 (1991). The "Iran" reference concerns U.S. efforts to secure the release of American hostages held by Iranian-backed terrorists in Lebanon. *Id.* at 120-21. The "Contra" reference has to do with secret U.S. aid for Nicaraguan rebels ("contrarevolucionarios") who sought to overthrow the Sandinista government in Nicaragua. *Id.* at 3. For a brief description of the Iran-Contra Affair, see *infra*, notes 123-71 and accompanying text.

3. 50 U.S.C.A. §§ 413-15 (West Supp. 1992).

4. See 137 CONG. REC. H6161 (daily ed. July 31, 1991) (statement of Rep. Dave McCurdy). For a discussion of the definition of "covert action," see *infra* notes 9-26 and accompanying text.

5. Signing Statement, *supra* note 1, at 1137-38. See also *Bush Signs Bill on Covert Intelligence*, S.F. EXAMINER, Aug. 16, 1991, at A24. By signing the bill, Bush prevented the funding authority for the CIA and other intelligence agencies from lapsing. *Id.*

conference report on the Act recognized this conflict and acknowledged that the courts must ultimately decide how to interpret the disputed measures.⁶ At the heart of this dispute is the claim that the Constitution invests the executive with plenary, or full, authority as the sole organ of our nation's external relations and the sole representative in dealing with foreign nations.⁷ If this argument is correct, then Title VI unconstitutionally infringes on the president's inherent right to conduct covert actions without notifying Congress.⁸

This Article will address the following issue: Does Title VI unconstitutionally restrict the president's ability to conduct covert actions? Part I of this Article provides background information about the meaning of the term "covert action," about the historical conflict over the president's claim of inherent authority over covert actions, and about prior covert action oversight laws. Part II describes the intelligence oversight scheme established by Title VI and discusses its rationale. Part III analyzes the constitutional and policy arguments which President Bush has made against Title VI. The conclusion of this Article is contained in Part IV. Simply stated, Title VI is not only constitutional; it is also good policy.

I. Background

A. What Is a Covert Action?

The United States government's use of unconventional warfare tactics,⁹ including covert actions, increased dramatically following World

6. H.R. CONF. REP. NO. 166, *supra* note 1, at H5898, H5905.

7. C. Boyden Gray, *Remarks of C. Boyden Gray*, 11 HOUS. J. INT'L L. 263, 264-65 (1988). As President Bush's White House Counsel, Gray reportedly urged President Bush to veto an earlier version of the Act. Carroll J. Doherty, *Bush's Veto of Authorization Angers Panel Members*, 48 CONG. Q. WKLY. REP. 4088, Dec. 8, 1990.

8. See Bruce E. Fein, *The Constitution And Covert Action*, 11 HOUS. J. INT'L L. 53, 65 (1988). Mr. Fein was the research director on the Republican staff of the House Committee on Covert Arms Transactions with Iran. *Id.* at 53.

9. Modern unconventional warfare is a style of armed hostilities which was pioneered by Major General William J. Donovan, director of the Office of Strategic Services (OSS) during World War II. A. BROWN, *THE LAST HERO, WILD BILL DONOVAN* xi, 436 (1984). As advocated by Donovan, unconventional war typically involved the use of numerous small bands of agents and local guerrilla fighters, operating in secrecy behind enemy lines to inflict maximum damage against enemy targets. See *id.* at 431-33, 436-37. After World War II, the Central Intelligence Agency adopted Donovan's theory and practice of unconventional warfare and made extensive use of paramilitary and guerrilla tactics during early CIA covert actions. JOHN RANELAGH, *THE AGENCY, THE RISE AND DECLINE OF THE CIA* 216-17 (1987).

War II.¹⁰ Unconventional war was a major element of our nation's strategy to fight the spread of Communism.¹¹ Controversy about U.S. covert actions also increased during the last twenty years, in part as a result of several public congressional hearings.¹²

President Reagan referred to covert actions as "special activities" of the U.S. government in a 1981 Executive Order.¹³ The Iran-Contra Committees defined "covert action" and "special activity" as a clandestine activity going beyond secret intelligence collection.¹⁴ They wrote that covert actions are official government efforts at influencing political events in other countries in concealed ways.¹⁵

Others, however, have said that "covert action" is really a "neutered way to say secret warfare."¹⁶ Since 1946, the United States has secretly conducted armed hostilities against at least sixteen nations without a for-

10. See generally PHILLIP AGEE, *INSIDE THE COMPANY: A CIA DIARY* (1976); WILLIAM E. COLBY, *HONORABLE MEN: MY LIFE IN THE CIA* (1978); L. KIRKPATRICK, *THE REAL CIA* (1968); VICTOR MARCHETTI & JOHN MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* (1974); DAVID ATLEE PHILLIPS, *THE NIGHT WATCH: 25 YEARS OF PECULIAR SERVICE* (1977); L. FLETCHER PROUTY, *THE SECRET TEAM* (1973); HARRY ROSITZKE, *THE CIA'S SECRET OPERATIONS* (1977); JOHN STOCKWELL, *IN SEARCH OF ENEMIES: A CIA STORY* (1978). For reports of congressional investigations of covert actions prior to the Iran-Contra Affair, see generally SENATE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FOREIGN AND MILITARY INTELLIGENCE, FINAL REPORT, Books I-IV, 94th Cong., 2d Sess. (1976) [hereinafter CHURCH COMMITTEE FINAL REPORT]; SENATE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FOREIGN AND MILITARY INTELLIGENCE, INTERIM REPORT: ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, 94th Cong., 2d Sess. (1975) [hereinafter CHURCH COMMITTEE INTERIM REPORT].

11. BROWN, *supra* note 9, at 11-12.

12. See generally COLBY, *supra* note 10; CHURCH COMMITTEE FINAL REPORT, *supra* note 10; CHURCH COMMITTEE INTERIM REPORT, *supra* note 10.

13. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981). This order defines "special activities" as "activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States government is not apparent or acknowledged publicly . . ." Issued by former President Ronald Reagan, this order is still effective. See *Bush Cites 'Covert Action' In Intelligence Bill Veto*, 48 CONG. Q. WKLY. REP. 4119, Dec. 8, 1990 [hereinafter Veto Memorandum] (reprinting a Memorandum of Disapproval by President George Bush dated Nov. 30, 1990. President Bush wrote that his administration would not allow executive branch officials to conduct covert actions forbidden by law and by Executive Order No. 12,333.).

14. SENATE SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, HOUSE SELECT COMMITTEE TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN CONTRA AFFAIR WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS. S. REP. NO. 216, H.R. REP. NO. 433, 100th Cong., 1st Sess. 375 (1987) [hereinafter IRAN-CONTRA REP.].

15. *Id.*

16. *Remember Iran-Contra*, N.Y. TIMES, Dec. 22, 1990, § 1 (Editorial), at 26.

mal declaration of war.¹⁷ Most recently, the Iran-Contra Affair produced new momentum in Congress to reform how U.S. covert actions are carried out.¹⁸

The new statutory definition for the term covert action is a key element of Title VI's reform package.¹⁹ Under Title VI, covert action means a U.S. government activity to influence political, economic, or military conditions abroad where it is intended that the government's role will not be apparent or acknowledged publicly.²⁰ All U.S. government activities that fall under this definition must be initiated with a

17. See Tom Gervasi, *A Chronology: United States Covert Action Abroad To Impose or Restore Favorable Political Conditions, 1946-1983 (Partial List)*, reprinted in DARREL GARWOOD, *UNDER COVER, THIRTY-FIVE YEARS OF CIA DECEPTION* 293-99 (1985). Examples of such "covert actions" conducted by the Central Intelligence Agency include:

1) Secret CIA funding of Italian and French labor union leaders and moderate politicians, instrumental in breaking Communist-inspired dock strikes in 1948. See LEONARD MOSLEY, *DULLES, A BIOGRAPHY OF ELEANOR, ALLEN, AND JOHN FOSTER DULLES AND THEIR FAMILY NETWORK* 241-242 (1978);

2) The so-called "Operation Valuable," an unsuccessful U.S.-British effort to use a group of Albanian exiles to overthrow the Communist government of Albania in the early 1950s. See JOHN PRADOS, *PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS SINCE WORLD WAR II THROUGH IRANSCAM* 45-51 (1986). (A factor which probably contributed to the failure of this operation was that H.A.R. (Kim) Philby, one of two British representatives on the joint coordinating committee working on Operation Valuable with the CIA, was actually a double agent spying on behalf of the Soviet Union. *Id.* at 48, 50. See also MOSLEY, *supra* note 17, at 278-86; THOMAS POWERS, *THE MAN WHO KEPT THE SECRETS: RICHARD HELMS AND THE CIA* 44 (1979);

3) Secret military support for Nationalist Chinese guerrillas operating from Thailand, Laos, and Myanmar (formerly Burma) who unsuccessfully attempted to overthrow Communist China beginning in the early 1950s. PRADOS, *supra* note 17, at 73-78; POWERS, *supra* note 17, at 101-02;

4) "Operation Ajax," a plan by which the CIA secretly orchestrated and financed civil disturbances in Iran in 1953 that ultimately helped Shah Mohammad Reza Pahlavi remove Prime Minister Dr. Mohammad Mossadegh from power. PRADOS, *supra* note 17, at 92-98;

5) Covert actions in other countries in which the CIA secretly trained, financed, armed and "guided" foreign nationals, exile groups and mercenaries in order to help them overthrow the targeted governments by force. These include: Guatemala (1954), *id.* at 98-107; Indonesia (1956-1958), *id.* at 132-44; Tibet (1956-1972), *id.* at 149-70; Cuba (1959-1963), *id.* at 171-217; Zaire (formerly the Congo) (1960-1963), *id.* at 232-38; Vietnam (1958-1972), *id.* at 239-60; Iraq (1969-1973), *id.* at 313-15; Chile (1970-1972), *id.* at 315-21; Angola (1974-1976), *id.* at 337-47; Afghanistan (1979-1988), *id.* at 356-67; and Nicaragua (1981-1986), *id.* at 378-401.

18. Fessler, *supra* note 2, at 2187.

19. H. R. CONF. REP. NO. 928, 101st Cong., 2d Sess. 27 (1991), reprinted in CONG. REC. H12281, H12289 (daily ed. Oct. 23, 1990) [hereinafter H. R. CONF. REP. NO. 928] (joint explanatory statement of the conference committee on S. 2834, the Intelligence Authorization Act, Fiscal Year 1991). President Bush vetoed the proposed act. See Veto Memorandum, *supra* note 13, at 4119.

20. Pub. L. No. 102-88, § 602, tit. VI, § 503(e), 105 Stat. 429, 443 (codified at 50 U.S.C.A. § 413b(e) (West Supp. 1992)).

presidential finding²¹ and Congress must be notified of every such operation in a timely manner.²²

President Bush insisted that a statutory definition of the term covert action was unnecessary.²³ He wrote that the existence of a statutory definition unconstitutionally infringed on his inherent right to conduct covert actions as he believed appropriate without notifying Congress.²⁴

Even though his bid for re-election was defeated, this executive supremacy claim by President Bush and his legal advisors requires us to reconsider fundamental constitutional values.²⁵ Are the core values of our democracy—political accountability of the military and the intelligence services, democratic control of foreign policy, and the rule of law—subordinate to a President's inherent authority to conduct covert actions that are secret even from Congress?²⁶

B. The Executive Supremacy Argument

The Bush administration's most powerful advocate for executive supremacy over covert actions was White House Counsel C. Boyden Gray.²⁷ Shortly after his appointment in 1988 by President-elect Bush, Gray explained his views to a law school symposium on the Iran-Contra Affair.²⁸ He criticized the investigative hearings conducted by Congress in the aftermath of Iran-Contra.²⁹ He also gave his opinion that the Constitution gives the president the lead foreign relations role, with Congress performing only those functions expressly committed to it.³⁰ Those congressional functions, which Gray did not specify, are to be construed narrowly.³¹ In Gray's view, persons who argue that Congress has more foreign affairs powers than the president are turning 200 years of history on its head and are completely misreading the Framers' intent.³²

While recognizing that Congress and the executive branch share foreign affairs powers, Gray argued that the Framers intended to vest "the

21. *Id.* at § 503(a) (codified at 50 U.S.C.A. § 413b(a) (West Supp. 1992)).

22. *Id.* at § 503(b) (codified at 50 U.S.C.A. § 413b(b) (West Supp. 1992)).

23. Signing Statement, *supra* note 1, at 1137-38.

24. *Id.*

25. David Fagelson, *The Constitution and National Security: Covert Action in the Age of Intelligence Oversight*, 5 J.L. & POL. 275, 275-76 (1989).

26. *Id.*

27. Gray, *supra* note 7, at 263.

28. *Id.* at 267-70. See generally Symposium, *Legal and Policy Issues In The Iran Contra Affair: Intelligence Oversight In A Democracy*, 11 HOUS. J. INT'L L. 1 (1988).

29. Gray, *supra* note 7, at 268-70.

30. *Id.* at 264-65.

31. *Id.* at 265.

32. *Id.* at 264.

totality of foreign affairs powers in the executive branch.”³³ According to Gray’s interpretation of the Federalist Papers, the key factor motivating the Framers was their fear of the “natural tendency” of legislatures to aggrandize power.³⁴ Gray concluded, therefore, that the Framers spelled out congressional foreign affairs powers in more detail because they feared overreaching by Congress.³⁵ In order to preserve the principle of separation of powers and the executive’s authority, the Constitution gives Congress only a “few, specific and narrowly construed” powers.³⁶ Thus, according to Mr. Gray, it is simplistic to argue that Congress has greater foreign affairs powers than the president simply because there are more words used in the Constitution to describe Congress’ foreign affairs powers than to describe the president’s powers.³⁷

C. Rebutting the Executive Supremacy Argument—A Review of the Constitution’s Text in Historical Perspective

Numerous provisions of the Constitution expressly balance the president’s powers with Congress’s powers in foreign and military affairs. On one hand, the Constitution vests executive power in the president.³⁸ Also, the president serves as Commander-in-Chief of the armed forces.³⁹ The president may appoint ambassadors, subject to approval by a majority of the Congress, and may receive emissaries of other nations.⁴⁰ The president may also make treaties with other nations, subject to the “[a]dvice and [c]onsent” of two-thirds of the Senate.⁴¹ These provision are often cited as justifications for the executive supremacy theory.⁴²

On the other hand, those presidential powers are expressly balanced by numerous specific foreign affairs and war powers given to Congress. For example, as noted above, the powers to appoint ambassadors and make treaties are expressly balanced by Senate powers to approve ambassadorial appointments and to ratify treaties.

33. *Id.* The “political bibles” Gray referred to are the writings of Locke, Montesquieu, and Blackstone. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. U.S. CONST. art. II, § 1, cl. 1.

39. “The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States” U.S. CONST. art. II, § 2, cl. 1.

40. U.S. CONST. art. II, § 2, cl. 2. and art. II, § 3.

41. U.S. CONST. art. II, § 2, cl. 2.

42. Fagelson, *supra* note 25, at 279.

Another important constitutional measure to prevent unbridled executive power is the Take Care Clause, which imposes a duty on the president to “take [c]are that the [l]aws be *faithfully* executed.”⁴³ Upon assuming office, the president takes an oath to “preserve, protect, and defend” the Constitution.⁴⁴ The Take Care Clause originated from the English Bill of Rights, which forbade monarchs from suspending laws that they did not like.⁴⁵ It has been said that the clause reflects the principle of accountability and signifies that “ours is a government of laws, not of men.”⁴⁶

A second important check on the executive’s power is the Necessary and Proper Clause.⁴⁷ Under that provision, Congress has the power to draft laws creating the bureaucratic infrastructure of executive agencies and to determine the nature, scope, power, and duties of these agencies.⁴⁸ One traditionally recognized duty under the Necessary and Proper Clause is that executive branch officials, including the president, may be required by law to report to Congress on a broad range of subjects that are of vital importance to our national well being.⁴⁹ The Rehnquist Court has considered the power to draft laws giving Congress the ability to compel such reports from executive agency heads to be a legitimate legislative function of Congress.⁵⁰

Perhaps the best evidence of the Framers’ intent to give Congress the power to obtain information from the executive branch comes from the records of the First Congress. In one of its first acts, it created the Treasury Department.⁵¹ The Act included a provision giving either house of Congress the power to require the Treasury Secretary to submit

43. U.S. CONST. art. II, § 3 (emphasis added).

44. U.S. CONST. art II, § 1, cl. 8.

45. IRAN-CONTRA REP., *supra* note 14, at 419. See English Bill of Rights of 1689, 1 W. & M. st. 2, ch. 2. See also WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 82-83 (George Chase ed., 3d ed. 1906); 1 WILLIAM WINSLOW CROSKY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 434-36 (1953).

46. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). “No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role [O]urs is a government of laws, not of men.” *Id.*

47. U.S. CONST. art. I, § 8, cl. 18. Congress has the power “[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof.”

48. *Morrison v. Olson*, 487 U.S. 654, 694-96 (1988).

49. *Id.*

50. *Id.*

51. Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65-66 (1789). “[T]he duty of the Secretary of the Treasury . . . to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting *all matters referred to him* by the

reports about official matters whenever requested.⁵² Treasury Secretary Alexander Hamilton expressly recognized Congress's authority. His reports to the First Congress always began with an acknowledgment of the congressional order requiring his report.⁵³ The Necessary and Proper Clause, therefore, provides a constitutional basis for Congress's power to compel executive reports that are needed in furtherance of legitimate legislative purposes.

A third significant counterbalance to executive powers, affecting every aspect of executive functions, including foreign affairs and the military, is the congressional "power of the purse."⁵⁴ The president may constitutionally spend only lawfully appropriated funds for any agency, including the armed forces or the intelligence services.⁵⁵ In the *Federalist Papers*, James Madison viewed the power of the purse as the most important power Congress can have against the abuse of executive power.⁵⁶ One U.S. Supreme Court opinion stated that "[w]hile Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command."⁵⁷ Recognizing this principle in the aftermath of the Iran-Contra Affair, President Reagan publicly stated that "[t]he President of the United States cannot spend a nickel. Only Congress can authorize the spending of money."⁵⁸

The fourth check on executive power was perhaps the most crucial and historically important decision made by the Framers to ensure a democratic form of government. They vested the Commander in Chief power in the Chief Executive but granted what were thought to be the concomitant war powers (to declare war or to raise and regulate armed forces) to Congress.⁵⁹ The Framers divided these powers between the

Senate or House of Representatives, or which shall appertain to his office." *Id.* at § 2, 1 Stat. 65-66 (emphasis added).

