

THE CONSTITUTION AND THE IRAN-CONTRA AFFAIR: WAS CONGRESS THE REAL LAWBREAKER?

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I. INTRODUCTION

I have chosen for my subtitle this afternoon a question which may seem shocking to some: "Was *Congress* the Real Lawbreaker?" Put simply, I think the Majority Report of the congressional Iran-Contra committees was an intellectually sloppy and occasionally dishonest¹ polemic. Both the public hearings and the report which followed did serious damage to the national security² while virtually ignoring the issue which both sides acknowledged was at the crux of the dispute³—the constitutional

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1. See, e.g., *infra* text accompanying note 111.

2. The public disclosure and confirmation of numerous intelligence relationships with other states has once again signaled to the world that the United States Government can not keep secrets. As a result, our ability to gain the cooperation of friendly intelligence services and independent intelligent sources has been harmed. Whatever the extent of damage done by the reports in an unreliable Lebanese newspaper that the United States was trading arms for hostages, the public confirmation of these details by the American Congress has certainly done more to encourage future acts of terrorism. Thanks to the public confirmation of certain sensitive activities, European states which already were covertly engaged in intercourse with Iran now have a pretext for expanding such activities—and in the case of France, rather openly paying ransom to obtain the release of hostages.

3. The Majority Report argued: "Key participants in the Iran-Contra Affair had serious misconceptions about the roles of Congress and the President in the making of foreign policy [W]e note that the attitude that motivated this conduct was based on a view of Congress' role in foreign policy that is without historical or legal foundation." *REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR*, S. REP. NO. 216, H. REP. NO. 433, 100th Cong., 1st Sess., at 387 (1987) [hereinafter *IRAN-CONTRA REPORT*]. Chapter two of the Minority Report began with the statement: "Judgments about the Iran-Contra Affair ultimately must rest upon one's views about the proper roles of Congress and the President in foreign policy." *Id.* at 457.

separation of national security powers between the political branches of our government. It is the purpose of this paper to address some of those issues.

This is not to argue that no executive branch employee violated a "law" during the Iran-Contra transactions. Perhaps there were several such violations, and even some "criminal" conduct as well. When the special prosecutors and grand juries have all completed their work, perhaps someone will be shown to have pocketed some of the proceeds of the arms sales. These issues are important, but they are ancillary to the more critical issues raised by the controversy.

The primary issue—a matter which should be of concern to all Americans—is did the executive branch (if not President Reagan himself, then senior members of his White House staff) violate the constitutional principle of separation of powers by improperly denying Congress its rightful role in overseeing secret dealings with foreign powers? And if it can be established that the executive branch did not wrongfully deny such information to Congress, the corollary question is whether the crisis arose from unconstitutional efforts by Congress to seize control of executive powers granted to the President by the Constitution.

While the paper will focus primarily upon legal questions of constitutional separation of powers, a brief summary of how congressional excesses in this area arguably impacted upon the Iran-Contra Affair may be in order at this point. It can be argued that the National Security Council assumed certain functions which have traditionally been carried out in a more regular fashion by the Central Intelligence Agency (CIA) because Congress had so tied the hands of the CIA that secrecy could not be preserved through the normal machinery of government. Since secrecy was deemed essential to the success of these sensitive negotiations, an alternative mechanism—which lacked the normal controls present at the CIA, and did not benefit from the professional judgments of the intelligence community—was established to provide at least some chance of success.

Such a scenario would be strengthened by establishing three premises: first, that Congress, in taking a more active role in the micromanagement of national security affairs, has departed dramatically from the constitutional scheme established two hundred years ago in Philadelphia; second, that, while exercising this expanded role, the Congress has validated the judgment of the Founding Fathers that legislative bodies were unable to safeguard national security secrets; and finally, that the inability (or unwillingness) of Congress to keep secrets led senior administration officials to abandon the traditional mechanism for covert

action and develop new procedures for conducting the nation's most secret business.

Establishing the first of these premises will occupy the bulk of the pages which follow, and is the primary purpose of the paper. Without going into detail, it should not be difficult to establish a *prima facie* case for points two and three. According to press accounts, although the congressional Intelligence Committees have no power to "veto" proposed covert actions, in 1985 the chairman and vice chairman of the Senate Intelligence Committee threatened to "go public" if a particular antiterrorism covert operation against Libyan leader Muammar Quaddafi was not terminated.⁴ Within two weeks of the day the committee was briefed, the operation was "leaked" to Bob Woodward and appeared in the *Washington Post*, at which time the other countries involved in the plan refused to cooperate further.⁵ Denied the alternative of covert action, the President ultimately concluded that it was necessary to send U.S. armed forces into hostilities to deter Libyan-sponsored terrorism—resulting in a tragic loss of life on both sides which might not have been necessary had the Senators not appropriated to themselves the right to destroy the President's initial plan by an unauthorized disclosure. The Senators would also seem at least morally responsible for the many victims of Libyan terrorism around the world who might have been spared had the President's initial multinational approach proven successful. According to press accounts, "Sen. Dave Durenberger and Sen. Patrick J. Leahy, at the time chairman and vice chairman of the Senate Intelligence Committee, were blamed for the leak by officials close to the incident after the FBI traced it to the committee."⁶ This same account reports:

4. Gertz, *2 Senators Threaten to Leak Covert Scheme: Anti-Quaddafi Plan Scuttled After Story is Published*, Wash. Times, July 21, 1987, at A1, A8. According to the Minority Report of the Iran-Contra committees, data collected by a Senate Intelligence Committee study suggests that "a cleared person in Congress is 60 times more likely than his counterparts [in the executive branch] to engage in unauthorized disclosures." IRAN-CONTRA REPORT, *supra* note 3, at 575.

