THE CONSTITUTION AND COVERT ACTION

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Twin statutes governing the President's authority to employ the Central Intelligence Agency or other executive branch arms to conduct covert operations in furtherance of national security or foreign policy goals are flagrantly unconstitutional. They gratuitously intrude Congress on the President's authority to enforce international law, to deter or repel aggression threatening national security, and to safeguard state secrets. Further, the statutes advance no legitimate constitutional power of Congress.

The Majority Report of the House and Senate Iran-Contra committees erred in maintaining that President Reagan violated these laws by failing to make written findings and to notify select congressional intelligence committees of covert actions.[1] A President is not bound by unconstitutional laws.

I.

In 1947, Congress established the Central Intelligence Agency (CIA). It was empowered to advise the National Security Council regarding national security intelligence activities, to protect intelligence sources and methods, and to perform other functions and duties relating to intelligence affecting the national security as the National Security Council may from time to time direct. The latter power has been accepted by the Chief Executive and Congress as contemplating covert action.

The creation of the CIA to undertake covert action in support of national security or foreign policy goals of the President was akin to the creation of the Department of Justice in 1870 to enforce civil or criminal statutes enacted by Congress. The Constitution's separation of powers

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1. For example, in the selling of U.S. arms to Iran in exchange for three American hostages, and in supporting the Nicaraguan contra forces seeking to dislodge the governing Sandinista regime.

prohibits Congress from dictating or controlling the President's or the Justice Department's law enforcement discretion in the interpretation of the law, in the initiation of criminal prosecutions, or in the promulgation of rules pursuant to delegated legislative power.[2]

Such intrusions would unconstitutionally combine lawmaking with law execution. If Congress is dissatisfied with the Justice Department's execution of the law, the remedy is either impeachment of wrongdoing officials, abolition of the Department, an aggregate reduction of Department appropriations, or other expressions of censure. But, Congress is not entitled to arrogate law enforcement prerogatives because of a disagreement over their exercise. Thus, Congress could not utilize its power of the purse to instruct the Department against initiating antitrust prosecutions of farmer cooperatives or labor unions, to mandate a prosecution against Manuel Noriega for drug trafficking, or to be informed of the testimony of all persons called before grand juries.

The CIA and other intelligence agencies perform a role in the execution of national security and foreign policy, or in the enforcement of international law, that mirrors the role of the Department of Justice in the administration of civil and criminal laws. That means, correspondingly, the Congress cannot interfere with the President's choice of how to use intelligence agencies in furtherance of legitimate constitutional objectives. Thus, Congress cannot prohibit the CIA from operating in enumerated countries (such as Nicaragua or Angola), building a tunnel under the Berlin wall to conduct wiretapping, aiding the enforcement of international law, rescuing American citizens, protecting American property, or deterring aggression that violates treaties.

These types of restrictions interfere with the President's discretion over administration of the 1947 National Security Act, and over international law enforcement. They are akin to a statute prohibiting the Department of Justice from indicting Daniel Ortega of Nicaragua for illegal drug smuggling, and would be unconstitutional.

Until 1974, Congress desisted from handcuffing the President's use of covert action and intelligence operations. During that twenty-seven year period, the executive branch displayed a remarkable capacity for maintaining the secrecy of covert operations when disclosures would have been their epitaphs. Thus, the CIA conducted successful missions in Italy and other Western European countries in the aftermath of World War II, and in Iran, Guatemala, and the Phillipines during the 1950's. The Agency was maladroitly employed in the 1961 Bay of Pigs fiasco, in attempts to assassinate Fidel Castro, and in seeking the overthrow of

2. *See* Bowsher v. Synar, 106 S. Ct. 3181 (1986); INS v. Chada, 462 U.S. 919 (1983).

Sukarno in Indonesia. But these missions did not fail for want of secrecy. CIA involvement in Chile in 1970 and 1973, and in Laos during the 1960's, was also held secret. The U2 spy plane was developed by the CIA and Lockheed Aircraft expeditiously and inexpensively without breaches of secrecy.

A handful of select congressmen were typically informally informed by the CIA of its covert activities during the 1947-1974 period. The oversight model followed the executive branch's limited disclosures to Speaker of the House Sam Rayburn and a handful of other legislators of the status of the Manhattan Project during World War II.