52. *Id.*

53. See, e.g., *Report on Manufactures*, 3 ANNALS OF CONG. 971 (1791) ("The Secretary of the Treasury, in obedience of the Order of the House of Representatives . . .").

54. "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." U.S. CONST. art. I, § 9, cl. 7.

55. *Id.* See also U.S. CONST. art. I, § 8, cl. 12, giving Congress the power "[t]o raise and support Armies . . ."; U.S. CONST. art. I, § 8, cl. 13, granting Congress the power "[t]o provide and maintain a Navy."

56. "This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST, No. 58, at 399 (James Madison) (1937).

57. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).

58. *Televised News Conference*, N.Y. TIMES, Oct. 22, 1987, at 8.

59. Fagelson, *supra* note 25, at 280.

executive and Congress because they feared executive aggrandizement of military power as much as, if not more than, legislative overreaching.⁶⁰

Some of the Framers feared that a strong executive would be unable to resist the temptation to unwisely involve the new nation in armed conflict in order to secure political power at home.⁶¹ In the debates at the Constitutional Convention, one delegate explained that the division of Commander in Chief powers from the other war powers is the key to a system of government that was deliberately calculated to avoid war.⁶²

Of course, the new American republic's military weakness and geographic isolation were two reasons for the Framers' aversion to war.⁶³ In 1790, the United States had a standing army of just over 700 persons.⁶⁴ An eight-year war for independence had ended just a few years before the opening of the Constitutional Convention. In that context, the political innovation created by the Framers was the establishment of a system of government in which the chief of state acted as commander-in-chief, but without total discretion over the creation, management, and use of the armed forces. This separation of powers ensured civilian control of the military and guaranteed legal and political accountability of the chief executive—revolutionary concepts during the age of divine right monarchies.⁶⁵

60. Alexander Hamilton wrote that history "does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a president of the United States." *THE FEDERALIST*, No. 75, at 82 (Alexander Hamilton) (1937). James Madison, in *HELVIDIUS* No. 4, wrote: "War is, in fact, the true nurse of executive aggrandizement. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honors and emoluments of office are to be multiplied; and it is executive patronage under which they are to be enjoyed. It is in war, finally, that the laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or bestial love of fame are all in conspiracy against the desire and duty of peace." *6 WRITINGS OF JAMES MADISON* 174 (G. Hunt ed. 1906).

61. *See infra* note 60.

62. One delegate, James Wilson of Pennsylvania, said that "[i]t will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large From this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war." *2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 528 (Philadelphia, J.B. Lippencott & Co., 2d ed. (1881)).

63. Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 *HARV. INT'L L.J.* 1, 21, 21, n.119-20 (1983).

64. *Id.* at 45 n.244.

65. *See* *The Federalist* No. 69, at 417-18 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640-55 (1952) (Jackson, J., concurring).

The express limits on presidential commander-in-chief powers contained in Article I, Section 8 evince the Founders' intent that the President would have fewer plenary war and foreign relations powers than those held by the British King.⁶⁶ To implement their intent, the Founders gave Congress six express powers over the creation, use, and regulation of armed forces that the English monarch of the time exercised. These included powers to: 1) define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;⁶⁷ 2) to declare war; 3) grant letters of marque and reprisal;⁶⁸ 4) make rules concerning captures on land and water;⁶⁹ 5) raise and support an army and navy;⁷⁰ and 6) make rules for the government and regulation of the land and naval forces.⁷¹ Viewed as a whole, the concept of an expressly defined, comprehensive power sharing arrangement between the president and Congress was a truly revolutionary political innovation.

The system of shared war and foreign relations powers described above is comprehensive because it recognized the reality that nations used armed forces not only during times of formally declared war, but also in other situations of armed hostility short of formal war, such as

66. Fagelson, *supra* note 25, at 279-80.

67. U.S. CONST. art. I, § 8, cl. 10.

68. Letters of marque and reprisal originally were "governmental documents authorizing an individual to make reprisals on the subjects or citizens of an enemy nation for injuries done him by enemy troops; . . . later, a governmental document authorizing an individual to arm a ship and capture the merchant ships and property of an enemy nation." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1039 (2d ed. 1983). There was a time in U.S. history when it was thought that the Congress might have to issue letters of marque. This was thought of as a means of supplementing the nation's armed forces in times of crisis, given that in 1790, the United States had a standing army of 719 persons. Lobel, *supra* note 63, at 45 n.244. Even though the Framers of the Constitution included a provision for the possible use of letters of marque, the practice of granting such letters had been discarded by the 18th century, and was never used by the United States. *Id.* at 63 n.323. However, the use of privateers by the United States was extensive during the naval conflicts with France in 1798-1800, and again during the War of 1812. *Id.* See also SENATE SUBCOMM. ON TERRORISM, NARCOTICS, AND INTERNATIONAL RELATIONS, S. REP. No. 165, 100th Cong., 2d Sess. 1061 (1988) [hereinafter KERRY REPT.] (declassified transcript of the testimony of Thomas E. Marum, Justice Department Deputy Chief of the Internal Security section of the criminal, before the subcommittee on October 25, 1988, reproduced as an exhibit. During the examination, subcommittee staff member Jack Blum remarked that "[a] number of us have joked here that in the course of the Iran-contra affair perhaps what should have happened was they should have been sent to the Foreign Relations Committee for letters of mark [sic] and reprisal and everything would have been all right. But that, of course, didn't happen.") See also IRAN-CONTRA REP., *supra* note 14, at 27-28.

69. U.S. CONST. art. I, § 8, cl. 11.

70. U.S. CONST. art. I, § 8, cls. 12 & 13.

71. U.S. CONST. art. I, § 8, cl. 14.

actions to capture privateers⁷² or pirates who preyed on merchant shipping. An early U.S. Supreme Court decision recognized this reality in making a distinction between "solemn war" and "imperfect war."⁷³ That Court recognized that in imperfect wars, armed forces might be deployed in limited hostilities without a declaration of war to achieve narrow, specifically defined objectives.⁷⁴ Covert actions, which are armed hostilities secretly conducted against a foreign "enemy" to achieve narrow, specifically defined objectives, are a modern kind of informal war.

Congress traditionally has not interfered with the president's power to use military force either covertly or overtly against foreign nations in informal wars.⁷⁵ It has been observed, however, that "[p]ractice has not legitimized a clear pattern."⁷⁶ There were at least twelve episodes in U.S. history where presidents felt constrained by the lack of Congressional approval for proposed military actions abroad and subsequently drew back from the actions.⁷⁷ More recently, President Bush avoided a constitutional crisis over his authority to conduct "Operation Desert Storm," the U.S. invasion of Kuwait and Iraq, by asking Congress for a resolution

72. A privateer was a privately owned warship having a crew made up of private citizens, but licensed by a government with documents called "letters of marque and reprisal" to seize and plunder an enemy's ships. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1039, 1432 (2d ed. 1983).

73. JOHN F. LEHMAN, *THE EXECUTIVE, CONGRESS, AND FOREIGN POLICY* 37 (1976) (quoting *Bas v. Tingy*, 4 Dall. 37, 40-41 (1800)). The Supreme Court stated that a solemn war is one which has been formally declared by Congress. *Id.* The Court wrote:

If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation In such a war, all the members act under a general authority, and all the rights and consequences of war attach to their condition.

Id.

An imperfect war is a state of hostilities that is "more confined in its nature and extent; being limited as places, persons and things . . . ; because those who are authorized to commit hostilities act under special authority and can go no further than to the extent of their commission." *Id.* (footnote omitted).

74. *Id.*

75. *Id.* at 38. One Library of Congress study found that in 165 cases where U.S. armed forces were used abroad between 1798 and 1970, the United States actually declared war five times. *Id.* at 37-38.

76. *Id.* at 38.

77. *Id.* at 39. These were:

[T]he war with France in 1800, actions against the Barbary Pirates in 1802 and 1815, the Florida expeditions of 1812-16, the attempted annexation of Texas in 1844, hostilities with Mexico in 1914-17, troop deployments to Europe in 1951, assistance to the French in Indochina in 1954, Formosa in 1955, Lebanon in 1958, Cuba in 1962, Vietnam in 1964, and Cambodian military assistance in 1971.

Id. (footnote omitted).

giving him the authority to begin offensive actions there.⁷⁸

D. Summary: The Executive Supremacy Theory Is Not Supported by the Constitution's Text in Light of the Framers' Historical Experience

The United States has grown up during the last two hundred years. It is no longer weak, isolated, and vulnerable. Today the United States is the world's sole military superpower. The forces commanded by today's president would astound the Framers. In the 1970s, one eminent historian contended that the executive office had evolved into an "imperial presidency."⁷⁹ It is crucial to remember, however, that the Framers fought and won a Revolutionary War against King George III, an absolute monarch. It was the experience of living under the English monarchy, and the experience of carrying out a revolutionary war to overthrow that system of government, which shaped their political thinking. Given the historical context and record, it is impossible to conceive of the Framers as intending unchecked executive supremacy in foreign and military affairs.

The text of the Constitution reflects the Framers' experiences. Article I, Section 8 expressly gives Congress important powers over the creation, maintenance, and use of the armed forces. Nothing in the text restricts Congress's powers to a particular situation. These powers remain with Congress in all situations from peacetime to formally declared wars, limited or imperfect wars, and other military operations outside the United States to enforce international law.

The rest of the constitutional framework supports the argument that the Framers did not intend the new executive branch to monopolize political, military, and foreign relations as the English monarchy did. Unlike the English monarchy, the chief executive in the new democracy

78. H.R.J. Res. 77, 102d Cong., 1st Sess. (1991) (enacted), reprinted in *Congress Approves Resolution Authorizing Use of Force*, 49 CONG. Q. WKLY. REP. 131, Jan. 12, 1991 (an identical measure was adopted by the Senate). See also *President's Letter to Congress*, reprinted in Joan Biskupic, CONSTITUTIONAL QUESTIONS REMAIN, 49 CONG. Q. WKLY. REP. 70, Jan. 12, 1991 (asking that Congress adopt resolutions supporting the President's proposed use of force against Iraq); Carroll J. Doherty, *Bush Is Given Authorization To Use Force Against Iraq*, 49 CONG. Q. WKLY. REP. 65-70, Jan. 12, 1991.

79. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* viii - x (1973). Schlesinger wrote: "The constitutional Presidency—as events so apparently disparate as the Indo-china War and the Watergate affair showed—has become the imperial Presidency and threatens to be the revolutionary Presidency." *Id.* at viii. Schlesinger observed that "[i]n the last years presidential primacy, so indispensable to the political order has turned into presidential supremacy." *Id.* "By the early 1970s the American President had become on issues of war and peace the most absolute monarch (with the possible exception of Mao Tse-tung of China) among the great powers of the world." *Id.* at ix.

would be subject to lawful limitations on the exercise of political power under the Take Care Clause. Under the Necessary and Proper Clause, the bureaucratic infrastructure managed by the president would be created by Congress, and subject to congressional control over its nature, scope, power, and duties. Congress's "Power of the Purse" would limit the executive to spending only those funds appropriated by law. In foreign relations, the appointment of ambassadors and the approval of treaties would both be subject to the advice and consent of the Senate. Finally, in the crucial area of power over U.S. military forces, the president's commander-in-chief powers would be subject to six specific limitations over the creation, use, and regulation of the armed forces under any circumstances for which such forces could be used, from formal war to informal, limited armed conflicts short of war.

In short, there is no support in the text of the Constitution or the historical record for unfettered executive supremacy, especially where foreign affairs and control over the armed forces are concerned.

Turning to more recent history, this Article will next examine how post-World War II laws regarding the establishment of the CIA and the modern intelligence community, as well as prior intelligence oversight laws, recognized that the power to conduct hostile operations against foreign nations using covert actions is shared between the president and Congress. The statutory scheme establishing U.S. intelligence agencies was based on the "shared powers" theory, and not upon the "executive supremacy" argument. The key elements in implementing the "shared powers" theory with regard to the creation and management of covert actions are laws providing for congressional oversight of those executive agencies responsible for intelligence activities and covert actions.

E. The Statutory Framework for Congressional Oversight of Covert Actions Reflects the Theory of Shared War and Foreign Relations Powers

1. The National Security Act of 1947

When the National Security Act of 1947 established the CIA, the enabling legislation did not expressly authorize the agency to conduct covert actions. It did, however, allow the CIA "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."⁸⁰ Bruce Fein, an influential advocate of executive supremacy over covert actions, has argued that the "such other functions" clause is a delegation of au-

80. 50 U.S.C. § 403(d)(5) (1988). This is usually referred to as the "such other functions" clause.

thority by Congress giving the CIA, and thus the president, the power to conduct covert activities without Congressional notification, approval, funding, or oversight.⁸¹

In 1947, however, former CIA General Counsel Lawrence Houston (the principal draftsman of the National Security Act of 1947) advised the first CIA Director, Admiral Roscoe H. Hillenkoetter, that the "such other functions" clause failed to provide the CIA with the legal authority to conduct secret propaganda and paramilitary actions.⁸²

Dr. Walter Pforzheimer, a key participant in the events surrounding the creation of the CIA,⁸³ recently wrote that the CIA has not interpreted the "such other functions" clause in the National Security Act as providing a basis for the CIA to conduct covert action.⁸⁴ Dr. Pforzheimer wrote that starting with a request for the CIA to undertake covert actions to prevent the Communists from winning the 1948 Italian elections, "the CIA's general counsel has taken the position that § 102(c)(5)⁸⁵ did not serve as the legal basis for the CIA to engage in covert action; *that the CIA can perform a covert action only if the President or the National Security Council, which the President chairs, so directs, and the Congress deliberately funds it.*"⁸⁶ Dr. Pforzheimer observed that "the 1947 concept starts with the basic thought of a partnership in covert action between the Executive and the Congress."⁸⁷ In light of the recollections of the drafters of the National Security Act of 1947, the argument that the "such other functions" clause gives the president unfettered control over CIA covert actions is historically inaccur-

81. Fein, *supra* note 8, at 53-54.

82. Thirty-five years later, Houston recalled that he advised Hillenkoetter that "if the President, with his constitutional responsibilities for the conduct of foreign policy, gave the agency appropriate instructions and if Congress gave it the funds to carry them out, the agency had the legal capability of carrying out the covert actions involved." PRADOS, *supra* note 17, at 27-29 (quoting a letter from Mr. Houston to the Editor, N.Y. TIMES, July 26, 1982, at A14). See also RANELAGH, *supra* note 9, at 115, 767 n.7 (quoting Mr. Houston's interview with Ranelagh on July 8, 1983).

83. Dr. Pforzheimer was the CIA's first legislative counsel and the person who guided the National Security Act legislation through Congress. Walter Pforzheimer, *Remarks of Dr. Walter Pforzheimer*, 11 HOUS. J. INT'L L. 143, 143 (1988). He later became the CIA's chief archivist, and is regarded as one of the world's greatest authorities on the history of intelligence. See MOSLEY, *supra* note 17, at viii, 240.

84. Pforzheimer, *supra* note 83, at 147-48. The authority to conduct paramilitary and psychological warfare programs which in theory cannot be traced back to the U.S. government originated from National Security Council Directive NSC 10/2, signed by President Harry Truman on June 18, 1948. See THE CENTRAL INTELLIGENCE AGENCY: HISTORY AND DOCUMENTS 131-33 (W. Leary, ed. 1984). See also PRADOS, *supra* note 17, at 28-29.

85. Now codified at 50 U.S.C. § 403(d)(5) (1988).

86. Pforzheimer, *supra* note 83, at 148 (emphasis added).

87. *Id.*

rate. Instead, the National Security Act of 1947 reflects the shared powers theory.

2. *Appropriations Statutes*

Another element of this partnership between Congress and the president in covert actions is Section 504 of the National Security Act of 1947, which requires that the executive branch limit its spending on covert actions according to lawful appropriations.⁸⁸ The president may not make an “end run” around legally imposed spending limits on covert actions by obtaining funds from sources other than those appropriated by Congress.⁸⁹ Section 504 is consistent with Congress’s “power of the purse” as provided in Article I, Section 9, clause 7 of the Constitution.⁹⁰ It is another expression of the shared powers theory.

3. *The Hughes-Ryan Amendment of 1974*

Laws were enacted to improve the quality of intelligence oversight following the Watergate-era revelations of secret CIA involvement in breaking into and bugging the Democratic National Party headquarters and other domestic covert actions conducted by the CIA against U.S. citizens.⁹¹ For example, in the days following the revelation of CIA-run domestic covert actions against Vietnam War protesters, President Ford signed the Hughes-Ryan Amendment of 1974.⁹² This legislation required the president to make a “finding” that a peacetime covert action is

88. Pub. L. No. 102-88, tit. § 603, 105 Stat. 429, (codified at 50 U.S.C. A. § 414 (West Supp. 1992)). Section 603 revised and amended former § 504 of the National Security Act of 1947.

89. *Id.*

90. *U.S. Const.*, art. I, § 9, cl. 7 (“No money shall be drawn from the Treasury, but in consequence of appropriations made by law . . .”).

91. RANELAGH, *supra* note 9, at 520-33. James McCord and E. Howard Hunt, both of whom had retired from high level CIA posts, were the ringleaders of the Watergate burglary. The four other burglars had been recruited by Hunt during his CIA days, and one, Eugenio Martinez, was on the CIA payroll at the time of the burglary. *Id.* at 521. The CIA supplied equipment to Hunt immediately prior to the break-in at the request of Nixon assistant John Ehrlichman. *Id.* at 523. See also PRADOS, *supra* note 17, at 324 (discussing the various links between the Watergate burglars and the CIA); *id.* at 326 (describing congressional concerns about intelligence oversight). For other reasons contributing to congressional concern, see IRAN-CONTRA REP., *supra* note 14, at 377-78.

92. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (1974)(codified at 22 U.S.C. § 2422 (1988) (repealed 1991 by Title VI.)). The former Hughes-Ryan reporting requirements were enhanced and included in 50 U.S.C.A. § 413b (West Supp. 1992). See *infra* note 176 and accompanying text. See also PRADOS, *supra* note 17, at 326-27, 333 (discussing the Ford Administration’s response to Seymour Hersh’s headline-making revelations in the December 22, 1974 *New York Times* that the CIA was secretly engaged in a “huge” operation against domestic anti-war protesters and others).

important for national security and to notify Congress before spending appropriated funds to carry out those actions.⁹³ The provisions requiring the president to make a finding before conducting a covert action and to notify Congress are further manifestations of the shared powers theory.