5. Gertz, *supra* note 4.

6. *Id.* Nothing in the Constitution gives individual members of Congress a right to "veto by leak." Until Congress establishes some *effective* means of disciplining such individuals, the prospects for improved legislative-executive relations in this area are not good. Certainly the recent decision by the Senate Select Committee on Ethics that the disclosure of highly sensitive national security information about alleged U.S. intelligence activities in Israel to a pro-Israel lobby group during a speech by former Intelligence Committee Chairman David Durenberger was "not intentional, deliberate nor attended with gross negligence" will do nothing to improve the relationship. See Dewar, *Ethics Panel Criticizes Durenberger's Remarks: No Disciplinary Action Recommended*, Wash. Post, Apr. 30, 1988, at A7. Even if one were to accept the Ethics Committee's conclusion that the disclosure was "not intentional"—which on its face seems dubious—the application of a "gross negligence" standard before Senators who disclose the nation's intelligence secrets without authority are disciplined suggests that the Senate is not serious about controlling "leaks."

“Rear Adm. John Poindexter—at the time the No. 2 man on the National Security Council staff—was so ‘incensed’ by the leak that he urged President Reagan not to notify Congress about the first covert arms shipments to Iran, one administration official said.”⁷ To the extent that this press account is accurate, it would seem to follow that much of the responsibility for the tragedy we refer to as the “Iran-Contra Affair” lies directly at the feet of these Senators.

A. *Some Nonissues*

Perhaps I should identify a few matters which I consider to be “nonissues.” I do not believe that this conference would accomplish a great deal by focusing upon why Oliver North cashed a traveler’s check to buy leotards for his daughter. Even if personal corruption could be established—and the judicial system is far better equipped than we are to reach conclusions on that subject— it would hardly be unique. Private abuse of government trust is, unfortunately, sufficiently common that one more incident hardly warrants an American Bar Association conference on the matter.

Another bogus issue in my view is the allegation that it was improper for the Reagan administration to “privatize” foreign policy by involving individuals who were not federal employees in secret negotiations and transactions with foreign officials. As Henry M. Wriston demonstrates in his classic 1929 study, *Executive Agents in Foreign Relations*, from the day in 1790 that President Washington sent David Humphreys to Lisbon to explore the possibility of establishing diplomatic relations—under instruction to “avoid all suspicion of being on public business”—and throughout most of our nation’s history, it has been common practice for American Presidents to send private citizens on secret missions to further the foreign relations interests of the United States.

Nor is the fundamental issue that “ransom” may effectively have been paid to foreign terrorists. I do not find it shocking that Lt. Colonel North and President Reagan were decent and compassionate men, who were deeply concerned about reports that William Buckley was being slowly tortured to death, and that the lives of other American hostages may have been in jeopardy. The effort by some congressional critics to portray Oliver North and Ronald Reagan as “soft on terrorism” over this issue is as humorous as it is outrageous. As you will recall, PLO terrorist Abu Nidal identified Colonel North as one of three Americans his organization intended to murder—presumably because North had been so effective in fighting international terrorism. North may well be

7. Gertz, *supra* note 4.

subject to reasonable criticism on several counts, but these certainly do not include being “soft on terrorism.”

The reality is that our policy of not making concessions to terrorists is just that—a *policy*. It is not an ultimate *end* of our government, but one of many *means* which we use to promote more basic ends. It is a tactic to which our government generally adheres in an effort to avoid providing incentives for additional acts of terror. Trying to improve our influence on the Government of Iran, so that when Mssr. Khomeini goes on to his ultimate reward, we might be able to reduce the likelihood of Soviet control over this strategic territory, is also an important goal. Further, the suggestion that the sale of arms to Iran might lead to “a more constructive relationship with Iranian leaders” and “offset growing Soviet inroads in Iran” came not from the National Security Council staff but from the CIA national intelligence officer for the Middle East.⁸

Sometimes the government finds itself forced to choose between two or more very important principles, and the idea that no principle is of greater importance than “not making ‘deals’ with terrorists” doesn’t even pass the “straight face” test. Israel, too, has a strong public policy of not making “deals” with terrorists—and it has worked fairly well for them over the years as a part of a comprehensive antiterrorism policy. But while they do not like it advertised, the reality is that Israel has on several occasions made “concessions” to terrorists—including the release of hundreds of prisoners from Israeli jails. The real damage comes from not so much making concessions (which, admittedly, can encourage the specific terrorist group involved to repeat its acts in search of additional payoffs), but in disclosing indiscriminately to potential terrorists across the globe that you have *made* such a “payoff.” In the Iran-Contra Affair, responsibility for *that* act should properly be placed on the Congress and the press.