II.

In 1974, Congress enacted the Hughes-Ryan amendment to the 1961 Foreign Assistance Act,[3] because it disagreed with past CIA covert actions. The statute requires the President to make a finding that a CIA covert action "is important to the national security of the United States" before its initiation will be considered justified.[4] It is comparable to a statute that would compel the President to find that a proposed indictment of a foreign official implicated in drug smuggling would significantly reduce the use of illegal narcotics in the United States before it could be presented to a federal grand jury. The latter law would unconstitutionally intrude on the President's law enforcement prerogatives. Similarly, the Hughes-Ryan amendment unconstitutionally denies the President discretion over the use of the CIA to further national security objectives. Congress, for instance, could not proscribe the President's use of the CIA to overthrow Iran's Ayatollah Khomeini unless he first finds beyond a reasonable doubt that the gambit will succeed.

To complement the Hughes-Ryan amendment, Congress established a bevy of congressional intelligence oversight committees in 1975. They were unwieldy, duplicative, and burdensome to intelligence agencies. Consequently, Congress revamped its overseeing role with the Intelligence Oversight Act of 1980.

Subject to the constitutional prerogatives of the President, the Act imposes reporting requirements on the Director of the CIA and the head of any other agency involved in intelligence activities. They must fully and timely inform the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence of all intelligence activities undertaken on behalf of the United States. The twin committees

3. 22 U.S.C. § 2422 (1982).
4. *Id.*

must be informed of any significant anticipated intelligence activity, but their approval is not required to initiate covert action.

If the President determines that extraordinary circumstances which could affect the vital interests of the United States are present, he may limit prior notice of significant intelligence activities to a so-called "Gang of Eight": the chairmen and ranking members of the Intelligence Committees, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate.

Intelligence agency heads are also required to report to the Intelligence Committees in a "timely" fashion any illegal intelligence activity or significant intelligence failure, and any remedial action.

If the President authorizes an intelligence activity in a foreign country, excluding the collection of necessary intelligence, without prior notice to the Intelligence Committees or the Gang of Eight, he must report to the committees in a "timely" fashion with reasons for the bypass.

House Rule XLVIII created a sixteen-member Permanent Select Committee on Intelligence. Its members are limited to six years of continuous service, which prevents their acquiring expertise regarding the intelligence community, its problems, or its contributions to the national security.

Section seven of the House Rule empowers the Select Committee to publicize classified information, including intelligence methods or sources. If the President certifies the national interests of the United States would be adversely affected by disclosure, then the committee must obtain leave of the House to publicize the information. Individual members may not disclose information that the Select Committee has determined to keep secret.

Senate Resolution 400 of the 94th Congress created a fifteen-member Senate Select Committee on Intelligence with powers and procedures that echo those of its House counterpart.

III.

The congressional Intelligence Oversight Committees have compiled a deplorable record of unauthorized leaks of covert activities, which have severely damaged the nation's security and foreign policy objectives.

Former Director of the CIA William Colby recounted in his memoirs that every planned covert action reported to congressional Intelligence Committees in 1975 leaked, and virtually destroyed covert action as a tool for furtherance of national security or foreign policy objectives.

In January 1976, the House Intelligence Committee, under Chairman Otis G. Pike, declared an intent to publicize a report that the White House asserted was top secret. The full House, however, voted 246-124 to block release of the committee report until the President certified that it had been expunged of information that would adversely affect the nation's intelligence activities. To circumvent the House vote, a copy of the report was leaked to Daniel Schorr of CBS News, who transmitted it to the *Village Voice* for publication.

In November 1975, Chairman of the Senate Intelligence Committee, Frank Church, sought full Senate approval for release of a committee report detailing CIA involvement in assassination attempts on foreign leaders. The President objected to publicity because it would disclose secret information. When the Senate met in executive session to consider Senator Church's importuning for release, unexpected opposition developed. Accordingly, Church and the Democratic majority voted to adjourn the session without a vote to enable the committee to release the report on its own authority.

In a 1986 Brit Hume article carried in *The New Republic*, Senate Intelligence Committee member Joseph Biden boasted that he had twice threatened to disclose covert action plans by the Reagan administration that were "hairbrained." Such disclosures by Biden would have violated the committee's rules.