4. *The Congressional Oversight Act of 1980*

In 1980, President Reagan signed the Congressional Oversight Act, which added section 501 to the National Security Act of 1947 and amended Hughes-Ryan.⁹⁴ Section 501 required the CIA Director and all executive branch department and agency heads to “fully and currently inform” Congress “of all intelligence activities” of the U.S. government.⁹⁵ The statute also specifically required the president to inform the relevant congressional committees of “intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence.”⁹⁶ This provision for operations “other than activities intended solely for obtaining necessary intelligence” requires the timely disclosure of covert operations to Congress except in times of extreme national emergency.⁹⁷ By signing this law, President Reagan ratified the concept of shared powers in the conduct of U.S. covert actions.

5. *The Statutory CIA Inspector General*

Two amendments to the Central Intelligence Agency Act of 1949 have been enacted since 1988.⁹⁸ These amendments implemented one of the recommendations of the House and Senate select committees investigating the Iran-Contra Affair.⁹⁹

In 1988, Section 17 of the act was added in order to establish a

93. Foreign Assistance Act of 1974, Pub. L. 93-559, § 32, 88 Stat. 1804 (1974)(codified at 22 U.S.C. § 2422 (1988) (repealed 1991)). See also PRADOS, *supra* note 17, at 345; IRAN-CONTRA REP., *supra* note 14, at 377-78.

94. Intelligence Authorization Act For Fiscal Year 1981, Pub. L. No. 96-450, tit. IV, § 407(a), 22 U.S.C. § 2422 (1988); § 407(b)(1) (codified at 50 U.S.C. § 413 (1988)), (amended 1991). See also S. REP. No. 730, 96th Cong., 2d. Sess. 1-5, *reprinted in* 1980 U.S.C.C.A.N. 4192-95. [hereinafter S. REP. 730]. The amendment to Hughes-Ryan, in conjunction with the Congressional Oversight Act, reduced the number of congressional committees entitled to notice of covert action from seven to two. *Id.* at 4195-96.

95. 50 U.S.C. § 413(a)(1) (1988), (amended 1991).

96. 50 U.S.C. § 413(b) (1988), (amended 1991).

97. S. REP. 730, *supra* note 94, at 4192-95. See also IRAN CONTRA REP., *supra* note 14, at 414-15.

98. Central Intelligence Agency Act, ch. 227, § 17, *as amended*, Intelligence Authorization Act of 1989, tit. V, § 504, Pub. L. No. 100-453, *as amended*, Intelligence Authorization Act of 1990, tit. VIII, § 801, Pub. L. No. 100-193, (codified at 50 U.S.C.A. § 403q (West Supp. 1992)).

99. The formal names of the committees were the U.S. Senate Select Committee On Secret Military Assistance To Iran And the Nicaraguan Opposition, and the U.S. House of Repre-

statutory Office of Inspector General (IG) within the CIA.¹⁰⁰ The IG, appointed by the President and approved by the Senate, is subject to various congressional reporting requirements.¹⁰¹ In 1989, Section 17 was amended to clarify and expand these reporting requirements.¹⁰²

In its report on the 1989 amendments to section 17, the House Intelligence Committee wrote that its own review of the CIA IG's office "uncovered continued weaknesses in . . . internal review and oversight mechanisms, including personnel shortfalls . . . [and] a lack of full cooperation on the part of the CIA in providing the Committee access to [IG] reports."¹⁰³ The committee complained that the CIA had taken the position that it was within the CIA Director's sole discretion to control congressional review of IG reports.¹⁰⁴ They found that situation to be unacceptable.¹⁰⁵ Thus, amendments to Section 17 were enacted to require the CIA Director to give IG reports to the congressional intelligence committees upon request.¹⁰⁶ The CIA is also required to report, by topic, all IG inspections, audits, and inspections semi-annually to Congress.¹⁰⁷

Presidents Reagan and Bush argued that Section 17 is unconstitutional.¹⁰⁸ President Bush was "unpersuaded of the necessity for . . . a statutory [IG] at the CIA."¹⁰⁹ Bush stated that section 17 would harm national security and CIA effectiveness, but he signed it into law because he felt he could take steps to minimize such damage.¹¹⁰ President Bush was concerned that a statutory IG "could impair the ability of the CIA to collect vitally needed intelligence information by creating a perception

sentatives Select Committee to Investigate Covert Arms Transactions with Iran. *See* IRAN-CONTRA REP., *supra* note 14, at 425 (recommendation No. 15).

100. 50 U.S.C. § 403q(a).

101. H. REP. NO. 215(I), 101st Cong., 1st Sess. 35, *reprinted in* 1989 U.S.C.C.A.N. 1186 [hereinafter H. REP. 215(I)] (Appendix C, memorandum from the Congressional Research Service to Rep. Anthony Beilenson, Chairman, House Permanent Select Committee on Intelligence (Aug. 2, 1989)).

102. 1989 U.S.C.C.A.N. at 1172-73.

103. *Id.* at 1172.

104. *Id.* at 1173.

105. *Id.*

106. *Id.*

107. *Id.*

108. *President's Statement Upon Signing H.R. 4387*, 24 WEEKLY COMP. PRES. DOC. 1233, Oct. 3, 1988, *reprinted in* 1988 U.S.C.C.A.N. 2502-1 (President Reagan's statement); *President's Statement Upon Signing H.R. 2748*, 25 WEEKLY COMP. PRES. DOC. 1851, 1852-53, Dec. 4, 1989, *reprinted in* 1989 U.S.C.C.A.N. 1222-24.

109. *President's Statement Upon Signing H.R. 2748*, 25 WEEKLY COMP. PRES. DOC. 1851, Dec. 4, 1989, *reprinted in* 1989 U.S.C.C.A.N. 1222.

110. *Id.*

that confidentiality cannot be guaranteed.”¹¹¹ President Bush, therefore, did not embrace the “shared powers” theory when he signed the Statutory IG Act, and instead backed away from the concept.

6. *The Veto of an Early Version of The Intelligence Authorization Act, Fiscal Year 1991*

In December 1990, President Bush vetoed Senate Bill 2834, an early version of the Intelligence Oversight Act, Fiscal Year 1991.¹¹² Bush objected to the bill’s proposed statutory definition of covert action.¹¹³ The measure would have required a report to Congress of any request by an executive branch agency to private individuals or foreign governments to conduct a covert operation on behalf of the United States.¹¹⁴

President Bush argued that “[i]t is unclear exactly what sort of discussions with foreign governments would constitute reportable ‘requests’ under this provision”¹¹⁵ The President said that the definition unconstitutionally regulates executive branch diplomacy by chilling the “expression of certain views” to those nations and private persons who can secretly further U.S. aims.¹¹⁶ According to President Bush, “the very possibility of a broad construction of [covert action] could have a chilling effect on the ability of our diplomats to conduct highly sensitive discussions concerning projects that are vital to our national security.”¹¹⁷ “The mere existence of this provision,” Bush wrote, “could deter foreign governments from discussing certain topics with the United States at all.”¹¹⁸ Although his veto represented a retreat from the concept of shared powers, the House dropped the disputed oversight provision from a subsequent measure, House Bill 1455, the intelligence bill which the President ultimately signed.¹¹⁹

In conclusion, previous intelligence legislation relating to covert actions reflected the shared powers theory and translated that theory into law. President Bush, however, attempted to retreat from the shared powers concept, asserting instead the concept of the president’s inherent authority over covert actions. Against this background of the increasing

111. *Id.*

112. Veto Memorandum, *supra* note 13 at 4119.

113. *Id.*

114. S. 2834, 101st Cong., 2d Sess. § 602, *reprinted in* 136 CONG. REC. H12285, H12286 (daily ed. Oct. 23, 1990).

115. Veto Memorandum, *supra* note 13, at 4119.

116. *Id.*

117. *Id.*

118. *Id.*

119. *House Drops Oversight From Intelligence Bill*, S.F. CHRON., May 2, 1991, at A6.

assertion by President Bush of inherent authority over covert actions, Congress enacted Title VI.

II. Title VI of the Intelligence Authorization Act, Fiscal Year 1991

A. The Rationale Behind Title VI

1. Introduction

In December 1986, after the Iran-Contra Affair first became public, Special Prosecutor Lawrence Walsh was appointed by the Justice Department to investigate illegal conduct by members of the Reagan administration and other individuals.¹²⁰ Over the course of the intervening years, after two major congressional investigations, an investigation by the President's Special Review Board, and numerous successful criminal prosecutions,¹²¹ we now know a great deal about what occurred during Iran-Contra.

Congress responded to many of the specific legislative recommendations of the Iran-Contra Report by enacting Title VI.¹²² To understand exactly what evils Title VI was intended to prevent, it is necessary to briefly review the history of Iran-Contra.

2. The Iran-Contra Affair

On March 9, 1981, President Reagan authorized the CIA to spend up to \$19 million to covertly overthrow the Sandinista government of Nicaragua by supporting paramilitary groups based outside of that nation.¹²³ These "freedom fighters," who became known as the Contras,

120. NATIONAL SECURITY ARCHIVE, THE CHRONOLOGY: THE DOCUMENTED DAY-BY-DAY ACCOUNT OF THE SECRET MILITARY ASSISTANCE TO IRAN AND THE CONTRAS 625 (1987).

121. See *infra* notes 142, 150, 153, 162, 164, 330 and accompanying text.

122. Carroll J. Doherty, *New Openness Marks Debate on Intelligence Bill*, 48 CONG. Q. WKLY. REP. 3625, 3626, Oct. 27, 1990; Fessler, *supra* note 2, at 2187. See also 137 CONG. REC. H6160, H6161 (daily ed. July 31, 1991) (statement of Rep. Dave McCurdy).

123. NATIONAL SECURITY ARCHIVE, *supra* note 120, at 7. America has a long history of military intervention in Nicaragua: U.S. Marines invaded Nicaragua in 1909 and 1912, and from 1926 to 1933, fought a guerrilla war against Nicaraguan nationalists led by Augusto Cesar Sandino. HOLLY SKLAR, WASHINGTON'S WAR ON NICARAGUA 2-6 (1988). In 1933, President Herbert Hoover withdrew the Marines and Sandino signed a peace treaty. *Id.* at 5. After disarming and receiving land from the Nicaraguan Government to start an agricultural cooperative, Sandino and three hundred of his followers were ambushed and executed by forces of the Nicaraguan Guardia Nacional (National Guard). *Id.* These forces were headed by Anastasio Samoza Garcia, who in 1936, staged a military coup and began a dictatorship that was handed down from father to son Luis Samoza, to brother Anastasio Samoza Debayle. *Id.* at 5-6. On July 19, 1979, when Anastasio Samoza's Guardia Nacional was defeated after a five year civil war by the Sandinista National Liberation Front (F.S.L.N.), the stage for the

were made up primarily of Nicaraguan exiles and included survivors of the previous regime's National Guard.¹²⁴

The Contras conducted armed raids against their homeland from bases in Costa Rica, Honduras, and Guatemala.¹²⁵ By April 1985, they had become a guerrilla army of over 16,000 troops.¹²⁶ Ultimately, between 1981 and 1988, the Contra war caused the deaths of more than 25,500 Nicaraguans on both sides, and among civilians, more than 3,200 dead, more than 1,500 wounded, and 5,600 kidnapped.¹²⁷

Even though this was to be a covert action, word that the administration was secretly providing military support to the Contras reached the press and Congress shortly after the operation began.¹²⁸ In reaction

latest U.S. intervention was set. *Id.* at 32-34. The Sandinista Party, which seized power in Nicaragua, took its name from the martyred nationalist Sandino. *Id.* at 9. See also IRAN-CONTRA REP., *supra* note 14, at 25-27.

124. IRAN-CONTRA REP., *supra* note 14, at 27-29. After Somoza was ousted in 1979, about 2,000 National Guardsmen fled to Honduras and another 1,000 fled by boat to El Salvador. SKLAR, *supra* note 123, at 34. Some were immediately spirited to the United States: within days after the downfall of Somoza, a DC-8 with about 130 Guardia survivors, rounded up by an American in Red Cross guise identified only as "Bill," landed in Miami. CHRISTOPHER DICKEY, WITH THE CONTRAS: A REPORTER IN THE WILDS OF NICARAGUA 54 (1985). Former Secretary of State George Schultz publicly called the Contras "freedom fighters," and President Reagan referred to the Contras as "the moral equal of our Founding Fathers and the brave men and women of the French Resistance." SKLAR, *supra* note 123, at 261.

The Contras were not a monolithic group, but were composed of: 1) former members of the Nicaraguan National Guard and others loyal to Somoza; 2) anti-Somocistas who supported the revolution but who felt betrayed by the Sandinistas; and 3) others who were not directly involved in the revolution, but who later became disenchanted with the Sandinistas. IRAN-CONTRA REP., *supra* note 14, at 27-29. The largest Contra group, the Nicaraguan Democratic Force (FDN), led by former businessman Adolfo Calero Portacarrero, operated out of Honduras to Nicaragua's north. *Id.* at 29. The FDN consisted mostly of former Guardsmen, and numbered only a few hundred in 1981. *Id.* In 1981, former Sandinista guerrilla leader Eden Pastora (a.k.a. "Commander Zero") formed a smaller group of Contra rebels operating out of Costra Rica to the south of Nicaragua. *Id.* Also, various Indian groups operated against the Sandinistas along Nicaragua's Atlantic coast. *Id.*

125. 5 *Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, House Select Committee to Investigate Covert Arms Transactions with Iran*, 100th Cong., 1st. Sess. 1152-53 [hereinafter *Joint Hearings*] (memo from National Security Council aide Lt. Col. Oliver North to National Security Council Advisor Robert McFarlane, Apr. 11, 1985).

126. *Id.*

127. SKLAR, *supra* note 123, at 393. In *United States v. Terrell*, 731 F. Supp. 473 (S.D. Fla. 1989), the court used the phrase "Contra war" to describe how one Contra operative saw the U.S. government's attempt to overthrow the Sandinistas. The court dismissed charges against six Contra supporters for violating the Neutrality Act, 18 U.S.C. § 960 (1988), holding that the act forbids private military expeditions only against nations the United States is "at peace" with. *Terrell*, 731 F. Supp. at 477. Nicaragua was not such a nation. *Id.* at 476-77.

128. In March 1981, Parade magazine published the first account of Contra training camps in the United States, in this case, 20 minutes by car from Miami's international airport. Adams, *Exiles Rehearse For The Day They Hope Will Come*, PARADE MAGAZINE Mar. 15, 1981,

to this news, between 1981 and 1984 Congress passed several restrictions on Contra aid.¹²⁹

Following public outcry over the disclosure of secret CIA participation in military raids on Nicaragua,¹³⁰ Congress passed a measure known as Boland II,¹³¹ which totally banned administration aid to the Contras between October 1, 1984 and August 8, 1985.¹³² Congress intended Boland II to deprive the President of funds that he could spend on overthrowing the government of Nicaragua.¹³³ President Reagan signed Boland II into law, knowing that Congress intended to end U.S. aid to

at 4-6; Art Harris, *Nicaragua Exiles Stake Their Claim*, WASH. POST, Aug. 16, 1981, at A1. National Security Decision Directive 17, based on the March finding, was signed by President Reagan on December 1, 1981. It authorized CIA action against the Sandinistas in coordination with foreign countries. BEN BRADLEE, JR., *GUTS AND GLORY: THE RISE AND FALL OF OLIVER NORTH* 144 (1988). The directive was leaked by "informed" sources in February 1982. Don Oberdorfer & Patrick E. Tyler, *Reagan Backs Action Plan for Central America*, WASH. POST, Feb. 14, 1982, at A1.

129. The first such restriction, effective December 21, 1982, became known as "Boland I," after its sponsor, Rep. Edward P. Boland of Massachusetts. It prohibited U.S. aid to the Contras for the purpose of overthrowing the Nicaraguan government or provoking a military exchange between Nicaragua and Honduras. Defense Appropriations Act for Fiscal Year 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982). See also IRAN-CONTRA REP., *supra* note 14, at 395-96.

In 1983, Congress authorized a spending cap of \$24 million for military and paramilitary operations in Nicaragua "by any nation, group, organization, movement, or individual." Department of Defense Appropriation, Fiscal Year 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452 (effective Dec. 9, 1983); Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (effective Dec. 8, 1983). See also IRAN-CONTRA REP., *supra* note 14, at 396-97.

130. IRAN-CONTRA REP., *supra* note 14, at 397-98. In April 1984, the CIA was publicly linked to the mining of Nicaraguan harbors and to paramilitary attacks against Nicaragua's oil storage facilities at the port of Corinto.

131. After its sponsor, Rep. Edward P. Boland of Massachusetts. See *supra* note 129.

132. Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-441, § 106(c), 98 Stat. 1699, 1700-01 (terminated Oct. 11, 1984); Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1935 (1984) (effective Oct. 12, 1984; terminated Aug. 15, 1985); Intelligence Authorization Act, Fiscal Year 1985, Pub. L. No. 98-618, § 801, 98 Stat. 3298, 3304 (1984) (effective Nov. 8, 1984; terminated Oct. 30, 1985).

133. Pub. L. No. 98-473 provided that:

[N]o 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.

The Congress intended that all military aid to the Contras be cut off. IRAN-CONTRA REP., *supra* note 14, at 397-98, 416-17.

See also 9 *Joint Hearings*, *supra* note 125, at 432-35 (containing Rep. Boland's and Sen. Rudman's discussion of the legislative intent of Boland II with Attorney General Meese); 5 *Joint Hearings*, *supra* note 125, at 409 ("to repeat, the compromise provision clearly ends United States support for war in Nicaragua.") (quoting Rep. Boland immediately prior to the House of Representatives enactment of Boland II).

the Contras, even though he strongly disagreed with Congress.¹³⁴

Despite Boland II and despite the continuing ban on lethal or military funding for the Contras the next year,¹³⁵ a small group within President Reagan's National Security Council staff secretly continued providing both military and non-military supplies to the Contras.¹³⁶ This covert support network of government employees, private "consultants," and domestic and offshore companies later became known as The Enterprise.¹³⁷ NSC staff aide Oliver North,¹³⁸ Retired Air Force General Richard Secord, and Secord's business partner, arms dealer Albert Hakim, established The Enterprise at CIA Director William Casey's

134. *Excerpts From Reagan's Testimony on the Iran-Contra Affair*, N.Y. TIMES, Feb. 23, 1990, at A18. Reagan was asked:

[Q] "You are aware that the Boland Amendment became law; is that correct, Mr. President?" [Mr. Reagan] "Yeah." [Q] "Once that happened and the ability of your Administration to continue to fund assistance to the contras for military and paramilitary activities, once that happened, you did not . . . [authorize] the National Security Council . . . to continue to aid the contras militarily and paramilitarily in the same way that the C.I.A. had done; is that correct?" [Mr. Reagan] "Apparently so."