8. In May 1985, the CIA national intelligence officer for the Middle East prepared a five-page memo which went to the NSC and the State Department, arguing for a change in U.S. policy that would seek a more constructive relationship with Iranian leaders interested in improved ties with the West. The memo argued in part that the U.S. could permit allies to sell arms to Iran as one of the alternative means of establishing Western influence so as to offset growing Soviet inroads in Iran. Apparently using the arguments in this memo two members of the NSC staff then prepared a draft National Security Decision Directive (NSDD) which proposed a departure in U.S. policy toward Iran. Describing the Iranian political environment as increasingly unstable and threatened by Soviet regional aims, the draft NSDD stated that the U.S. is compelled to undertake a range of short and long term initiatives to include the provision of selected military equipment to increase Western leverage with Iran and minimize Soviet influence.

Senate Select Committee on Intelligence, Report on Preliminary Inquiry, January 29, 1987 (typewritten), transmitted by Chairman David L. Boren and Vice Chairman William S. Cohen to Chairman Daniel K. Inouye of the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, January 29, 1987, p. 1.

The idea of providing arms in return for increased influence in a critically important part of the world is not *per se* a bad one. One needs to balance carefully the probable consequences of such a transaction, and to evaluate them in the context of likely developments in the absence of such an arrangement. If, for example, such a transaction would decrease by twenty percent the likelihood of a Soviet takeover in Iran within the next decade, while at the same time increasing the attractiveness of terrorism so that an estimated ten to twenty Americans would lose their lives in bombings, a reasonable person might conclude that the benefits were worth the risk—particularly when one considers that a less militant Iran might in the long run lead to a substantial reduction of international terrorism. It is not the purpose of this paper to resolve this particular policy equation; but instead to note that under certain circumstances it might prove to be in the national interest to “deal” with hostage takers (indeed, an uncompromising posture of never “negotiating” with countries which provide support to terrorists or hostage takers would leave us with little reason to maintain an embassy in Moscow).

I do not wish to be misunderstood. All other things being *equal*, making concessions to terrorists is in my view a major tactical blunder. I think as a nation we need to be prepared to lose a few hostages, rather than to encourage a dramatic expansion in the hostage-taking business by making it a lucrative enterprise. However, the practice of rewarding hostage-takers is hardly new for the United States. It dates back at least to 1792, during the first administration of President George Washington, when the Senate approved a treaty to pay annual tribute to Algiers “to redeem our captives.”⁹ Indeed, the primary controversy with respect to that treaty was not whether rewarding terrorists was good policy, but whether the “payoff” should be concealed from the House of Representatives.¹⁰ It is noteworthy that it was the United States Senate, not the President, which in 1792 advocated keeping the agreement secret from the House. As Secretary of State Jefferson explained:

The Senate were willing to approve [the treaty], but unwilling to have the lower house applied to previously to furnish the money; they wished the President to take the money from the treasury, or open a loan for it. They thought . . . that if the particular sum was voted by the Represent[atives], it would not be a secret.¹¹

It may also be worth noting why the President rejected the Senate’s

9. 1 THE WRITINGS OF THOMAS JEFFERSON 190 (P. Ford, ed. 1892).

10. *Id.*

11. *Id.* at 191.

suggestion that the agreement be kept secret from the House. As Jefferson observed: "The President had no confidence in the secrecy [*sic*] of the Senate, & did not chuse [*sic*] to take the money from the treasury or to borrow."¹²

From this it should be clear that concern about congressional "leaks" did not originate with the Reagan administration, nor even (as some "old hands" assume) with the Nixon administration. The inability of legislative bodies to keep secrets was understood very well by the men who met in Philadelphia two hundred years ago to draft our Constitution,¹³ and it influenced their decisions on the division of powers.

II. ANALYTICAL APPROACHES TO THE SEPARATION OF FOREIGN AFFAIRS POWERS¹⁴

A. *The Duty to "Faithfully Execute" the "Laws"*

There is a great deal of talk these days about Executive abuse of the Constitution and laws in the field of foreign affairs. Some find these questions simple, and note that under the Constitution the President is required to "take Care that the Laws be faithfully executed."¹⁵ Since Congress has the "legislative" power, it would seem to follow that the duty of the President in foreign affairs is to "execute" whatever "laws" Congress finds it "necessary and proper"¹⁶ to enact. This approach ignores the fundamental difference between the role of Congress in domestic and foreign affairs; and, more importantly, it begs the question of what is the "law." Certainly the Constitution itself is superior to enactments of Congress, and when the two are in conflict the President would seem to have little option but to ensure that the Constitution is "faithfully executed"—even if that requires that a statutory enactment be read narrowly so as not to conflict with constitutional principles.

B. *Foreign Policy as a "Shared Power"*

Another approach, one embraced by the Majority Report of the

12. *Id.*

13. *See, e.g., infra* note 68 and accompanying text.