In 1984, CIA officials disclosed to the Senate Select Committee information suggesting that India was contemplating a preemptive attack against Pakistan's nuclear development facilities. The information leaked, and alerted India that its security had been penetrated by a French intelligence ring which was cooperating with the United States. The French penetration was thus subsequently lost.

On March 15, 1987, Senator David Durenberger, former chairman of the Senate Intelligence Committee, reported to the American Israeli Public Affairs Committee that the CIA had recruited an Israeli military officer to spy on Israel for the United States. The Senator's disclosure seemed intended to counteract anti-Israeli sentiments that emerged from the conviction and life sentencing of Jonathan Jay Pollard, on behalf of Israel.

The Senate Ethics Committee investigated Durenberger's improper disclosure, finding that it contravened *Senate Resolution 400*. Its sanction was a terse letter mildly admonishing that Durenberger's conduct "gave the appearance that [he was] disclosing sensitive national security information" and "jeopardized the mutual confidence which must exist between the Congress and Intelligence Community."

Senator Pat Leahy, former vice chairman of the Senate Intelligence

Committee, voluntarily yielded his membership after two egregious leaks. He provided a reporter with a copy of a draft Senate Intelligence Committee report on aspects of the Iran-Contra Affair that the committee had voted to withhold. Leahy also publicly disclosed in an NBC television interview that the United States had interdicted an Egyptian aircraft carrying the *Achille Lauro* hijackers and murderers to Tunisia by intercepting Egyptian communications. He made the disclosure after receiving a CIA briefing, and despite a federal criminal statute against disclosure of classified communications intelligence information.[5]

In 1987, President Reagan reported to the House Intelligence Committee a planned CIA covert action to assist Phillipine President Corazón Aquino in fighting the communist insurgency in her country. President Aquino is presently embroiled in controversy with the Phillipine Legislature over the presence of the United States military at Clark Air Force Base and at Subic Bay. Foreign politics militates against any further overt presence of the United States in the Phillipines. But the week following its report to the House Committee, the CIA's planned covert action was published in *Newsweek* magazine and was scuttled.

A California Congressman recently departed the House Intelligence Committee because of irresponsible handling of satellite photo reconnaissance information.

On July 27, 1988, the *Washington Post* publicized a covert action against Panamanian despot Manuel Noriega. The leak occurred shortly after the executive branch briefed the Intelligence Committees on the operation.

The cascade of leaks from congressional committees and their individual members has caused at least three-fold damage to the national security. First, foreign governments are loath to cooperate with the United States where secrecy is desired. Thus, the Government of Canada provided assistance in the rescue of six Americans hiding in the Canadian Embassy in Tehran only after receiving assurances from President Jimmy Carter that Congress would not be notified until the rescue mission had concluded. The covert rescue mission consumed three months in preparation, and premature disclosure might have caused Iranians to attack the Canadian Embassy, or otherwise foiled the exfiltration.

Second, foreign intelligence agencies are reluctant to share sensitive information with the United States intelligence community. As CIA officer David Phillips relates, in 1975 a representative of one of the world's

5. 18 U.S.C. § 798(a)(4) (1982).

major intelligence services asked the CIA to return documents he had shared with the CIA during past years.

Third, the recruiting and maintaining of intelligence sources is increasingly difficult because exposure would frequently be life threatening. Richard Welch, a CIA agent in Greece, was assassinated after a magazine identified him.

Former CIA Director Stansfield Turner testified to the damage to national security caused by recurring disclosures of classified information, whether from Congress, the executive branch, or private individuals:

> [W]e have had a number of sources discontinue work with us. We have had more sources tell us they are very nervous about continuing work with us. We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us for fear it will not remain secret. I cannot estimate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter business with us.[6]

Leaks from the House and Senate Intelligence Committees are endemic. They cannot be deterred by the threat of criminal sanctions because of the Speech or Debate clause of the Constitution. It provides a blanket shield from prosecution for disclosures a member makes on the floor of Congress, or during a committee hearing. Thus, Senator Mike Gravel read classified portions of the Pentagon Papers into the *Congressional Record* with impunity during a debate on a State Department authorization bill.[7]

The indulgent treatment afforded Senator Durenberger by the Senate Ethics Committee shows that Congress is disinclined to discipline its own members for mishandling of intelligence information.