Id. In response to a question from the trial judge, President Reagan replied: "I am remembering my telling those same people [Poindexter and North] to be helpful to private citizens who were trying to do something that the Congress of the United States refused to do and abandoning its responsibility." *Id.* Clearly, President Reagan understood Congress's intent in passing Boland II.

135. Boland II authorized the President to request after February 28, 1985 up to \$27 million in aid for the Contras upon certain conditions. IRAN-CONTRA REP., *supra* note 14, at 397-98. Congress approved the President's request for humanitarian (non-lethal) aid pursuant to Boland II, and this became law on August 8, 1985. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 722(g), 99 Stat. 190, 254-55 (terminated Mar. 31, 1986); Supplemental Appropriations Act 1985, Pub. L. No. 99-88, 99 Stat. 324 (effective Aug. 15, 1985; terminated Mar. 31, 1986). *See also* IRAN-CONTRA REP., *supra* note 14, at 401-02.

Restrictions on Contra spending by the intelligence agencies were included in a measure known as Boland III. Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, § 105, 99 Stat. 1002, 1003 (effective Dec. 4, 1985; terminated Oct. 17, 1986); Further Continuing Appropriations Act for Fiscal Year 1986 and for other purposes, Pub. L. No. 99-190, § 8050, 99 Stat. 1185, 1211 (effective Dec. 19, 1985; terminated Oct. 17, 1986). *See also* IRAN-CONTRA REP., *supra* note 14, at 404. The spending restrictions provided in Boland II were continued, but now the agencies could provide communications equipment, related training, and intelligence information and advice. *Id.* All restrictions on lethal and non-lethal aid to the Contras were lifted when Congress appropriated \$100 million for Contra aid, effective October 18, 1986. Making continuing appropriations for the Fiscal Year 1987, and for other purposes, Pub. L. No. 99-500, §§ 206-09 (terminated Oct. 30, 1987); Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 106, 100 Stat. 3190, 3191 (1986) (effective Oct. 27, 1986, terminated Oct. 30, 1987). *See also* IRAN-CONTRA REP., *supra* note 14, at 405.

136. IRAN-CONTRA REP., *supra* note 14, at 77-78.

137. *Id.* at 59.

138. At the time, North was a Marine Corps Lieutenant Colonel temporarily assigned to the NSC staff.

request.¹³⁹

In undertaking this secret support effort, at least three key members of the Reagan Administration¹⁴⁰ directed efforts to raise funds for the Contras by soliciting donations from private citizens and foreign governments. This money was then funnelled through The Enterprise's network of shell companies and secret bank accounts to the Contras, among others.¹⁴¹ The majority of the Iran-Contra Committees concluded that the solicitation of funds from third parties was done to evade congressional restrictions against Contra aid and was unlawful.¹⁴²

The Enterprise also raised money by secretly purchasing arms from the CIA at discount prices and selling them to Iran for a sizeable markup, then diverting the profits into The Enterprise and, ultimately, to the Contras.¹⁴³ The arms were sold to Iran as part of a separate NSC-run covert action to gain the release of U.S. hostages held by Iranian-backed terrorists in Lebanon.¹⁴⁴ The secret arms sales to Iran were contrary to the Reagan administration's public position that it opposed all arms sales by any nation to Iran.¹⁴⁵ The Iran-Contra Committees found that the arms sales violated the Arms Export Control Act.¹⁴⁶ Their report concluded that the diversion of taxpayer dollars to The Enterprise and to the Contras constituted an illegal conversion of U.S. government funds for unauthorized purposes.¹⁴⁷

Although The Enterprise functioned primarily to benefit the Contras,¹⁴⁸ some of the funds were diverted to private hands. Secord, Hakim, and their partner, ex-CIA officer Thomas Clines, made profits for themselves of approximately \$4.4 million.¹⁴⁹ Secord, Hakim, and Clines each pleaded guilty in federal court for criminal violations that occurred

139. IRAN-CONTRA REP., *supra* note 14, at 59.

140. Late CIA Director William Casey (1981-1986), National Security Advisor Robert McFarlane (1983-1985), and his successor, former Vice Admiral John Poindexter (1985-1987).

141. IRAN-CONTRA REP., *supra* note 14, at 331, 413.

142. *Id.* at 331, 413. The key operatives involved in fundraising were convicted of criminal charges. Conservative fundraiser Carl R. "Spitz" Channell pleaded guilty to one count of conspiracy to defraud the Treasury for illegally using a tax-exempt foundation to raise money from private donors to help purchase weapons for the Contras. *Pro-Contra Fund-Raiser Channell Gets Probation*, S.F. EXAMINER, July 7, 1989, at A15. Channell's former associate in the scheme, Richard R. Miller, pleaded guilty to a similar charge for his role in the affair. *Id.*

143. IRAN-CONTRA REP., *supra* note 14, at 335-38, 415-17.

144. DRAPER, *supra* note 2, at 120-22, 125-27, 171-73, 174-202, 212-16.

145. IRAN-CONTRA REP., *supra* note 14, at 461-62. *See also* DRAPER, *supra* note 2, at 120-21.

146. 22 U.S.C. § 2753(a) (1989). *See* IRAN-CONTRA REP., *supra* note 14, at 418-19.

147. IRAN-CONTRA REP., *supra* note 14, at 417-18, 421 n.28.

148. *Id.* at 51-52.

149. *Id.* at 331. Secord is currently prosecuting a claim in Swiss courts to prove that \$10 million in funds from The Enterprise which have been frozen in a Swiss bank account for over

during Iran-Contra.¹⁵⁰

The Iran-Contra Committees found that Central America was not the only battle-front for The Enterprise. The Enterprise secretly donated money to political campaigns aimed at unseating "anti-Contra" members of Congress targeted by Lieutenant Colonel North.¹⁵¹ It hired public relations consultants who engaged in fundraising, congressional lobbying, and media advertising in the United States on behalf of the Contra cause without ever revealing their financial links to the NSC or the U.S. government.¹⁵²

When Congress began receiving information from the press in 1985 that members of the NSC staff were running a covert action against the Nicaraguan government, several members of the administration falsely told Congress that the press charges were not true.¹⁵³

A majority of the members of the Iran-Contra Committees found that neither President Reagan nor other members of his administration notified Congress of the covert action as required by law.¹⁵⁴ The committees also found that President Reagan did not personally authorize many aspects of the Iranian and the Contra covert actions with written "findings," as required by Executive Orders and the Hughes-Ryan Amendment.¹⁵⁵

five years belong to him, and not the U.S. government. Yost, *Fight Over Frozen Iran-Contra Funds*, S.F. CHRON., Aug. 17, 1992, at A2.

150. Secord pleaded guilty as part of a plea bargain to one count of making a false statement to congressional investigators. See David Johnston, *Secord Is Guilty Of One Charge In Contra Affair*, N.Y. TIMES, Nov. 9, 1989, at A24. Hakim pleaded guilty as part of a plea bargain to one count of illegally supplementing the income of a government officer (NSC Aide North). See David Johnston, *Hakim Pleads Guilty to One Misdemeanor*, N.Y. TIMES, Nov. 22, 1989, at A18. Clines was convicted of four tax charges, including underreporting income during 1985 and 1986 (including nearly \$973,000 in profits from arms sales on behalf of The Enterprise), and failing to disclose to the Internal Revenue Service his control of bank accounts holding more than \$10,000. Michael Wines, *Iran-Contra Aide Gets Prison Term*, N.Y. TIMES, Dec. 14, 1990, at A36.

151. IRAN-CONTRA REP., *supra* note 14, at 98-99.

152. *Id.*

153. *Id.* at 122-33, 137-42, 149-50. CIA Central American Task Force Chief Alan D. Fiers, Jr., pleaded guilty to two misdemeanor charges of lying to Congress about CIA involvement to support the Contras. Freedman, *Guilty Plea Opens New Avenues To Irangate*, S.F. EXAMINER, July 8, 1991, at A1. Assistant Secretary of State Elliott Abrams, who testified along with Fiers before Congress, pleaded guilty to two misdemeanor charges of lying before Congress. David Johnston, *Elliott Abrams Admits His Guilt On 2 Counts in Contra Cover-Up*, N.Y. TIMES, Oct. 8, 1991, at A1.

154. IRAN-CONTRA REP., *supra* note 14, at 414-15.

155. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981); National Security Decision Directive 159. See also IRAN-CONTRA REP., *supra* note 14, at 416. The lack of covert action findings appears to have violated the Hughes-Ryan Amendment, *supra* note 92 and accompanying text, but the Iran-Contra Report does not address this.

3. *The Iran-Contra Coverup*

President Reagan publicly claimed to be unaware of either the existence or activities of The Enterprise.¹⁵⁶ Yet, due to extreme carelessness on the part of members of a Contra resupply air crew, conclusive proof that the U.S. government was supporting the Contras literally fell into the Sandinistas' hands. On October 5, 1986, a commercial cargo aircraft leased by The Enterprise from a CIA front company, flying with a "private" American crew and loaded with 10,000 pounds of ammunition and gear, was shot down over Nicaragua.¹⁵⁷ The Nicaraguan government obtained documents from inside the plane, and confirmation from the flight's lone survivor, proving that the U.S. government was secretly arming the Contras.¹⁵⁸

At this point, the White House could no longer credibly deny that it

156. IRAN-CONTRA REP., *supra* note 14, at 145-47. See also JOHN TOWER ET AL., PRESIDENT'S SPECIAL REVIEW BOARD, THE TOWER COMMISSION REPORT 56-57, 61 (N.Y. Times ed. 1987) [hereinafter TOWER REP.], which stated that "[t]he President told the Board on January 26, 1987, that he did not know that the NSC staff was engaged in helping the Contras. The Board is aware of no evidence to suggest that the President was aware of LtCol [sic] North's activities." *Id.* at 61. Reagan, however, provided written answers under oath to a 1987 grand jury about North's activities, answers that have remained secret. Bronner, *Iran-gate Inquiry To Widen*, S.F. EXAMINER, Apr. 14, 1990, at A1. During Reagan's deposition in the Poindexter trial, reference was made to those answers, and Bronner reported that the references suggest that Reagan may have, in fact, been aware of North's activities. *Id.* at A14.

The late Senator John Tower also had doubts about the former President's candor concerning activities of The Enterprise. In his autobiography, Tower wrote the following account of Reagan's interview with the Special Review Board:

I sat opposite the president . . . listening hard to Reagan's rather convoluted statement But I, for one, was shocked at what I was hearing. The president was recanting his previous testimony—testimony fully consistent with documentary evidence we had obtained and with the statements of McFarlane and other individuals While starting to repeat his previous answer, he stood up and went over to his desk. He picked up a sheet of paper and, as I remember his words, said to the board, "This is what I am supposed to say," and proceeded to read us an answer prepared by Peter Wallison, the White House counsel.

It was obvious that the president had been prepped by Wallison and words were being put into his mouth.

JOHN TOWER, CONSEQUENCES: A PERSONAL AND POLITICAL MEMOIR 283 (1991).

157. IRAN-CONTRA REP., *supra* note 14, at 144.

158. *Id.* Because the aircraft's crew took their wallets with them, the Nicaraguans were immediately able to link the crashed aircraft to the White House and to the NSC. The Sandinistas recovered documents from survivor Eugene Hasenfus and the deceased pilot identifying them as U.S. "advisors" at Illopango Air Force Base in El Salvador, a jointly run U.S.-Salvadoran military base. *Id.* Also found were business cards belonging to Robert Owen, a self-styled public relations consultant working under contract for the State Department's Nicaraguan Humanitarian Aid Organization (NHAO) but surreptitiously serving as a courier between NSC Aide Oliver North and various members of The Enterprise. *Id.* BRADLEE, *supra* note 128, at 445; SKLAR, *supra* note 123, at 324; IRAN-CONTRA REP., *supra* note 14, at 144. The NHAO provided U.S. government "humanitarian" (non-lethal) aid to the Contras. *Id.* at 61. On October 7, 1986, Nicaraguan Foreign Ministry Secretary General Alejandro Bendana

was providing military support for the Contras.¹⁵⁹ Yet, on October 8, three days after the plane went down, President Reagan erroneously told reporters that the downed aircraft belonged to a private group supporting the Contras and that there was no connection between the flight and the U.S. government.¹⁶⁰ Assistant Secretary of State Elliott Abrams was called before Congress and asked if the Nicaraguan charges against the United States were true.¹⁶¹ Abrams lied and told Congress that the flight was not part of a covert U.S. activity against Nicaragua.¹⁶² He later pleaded guilty to two misdemeanor counts of giving false statements to Congress.¹⁶³ So did the chief of the CIA's Latin American Division, Allen Fiers, who testified before Congress with Abrams.¹⁶⁴

In early November 1986, the much-guarded secrecy surrounding the administration's "arms for hostages" deal with Iran was shattered by a story in the Lebanese magazine, *Al-Shiraa*.¹⁶⁵ On November 5, 1986, President Reagan erroneously told reporters that the story of United States arms sales to Iran "has no foundation."¹⁶⁶ Four days later, the

told ABC Nightline Host Ted Koppel that the Hasenfus flight was "directly run from the White House, from the office of a Mr. North, I believe." SKLAR, *supra* note 123, at 324-25.

159. High-level U.S. officials knew that the Hasenfus flight was part of a U.S. covert action: Col. Sam Watson, Vice President Bush's Deputy National Security Advisor, received a telephone call after the crash from Enterprise manager Felix Rodriguez in El Salvador, who warned Watson that Lt. Col. North was involved with the flight. 7 *Joint Hearings, supra* note 125, at 479 (handwritten notes of Col. Sam Watson, Oct. 5, 1986, designated by the Select Committees as OLN 99). See also IRAN-CONTRA REP., *supra* note 14, at 145; BRADLEE, *supra* note 128, at 445. After learning that the Hasenfus plane was missing, the CIA Station Chief in Costa Rica, Joseph (Jose) Fernandez (aka "Tomas Castillo"), mobilized Contra forces in southern Nicaragua to begin searching for the plane. IRAN-CONTRA REP., *supra* note 14, at 144. On October 17, 1986, Hasenfus gave an interview on CBS's *60 Minutes*, revealing the involvement of the U.S. government with the flight and claiming that Vice President George Bush knew about the covert arms supply operation. NATIONAL SECURITY ARCHIVE, *supra* note 120, at 526.

160. NATIONAL SECURITY ARCHIVE, *supra* note 120, at 446. IRAN-CONTRA REP., *supra* note 14, at 145.

161. *The Downing Of a United States Plane in Nicaragua and United States Involvement in the Contra War: Hearing Before the House Subcommittee on Western Hemisphere Affairs of the House Committee on Foreign Affairs*, 99th Cong., 2d Sess. 12-13 (1986) (containing written statement by Abrams, stating "I am happy to reiterate once again that the flight in which Mr. Hasenfus took part was a private initiative. It was not organized, directed, or financed by the U.S. government.").

162. David Johnston, *Elliott Abrams Admits His Guilt On 2 Counts in Contra Cover-Up*, N.Y. TIMES, Oct. 8, 1991, at A1. As to Abrams's knowledge that his statement to Congress was false, see JEFFREY TOOBIN, *OPENING ARGUMENTS, A YOUNG LAWYER'S FIRST CASE: U.S. V. OLIVER NORTH* 88-89, 94-95 (1991).

163. Johnston, *supra* note 162.

164. Freedman, *Guilty Plea Opens New Avenues To Irangate*, S.F. EXAMINER, July 8, 1991, at A1.

165. NATIONAL SECURITY ARCHIVE, *supra* note 120, at 537 (Nov. 3, 1986 entry).

166. *Id.* at 544-45.

administration reversed itself and admitted selling arms to Iran in order to gain the hostages' freedom.¹⁶⁷

When the Justice Department began probing the NSC staff in late November 1986, North and National Security Advisor Poindexter reacted by destroying and altering numerous relevant documents.¹⁶⁸ It was not until after North destroyed most of the files about the Iranian and Nicaraguan operations that Justice Department investigators found evidence of possible illegal conduct by Administration officials.¹⁶⁹ In late November 1986, Attorney General Edwin Meese publicly revealed the existence of the "diversion" of funds and announced that the Justice Department would begin a criminal investigation.¹⁷⁰ The Enterprise abruptly ended its operations and Congress began hearings on the matter

167. *Id.* at 550.

168. IRAN-CONTRA REP., *supra* note 14, at 11, 286, 305-25.

169. *Id.*

170. *Id.* In addition to the criminal cases already mentioned as a result of this criminal investigation, the Special Prosecutor obtained the conviction of former National Security Advisor Robert C. McFarlane, who pleaded guilty to four counts of withholding information from Congress regarding the Iran-Contra Affair as part of a plea bargain. See Philip Shenon, *McFarlane Admits Withholding Data On Aid To Contras*, N.Y. TIMES, Mar. 11, 1988, at A1 (Late city final edition with correction).

Former National Security Advisor John M. Poindexter was found guilty in a jury trial of five felony counts, including conspiracy, obstruction of Congress, and making false statements to Congress. See Freedman, *Poindexter Convicted On All Five Counts*, S.F. EXAMINER, Apr. 8, 1990, at A1. Poindexter successfully appealed his convictions to the U.S. Court of Appeals on the grounds that the jury was "tainted" by the immunized testimony he gave before Congress. See Ann Pelham, *Tainted Testimony, Take 2*, LEGAL TIMES, Dec. 31, 1990, at 2.

Former NSC Aide Oliver L. North was found guilty by a jury of three counts, including obstructing Congress by destroying documents and accepting an illegal gratuity. See *Verdict A Mixed Signal For 3 Other Defendants*, N.Y. TIMES, May 5, 1989, at A18. The U.S. Court of Appeals reversed and set aside two of his convictions in July 1990 pending a hearing to determine whether the witnesses were influenced by immunized testimony that North had given before Congress. On one count, the trial judge had improperly instructed the jury. *Iran-contra Prosecutor Is Seeking High Court Review In North Case*, N. Y. TIMES, Jan. 16, 1991, at A19. After the Supreme Court rejected the Special Prosecutor's appeal and remanded the case to the federal district court for hearings on whether or not the jury was influenced by immunized testimony, the charges against North were dropped. Savage, *Top Court Gives Oliver North A Big Victory*, S.F. CHRON., May 29, 1991, A1.