14. This section is largely derived from a paper entitled *Separation of Powers in Foreign Policy: The Theoretical Underpinnings*, delivered by the author at an A.B.A. conference at George Mason University.

15. U.S. CONST. art. II, § 3. Professor Louis Henkin writes: "In regard to foreign, as to domestic affairs (our characterizations, not the Constitution's) Congress was to legislate and the president was to take care that the laws be faithfully executed." Henkin, *Foreign Affairs and the Constitution*, FOREIGN AFF. No. 2, Winter 1987-1988, at 284, 287.

16. "The Congress shall have Power . . . To 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 in any Department or Officer thereof." U.S. CONST. art. I, § 8.

Iran-Contra committees, is to view "foreign policy" as "a shared power."¹⁷ Indeed, this was a subheading in chapter 25 of the Majority Report.¹⁸

Certainly it is true that both the President and Congress have constitutional powers that may be exercised in such a way as to affect foreign affairs. The President is given the executive power through article II, section 1,¹⁹ and designated "Commander in Chief" and given other expressed powers, but Congress is given a veto over a decision to launch a war against another state, and the Senate is given a veto over the ratification of treaties.²⁰ Article I, section 8, also expressly vests other important powers with foreign affairs implications in the Congress. But the suggestion that these are "shared" powers, while in some respects not technically inaccurate,²¹ invites imprecise analysis. To conclude that, because both the President and the Senate have a role in the treaty-making process, it is constitutionally permissible for the Senate to assume the negotiation function, to "interpret" the international effect of a treaty,²² or to bring an approved treaty into international legal effect by transmitting it to the United Nations, is simply *wrong*. It would be akin to saying that, since both the President and the Senate have a "role" in the appointment process, the Senate may assume the function of *nominating* cabinet officials and then *appointing* them over the President's objection. A far more useful analysis, in both instances, is to recognize that the President, the Senate, and the Congress each have certain specific powers which influence United States relations with the external world.

17. IRAN-CONTRA REPORT, *supra* note 3, at 391.

18. *Id.* ch. 25.

19. See *infra* notes 35-47 and accompanying text for a discussion of the meaning of this provision.

20. Professor Quincy Wright has observed:

In foreign relations . . . the President exercises discretion, both as to the means and to the ends of policy. He exercises a discretion, very little limited by directory laws, in the methods of carrying out foreign policy Though Congress may suggest policies its resolutions are not mandatory and the President has on occasion ignored them. Ultimately, however, his power is limited by the possibility of a veto upon matured policies, by the Senate in the case of treaties, by Congress in the case of war In foreign affairs, therefore, the controlling force is the reverse of that in domestic legislation. The initiation and development of details is with the President, checked only by the veto of the Senate or Congress upon the completed proposals.

Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 149-50 (1922) [hereinafter AMERICAN FOREIGN RELATIONS]; see also *infra*, note 86 and accompanying text.

21. The President, for example, does have a role in all of Congress' art. I, § 8 powers (such as the power to "declare war") by virtue of his qualified veto over legislative proposals.

22. Of course, this is currently being attempted. See Turner, *Beware the Tyranny of the Senate*, Wall St. J., Feb. 22, 1988, at 20.

C. Totaling "Enumerated Powers"

Still a third approach is to count up the enumerated powers of Congress dealing with foreign affairs—the power to “regulate Commerce with foreign Nations,” to “declare war,” to “raise and support armies,”²³ and the like—and to compare these with the enumerated powers of the President in this area, such as the power to be “Commander in Chief of the Army and Navy,” and the power to “make Treaties” with the approval of two-thirds of the Senate.²⁴ For example, W. Taylor Reveley III writes: “On its face, the text [of the Constitution] tilts decisively toward Congress. Comparison of articles I and IV with article II shows that most of the specific grants of authority run to Congress.”²⁵

This analysis leads to two apparently reasonable conclusions: (1) the bulk of the “foreign affairs” powers are vested in Congress and the Senate; and (2) there is a great deal of unspecified territory—a finding which in turn leads to the conclusion that the Constitution was intended to be “an invitation to struggle for the privilege of directing American foreign policy.”²⁶ I believe this approach results from a misperception of article II, section 1, of the Constitution.

D. The Grant of "Executive Power"

There is a great deal more clarity and wisdom inherent in our constitutional separation of foreign relations powers than is commonly perceived in the post-Vietnam era. In my view, the key to understanding the division of powers in this area is contained in the first section of article II of our Constitution, which provides that “The executive Power shall be vested in a President of the United States of America.”

It is important to remember that this constitutional grant of “executive power” to the President is in broad terms, conditioned only by specific grants to the Senate or Congress and the rights guaranteed to the people; while the grant to Congress in article I, section 1, is limited to “[a]ll legislative powers *herein granted* (emphasis added).” As Jefferson,²⁷ Hamilton,²⁸ and Madison²⁹ observed, the “exceptions” to the executive power that are vested in the Senate and Congress were intended to be construed *strictly*. Since the powers vested in the President by the

23. U.S. CONST. art. I, § 8.

24. *Id.* art. II, § 2.