Leaks are also inevitable because of the size of the twin intelligence committees and their staffs. In aggregate, committee members and employees with regular access to classified information number approximately 132, a group whose size is incompatible with secrecy. The Founding Fathers would be aghast at congressional insouciance with classified information.

During the Revolutionary War, five members of the Second Continental Congress sat on the Committee of Secret Correspondence, the foreign intelligence arm of the infant nation. When the committee was

6. Snepp v. United States, 444 U.S. 507, 512 (1980) (citation omitted).
7. *See generally* Gravel v. United States, 408 U.S. 606 (1972).

informed of France's agreement to supply arms, munitions, and money covertly to the revolutionary cause, committee members Ben Franklin and Robert Morris concurred that the information should be withheld from Congress. They observed:

> Considering the nature and importance of [the above intelligence], we agree in opinion that it is our indispensable duty to keep it a secret from Congress . . . . As the court in France has taken measures to negotiate this loan in the most cautious and secret manner, should we divulge it immediately, we may not only lose the present benefit, but also render the court cautious of any further connection with such unguarded people and prevent their granting other loans of assistance that we stand in need of. We find, by fatal experience, the Congress consists of too many members to keep secrets.[8]

John Jay likewise lamented the lack of secrecy in foreign affairs that plagued the nation before the Constitution was ratified with its unitary executive responsible for international negotiations.[9]

Leaks are further inevitable because members of Congress are accustomed to disclosure and crave publicity and kudos with the media, either consciously or unconsciously. Thus, many congressmen refuse intelligence briefings to avoid unwitting disclosures. Limiting intelligence committee members to six-year terms insures that habits of taciturnity will not develop.

Some members of Congress may leak information because they are ignorant of the damage it will cause to the nation. They lack the broad mosaic of knowledge necessary to calculate whether a single piece of information could be exceptionally revealing to more knowing foreign intelligence services, such as the Soviet KGB. They also lack the mental energy and discipline to master the history and operations of the intelligence community.

Thus, Speaker of the House Jim Wright falsely testified before the House Intelligence Committee, then considering a bill for tighter oversight of covert operations, that the CIA in 1954 sought to assassinate the incumbent President of Guatemala, Jacobo Arbenz Guzman. The Speaker also falsely maintained that the CIA, in 1971, unilaterally contrived and attempted to effectuate a plan to undermine the elected government in Chile. The CIA had, however, under President Nixon's instructions in 1971, provided funds to democratic political groups in Chile, as it had done in Italy in the aftermath of World War II. The

8. *Quoted in* Sayle, *The Historical Underpinnings of the U.S. Intelligence Community*, 1 INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE 5 (1986).

9. THE FEDERALIST No. 64 (J. Jay).

1973 military coup in Chile that overthrew President Salvador Allende was executed by the Chilean military without any participation by the CIA.

In 1983, CIA Director William Casey informed the House and Senate Intelligence Committees of a covert plan to assist the Nicaraguan Contras to mine Nicaragua's harbors. Senators Moynihan and Goldwater of the committee, nonetheless, insisted otherwise, but their claims were discredited by the majority of their Intelligence Committee colleagues. The episode confirms the propensity of congressmen to inattention, mental sloth, or irresponsibility regarding intelligence matters.

In conclusion, it would be delusionary to believe that Congress is institutionally capable of full-scale oversight of intelligence matters without recurrent and damaging leaks.

IV.

The President's frequent and compelling need for secrecy in the conduct of foreign affairs through covert action, or otherwise, is exemplified by the widely misevaluated "arms-for-hostages" deal with Iran.

President Reagan could contemplate an impressive array of national security benefits by assuaging or eliminating Iran's enmity towards the United States under the regime of Ayatollah Khomeini. His rule threatens wholesale disruption of oil supplies from the Persian Gulf essential to international economic equilibrium. Khomeini's decisions to plant mines in international waters, to attack oil installations in Kuwait, and to destabilize the regime in Saudi Arabia by sending 150,000 Shiite fanatics to Mecca in the summer of 1988 are further illustrative of the Iranian menace.