Criminal charges brought by the Special Prosecutor against CIA Costa Rica Station Chief Joseph Fernandez were dropped after Attorney General Richard Thornburgh barred the use of classified information that would have been essential to Fernandez's defense. Anthony Lewis, *Abroad At Home*, N.Y. TIMES, Nov. 30, 1989, at A31.

Clair George, who was the CIA Deputy Director of Operations during Iran-Contra, is currently on trial for nine counts, including making false statements to Congress, perjury, and obstruction of justice and a federal grand jury. *Ex-CIA Official Tells of Illegal Action*, S.F. CHRON., Aug. 1, 1992, at A4. See also *Ex-Sen. Eagleton Says CIA Spy Chief Hampered Probe*, S.F. CHRON., Aug. 8, 1992, at A3; *Secord Tells of Meeting CIA Spy Chief*, S.F. CHRON., Aug.

the following summer.¹⁷¹

B. The Legislative Remedy-Enhanced Reporting Requirements for Covert Actions

Each element of Title VI is designed to address a particular abuse that arose during the Iran-Contra Affair.¹⁷² First, former section 501 of the National Security Act of 1947¹⁷³ was stricken and redrafted to make clear that the President “shall insure” that the congressional intelligence committees are kept “fully and currently” informed of any “significant anticipated intelligence activity,” including any covert actions.¹⁷⁴ The section will also require the President to make sure that “any illegal intelligence activity is reported promptly to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.”¹⁷⁵

1. *The New Section 503 of the National Security Act of 1947*

Title VI repeals the Hughes-Ryan amendment¹⁷⁶ and moves the substance of the presidential covert action reporting requirements to a

6, 1992, at A11. The court declared a mistrial and ordered that he be retried. *Mistrial in CIA Spymaster Case*, S.F. CHRON., Aug. 27, 1992 at A2.

Secretary of Defense Caspar Weinberger was indicted in June 1992, and he pleaded not guilty to five felony charges of obstructing congressional and criminal investigations of Iran-Contra. Ostrow, *Weinberger Pleads Not Guilty*, S.F. CHRON., Aug. 20, 1992, at A2. See also Johnston, *Weinberger's Notes: Proof of Guilt, or Innocence*, S.F. CHRON., June 22, 1992, at A9.

On December 24, 1992, President Bush pardoned the following people: Caspar Weinberger, Elliott Abrams, Robert McFarlane, Duane Clarridge, Alan Fiers, Jr., and Clair George. Harry Rosenthal, *Bush Pardons Weinberger*, S.F. EXAMINER, Dec. 24, 1992, at A1. This action came too late to incorporate it into the text of this Article.

See also *infra* note 330.

171. IRAN-CONTRA REP., *supra* note 14, at xv.

172. A majority of the Iran-Contra Committees concluded in 1987 that “the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance.” IRAN-CONTRA REP., *supra* note 14, at 423. Nevertheless, the committees recommended numerous, specific legislative reforms.

173. July 26, 1947, ch. 343, tit. V, § 501, *as added* Oct. 14, 1980, Pub. L. No. 450, tit. IV, § 407(b)(1), 94 Stat. 1975, 1981 (1980) (*as amended* at 50 U.S.C. § 413 (1980)).

174. Pub. L. No. 102-88, § 602, tit. VI, § 501(a)(1), 105 Stat. 429, 441 (1992) (codified at 50 U.S.C.A. § 413(a)(1) (West 1992)). See 137 CONG. REC. H6161 (daily ed. July 31, 1991) (statement of Rep. Dave McCurdy). See also Pub. L. No. 102-88, § 602, tit. VI, § 501(f), 105 Stat. 429, 441 (1992) (codified at 50 U.S.C.A. § 413f (West 1992)) (“intelligence activities” which must be reported to Congress include covert actions which are defined by § 503(e) of this new legislation).

175. Pub. L. No. 102-88, § 602, tit. VI, § 501(b), 105 Stat. 429, 441 (1991) (codified at 50 U.S.C.A. § 413b (West 1992)). This provision responds to Recommendation No. 18 of the Iran-Contra Committees. IRAN-CONTRA REP., *supra* note 14, at 426.

176. 22 U.S.C. § 2422 (1988) (repealed 1991).

new version of section 503 of the National Security Act of 1947.¹⁷⁷ This new version continues the requirement in Hughes-Ryan that the president may authorize a covert action only upon making a "finding" that a covert action is necessary to support identifiable U.S. foreign policy objectives, and that the action is important for U.S. national security.¹⁷⁸

This provision, however, was enhanced by the following requirements: (1) such a finding must be in writing;¹⁷⁹ (2) if time does not permit the preparation of a written finding, a written record of the president's decision must be made "contemporaneously" and reduced to a written finding within 48 hours;¹⁸⁰ and 3) presidential covert action findings may not authorize activities that have already occurred.¹⁸¹ These particular enhancements were based on two formal recommendations for legislative reform by the Iran-Contra Committees.¹⁸²

A finding must specify each U.S. government agency, department, or entity which will fund or otherwise significantly participate in the action.¹⁸³ In general, any employee, contractor, contract agent, or entity of the U.S. government participating in a covert action must be subject to CIA rules and regulations.¹⁸⁴ Findings shall specify whether it is contemplated that any "third party"¹⁸⁵ will be used to carry out, fund, or otherwise participate in any significant way in a covert action.¹⁸⁶ With some exceptions, these third parties must be subject to U.S. government

177. 102 Pub. L. No. 88, § 602, tit. VI, § 503(a), 105 Stat. 429, 442 (1992) (codified at 50 U.S.C.A. § 413b (West 1992)).

178. Pub. L. No. 102-88, § 602, tit. VI, § 503 (a), 105 Stat. 429, 442 (1992) (codified at 50 U.S.C.A. § 413b(a)).

179. *Id.* at § 503(a)(1) (codified at 50 U.S.C.A. § 413b(a)(1)).

180. *Id.*

181. *Id.* at § 503(a)(2) (codified at 50 U.S.C.A. § 413b(a)(2)).

182. IRAN-CONTRA REP., *supra* note 14, at 423 (Recommendation No. 2), 424 (Recommendation No. 7).

183. Pub. L. No. 102-88, § 602, tit. VI, § 503(a)(3), 105 Stat. 429, 442 (1992) (codified at 50 U.S.C.A. § 413b(a)(3)). *See* IRAN-CONTRA REP., *supra* note 14, at 424 (Recommendation No. 5).

184. Pub. L. No. 102-88, § 602, tit. VI, § 503(a)(3), 105 Stat. 429, 442 (1992) (codified at 50 U.S.C.A. § 413b(a)(3)). The exception is that employees, contractors, contract agents, or other entities of non-CIA departments within the U.S. government may be subject to written policies and regulations adopted by such department, agency, or entity, to govern such participation. *Id.*

185. *Id.* § 503(a)(4) (codified at 50 U.S.C.A. § 413b(a)(4) (West Supp. 1992)). A third party is a person or group "which is not an element of, or a contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations." *Id.*

186. Pub. L. No. 102-88, § 602, tit. VI, § 503(a)(4), 105 Stat. 429, 442 (codified at 50 U.S.C.A. § 413b(a)(4)). *See* IRAN-CONTRA REP., *supra* note 14, at 424-25 (Recommendation Nos. 5, 9, 13).

policies and regulations.¹⁸⁷ Finally, presidential covert action findings may not authorize “any action that would violate the Constitution or any statute of the United States.”¹⁸⁸

Section 503(b) requires the Director of Central Intelligence and all U.S. government department heads involved in a covert action to “fully and currently” inform the congressional intelligence committees of the action.¹⁸⁹ This must be done “with due regard” for the protection of “sensitive intelligence sources and methods or other exceptionally sensitive matters.”¹⁹⁰ Congress must also be informed of any significant covert action failures.¹⁹¹ The CIA Director and the heads of any other government departments, agencies, or entities must provide “any information or material” about covert actions which the intelligence committees request.¹⁹²

Section 503(c)(1) states that the president “shall insure” that covert action findings are reported to the intelligence committees “as soon as possible *after* such approval *and before* the initiation of the covert action” except under two conditions.¹⁹³ First, the president may decide that “extraordinary circumstances” affecting vital U.S. national interests exist.¹⁹⁴ Then, the finding need be disclosed only to eight people: the chairpersons and ranking minority members of the two intelligence committees and the majority and minority leaders of the House and Senate.¹⁹⁵ Second, whenever a covert action is begun without first providing

187. Pub. L. No. 102-88, § 602, tit. VI, § 503(a)(4), 105 Stat. 429, 442 (codified at 50 U.S.C.A. § 413b(a)(4) (West Supp. 1992)). The language of the statute seems to suggest that third parties acting on behalf of a foreign government in their official capacities would not be subject to CIA regulations.

188. *Id.* at § 503(a)(5) (codified at 50 U.S.C.A. § 413b(a)(5) (West Supp. 1992)). *See* IRAN-CONTRA REP., *supra* note 14, at 424, 426 (Recommendation Nos. 6, 18).

189. Pub. L. No. 102-88, § 602, tit. VI, § 503(b)(1), 105 Stat. 429, 442 (codified at 50 U.S.C.A. § 413b(b)(1)).

190. *Id.*

191. *Id.* at § 503(b)(1) (codified at 50 U.S.C.A. § 413b(b)(1)).

192. *Id.* at § 503(b)(2) (codified at 50 U.S.C.A. § 413b(b)(2)). The intelligence committees may seek classified information about covert actions only when they are carrying out their “authorized responsibilities.” *Id.* The CIA Director and other agency heads must produce information about covert actions which are under the “possession, custody, or control” of their agency. *Id.*

193. *Id.* at § 503(c)(1) (codified at 50 U.S.C.A. § 413b(c)(1) (West Supp. 1992) (emphasis added)). In all cases, written covert action findings must be provided to the intelligence committees or, in some cases, the members of Congress specified in § 503(c)(2). *Id.* at § 503(c)(4) (codified at 50 U.S.C.A. § 413b(c)(4)). The president must also notify Congress of any “significant change” in any previously approved covert action by the same means that are provided in § 503(c)(1)-(3). *Id.* at § 503(d) (codified at 50 U.S.C.A. § 413b(d) (West Supp. 1992)).

194. *Id.* at § 503(c)(1) (codified at 50 U.S.C.A. § 413b(c)(1) (West Supp. 1992)).

195. *Id.* at § 503(c)(2) (codified at 50 U.S.C.A. § 413b(c)(2) (West Supp. 1992)). The president may disclose the finding to any other member of the congressional leadership. *Id.*

a finding to Congress, "the President shall fully inform the intelligence committees in a *timely fashion*."¹⁹⁶ Along with that notice, Congress must receive a statement of the President's reasons for not giving prior notice of the covert action.¹⁹⁷

Section 503(e) establishes for the first time a statutory definition of the term "covert action." Specifically, "covert action" means a U.S. Government activity "to influence political, economic, or military conditions abroad," where the government's role "will not be apparent or acknowledged publicly."¹⁹⁸ Additionally, the statute sets out distinctions between covert actions and other U.S. government activities.

First, "covert action" does not cover activities having the primary purpose of: 1) acquiring intelligence;¹⁹⁹ 2) performing counterintelligence;²⁰⁰ 3) improving or maintaining the operational security of U.S. government programs;²⁰¹ or 4) carrying out "administrative activities."²⁰² Next, covert actions are distinguished from "traditional diplomatic or military activities."²⁰³ The subsection also distinguishes covert

196. *Id.* at § 503 (c) (3) (codified at 50 U.S.C.A. 413b(c)(3))(emphasis added).

197. *Id.*

198. *Id.* at § 503 (e) (codified at 50 U.S.C.A. 413b(e)).

199. *Id.* at § 503(e)(1) (codified at 50 U.S.C.A. 413b(e)(1)). Covert actions are distinguished in Title VI from all other U.S. government intelligence activities. *See id.* at § 502(1) (codified at 50 U.S.C. 413a(1)). Used here, the phrase "acquire intelligence" means an activity whose primary purpose is gathering intelligence *information*.

200. *Id.* at § 503(e)(1) (codified at 50 U.S.C.A. 413b(e)(1)). The conference committee made clear that "traditional counterintelligence activities" such as double-agent operations and efforts to frustrate intelligence gathering by hostile foreign intelligence services are not covert actions. H.R. CONF. REP. 166, *supra* note 1, at H5905.

201. Pub. L. No. 102-88, § 602, tit. VI, § 503(e)(1), 105 Stat. 442 (codified at 50 U.S.C.A. 413b(e)(1)).

202. *Id.*

203. *Id.* at § 501(e)(2) (codified at 50 U.S.C.A. 413b(e)(2)). Diplomacy, even secret diplomacy, does not fall under the category of covert action. In conducting official U.S. diplomacy, the government's role is intended to be apparent. A more problematic distinction is between covert actions and traditional military activities. The conference committee intended that

"'traditional military activities' include activities by military personnel under the direction and control of a [U.S.] military commander (whether or not the U.S. sponsorship of such activities is apparent or later to be acknowledged) preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities for the activities and for operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving [U.S.] military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly. *In this regard, the conferees intend to draw a line between activities that are and are not under the direction and control of the military commander. Activities that are not under the direction and control of a military commander should not be considered as "traditional military activities."*

H.R. CONF. REP. 166, *supra* note 1, at H5905-5906 (emphasis added).

actions from "traditional law enforcement activities."²⁰⁴ Finally, the term does not include routine support for overt U.S. government operations abroad.²⁰⁵

The congressional conference report elaborates on these distinctions and the reasons for them.²⁰⁶ The committee believed the definition would exclude publicly acknowledged activities, even those designed to mislead foreign adversaries about our government's military capabilities, intentions, or operations,²⁰⁷ or to influence foreign public opinion or political attitudes.²⁰⁸ They reasoned that "covert action" should not include activities which the U.S. government publicly acknowledges, even if the specific objectives of the operations are concealed.²⁰⁹ The conferees agreed that the definition would only apply if "*the fact of [U.S.] government involvement in the activity is itself not intended to be acknowledged.*"²¹⁰

2. Summary: The Legislative Intent Behind Title VI

It is important to recognize that Title VI is not a statute that merely requires the president to report specified information to Congress. Title VI goes beyond information sharing, requiring the president to take certain affirmative actions before beginning a covert action. The president must make a legal and factual determination about whether or not a proposed secret government operation falls under the statutory "covert action" definition.²¹¹ The president must then make a written "finding" before beginning a covert action specifying that the operation is necessary to support an identifiable foreign policy objective *and* that it is important to U.S. national security.²¹² If Congress is not informed of the finding before the operation, the written finding must be transmitted in a timely manner to the relevant congressional committees, or to the bipartisan leadership of those committees.²¹³ Title VI also imposes a limitation on the president's war powers, that is, a presidential finding may not

204. Pub. L. No. 102-88, § 602, tit. VI, § 503(e)(3), 105 Stat. 442 (codified at 50 U.S.C.A. 413b(e)(3)). The conference report did not elaborate on this distinction.

205. Other than those activities described in § 503(e)(1), (2), or (3). *Id.* at § 503(e)(4) (codified at 50 U.S.C.A. 413b(e)(4)).

206. H.R. CONF. REP. 166, *supra* note 1, at H5905-5906.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* (emphasis added).

211. Pub. L. No. 102-88, § 602, tit. VI, § 503(e), 105 Stat. 442 (codified at 50 U.S.C.A. 413b(e)).

212. *Id.* at Sec. 503(a) (codified at 50 U.S.C.A. 413b(a)).

213. *Id.* at Sec. 503(c) (codified at 50 U.S.C.A. 413b(c)).

authorize any covert action that would violate the Constitution or any U.S. statutes.²¹⁴

Certain duties are imposed upon Congress as well. Each house formulates rules to protect classified information in consultation with the CIA Director (these rules currently require Intelligence Committee members to obtain Top Secret security clearances from the CIA, sign non-disclosure agreements, and be subject to sanctions for unauthorized disclosure).²¹⁵ In extraordinary circumstances affecting vital U.S. national security interests, the president may limit access to the covert action finding to a bi-partisan group of eight congressional leaders.²¹⁶

As Title VI shows, Congress has not regarded the power to conduct covert actions lightly. Congress enacted Title VI to prevent the types of intelligence abuses which took place during the Iran-Contra scandal.

214. *Id.* at Sec. 503(a)(5) (codified at 50 U.S.C.A. 413b(a)(5)).

215. *Id.* at Sec. 501(d) (codified at 50 U.S.C.A. 413(d)). House Of Representatives Rule XLVIII, Rules Of Procedure For The House Permanent Select Committee On Intelligence, Rules 9 & 10.

216. *Id.* at Sec. 503(c)(2) (codified at 50 U.S.C.A. 413b(c)(2)). These are the chairperson and ranking minority member of the House and Senate Select Intelligence committees, the Speaker and ranking minority member of the House, and the majority and minority leaders of the Senate.

Some may question whether telling this group is like telling the entire city of Washington. It must be recalled, however, that over two million Americans in the government and private sectors hold top secret or higher security clearances. WILLIAM BURROWS, *DEEP BLACK: SPACE ESPIONAGE AND NATIONAL SECURITY* xiii (1986). It has been estimated that the U.S. intelligence budget during the 1980s was about \$200 billion with most of the appropriations being hidden in the budgets of other federal agencies. *Id.* at 201. With such large sums at stake, and given the background of abuses which occurred during Iran-Contra, current CIA Director Robert Gates has strongly advocated complying with the disclosure requirements of Title VI. During his confirmation hearings to become CIA Director last year, Gates testified:

We know that many Americans are uneasy about the CIA and U.S. Intelligence activities. They understand the need for information and even on occasion for covert action, but they are uncomfortable with secrecy. And therein lies the value of congressional oversight: the reassurance to Americans that the laws are obeyed and that there is accountability. This, then, puts a special responsibility on intelligence agencies to be truthful, straightforward, candid and forthcoming in dealings with Congress.

REPORT OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE WITH ADDITIONAL VIEWS, NOMINATION OF ROBERT M. GATES TO BE DIRECTOR OF CENTRAL INTELLIGENCE, SENATE EXEC. REP. NO. 19, 102d Cong., 1st Sess. 196 (1991).

Specifically with regard to the disclosure requirements of Title VI, Director Gates testified that "I believe that as a practical matter, I would recommend against non-notification of any [covert action] finding to Congress . . . Should the President decide for some reason, involving life and death, not to notify the Congress, it is my view that non-notification should be withheld for no more than a few days at most." *Id.* Gates testified that if the President insisted on withholding a covert action finding from Congress for more than a few days, Gates would contemplate resignation, and he would resign if he believed that "something illegal were going on" with regard to a covert action finding that was being withheld from Congress. *Id.* at 196-97.