25. W. REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS 29 (1981).

26. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 171 (4th rev. ed. 1957) [hereinafter THE PRESIDENT].

27. See *infra* notes 48-49 and accompanying text.

28. See *infra* note 51 and accompanying text.

29. See *infra* note 56 and accompanying text.

Constitution may not be taken away by a simple statute,³⁰ a statute which pretends to compel the President to yield the independent powers of the Presidency to the Congress would not be a part of the "supreme law of the land."³¹ Since the President is required by the Constitution to take an oath of office to "preserve, protect and defend the constitution of the United States"³² and since the Constitution is the preeminent "law" that the President is required to "take care" be "faithfully executed,"³³ even a *cooperative* President would not have the legal option of acquiescing in such an unconstitutional procedure.³⁴

E. *The Intent of the Founding Fathers*

1. The Theories of Locke, Montesquieu, and Blackstone

If "original intent" is not the only step in understanding the Constitution, at least it provides us with a useful starting point.³⁵ Many legal scholars try to examine the Federal Convention of Philadelphia in an effort to understand the Constitution; but I propose beginning earlier still. If we want to understand what "executive power" meant to the men who gathered in Philadelphia in the summer of 1787, we should begin with the scholars and theorists whose works most influenced our Founding Fathers on separation of powers questions—men like Locke, Montesquieu, and Blackstone.

All three of these writers viewed the control of foreign affairs to be the exclusive province of the Executive. They argued, in essence, that legislative bodies were "incompetent" to manage foreign affairs because they lacked the essential qualities of unity of design, secrecy, and speed of dispatch. Locke, of course, distinguished between the "executive" power to "execute" the laws enacted by the legislature, and what he called the "federative" power over "War and Peace, Leagues and Alliances, and all

30. U.S. CONST. art. V.

31. "This constitution, and the laws of the United States *which shall be made in pursuance thereof*; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." *Id.* art. VI (emphasis added). Any statute which sought to deprive the President of his independent powers under the Constitution would exceed the proper authority of Congress, and thus not be a "law . . . made in pursuance" of the Constitution. *Id.*

32. *Id.* art. II, § 1.

33. *Id.* art. II, § 3.

34. This is not to say that a cooperative President could not waive his privilege to deny sensitive national security information to Congress. Every President in recent decades has done so in the large majority of occasions. But it would be improper for one President to conspire with the Congress to deprive a subsequent President of his constitutional executive privilege. A statute to that effect, even if signed into law and endorsed by a sitting President, would still not be a valid legislative act under the Constitution.

35. The Supreme Court has often emphasized the value of "contemporaneous construction" in interpreting constitutional language. *See, e.g.,* *Cooley v. Port of Philadelphia*, 53 U.S. 299, 315 (1851).

the Transactions, with all Persons and Communities without the Commonwealth."³⁶ But he explained:

These two Powers, *Executive* and *Federative*, though they be really distinct in themselves, yet one comprehending the *Execution* of the Municipal Laws of the Society *within* its self, upon all that are parts of it; the other the management of the *security and interest of the publick without*, with all those that it may receive benefit or damage from, yet they are always almost united. And though this *federative Power* in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than the *Executive*; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good.³⁷

Montesquieu distinguished between the "legislative" power, "the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."³⁸ Blackstone argued that the handling of all aspects of the "national intercourse with foreign nations" was an "executive" prerogative.³⁹ Indeed, Professor William Goldsmith observed in volume one of his study *The Growth of Presidential Power* that the Founding Fathers "were obviously greatly influenced by Blackstone's definition of executive powers, and gave their democratic monarch many of the same responsibilities."⁴⁰

It follows that the Founding Fathers—in vesting "the executive Power" in the President through article II, section 1—intended to grant the President exclusive control over foreign affairs, subject to certain very important but limited exceptions spelled out in the text of the Constitution. If this view seems radical today, that was not always the case. Indeed, this understanding has until the past few decades been viewed as the "majority viewpoint" on this subject—although obviously not without occasional challenge.

One of the great American scholars of this century in this field was the late Quincy Wright—who served as President of the American Society of International Law, the American Political Science Association, and the International Political Science Association. He authored more

36. J. LOCKE, SECOND TREATISE OF GOVERNMENT § 146. In 1790, Jefferson wrote that "Locke's little book on Government . . . is perfect." 5 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 9, at 173.

37. J. LOCKE, *supra* note 36 (emphasis in original).

38. 1 C. MONTESQUIEU, THE SPIRIT OF LAWS 151 (T. Nugent trans., rev. ed. 1900); see also FEDERALIST No. 47, quoted *infra* note 58 and accompanying text.

39. See, e.g., Bestor, *Separation of Powers in the Domain of Foreign Affairs*, 4 SETON HALL L. REV. 527, 532 (1974), citing 1 W. BLACKSTONE, COMMENTARIES 252, 261.