If the Ayatollah were successful in curbing oil supplies either by his dominance of Kuwait or Saudi Arabia, or by his obstructions to neutral shipping in the Persian Gulf, the price of crude oil would spiral. That price would precipitate an economic depression comparable to that in 1973 when OPEC embargoed oil sales to the United States and the Netherlands, and hiked crude oil prices. Forestalling such an economic and national security calamity by ousting or assuaging Khomeini is a compelling United States objective.

It speaks volumes that several EEC countries and Japan displayed new-found sympathy for the PLO and Palestinian terrorist causes in the Middle East to obtain oil supplies during the 1973 OPEC embargo. These countries were exceptionally dependent on oil imports to operate their respective economies. But their verbal support for notorious Palestinian groups undermined the security of Israel and foreign policy goals

of the United States in the Middle East. A reprise of EEC and Japan yielding to Palestinian demands is probable if oil supplies in the Persian Gulf are again threatened.

Iranian aggression under the Ayatollah precipitated the purchase of hundreds of medium range missiles by Saudi Arabia from China. The missiles are capable of striking either Israel or Iran. Saudi Arabia severed diplomatic relations with Iran and pledged to become a signatory to the Nuclear Nonproliferation Treaty to assuage concerns of the United States that the missiles might be used offensively to carry nuclear warheads or chemical weapons to Israel. Saudi Arabia is hostile to Israel because of the latter's occupation of East Jerusalem, a holy place for Sunni Moslems who dominate the Saudi ruling hierarchy.

President Reagan might wish to oust Khomeini from power by collaborating with rival political factions because Khomeini fosters terrorism in Lebanon and elsewhere. Reliable evidence shows that Iran recently assisted in the hijacking of a Kuwaiti air carrier to Algeria by Moslem extremists, which was an attempt to coerce Kuwait to release seventeen Shiites imprisoned there for bombing the Embassies of the United States and France, and for destroying utility property and other economic assets of Kuwait. The terrorists were augmented in Iran by other Moslem fanatics, and received additional weapons there.

Iran is also closely wedded to the Hezbollah Moslem terrorists who regularly perpetrate kidnappings in Beirut and South Lebanon. Over a score of individuals from Western nations are currently held hostage by Hezbollah. Others have been tortured and murdered, such as the former CIA Bureau Chief in Beirut, William Buckley. Iran was also complicit in the murderous 1983 attack on United States Marines in Beirut that left over 200 dead.

Seeking to establish a regime in Iran more friendly to the United States is also important to the national security because of Iran's strategic location. Approximately one million Afghan refugees from the Soviet occupation of their country reside in Iran. The United States possesses a two-fold interest in arming and supporting these refugees: (1) to insure that the Soviets honor their international commitment to withdraw from Afghanistan by the end of 1988; and (2) to aid in the ouster of the incumbent Afghan despot and Soviet puppet—Najibullah. He is the recent beneficiary of one billion dollars in Soviet military aid, and has been promised thousands of Soviet advisors after the Soviet troop removal has been completed. Iranian friendship towards the United States would enormously facilitate U.S. support for the Afghan resistance.

Iran is a pivotal barrier to the centuries-long desire of Russia to acquire warm water ports for its expanding navy. If Iran provided naval

bases for the Soviet Union in exchange for economic aid or diplomatic and military assistance in its war with Iraq, the national security interests of the United States, Western Europe, and Japan would be imperiled, as would the anticommunist Moslem nations bordering the Persian Gulf. Indeed, President Jimmy Carter declared that war with the Soviet Union would be precipitated by its occupation of a Persian Gulf oil producing country. The United States holds a compelling national security interest in cultivating present or future Iranian rulers to resist the blandishments and belligerence of the Soviet Union.