In summary, Title VI follows the shared-powers model first set by the National Security Act of 1947 and followed by the Hughes-Ryan Amendment, the Congressional Oversight Act of 1980, and the Statutory CIA-IG Acts of 1987 and 1988. The legislative mandate for a partnership between Congress and the president in the conduct of covert action is firmly rooted in the war and foreign affairs power-sharing arrangement established in the Constitution by the Framers.

III. Evaluating President Bush's Opposition to Title VI—Is Title VI Constitutional?

Although President Bush failed to win re-election, the arguments he and his legal advisors made against Title VI raise important constitutional issues that future presidents will need to address. President Bush believed that certain unspecified portions of Title VI are unconstitutional.²¹⁷ In his message accompanying the signing of Title VI, the President complained that requiring him to inform Congress "in a timely manner" of all covert actions²¹⁸ is unconstitutional.²¹⁹

The congressional conference committee on the Act believed that "in a timely manner" should be interpreted as "within a few days."²²⁰ When Title VI was pending before Congress, however, President Bush wrote a letter to the heads of the congressional intelligence committees about his interpretation of the "timely manner" requirement.²²¹ President Bush wrote that he would give prior notice of covert actions to Congress "in almost all instances."²²² He also stated, however, that any withholding of findings for longer periods of time would be based on his assertion of an unspecified constitutional authority.²²³ This statement suggests that the President believed that he may withhold covert action

217. Signing Statement, *supra* note 1, at 1137-38.

218. Pub. L. No. 102-88, § 602, tit. VI, § 503(c), 105 Stat. 442 (codified at 50 U.S.C.A. 413b(c)) (requiring, specifically, notice of those covert actions for which prior notification was not given).

219. *See* Pub. L. No. 102-88, § 602, tit. VI, § 503(c)(3), 105 Stat. 442 (codified at 50 U.S.C.A. 413b(c)(3)). The President said that he was glad that Congress had accepted his interpretation of the "timely notice" provision in § 503(c)(3). Signing Statement, *supra* note 1, at 1137-38. The congressional conference report, however, expressly disagreed with the President's interpretation of "timely notice," and in particular disagreed with the President's assertion that notification of covert actions could, in some cases, be withheld for longer than just a few days. H. R. CONF. REP. 166, *supra* note 1, at H5904-06.

220. H.R. CONF. REP. 166, *supra* note 1, at H5905.

221. *Id.* at H5905 (reprinting an undated letter from President Bush to the Chairman of the House Intelligence Committee).

222. *Id.*

223. *Id.* President Bush wrote that any withholding beyond a few days "will be based on my assertion of authority granted this office by the Constitution." *Id.*

findings for longer periods of time, without any articulated limit.²²⁴

The congressional conference report on Title VI emphatically disagreed with the President's interpretation.²²⁵ The report reprinted the President's letter and directly challenged the existence of any constitutional authority giving the President authority to withhold a covert action finding for more than a few days under any circumstances.²²⁶ The conference committee realized that only the judiciary could authoritatively settle this dispute.²²⁷

One reason why President Bush objected to disclosing covert action findings to Congress²²⁸ is that Title VI contains "legislatively directed policy determinations" which he claimed are unconstitutional under the U.S. Supreme Court's *INS v. Chadha* decision.²²⁹ It is necessary, therefore, to analyze the *Chadha* case and to determine its applicability to Title VI.

In *Chadha*, the Justice Department ordered that deportation proceedings against an alien be suspended.²³⁰ A statute required that the Attorney General report all suspensions of deportations to Congress.²³¹ The statute also allowed the House by resolution to reverse the suspension without presenting the "legislation" to the president for signature.²³² Chadha's deportation had been suspended by the Attorney General, but the House enacted a resolution commanding the federal district court to issue the deportation order, which the court did.²³³ Chadha appealed, arguing that the statute authorizing the House to issue a resolution to overturn the Justice Department's decision to suspend the deportation proceedings was unconstitutional.²³⁴

The Supreme Court agreed.²³⁵ The Court reasoned that under the doctrine of bicameralism, congressional powers were vested in both the House and Senate, and legislation must be passed by both houses.²³⁶ Furthermore, bills cannot become law until they are presented to the

224. *Id.* at H5905.

225. *Id.*

226. *Id.*

227. *Id.*

228. Signing Statement, *supra* note 1, at 1137-38.

229. 462 U.S. 919 (1983).

230. *Id.* at 923-25.

231. *Id.* at 924-25.

232. *Id.* at 926-28.

233. *Id.* at 928.

234. *Id.*

235. *Id.* at 952-55.

236. *Id.* at 955.

president for signature.²³⁷ These procedures were intended by the Framers as an integral part of the separation of powers concept.²³⁸

Applying this rule, the Court found that the House resolution constituted a legislative veto over the Justice Department's decision to suspend Chadha's deportation.²³⁹ Such a one-house legislative veto did not comply with the requirement of bicameral passage of legislation and presentment to the president, thus the statute conflicted with the separation of powers doctrine.²⁴⁰

Although President Bush's signing message was unclear about exactly which provisions of Title VI were invalid, or how the *Chadha* case applied, a clue about the Bush Administration's application of *Chadha* to covert actions can be found in a 1989 Justice Department memorandum to the House Select Committee on Intelligence opposing the amendments to the CIA Inspector General Act of 1989.²⁴¹ The Justice Department wrote that it opposed the requirement in the CIA-IG Act that IG reports be disclosed to the congressional intelligence committees upon request.²⁴²

The memorandum cited *Chadha* for the proposition that "Congress may not impose legal duties, including reporting duties [applying to executive branch officers and agencies], by allowing congressional committees to exercise legislative power."²⁴³ The Justice Department reasoned that the requirement of bicameralism (i.e., passage of legislation by both houses of Congress) and the separation of powers doctrine as expressed in *Chadha* prohibit congressional committees from obligating executive branch officials to report to them.²⁴⁴ Because Section 503(c) also requires the president to report to Congress regarding particular executive branch activities, it is conceivable that future presidents would share the Bush Administration's objection to such requirements in Title VI.

Contrary to the Justice Department's argument, *Chadha* does not support the proposition that statutes violate the separation of powers doctrine when they require executive branch officials to report to congressional committees. *Chadha* held that the House could not, by resolution, reverse the Attorney General's decision to suspend a deportation

237. *Id.*

238. *Id.* at 955-59.

239. *Id.* at 954-55.

240. *Id.*

241. H. REP. 215(I), *supra* note 101, at 1183. (Appendix A, letter from Assistant Attorney General Carol T. Crawford to Rep. Anthony C. Beilenson (July 18, 1989)).

242. *Id.*

243. *Id.*

244. *Id.*

hearing.²⁴⁵ Title VI does not allow Congress to veto a covert action by resolution.

Title VI does allow the intelligence committees to compel members of the executive branch to disclose information about covert actions. In this regard, the Court in *Chadha* reasoned that “[t]he Constitution provides Congress with abundant means to oversee and control its administrative creatures. . . . Other means of control, such as durational limits on authorizations *and formal reporting requirements*, lie well within Congress’ constitutional power.”²⁴⁶ The Justice Department’s memorandum simply did not address this contrary dictum within the *Chadha* decision itself. The Justice Department’s position reflected a misreading of *Chadha* and asserted the absence of congressional power in areas where *Chadha* says Congress has legitimate powers.

In a memorandum opposing the Justice Department’s interpretation of *Chadha*, the Congressional Research Service (CRS) noted that statutes requiring Executive officers to report directly to Congress about their activities were passed by the very first Congress and were recognized as a legitimate exercise of power under the Necessary and Proper Clause.²⁴⁷ It is well settled that the actions of the First Congress are persuasive evidence of what the Framers of the Constitution intended.²⁴⁸

The CRS also pointed to the present-day pervasiveness of reporting requirements. In 1988 there were 482 separate reporting requirements imposed on the President in all aspects of the executive’s power, including national security, defense, and foreign affairs.²⁴⁹ In its memorandum, the CRS noted that more than 3,250 reports were regularly required of cabinet-level officials, departments, and other executive agencies.²⁵⁰ The CRS opinion concluded that Congress’s “need for reliable information in order to fulfill its constitutionally mandated functions” gives it “plenary power to compel information needed” from the executive Branch.²⁵¹

The constitutionality of reporting requirements is further supported by the holding of *Nixon v. Administrator of General Services*,²⁵² in which the Supreme Court upheld the constitutionality of the Presidential Re-

245. *Id.* at 954-55.

246. *Chadha*, 462 U.S. at 935 n.19 (emphasis added).

247. H. REP.2151(I), *supra* note 101, at 1193. (Appendix C, memorandum from the Congressional Research Service to Rep. Anthony Beilenson (Aug. 2, 1989)).

248. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 788-90 (1983); *Carroll v. U.S.*, 267 U.S. 132, 150-52 (1925).

249. H. Rep. 215(I), *supra* note 101, at 1195 (Appendix C).

250. *Id.*

251. *Id.* at 1195-96.

252. 433 U.S. 425 (1977).

cordings and Materials Preservation Act (PRMPA).²⁵³ The PRMPA directed the Administrator of the General Services Administration to take custody of former President Richard Nixon's papers and tape recordings following his resignation from office.²⁵⁴ President Nixon challenged the constitutionality of the PRMPA on several grounds, including violation of the separation of powers and presidential privilege doctrines.²⁵⁵

In rejecting President Nixon's separation of powers claim, the Court found that the executive branch became a party to the PRMPA's regulations when President Gerald Ford signed it into law.²⁵⁶ The Court also found it highly relevant that the custody of the materials was to be given to the GSA Administrator, an executive branch officer.²⁵⁷ Because the PRMPA gave the GSA Administrator the power to screen the material and assert any applicable privileges, the materials would not be released if some valid privilege barred their release.²⁵⁸ The Court noted that there was abundant precedent for the statutory regulation and mandatory disclosure of documents belonging to the executive branch.²⁵⁹ Significantly, the Court found that Congress had the power to enact the PRMPA and to regulate the disposition of executive branch documents based on the important legislative goals which the PRMPA sought to attain.²⁶⁰

The statutory scheme for the handling of presidential documents in *Nixon v. Administrator of General Services* can be distinguished from the information sharing plan in Title VI because in the *Nixon* case, the statute required that the screening process be done by an executive branch officer. In Title VI, certain information about covert actions is required to be transmitted outside the executive branch to the congressional intelligence committees. However, those members of Congress entitled to receive covert action findings and other classified information from the president are required by law to obtain security clearances and to obey strict rules of confidentiality which have been developed in consultation with the Director of Central Intelligence, who is a member of the executive branch.²⁶¹ In developing these rules, Congress and the executive branch are required to give due consideration to protecting intelligence

253. See note following 44 U.S.C. § 2107 (1988).

254. 433 U.S. at 430.

255. *Id.* at 429.

256. *Id.* at 441.

257. *Id.* at 443-44.

258. *Id.* at 444.

259. *Id.* at 445.

260. *Id.* at 445-46.

261. Pub. L. No. 102-88, § 602 (a) (2), tit. VI, § 501 (d), 105 Stat. 441, (codified at 50 U.S.C.A. § 413 (d) (West Supp. 1992)).

sources and methods.²⁶² Title VI authorizes the executive branch to conduct its own screening of the information prior to any materials being given to the intelligence committees. At the president's sole discretion, disclosure of a covert action finding may be limited to a bipartisan group of eight congressional leaders.

Therefore, Title VI gives the president extensive powers to screen and even withhold particularly sensitive information. This is unlike the statute in *Nixon v. Administrator of General Services*, which covered the disposition of *all* presidential documents regardless of the subject matter or sensitivity and which gave the president no ability to screen the materials prior to their being turned over to the GSA Administrator.

Also, unlike the statute in *Nixon v. Administrator of General Services*, Title VI requires the president to take the initiative in disclosing to Congress only one specific, narrowly defined category of information—that concerning covert actions. As discussed in part I of this Article, the constitutional authority for conducting hostilities against foreign targets in the form of covert actions is shared by the president as Commander in Chief and by Congress under the war powers of Article I, Section 8. Title VI serves an important legislative purpose, namely, to insure that Congress receives sufficient information about covert actions in order to exercise its war powers under Article I, Section 8. Therefore, a statute which requires the president to share a very limited, narrowly defined category of information with Congress—information which is necessary to the effective carrying out of powers and duties jointly held by Congress and the executive branch—cannot be said to violate the separation of powers doctrine.

The case of *In re Neagle*²⁶³ has been cited by opponents of Title VI for the proposition that “it has been further established by Supreme Court precedent that the President is entrusted with enforcement of international law.”²⁶⁴ Under this view, congressional intrusions into the President's power to conduct international law enforcement would seem to violate the separation of powers doctrine. There is dictum in *Neagle* which states that the president's power includes “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.”²⁶⁵ This statement in *Neagle*, however, was ex-

262. *Id.* See, e.g., House Of Representatives Rule XLVIII, Rules Of Procedure For The House Permanent Select Committee On Intelligence, Rules 9 & 10.

263. 135 U.S. 1 (1890).

264. Fein, *supra* note 8, at 66.

265. *Id.* at 64. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 687 (1952) (Vinson, J., dissenting).

traneous to its holding, which was that *state courts* may not prosecute federal officers for conduct authorized by federal law, whether explicitly authorized by statute or not.²⁶⁶ Subsequent Supreme Court decisions have adopted a far less expansive conception of presidential foreign affairs powers than those expressed in the *Neagle* dictum. In *Dames & Moore v. Regan*,²⁶⁷ the Supreme Court cited with approval Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*²⁶⁸ that "when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb.'"²⁶⁹ This is in accord with the conception of the president's foreign relations powers as stated by Justice Sutherland in *U.S. v. Curtis Wright Export Corp.*:²⁷⁰ the President's power in international relations "like every other governmental power, must be exercised in subordination to applicable provisions of the Constitution."²⁷¹ Consequently, as Justice Jackson stated in *Youngstown Sheet & Tube*, "the President might act in external affairs without congressional authority, but not contrary to an Act of Congress."²⁷² Under this view of presidential powers, external affairs powers are shared between Congress and the president—and legislation such as Title VI can be a constitutionally effective check to presidential powers.

In his message accompanying the signing of Title VI,²⁷³ President Bush objected to Title VI because he felt that it detracted from his authority to withhold information, the release of which would damage foreign relations, national security, the deliberative processes of the executive branch, and the performance of the Executive's constitutional duties.

The Supreme Court has not authoritatively defined the extent of the President's authority to withhold information from Congress based on an

266. *Neagle*, 135 U.S. at 58-59, 75-76.

267. 453 U.S. 654 (1981).

268. 343 U.S. 579 (1952).

269. *Dames & Moore*, 453 U.S. at 668-69, (quoting *Youngstown*, 343 U.S. at 637-38 (Jackson, J. concurring)). In *Dames & Moore*, the Supreme Court upheld the President's right to suspend preexisting claims of private citizens against Iran and to relegate them to an Iran-U.S. claims tribunal. The Court reasoned that regarding the compromise of claims against foreign governments, Congress had indicated "its acceptance of a broad scope for executive action." 453 U.S. at 677. See also *U.S. v. Curtis-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936), a case which involved a question of the president's foreign policy powers when Congress expressly authorized the executive to act. Neither *Dames & Moore* nor *Curtis-Wright* addressed the issue of the president's foreign policy powers when Congress expressly forbids the president to act as it did when it enacted Boland II.

270. 299 U.S. 304 (1936).

271. *Id.* at 319-20.

272. *Youngstown Street & Tube Co.*, 343 U.S. at 636 n.2.

273. Signing Statement, *supra* note 1, at 1137-38.

assertion of a so-called "executive privilege" for diplomatic, military, or national security secrets in the face of a statute requiring disclosure of such secrets to Congress. Several cases involving the disposition of former President Nixon's presidential records, however, are instructive.

In *U.S. v. Nixon*,²⁷⁴ President Nixon resisted subpoenas served on him as a third party for production of his famous "Oval Office tape recordings" for use in the criminal trials of several of his former subordinates.²⁷⁵ President Nixon opposed the subpoenas in part based on the generalized claim of absolute privilege for presidential communications.²⁷⁶ He argued that this absolute privilege rested on the separation of powers doctrine (the executive versus the judicial branch) and the need for confidentiality of high-level communications.²⁷⁷ President Nixon did not base any claim of privilege on the grounds that the information sought contained military or diplomatic secrets.²⁷⁸ In dictum, the Court recognized the existence of such a privilege and observed that the courts traditionally have shown the utmost deference to areas involving the president's Article II duties.²⁷⁹ Absent such a claim, however, a criminal defendant's due process rights outweighed the president's interest in preserving the confidentiality of executive branch communications.²⁸⁰

In *Nixon v. Administrator of General Services*,²⁸¹ the Court dismissed President Nixon's generalized "executive privilege" claims noting that the privilege was a qualified one and that an absolute presidential privilege to withhold information did not exist.²⁸² As in *U.S. v. Nixon*,²⁸³ the Court observed that President Nixon did not base his claim on preservation of military or diplomatic secrets.²⁸⁴

In *Nixon v. Administrator of General Services*,²⁸⁵ the Court articulated a balancing test. The majority recognized that Congress had legitimate interests in regulating the handling of presidential papers: 1) to promote the public interest in restoring public confidence in our political

274. 418 U.S. 683, 710-11 (1974).

275. *Id.* at 686-89.

276. *Id.* at 705-06.

277. *Id.* at 706.

278. *Id.* at 710.

279. *Id.* at 710-11.

280. *Id.* at 711-14.

281. 433 U.S. 425 (1977).

282. 433 U.S. at 446.

283. 418 U.S. 683 (1974).

284. 433 U.S. at 446 n.9.

285. 433 U.S. 425 (1977).

processes in the wake of President Nixon's resignation from office;²⁸⁶ 2) to insure that future presidents would have access to the papers of prior presidents;²⁸⁷ and 3) to insure that Congress would have access to such papers pursuant to its inherent investigative powers in order to aid the congressional process of assessing the need for reform legislation.²⁸⁸ The court also noted the diminishing expectation of confidentiality of executive branch materials with the passage of time.²⁸⁹

On the other side of the balance was the need to provide confidentiality to presidential advisors in order to insure that presidents receive full and frank submissions of facts and opinions from their advisors.²⁹⁰ The Court held that the intrusion caused by the PRMPA was minimal and that President Nixon's claim of privilege "must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes."²⁹¹

Based on President Bush's signing statement, a future president may assert executive privilege over covert action information and refuse to comply with Title VI. If this privilege were asserted, the Supreme Court would likely consider giving utmost deference to this claim as the dictum in *U.S. v. Nixon* suggests.²⁹² The Court should apply a balancing test as in *Nixon v. Administrator of General Services* to determine whether Title VI unconstitutionally infringes upon presidential powers. The issue would be whether the need for keeping a national security secret (in this case, a covert action finding) outweighed any legitimate congressional interest in requiring the president to inform the intelligence committees of the secret.