40. 1 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 56 (1974).

than twenty books in his distinguished career. Writing in 1922 in his classic study, *The Control of American Foreign Relations*, Professor Wright characterized “the works of John Locke, Montesquieu, and Blackstone” as “the political Bibles of the constitutional fathers,” and asserted that “when the constitutional convention gave ‘executive power’ to the President, the foreign relations power was the essential element in the grant.”⁴¹

If, as its natural meaning would seem to suggest, the language in article II, section 1, vesting the “executive power” in the President was intended to have that effect, it clarifies some of the confusion which results from “counting up” the constitutional powers of Congress and the President in the foreign affairs area. Note again the distinction between article I, section 1—which provides that “[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States”⁴²—and the much broader grant in article II of not “[a]ll executive Powers *herein granted*,” but instead “[t]he executive Power”⁴³ in the President. Thus, in view of this difference in wording, one understands why the Founding Fathers felt it necessary to enumerate every foreign affairs power of Congress, while conveying the bulk of the executive foreign affairs powers to the President in the first sentence of article II.

The President’s broad “executive” power over foreign affairs was not comparable to that of the King of England, because certain very specific and important “checks” were included in the American system to guard against abuse. Thus the Senate was given a veto over important diplomatic appointments (to insure that no “unfit” person was appointed by the President⁴⁴) and over treaties;⁴⁵ and Congress was given the power to “declare war,” “regulate commerce,” “raise and support armies,” and the like. But I will argue that these were recognized to be “exceptions” out of the large grant of “executive power” to the President, and as exceptions they were intended to be narrowly construed.

Advocates of legislative branch preeminence in this field like to dismiss article II, section 1, of the Constitution as not granting *any* power to the President.⁴⁶ Put simply, I think they are mistaken. Their view was

41. *AMERICAN FOREIGN RELATIONS*, *supra* note 20, at 147. Professor Louis Henkin writes that, “The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone.” L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 43 (1972).

42. Emphasis added.

43. Emphasis added.

44. *See, e.g.*, 3 *THE WRITINGS OF THOMAS JEFFERSON* 17 (A. Lipscomb & A. Bergh, eds., 1903); *THE FEDERALIST* No. 76, at 509, 513 (A. Hamilton) (J. Cooke ed. 1961).

45. T. JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES* 169, § 52 (2d ed. 1812); *see infra* note 86 and accompanying text.

46. *See, e.g.*, Henkin, *supra* note 15, at 292.

expressly rejected by the Supreme Court in the 1926 case of *Myers v. United States*,⁴⁷ and finds little support from the records of the Federal Convention, the contemporary writings and statements of such preeminent thinkers as Jefferson, Hamilton, and Madison, or the actual practice of the First Congress—two-thirds of whose members had served either at the Philadelphia Convention or in State ratification conventions.

2. Early Constitutional Interpretations

a. *Thomas Jefferson*

Let us begin by examining the views of Jefferson, Hamilton, and Madison on this point. On April 24, 1790, Jefferson wrote in a carefully drafted legal opinion to President Washington:

The Constitution has divided the powers of government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy. The Legislative it has given completely to the Senate and House of representatives; it has declared that "the Executive powers shall be vested in the President," submitting only special articles of it to a negative by the Senate; and it has vested the Judiciary power in the courts of justice, with certain exceptions also in favor of the Senate.

The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.⁴⁸

Lest there be any confusion about how limited the role of the Senate was perceived to be in such matter, it is useful to examine Jefferson's statement more carefully. At issue was whether the Senate, by virtue of its power to approve diplomatic nominations, was entitled to determine the *destination* or *grade* that was appropriate for an individual nominee. Jefferson concluded:

The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them; nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the President. They are only to see that no unfit person be employed.⁴⁹

47. 272 U.S. 52, 128, 151 (1926).

48. 16 THE PAPERS OF THOMAS JEFFERSON 378-79 (J. Boyd ed. 1961) (emphasis in original).

49. *Id.* at 397.

Now this view is entirely inconsistent with the idea expressed by some that the President in the sphere of foreign affairs was intended to be something of an “errand boy” for the all-powerful Congress—to be allowed a certain leeway when he behaved himself, but to be slapped down quickly when he displeased his masters. Furthermore, it is clear that the opinion reflected more than just Mr. Jefferson’s personal thinking. President Washington wrote in his diary three days after he received the opinion:

Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay’s and Mr. Jefferson’s—to wit—that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no further than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.⁵⁰

This suggests a number of interesting conclusions. It seems evident that such figures as George Washington, Thomas Jefferson, John Jay, and James Madison agreed that: (1) the President had constitutional foreign affairs powers that were not specifically enumerated in the Constitution (presumably because of article II, section 1, since that was the basis for Jefferson’s conclusion); and (2) the expressed powers of the Senate in this area were viewed as “exceptions” to the President’s power, and thus were to be “construed strictly.”

b. Alexander Hamilton

Although Alexander Hamilton does not appear to have been consulted by Washington on Jefferson’s memorandum, he made an almost identical observation three years later in his first *Pacificus* letter, when he wrote:

The second Article of the Constitution of the UStates, section 1st, establishes this general Proposition, That “The *Executive Power* shall be vested in a President of the United States of America.