Finally, the President's covert overtures to Iranian political factions with influence over the Hezbollah, who hold American hostages in Lebanon, was an exercise of his constitutional authority to protect American citizens abroad. As early as 1860, a federal circuit court presided over by Supreme Court Justice Samuel Nelson expounded on this sinewy Presidential power in an opinion which stated:

> As the Executive head of the nation, the President is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, that citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different departments of government have been conveniently executed, whether by negotiation or force—a department of state and a department of the navy.
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> Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of the government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.[10]

The President's constitutional authority to rescue American citizens

10. Durand v. Holland, 8 F. Cas. 111 (E.D.N.Y. 1860) (No. 4,186).

held hostage abroad is reinforced by the 1868 Hostages Act, which provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government . . . and it appears to be wrongful and in violation of the rights of American citizenship . . . the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release.[11]

President Reagan's covert arms transactions and overtures to factions within Khomeini's Iran thus furthered section 1732; indeed, Reagan's actions effectuated the release of three American hostages.

Secrecy was imperative to attain the multiple national security and foreign policy goals sought by President Reagan's Iranian gambit. Any Iranian faction that might be hostile towards Khomeini would need the protection of secrecy to avoid political or physical reprisals. That secrecy would be necessary both for actual arms transactions and ancillary negotiations.

Similarly, secrecy was necessary to avoid endangering the American hostages held by Hezbollah. The latter might have murdered the hostages if they discovered the United States was collaborating with an Iranian faction they reviled.

The Administration's belief in Iranian "moderate" factions or in ameliorating Khomeini's hostility was reasonable. Iran's 1988 agreement to a cease-fire in its war with Iraq is proof.

If the House and Senate Intelligence Committees or the Gang of Eight had received prior notice of the President's covert Iranian overture, the plan would have instantly leaked. The publicity would have foreclosed the advancement of many compelling foreign policy and national security goals of the United States.

V.

The congressional need for prior notice of covert action to fulfill its legislative duties is hollow. Notice is unnecessary for the enactment of legislation. It would be unconstitutional for Congress to veto by statute a discreet covert operation, or a cluster of clandestine activities, undertaken by an intelligence agency to further authenticate national security goals. The so-called "Clark amendment," forbidding CIA actions in Angola until its repeal in 1985, and the Boland amendment, forbidding CIA operations in Nicaragua, were unconstitutional. They may be likened to

11. 22 U.S.C. § 1732 (1982).

federal statutes prohibiting the President from indicting any person suspected of espionage against the United States if they are citizens of Israel or Ireland. The Clark and Boland amendments improperly arrogated to Congress administration of the nation's foreign policy.

Congress cannot compel notice of covert actions to advise the President. If he believes that congressional advice would be useful in planning or conducting covert operations, he may ask for it. Thus, President Kennedy sought advice from Senator Fulbright as to whether the ill-starred Bay of Pigs venture should be undertaken. Congress, however, cannot force the President to seek its advice in the performance of national security or foreign policy duties.

Congress does not require contemporaneous notice of covert operations to oversee the CIA, or to prevent violations of federal criminal laws. A President may be impeached and discharged from office for a corrupt administration of the CIA. If Congress invokes its impeachment powers, then it would be entitled to disclosure of particular covert actions that it reasonably believes would prove a high crime or misdemeanor by the President. Congress can insist on belated information of covert actions to determine whether the CIA should be abolished for ineptitude or otherwise.

Experience demonstrates the unsuitability of general legislation to govern the activities of the CIA. Congress renounced the effort after several futile attempts in the late 1970's to enact a CIA charter. A legislative consensus emerged that the countless imponderables of international affairs made general rules for the Agency counterproductive or unworkable.

VI.

President Reagan possesses constitutional authority to covertly employ the CIA or other intelligence agencies to assist the military effort of the Nicaraguan Contras to overthrow the tyrannical regime headed by Sandinista Daniel Ortega. Insofar as the Boland amendment, the Hughes-Ryan amendment, and the Intelligence Oversight Act sought to restrict this Presidential power, they were unconstitutional.

The President's executive powers in article II extend to the enforcement of treaties and other rules of international law. As Justice Horace Gray explained in the *Paquete Habana*,[12] international law is part of the law of the United States. It has further been established by Supreme

12. 175 U.S. 677 (1900).

Court precedent that the President is entrusted with enforcement of international law.[13]

The Sandinista rulers in Nicaragua are flouting at least three treaties. The 1947 Rio Treaty, to which the United States and Nicaragua are signatories, prohibits in article 1 threats or use of force in any manner inconsistent with the United Nations Charter, or other Treaty provisions. The U.N. Charter stipulates that, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."[14] Article 3 of the Rio Treaty authorizes the United States to retaliate against any unprovoked attacks against signatories, which include El Salvador, Honduras, Guatemala, and Costa Rica.