The legislative intent of Title VI and of the entire statutory covert action oversight scheme as it was developed over the years has been discussed in part II of this Article. Congress, together with several presidents, including Presidents Ford, Reagan and Bush, enacted laws which were intended to put a halt to the repeated pattern of executive branch abuses of covert action over the last thirty years. These reforms have been thought to be important in restoring public confidence in the CIA and other executive branch agencies which have engaged in covert actions. As in *Nixon v. Administrator of General Services*, courts should

286. *Id.* at 453.

287. *Id.* at 452-53.

288. *Id.* at 453.

289. *Id.* at 450-51.

290. *Id.* at 448-49.

291. *Id.* at 454.

292. 418 U.S. at 710-11.

give weight to these legislative goals.²⁹³

A. President Bush's Policy Objections to Title VI

At the heart of President Bush's opposition to Title VI's covert action disclosure requirements is the policy argument that Congress has not proven itself trustworthy of protecting vital national security secrets.²⁹⁴ If it is true that Congress cannot be trusted to prevent vital national secrets from being disclosed to our adversaries or the public, then the scales in the *Nixon v. Administrator of General Services* balancing test should tip heavily in favor of a president's assertion of executive privilege for military, diplomatic, and national security information.

Some influential opponents of covert action reform have said that congressional leaks have caused grave damage to numerous sensitive operations, putting the lives of many operatives at risk and giving our most vital secrets to dangerous foreign enemies.²⁹⁵ They argue that national security secrets are safe only in executive branch custody, and therefore, secret information about U.S. covert actions should not be entrusted to Congress.²⁹⁶

Taken at face value, these kinds of allegations against Congress appear very serious. If true, Congress should not receive access to important state secrets. But the validity of these charges are not supported by the historical record.

One critic, Bruce Fein, has accumulated a list of alleged congressional leaks as evidence that Congress cannot be trusted with important state secrets.²⁹⁷ It is apparent from the first item on the list, however, that such charges are overblown. The list begins by citing former CIA Director William Colby's memoirs for the proposition that leaks in 1975 by Congress "virtually destroyed covert actions as a tool for national

293. 433 U.S. at 453.

294. See Fein, *supra* note 8, at 56-61.

295. Bruce Fein and William B. Reynolds, *Plug Intelligence Committees' Leaky Faucets of Information*, THE RECORDER (San Francisco), Oct. 3, 1989, at 6. This mirrors the argument made in Fein, *supra* note 8, at 56-61.

296. Covert actions that Mr. Fein claims were wrecked by Congress include the following CIA activities: a program to open mail from or to selected American citizens, Powers, *supra* note 17, at 369-70, 378, 469 n.21; Operation MK/ULTRA, the CIA's extensive support of research into the use of mind-altering drugs such as L.S.D., and its random experimentation on unknowing citizens, *Id.* at 378, 428 n.4; Operation Chaos, a covert action designed to study, infiltrate, and disrupt the student anti-Vietnam war movement, *id.* at 315-17; and Operation Mongoose, the Kennedy administration's attempt to "rid" Cuba of President Fidel Castro through assassination, *id.* at 171, 184.

297. Fein, *supra* note 8, at 56-58.

security or foreign policy objectives.”²⁹⁸ This is a very serious charge, and if true, would indicate that entrusting state secrets to that body is unwise. This citation implies that congressional leaks in 1975 destroyed the effectiveness of CIA covert actions. The historical record indicates the contrary.

Not Congress, but a young employee of TRW Corporation, who had a top secret security clearance, caused the most seriously damaging leak about a U.S. covert action in 1975 when he disclosed a CIA covert action against the government of Australian Prime Minister Gough Whitlam.²⁹⁹ The TRW employee also tipped off the Soviets to the existence of an ultra-secret CIA satellite monitoring and relay station in Australia which was part of the U.S. system to provide, among other things, early warning against Soviet ballistic missile launches.³⁰⁰ The TRW employee also sold the Soviets cryptological “keys” which allowed them to unscramble years and years worth of secure CIA cable traffic which the Soviets had been intercepting.³⁰¹ In other words, by 1975, the Soviets were reading the CIA’s electronic mail and they knew how to cripple our early warning network. The Soviets also stirred anti-American sentiment in Australia, an important American ally, by leaking word of the CIA’s meddling in Australian elections.

298. *Id.* at 56. Mr. Fein is apparently referring to the following passage from former CIA Director Colby’s autobiography entitled *HONORABLE MEN, MY LIFE IN THE CIA* (1978):

Sadly, the experience [of reporting all CIA covert operations to the relevant congressional committees] demonstrated that secrets, if they are to remain secret, cannot be given to more than a few Congressmen—*every* new project subjected to this procedure during 1975 leaked, and the ‘covert’ part of CIA’s covert action seemed almost gone.

COLBY, *supra* note 10, at 423 (emphasis in original). Colby noted that there were at the time eight such relevant congressional committees. *Id.*

299. *See generally* ROBERT LINDSEY, *THE FALCON AND THE SNOWMAN: A TRUE STORY OF FRIENDSHIP AND ESPIONAGE* (1979). In the mid-1970s, Christopher Boyce, a troubled teen with alcohol and drug abuse problems, obtained a U.S. government security clearance with ease and was hired by TRW Corporation to work in a secret code and communications room maintained for the CIA. *Id.* at 17, 48-55, 56-69. With a friend’s help, Boyce sold information obtained from decoded CIA cables about secret CIA funding of conservative Australian political parties. *Id.* at 83. The cables revealed that the CIA officers and members of the Australian Conservative Party were actively plotting together to unseat liberal Australian Prime Minister Gough Whitlam. *Id.* at 83.

300. *Id.* at 81-82. The KGB appears to have leaked details of the CIA’s anti-Whitlam plot and the satellite station to the Australian press and Whitlam’s Labour Party in 1975. *Id.* at 163-65. The leaks informed the Australian public that in case of a nuclear war between the United States and Soviet Union, the CIA’s Australian relay station would be a prime target for Soviet nuclear attack. *Id.* The uproar in Australia caused by these leaks not only harmed vital U.S. national security sources and methods (the satellite surveillance system) but also created intense anti-U.S. feelings in Australia, one of our most important allies. *Id.* at 357-58.

301. *Id.* at 105-07, 122-23, 144, 176.

Bruce Fein's citation wrongfully implied that Director Colby believed that disclosing covert actions to Congress is a bad idea. In fact, during 1975 and afterwards, Director Colby believed just the opposite.³⁰² In 1974, the most sensitive CIA secrets were contained in a single document prepared by the CIA IG at the request of Colby's immediate predecessor as CIA Director, James Schlesinger.³⁰³ This document, entitled "Potential Flap Activities" but referred to informally as "the Family Jewels," confirmed nearly every serious charge of CIA abuses that had been brought up to that time.³⁰⁴ The Family Jewels cataloged nearly all of the most sensitive of the CIA's past and present covert operations.³⁰⁵

These covert actions included secret CIA cooperation with organized crime figures to assassinate Fidel Castro,³⁰⁶ CIA help in assassination plots against other foreign leaders,³⁰⁷ CIA ties to the Watergate burglary,³⁰⁸ CIA infiltration and disruption of the anti-Vietnam War and Civil Rights movements,³⁰⁹ a CIA domestic mail opening program,³¹⁰ CIA dossiers on millions of ordinary American citizens,³¹¹ White House smear campaigns designed to discredit, harass, and threaten political opponents,³¹² secret CIA experimentation with dangerous mind-altering drugs upon unsuspecting Americans,³¹³ and much more.³¹⁴

302. With regard to the 1975 congressional investigations of the CIA, Director Colby wrote:

I cannot pretend that I was happy with this exposure. I was perfectly aware of the troubles it would cause, the delicate matters that were likely to be unearthed and revealed and the sensations created by everybody and his brother engaging in cheap TV theatrics at the expense of the CIA's secrets. But I must say that, unlike many in the White House and, for that matter, within the intelligence community, I believed that the Congress was within its constitutional rights to undertake a long-overdue and thoroughgoing review of the Agency and the intelligence community. I did not share the view that intelligence was solely a function of the Executive Branch and must be protected from Congressional prying. Quite to the contrary, I felt that as the Constitution grants the powers of legislation and appropriations to the Congress, the Congress was entitled to conduct an investigation of the intelligence structure.

COLBY, *supra* note 10, at 404.

303. *Id.* at 367-77.

304. *Id.* at 367.

305. *Id.*

306. CHURCH COMMITTEE INTERIM REPORT, *supra* note 10, at 257, 259-60, 259 n.3.

307. *Id.* at 291-95.

308. COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 172-182 (1975) [hereinafter the ROCKEFELLER COMM'N REP.].

309. *Id.* at 130-51.

310. *Id.* at 101-16.

311. *Id.* at 240-51.

312. *Id.* at 172-208.

313. *Id.* at 226-29.

314. *See also* CHURCH COMMITTEE INTERIM REP., *supra* note 10, at 255-84.

In December 1974, Director Colby decided to give Congress, the press, and the public access to the Family Jewels, that is, all except confirmation of assassination plots.³¹⁵ Director Colby had personally leaked some of this information to investigative reporter Seymour Hersh, who wrote a December 22, 1974 *New York Times* headline story entitled: "Huge CIA Operation Reported in U.S. Against Anti-War Forces, Other Dissidents in Nixon Years."³¹⁶ Colby then deliberately used his congressional testimony before the Church Committee³¹⁷ in January 1975 to plant what he later termed a "bombshell" in the press—he personally authorized a watered-down version of the Family Jewels (minus references to assassinations) to be released by Congress to the public.³¹⁸

The next month, President Gerald Ford inadvertently leaked the CIA's biggest secret, its involvement in assassination plots against foreign leaders, during a private meeting with the editors of the *New York Times*.³¹⁹ Thereafter, throughout 1975, Director Colby willingly disclosed to Congress nearly every CIA secret,³²⁰ other than sources, methods, and current operations, with the intent that these secrets be publicly disclosed.³²¹ Colby reasoned that nearly all of the secrets revealed were "dead" ones of little value.³²² He released them because he believed it to be within Congress's constitutional rights to thoroughly investigate the CIA.³²³ In doing so, Colby has been credited with saving the agency from being dissolved by Congress in the wake of public anger at the nature of CIA covert operations which had been publicly confirmed by

315. COLBY, *supra* note 10, at 402.

316. RANELAGH, *supra* note 9, at 571-72.

317. Named after its chairman, Senator Frank Church.

318. According to Colby's memoirs, he was "privately delighted" that Congress intended to release these secrets. He wrote "I had been hoping to get it out—believing it to be the most effective way to counter the misconceptions fostered by Hersh's article." COLBY, *supra* note 10, at 402.

319. POWERS, *supra* note 17, at 290-91.

320. Including assassination plots.

321. RANELAGH, *supra* note 9, at 597. Colby was the Church Committee's source for most of the information about the CIA's past misdeeds. *Id.* at 594.

322. COLBY, *supra* note 10, at 15. He wrote:

The Agency's survival, I believed, could only come from understanding, not hostility, built on knowledge, not faith. And I thought this could be done without exposing the true secrets that needed to be kept, the names of the Americans and foreigners who worked with us under cover, and the sensitive technologies that could easily be made useless if revealed to the intended targets.

See also RANELAGH, *supra* note 9, at 598 (noting that "[n]o real operational changes were effected by [Colby's] revelations. Secrets tend to be valuable as secrets for only a narrow stretch of time. Nearly all the secrets revealed were 'dead.' The exercise was a file clearing, an emptying of the lumber room.").

323. RANELAGH, *supra* note 9, at 592-93. See also *supra* note 302 (quoting Colby as favoring the constitutional right of Congress to oversee executive branch intelligence operations).

President Ford and other CIA officials before the Church Committee investigations.³²⁴

One of the most dramatic consequences of Colby's decision in 1975 to go public with details of CIA misdeeds was the destruction of former CIA Director Richard Helms's career.³²⁵ The entire congressional hearing and disclosure process which began in 1975, however, contributed to a restoration of public confidence in the CIA.³²⁶

It is therefore inaccurate and highly misleading for critics such as Fein to blame Congress for destroying U.S. covert actions in 1975 and then to use that allegation to argue against Executive-congressional information sharing. In fact, leaks from TRW Corporation in 1975 disclosed the CIA covert action against Australian Prime Minister Whitlam, the CIA's global "early warning" satellite network, and the system for decoding CIA cables. These leaks seriously undermined the CIA's ability to conduct covert actions and secret intelligence gathering operations abroad. President Ford's leak about assassinations and Director Colby's decision to publicize the Family Jewels provided to opposition intelligence services a virtual operations manual on CIA covert actions.³²⁷ By the time Congress allegedly destroyed the effectiveness of CIA covert actions in 1975, leaks of sensitive information from non-congressional sources about embarrassing CIA misdeeds had already generated intense public pressure to severely restrict the agency's covert operations.

324. RANELAGH, *supra* note 9, at 575, 594.

325. President Ford fired Helms as Ambassador to Iran and Helms subsequently plead guilty to a federal perjury charge for lying to the Senate Foreign Relations Committee about CIA covert actions against Chilean President Salvador Allende. POWERS, *supra* note 17, at 10-12, 378-95.

The Church Committee hearings also left psychological scars upon a young C. Boyden Gray, later to become President Bush's White House Counsel and the chief Bush Administration opponent to congressional oversight of intelligence. Gray, *supra* note 7. Gray wrote:

Many years after my father left public service, he was called before the Church committee, investigating U.S. intelligence. In my view, the committee, animated by a desire to prove that the U.S. intelligence community was something of a rogue elephant, treated him badly. They ambushed him, did not give him any right to a lawyer, did not give him any opportunity to review the documents that they sprung on him, and did not give him any right to rebut certain unjustified assertions that they made afterwards. On the whole, it was an enormously bitter experience for him, so I think I have personal knowledge of how the congressional hearing process can impinge on individual liberties.

Id. One can only speculate about the extent, if any, to which Gray's attitudes later colored his legal advice to President Bush on this issue. See *supra* note 7.

326. RANELAGH, *supra* note 9, at 599.

327. Colby wrote in his memoirs that "I remain satisfied that [mine] was the correct approach, pragmatically and constitutionally, and eventually resulted in the Church Committee coming to fair conclusions about American intelligence." COLBY, *supra* note 10, at 407.

Recently, some of the more significant and politically embarrassing revelations of U.S. covert actions have resulted from the paradoxical requirement that secret operations must be revealed to foreign contacts and even opponents, if not to Congress. In a recent example, the NSC staff-run "arms for hostages" deal with Iran was leaked because the Beirut newspaper *Al-Shiraa* picked up on rumors started by the hostage-takers.³²⁸ That revelation followed closely on the heels of another major gaffe. One month earlier, Nicaragua's Foreign Secretary was able to tell an ABC *Nightline* audience about Oliver North's secret activities because the private crew of an Enterprise-run air mission shot down over Nicaragua took their wallets with them.³²⁹

The secret involvement of Panamanian General Manuel Noriega, a convicted drug trafficker, in the Contra operation is reminiscent of CIA cooperation with organized crime chiefs in the 1960s.³³⁰ It is both ironic and highly revealing that some past intelligence officials thought of peo-

328. BRADLEE, *supra* note 128, at 454-55.

329. IRAN-CONTRA REP., *supra* note 14, at 144. SKLAR, *supra* note 123, at 324-25.

330. Former CIA Director Colby admitted to Congress in 1975 that top Mafia officials worked on a contract basis for the CIA during the early 1960s in order to assassinate Fidel Castro. CHURCH COMMITTEE INTERIM REP., *supra* note 10, at 257, 259-60, 259 n.3. *See also* POWERS, *supra* note 17, at 120-21.

During Oliver North's criminal proceedings, the U.S. Department of Justice admitted that Panamanian dictator Manuel Noriega received a salary between 1971 and 1986 of over \$160,000 for services rendered as a CIA contract agent and over \$162,000 for his work on behalf of U.S. Army Intelligence. David Johnston, *U.S. Admits Payments to Noriega*, N.Y. TIMES, Jan. 19, 1991, at A14. The Justice Department also admitted that Noriega made an offer to Oliver North in mid-1986 to assassinate Sandinista leaders in Nicaragua in exchange for U.S. government help in clearing up Noriega's problems with the U.S. Drug Enforcement Agency, which suspected that Noriega was engaged in cocaine trafficking and money laundering. Yost, *North Links Bush to Rebel Aid*, S.F. EXAMINER, Apr. 6, 1989, at 1. National Security Advisor John Poindexter did not authorize Noriega to carry out assassinations, but did consent to have Noriega's forces carry out sabotage inside Nicaragua against the Sandinistas. *Id.* *See also* KERRY REP., *supra* note 68, at 92-95. Noriega also secretly provided donations and paramilitary assistance to the Contras between 1984 and 1986. *Id.* On April 9, 1992, Noriega was convicted in U.S. District Court of eight felonies, including conspiracy to manufacture and distribute cocaine, racketeering, money laundering, and cocaine smuggling between 1981 and 1986. Jackson and Clary, *U.S. Jury Convicts Noriega of 8 Drug Related Charges*, S.F. EXAMINER, Apr. 10, 1992, at A1.

The second-highest official in the State Department's Bureau of Intelligence and Research, Francis McNeil, testified before Congress that Noriega's participation in cocaine smuggling was, by 1984, common knowledge inside U.S. intelligence circles. *Drugs, Law Enforcement And Foreign Policy: The Cartel, Haiti And Central America, Hearings Before The Senate Subcomm. On Terrorism, Narcotics And International Operations, Senate Comm. on Foreign Relations, Part 3*, 100th Cong., 2d Sess. 37-38 (1988). McNeil testified that he was present at a 1986 meeting of representatives of various U.S. intelligence services on Nicaragua, where top Reagan Administration officials, in particular, Elliott Abrams, decided to use Noriega's help against the Sandinistas and not do anything to stop Noriega's narcotics trafficking "until after Nicaragua was settled." *Id.* at 39, 42, 324-25.

ple such as Noriega and Mafia chiefs as trustworthy allies, but regarded the leaders of the Intelligence Committees as being unworthy of sharing in important state secrets.³³¹

The policy argument behind "executive privilege" for state secrets is that leaks from Congress pose a serious threat to national security.³³² There are several reasons why that argument is unpersuasive.