The same article in a succeeding Section proceeds to designate particular cases of Executive Power. It declares among other things that the President shall be Commander in Cheif [*sic*] of the army and navy of the UStates and of the Militia of

50. *Id.* at 380 n.

the several states when called into the actual service of the US-tates, that he shall have power by and with the advice of the senate to make treaties; that it shall be his duty to receive ambassadors and other public Ministers and to take care that the laws be faithfully executed.

It would not consist with the rules of sound construction to consider the enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications; as in regard to the cooperation of the Senate in the appointment of officers and the making of treaties; which are qualifica[tions] of the general executive powers of appointing officers and making treaties: Because the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms—and would render it improbable that a specification of certain particulars was designd [*sic*] as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Governnt, the expressions are—“*All Legislative powers herein granted shall be vested in a Congress of the UStates;*” in that which grants the Executive Power the expressions are, as already quoted “*The Executive Pofwer]* shall be vested in a President of the UStates of America.” . . .

The general doctrine then of our constitution is, that the *Executive Power* of the Nation is vested in the President; subject only to the exceptions and qu[a]lifications which are expressed in the instrument. . . .

It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general “executive power” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.⁵¹

c. *James Madison*

In fairness, it should be noted that, at Jefferson’s urging,⁵² Madison

51. 15 THE PAPERS OF ALEXANDER HAMILTON 33, 39, 42 (H. Syrett ed. 1969) (emphasis added).

52. I would note that Jefferson’s motivation may well have been more his concern for France than about constitutional separation of powers. In his letter to Madison of July 7, 1793, enclosing copies of two of Hamilton’s *Pacificus* letters, Jefferson wrote:

Nobody answers him, & his doctrines will therefore be taken for confessed. For God’s sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public. There is nobody else who can & will enter the

took up his pen and strongly disagreed with Hamilton's assertion of broad executive powers in foreign affairs. For a variety of reasons, I would agree with scholars such as Myres McDougal and Asher Lans, who have concluded that Madison's *Helvidius* letters were deeply influenced by his "desire to befriend the French Republic."⁵³ Both Jefferson and Madison hoped that the United States would side with France in its war with Great Britain. Professor Marvin Meyers, editor of *The Mind of the Founder: Sources of the Political Thought of James Madison*, notes that Jefferson and Madison were unhappy with Washington's neutrality proclamation because they believed it neglected "America's moral, political, and treaty obligations to revolutionary France,"⁵⁴ and that Madison "saw a better chance of settling policy decisions his own way in Congress than in the executive branch, as his relations with Washington deteriorated."⁵⁵

Furthermore, Madison's *Helvidius* letters were in many respects in conflict with his earlier views of relevance to this issue—statements made on occasions when he had no obvious policy preference to influence his analysis. For example, on June 17, 1789, when Madison introduced a bill in the House of Representatives to establish the Department of Foreign Affairs, a debate arose over whether the President needed the approval of the Senate to remove the Secretary of Foreign Affairs (later that year redesignated Secretary of State). Madison argued that the President should be free to dismiss members of his cabinet despite the fact that the Constitution required Senate "advice and consent" to their appointment, and reasoned:

The doctrine . . . which seems to stand most in opposition to the principles I contend for, is, that the power to annul an appointment is, in the nature of things, incidental to the power which makes the appointment. I agree that if nothing more

lists with him.—Never in my opinion, was so calamitous an appointment made, as that of the present Minister of F. [France] here. Hot headed, all imagination, no judgment, passionate, disrespectful & even indecent towards the P. [President Washington] in his written as well as verbal communications, talking of appeals from him to Congress, from them to the people.

6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 9, at 338. This paragraph suggests that Jefferson, who had served as U.S. Minister to Paris and was known to favor the French position in its dispute with Great Britain, may have been motivated more by his affection for France (and dislike for Britain) than by concerns about Hamilton's constitutional theory. This conclusion is reinforced by the fact that Hamilton's basic conclusion about the control of foreign affairs was essentially paraphrased from Jefferson's memorandum of three years earlier. See *supra* text accompanying notes 48-49.

53. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 249 (1945).

54. THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 199 (M. Meyers ed. 1981) [hereinafter THE MIND OF THE FOUNDER].

55. *Id.* at 200.

was said in the Constitution than that the President, by and with the advice and consent of the Senate, should appoint to office, there would be a great force in saying that the power of removal resulted by a natural implication from the power of appointing. But there is another part of the Constitution no less explicit . . . ; it is that part which declares that *the Executive power shall be vested in a President of the United States*. The association of the Senate with the president in exercising that particular function, is an exception to this general rule; and *exceptions to general rules, I conceive, are ever to be taken strictly*.⁵⁶