Articles 18-20 of the Charter of the Organization of American States also denounce the use of coercive measures to intimidate a signatory state either to yield territory or to alter its internal political or economic structures. Article 27 makes an act of aggression that flouts articles 18-20 tantamount to an attack against the United States.

The Sandinista tyranny in Nicaragua has violated the U.N. Charter, the Rio Treaty, and the OAS Charter by fomenting and aiding insurrections in neighboring states, and violating the territorial integrity of Honduras. As Congress found in the 1985 Foreign Assistance Act, the Sandinista regime:

> (i) no longer includes the democratic members of the Government of National Reconstruction in the political process;
> (ii) is not a government freely elected under conditions of freedom of the press, assembly, and organization, and is not recognized as freely elected by its neighbors, Costa Rica, El Salvador, and Honduras;
> (iii) has taken significant steps towards establishing a totalitarian Communist dictatorship, including the formation of FSLN neighborhood watch communities and the enactment of laws that violate human rights and grant undue executive power;
> (iv) has committed atrocities against its citizens as documented in reports by the Inter-American Commission on Human Rights of the Organization of American States;
> (v) has aligned itself with the Soviet Union and Soviet allies, including the German Democratic Republic, Bulgaria, Libya, and the Palestine Liberation Organization;
> (vi) has committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the

13. *In re* Neagle, 135 U.S. 1 (1890).
14. U.N. CHARTER, art. 2, para. 4.

> Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention; and
> (vii) has built up an army beyond the needs of immediate self-defense, at the expense of the needs of the Nicaraguan people and about which the nations of the region have expressed deepest concern.[15]

President Reagan is endowed with constitutional power to decide how to respond to the violations of international law committed by Nicaragua. That power parallels his authority to determine whether to prosecute violations of domestic law.[16] It is a power invoked by Reagan to deploy U.S. Naval forces in the Persian Gulf to enforce international shipping law against Iranian violations. It was a power invoked by President McKinley in 1899-1900 to defend Western legations against the Boxer Rebellion in China, and by President Woodrow Wilson in 1916 to defend American citizens and property from Mexican brigands.

The appropriations power of Congress cannot hamstring the President's discretionary authority over international law enforcement. Congress could not deny the President funds to conduct extradition proceedings against Irish Republican Army members accused of atrocities in Great Britain, even if congressmen believed an IRA member would not receive a fair trial under British law. Similarly, Congress could not deny Reagan monies to renounce the U.S.-Soviet ABM Treaty that the President believed was a proper response to Soviet violations in constructing an interior phased array radar system and in encrypting test flight data.

The Boland amendments were unconstitutional because they usurped the power of President Reagan to fashion a response to the multiple violations of international law perpetrated by the Sandinistas. That conclusion is both faithful to the nation's constitutional experience and to the imperatives of speed and flexibility in international affairs.

Congress is invariably lead-footed. It meandered, for instance, in debating funds for evacuating Americans and South Vietnamese from South Vietnam in April of 1975 while President Gerald Ford acted decisively, thus mooting congressional confabulations.

VII.

The preeminence of the President over covert actions neither places him above the law nor amounts to political enthronement. As earlier

15. Pub. L. No. 99-83, § 722, 99 Stat. 249, 252 (1985).
16. *See* Nixon v. United States, 418 U.S. 683 (1974).

observed, the President can be impeached and removed from office for misusing his covert action powers. He can serve but two terms, and is elected by the people. Further, the ordinary zeal of a President for fame (*e.g.*, a Nobel Peace Prize award) and public popularity safeguards against substantial departures from the nation's mainstream ethos regarding covert actions that history would condemn. The greatest danger to the United States today is an enfeebled, not an imperial Presidency. Congress is the arm of government prone to flout the Constitution and its separation of powers principles. As James Madison warned:

> [I]n a representative republic where the executive majesty is carefully limited, both in the extent and duration of its power; and where the legislative power is exercised by an assembly which is inspired by a supposed influence of the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which activate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which it prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.[17]

17. THE FEDERALIST No. 48 (J. Madison).