First, the CIA by law screens Congress from all highly sensitive information about intelligence sources and methods.³³³ Therefore, Congress never obtains access to the most sensitive of national security secrets. Second, it has been just this sort of highly classified information about intelligence sources and methods that has been repeatedly leaked for over 30 years by the military, the CIA, and private defense contractors. The historical record shows that from the beginning of the Cold War to the end of the Reagan years, penetration of U.S. and allied intelligence by hostile governments has given the opposition a virtual window into the inner workings of U.S. intelligence.

A few examples discussed below illustrate the extent to which U.S. intelligence was penetrated by hostile intelligence services. One of the first CIA covert actions was "Operation Valuable," a disastrously unsuccessful U.S.-British effort to use an exile group to overthrow the Communist government of Albania in the early 1950s.³³⁴ Operation Valuable illustrates one of the central problems with preserving secrecy in covert actions when non-U.S. personnel are involved. Operation Valuable failed because H.A.R. (Kim) Philby, one of two British representatives working with the CIA on the operation, was actually a double agent spying on behalf of the Soviet Union.³³⁵

Larry Wu-Tai Chin, a distinguished CIA translator and analyst, sold top secret documents to the Peoples' Republic of China throughout his entire thirty-three-year CIA career.³³⁶ Former TRW employee Christopher Boyce also made devastating disclosures about U.S. intelli-

331. POWERS, *supra* note 17, at 146-49 (describing attitude of CIA officials toward working with organized crime figures to assassinate Castro). *See also id.* at 119-20 (describing former CIA Director Richard Helms's attitude toward congressional investigations of the CIA); IRAN-CONTRA REP., *supra* note 14, at 122-33, 137-42, 149-50 (showing contemptuous attitude of NSC staff officials Poindexter, McFarlane, and North toward Congress).

332. Fein, *supra* note 8, at 56-61.

333. Title VI, Sec. 501(d). *See, e.g.*, House Of Representatives Rule XLVIII, Rules Of Procedure For The House Permanent Select Committee On Intelligence, Rules 9 & 10.

334. *See* PRADOS, *supra* note 17, at 45-51.

335. *Id.* at 48, 50.

336. THOMAS B. ALLEN & NORMAN POLMAR, MERCHANTS OF TREASON 298-303 (1988). Chin had received a distinguished service medal from the CIA. *Id.* at 298.

gence operations' to Soviet intelligence.³³⁷ As previously discussed, Boyce sold Soviet agents the blueprints for what was, at the time, the CIA's most important spy satellite.³³⁸ He also sold the Soviets the "keys" which allowed them to unscramble vast quantities of supposedly secure CIA cable traffic.³³⁹

Working for the Soviets, the Walker-Whitworth spy ring completely compromised secret U.S. Navy communications from 1968 to at least 1985.³⁴⁰ Edward L. Howard, a CIA Soviet Union specialist, was uncovered as a Soviet spy in 1985, but he evaded capture and successfully defected to Russia.³⁴¹ By 1986, Howard's identification of U.S. agents in Russia to the KGB had "devastated the CIA's human intelligence operations in the Soviet Union."³⁴² Finally, the most important Soviet agent to defect to the United States, KGB Colonel Vitaly Yurchenko, was dining at a Washington restaurant when he told his CIA bodyguards that he was going outside to take a walk.³⁴³ The agents allowed him to leave alone, and he used the opportunity to defect back to the Soviet Union, taking important CIA information with him.³⁴⁴

Throughout the Cold War, critics such as Bruce Fein have complained that Congressional leaks harmed national security. However, disastrous leaks by Chin, Boyce, the Walker-Whitworth ring, Howard, Yurchenko, and many others³⁴⁵ from the 1950s to the mid-1980s gave opposition intelligence services vast knowledge about U.S. intelligence operations, sources, and methods, knowledge far beyond what the CIA made available to Congress. In short, the harm to national security caused by congressional leaks during the Cold War has been greatly exaggerated.

B. Conclusion

The *Nixon v. Administrator of General Services*³⁴⁶ balancing test

337. LINDSEY, *supra* note 299, at 17, 48-55, 56-69.

338. *Id.* at 91-93, 100-01, 105-07, 122-23, 126-28, 145-46, 256-63, 345.

339. *Id.* at 105-07, 122-23, 144, 176.

340. ALLEN & POLMAR, *supra* note 336, at 21-23, 272, 275. The U.S. Navy "keylists" provided by the ring were "pure platinum" to Soviet cryptologists. *Id.* at 334. This information most likely allowed the Soviets to continue to decode U.S. communications after 1985. *Id.* at 335.

341. *Id.* at 379-85.

342. *Id.* at 174. One CIA official reportedly said that Howard "wiped out" the CIA's Moscow Station. *Id.* at 415.

343. *Id.* at 308.

344. *Id.*

345. Over 70 Americans have been convicted of espionage since 1953. *Id.* at 336-45.

346. 433 U.S. 425 (1977).

which assesses executive privilege claims weighs several considerations. The Court recognized that Congress had legitimate interests in regulating the handling of presidential papers and materials; promoting the public interest in restoring public confidence in our political processes;³⁴⁷ insuring that future presidents would have access to materials generated by prior presidents;³⁴⁸ and insuring that Congress would have access to such papers pursuant to its inherent investigative powers in order to aid the congressional process of assessing the need for reform legislation.³⁴⁹

On the other side of the balance was the need to provide confidentiality to presidential advisors in order to insure that present and future presidents receive full and frank submissions of facts and opinions from their advisors.³⁵⁰ In that balance, courts should also consider the dictum in *U.S. v. Nixon*,³⁵¹ which suggested that the utmost deference should be given to claims of executive privilege over military, foreign affairs, and national security secrets.³⁵²

President Bush's opposition to Title VI's covert action disclosure requirements was based on a policy argument that Congress has not proven itself trustworthy of protecting vital national security secrets.³⁵³ Were this true, then the scales in the *Nixon v. Administrator of General Services* balancing test should tip heavily in favor of a president's assertion of executive privilege over covert action information. The historical record proves, however, that charges of congressional malfeasance in handling important state secrets are unfounded.

The history of post-World War II leaks from the executive branch and the private sector highlight the invalidity of the assumption that national security secrets, particularly secrets concerning covert actions, are safe only in executive branch hands. On the other hand, history shows that executive officers have frequently invoked executive privilege over national security information about covert actions in order to cover-up illegal, immoral, and politically embarrassing activity.³⁵⁴ That record of

347. *Id.* at 453.

348. *Id.* at 452-53.

349. *Id.* at 453.

350. *Id.* at 448-49.

351. 418 U.S. 683 (1974).

352. *Id.* at 710-11.

353. Gray, *supra* note 7, at 263-65. See also Fein, *supra* note 8, at 56-61.

354. In the wake of the Watergate affair and President Nixon's resignation, Senator Howard Baker, a member of the Senate Select Watergate Committee, made the following observation:

In short, recent experience indicates that the Federal Government exhibits a proclivity for overclassification of information, especially that which is embarrassing or incriminating; and I believe that this trend would continue if judicial review of classified documents applied a presumption of validity to the classification as recom-

abuse seriously undermines the rationale for keeping Congress in the dark about U.S. covert actions. The historical record also undermines the rationale behind the theory that courts should give presidents extreme deference to their claims of privilege over information about U.S. covert actions. The record shows a pattern of illegal and immoral conduct surrounding U.S. covert actions over the last thirty years, misuse by presidents and other executive officers of U.S. covert action resources, and misuse by some executive branch officers of "executive privilege" to shield themselves from criminal liability. Therefore, in applying the balancing test for claims of executive privilege under *Nixon v. Administrator of General Services*, courts should give little deference to executive branch claims of privilege when Congress seeks information about covert actions under Title VI. Courts should hold that a claim of executive privilege over covert action information "must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes."³⁵⁵

As one commentator eloquently stated, "the constitutional values at stake are nothing less than the political accountability of the military and the intelligence services, democratic control of foreign policy, and the rule of law."³⁵⁶ These core values of our democracy and the public interest in insuring political accountability on the part of our intelligence services, combined with Congress's legitimate need for information from the Executive about U.S. covert actions, tempered by rules allowing the executive branch to screen out sensitive information about intelligence sources and methods, should outweigh any generalized claim of executive privilege over covert action information.

IV. Conclusion

After Title VI was signed into law, the Senate Intelligence Committee raised the question of timely notice of covert actions to Congress during the confirmation hearings of CIA Director Robert Gates in

mended by the President. . . . In balancing the minimal risks that a Federal judge might disclose legitimate national security information against the potential for mischief and criminal activity under the cloak of secrecy[,] I must conclude that a fully informed citizenry provides the most secure protection for democracy.

Turner v. Ray, 587 F.2d 1187, 1209 (D.C. Cir. 1978) (Wright, J., concurring) (quoting Senator Baker's Senate statement prior to the congressional override of President Ford's veto of amendments to the Freedom of Information Act, 5 U.S.C. § 552 (1982)).

355. 433 U.S. at 454.

356. Fagelson, *supra* note 25, at 275-76.

September 1991.³⁵⁷ Director Gates testified that he would interpret "timely manner" in Section 503(c)(3) to mean "within a few days."³⁵⁸ He also volunteered that if a covert action finding ordered that Congress not be informed of any particular covert action, he would vigorously recommend to the president that Congress be informed, and that he would resign from office unless the president did not take his advice at least within a few days after the operation had begun.³⁵⁹ Although Gates was speaking not as a lawyer, but as a policymaker with many years of experience inside the CIA,³⁶⁰ his testimony gave some encouragement that Title VI would have an effect on changing the way that covert operations are managed.

Two episodes have dimmed that hope. First, President Bush's message upon signing the Intelligence Authorization Act, Fiscal Year 1991, gives no indication that he, or any like-minded successor, will notify Congress of all covert actions as Congress clearly intended in Title VI. The criticisms of Title VI in the signing message were foreshadowed by earlier presidential arguments against post-Iran-Contra covert action reform. Thus, it appears that by these arguments, the President has sought to create for himself and his successors an exemption or legal justification for continuing to conduct "business as usual" where covert actions are concerned.

This assertion brings with it the implication that Title VI might not be effective in preventing future covert action abuses. Nothing Congress or the law could do would prevent a President from ordering that Congress be kept completely in the dark about selected covert actions, particularly those which involve the potential to be politically embarrassing. In that case, reforms in Title VI will be meaningless because it is precisely those potentially embarrassing episodes, such as the Iran-Contra Affair, that Title VI was intended to prevent. After all, one factor contributing to the unlawful and abusive way the Iran-Contra operations were conducted was the assumption of this very privilege to conceal information about covert actions from Congress.

Second, in spite of his pledge to be more open with Congress, Director Gates recently engaged in a battle with House Banking Committee Chairman Henry Gonzalez over classified information sought by his committee regarding covert U.S. military and financial assistance to Iraq

357. See generally REPORT OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE WITH ADDITIONAL VIEWS, NOMINATION OF ROBERT M. GATES TO BE DIRECTOR OF CENTRAL INTELLIGENCE, S. EXEC. REP., No. 19, 102d Cong., 1st Sess. (1991).

358. *Id.* at 196-97 (quoting Gates's testimony (Sept. 16, 1991)).

359. *Id.*

360. *Id.*

in the years immediately preceding Iraq's invasion of Kuwait in August 1990.³⁶¹ After a nearly two year investigation by the House Banking Committee, Representative Gonzalez charged that senior White House officials secretly provided military, intelligence, and financial aid to the government of Iraqi President Saddam Hussein.³⁶² Gonzalez charged that top White House officials knowingly allowed the U.S. Department of Commerce to continue providing guarantees on risky private agricultural loans to the Iraqi government, even though the CIA knew that Iraqi-run U.S. front companies were illegally diverting substantial amounts of the loan money to purchase military equipment and other items necessary for developing chemical, biological and nuclear weapons.³⁶³ Gonzalez made some of his charges based on a secret CIA report entitled "Iraq-Italy, Repercussions of the BNL-Atlanta Scandal."³⁶⁴ According to Gonzalez, the CIA knew in September 1989 that U.S.-guaranteed loans issued by the Atlanta branch of Italy's Banca Nazionale del Lavoro (BNL) to Iraq were used to finance front companies engaged in purchasing sensitive military technologies.³⁶⁵ The White House allegedly concealed this information from Congress and then pressured Congress to approve \$1 billion in guarantees for loans to Iraq to be issued by BNL-Atlanta.³⁶⁶

Instead of cooperating with the Banking Committee, CIA Director Gates responded to these allegations by cutting off Representative Gonzalez's access to CIA documents about BNL-Atlanta.³⁶⁷ In a recent letter, Director Gates wrote that Representative Gonzalez's references to the CIA report on BNL-Atlanta on the House floor had revealed highly classified and particularly sensitive information.³⁶⁸ The CIA's Office of Security announced that it was investigating Gonzalez's revelations to determine their impact on national security.³⁶⁹

If we are to give Director Gates the benefit of the doubt, we must assume that U.S. national security has been harmed by the public revela-

361. *Target Blasts Probe by CIA*, S.F. EXAMINER, Aug. 1, 1992, at A1, A2.

362. See generally 138 Cong. Rec. H6005 (daily ed. July 7, 1992) (statement of Rep. Gonzalez). See also *Iraq Export List Wasn't Complete*, S.F. CHRON., June 22, 1992, at A3.

363. D. Frantz and M. Waas, *CIA Reportedly Confirms It Knew About Iraqi Plan*, S.F. Chron., Aug. 6, 1992, at A2. ("The CIA has acknowledged in a classified report that the agency had strong evidence about Iraq's worldwide effort to buy nuclear-weapons technology a month before President Bush signed an order mandating closer ties to Baghdad in the fall of 1989, according to sources.")

364. 138 CONG. REC. H6011 (daily ed. July 7, 1992).

365. *Id.*

366. *Id.*

367. *Target Blasts Probe By CIA*, S.F. EXAMINER, Aug. 1, 1992, at A1, A12.

368. *Id.*

369. *Id.*

tion that the CIA knew in 1989 how Iraq was using the BNL-Atlanta loans. Presumably, the source of this intelligence has value today, and thus, the identity of the source should be protected.

On the other hand, it is legitimate to question whether this intelligence source ever had any value. The 1989 CIA warnings were apparently ignored because the Bush Administration subsequently continued to press Congress to approve guarantees on BNL-Atlanta loans. Between 1989 and 1990, Iraq used U.S.-subsidized loans to upgrade its military capabilities without interference from the Bush administration. Ultimately, CIA warnings to the Bush Administration predicting Iraq's invasion of Kuwait in August 1990 were disregarded.³⁷⁰

There is a larger issue at stake, one that is beyond the question of the CIA's culpability in arming Iraq in the years before Operation Desert Storm. That is the question of accountability of our intelligence services. During Director Gates's confirmation hearings, he repeatedly promised Congress that he would improve the CIA's accountability, in his words, by being "truthful, straightforward, candid and forthcoming in dealings with Congress."³⁷¹ He testified that if he were confirmed as CIA director, "whatever differences may develop from time to time between the Intelligence Committees and the Executive branch generally or CIA in particular, I would resign rather than jeopardize that relationship of trust and confidence."³⁷² Such assurances were important in overcoming strong opposition to his confirmation by some members of the Senate Intelligence Committee.³⁷³ The attack on Representative Gonzalez's investigation of the Bush Administration's Iraq policy shows that Director Gates's assurances to Congress were meaningless. Consequently, despite the enactment of Title VI, and despite Director Gates's personal promises that he would improve the CIA's accountability, it appears that the Bush Administration continued to act as if it was "business as usual" when it came to congressional oversight of intelligence.³⁷⁴

370. D. Frantz, *Pentagon Bid to Toughen Bush Message to Hussein Told*, L.A. TIMES, Oct. 28, 1992, at A8.

371. S. EXEC. REP. No. 19, 102d Cong., 1st Sess. 196 (1991) (quoting Gates's testimony (Sept. 16, 1991)).

372. *Id.*

373. *Id.* at 220 (additional views of Sen. Dennis DeConcini). *See also id.* at 218 (additional views of Sen. Ernest F. Hollings).

374. *See Iraq Export List Wasn't Complete, Paper Reports*, S.F. CHRON., June 22, 1992, at A3. The article stated that:

U.S. Commerce Department records of technology exports to Iraq from 1985 to 1990 were altered to remove any mention of military items before the lists were turned over to Congress The Commerce Department list was provided in October 1990 to Representative Doug Barnard, D-Ga, who asked the department's inspector general to investigate after an anonymous caller said information had been deleted

This confrontation with Congress over Iraq, coming so soon after the enactment of Title VI, shows that it is very possible that the courts will one day be called upon to decide on Title VI's constitutionality. If that happens, the courts should look at the policy and history behind intelligence oversight laws, culminating with Title VI. They should also look at Title VI's foundation in the text and history of the Constitution.

Courts should recognize that Article I, Section 8 of the Constitution vests Congress with a panoply of war powers by including the power to make rules governing the conduct of U.S. armed forces overseas. Title VI is a statutory extension of this power to make rules governing the conduct of hostilities. Congress also has the power over appropriations legislation, and the president is bound by the Take Care Clause to obey current statutory restrictions against spending unappropriated funds. The prohibition in Title VI that the president may not approve covert actions conducted in violation of U.S. statutes finds its foundation in these constitutional provisions.

Furthermore, Congress has plenary power to investigate executive agency operations to prevent fraud and criminal activity. Title VI's requirement that the president submit covert action findings in advance, or at least in a timely manner, to Congress is an outgrowth of Congress's investigatory powers. The statutory scheme for oversight of covert actions has been the product of numerous scandals including Iran-Contra. The record shows that every statutory intelligence reform from Hughes-Ryan to Title VI has been drafted after extensive congressional investigations uncovered serious abuses. The oversight laws have been guided by the theory that the power to conduct covert actions is shared between the president and Congress. In order to preserve the constitutional partnership between the president and the Congress with regard to the exercise of war powers, and in consideration of Congress's lawful interest in regulating the exercise of these powers, courts should find Title VI to be entirely constitutional.

Id. Gates announced that he will resign in January 1993. *CIA Director to Quit in January*, S.F. CHRON., Nov. 7, 1992, at A4.