To take an additional example, in *Helvidius*, Madison spoke disdainfully of Locke and Montesquieu (of necessity, since, as he acknowledged, their theories of “executive” power undercut the position he advocated in 1793), arguing at one point “[w]riters . . . such as Locke, and Montesquieu . . . are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry.”⁵⁷ And yet, in *The Federalist* No. 47, in expounding the meaning of the Constitution for the American people, he referred to “the celebrated Montesquieu” as “[t]he oracle who is always consulted and cited” on the subject of separation of powers,⁵⁸ and in February 1792 he wrote that “Montesquieu . . . lifted the veil from the venerable errors which enslaved opinion.”⁵⁹ Not surprisingly, Madison subsequently stated that the task of replying to Hamilton’s essay was “the most grating one I have ever experienced.”⁶⁰

F. Traditional Congressional Deference

When members of the Constitutional Convention served in the early Congresses, they established a strong practice of deference to the President in foreign affairs. For example, when the Department of Foreign Affairs was established in the First Congress, the Secretary was charged simply with carrying out the directions of the President⁶¹—in sharp contrast to the Secretary of the Treasury, who was required to make regular reports to Congress.

Similarly, when funds were first appropriated for foreign affairs, the statute provided that “the President shall account *specifically* for all such expenditures of said money *as in his judgment* may be made public, and

56. 1 ANNALS OF CONG. 496-97 (1789) (emphasis added).

57. THE MIND OF THE FOUNDER, *supra* note 54, at 203.

58. THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

59. THE MIND OF THE FOUNDER, *supra* note 54, at 183.

60. *Quoted in* GOLDSMITH, *supra* note 40, at 404.

61. 1 Stat. 28 (1789).

also for the *amount* of such expenditures *as he may think it advisable* not to specify."⁶² Within three years, this Contingent Fund of Foreign Inter-course had grown from 40,000 dollars to one million dollars—about twelve percent of the entire federal budget.

The uniform practice in appropriating funds for foreign affairs during the first fifteen years under the new Constitution was summarized by Thomas Jefferson in a letter to Treasury Secretary Albert Gallatin in 1804:

The Constitution has made the Executive the organ for managing our intercourse with foreign nations The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties [I]t has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.⁶³

When the Senate first established a standing committee on foreign relations in 1816, one of its first reports stated:

The President is the constitutional representative of the United States with regard to foreign nations. He manages out concerns with foreign nations and . . . [f]or his conduct he is responsible to the Constitution The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.⁶⁴

Particularly in the field of intelligence operations, this legislative deference to the President continued as a fundamental principle of separation of powers until the post-Vietnam era.⁶⁵

1. The Need for Secrecy

Today we hear warnings of too much "secrecy" in national security affairs. While recognizing that many documents are improperly classified to avoid political embarrassment,⁶⁶ the importance of secrecy in the

62. *Id.* at 129 (1790) (emphasis added).

63. 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 44, at 5, 9, 10.

64. *Quoted in* E. CORWIN, THE PRESIDENT, *supra* note 26, at 441 n.114.

65. For an early example, even as strong an advocate of congressional authority as Henry Clay argued in 1818 that details of intelligence missions funded by the President's secret service fund "would not have been a proper subject for inquiry." ANNALS OF CONG. 1466 (1818). This and other legislative debates on separation of national security powers are discussed in a forthcoming book being published by the University Press of Virginia, entitled CONGRESS, THE CONSTITUTION, AND FOREIGN AFFAIRS: AN INQUIRY INTO THE SEPARATION OF POWERS by R. Turner.

66. To give just one example, the Department of State routinely classifies documents which contain information which might prove embarrassing to members of Congress. For example, in 1984, when an American Ambassador in Africa sent a cable to the Department

national security field should not be understated. A key reason for limiting the participation of the Senate and the House of Representatives in the business of foreign affairs was the Founding Fathers' belief that legislative bodies were not good at keeping secrets. This lesson had been reinforced during the experience under the Articles of Confederation when the Continental Congress had been responsible for the exercise of executive powers in the absence of an Executive. Indeed, as early as 1775, the control of foreign affairs was largely delegated to a five-member Committee of Secret Correspondence, chaired by Benjamin Franklin, whose sensitive proceedings were kept from most other members of Congress. When France agreed to provide covert assistance to the American Revolution,⁶⁷ Benjamin Franklin and Robert Morris (also a member of the Committee of Secret Correspondence) agreed that it was the committee's "indispensable duty to keep it a secret, even from Congress."⁶⁸ Indeed, they observed: "We find, by fatal experience, the Congress consists of too many members to keep secrets."⁶⁹

Not only did early Presidents "lie" to Congress and the American people about certain national security matters,⁷⁰ but in order to "cover up" a security leak by Thomas Paine concerning French covert assistance to the new nation, the Continental Congress itself passed a deceptive resolution⁷¹—which, by today's standards, would presumably qualify as another reprehensible case of "lying to the American people."⁷²

Nor for that matter could the Constitutional Convention itself have

seeking assistance in redeeming a bad check which the Ambassador had been pressured into cashing for a junketing Congressman who had found a wonderful buy in African art, the entire correspondence was given a national security classification—presumably to avoid the wrath of the deadbeat legislator, who had ignored several requests from the Ambassador to honor his debt.

67. Roughly 90 percent of the gunpowder used by the American revolutionaries during the first two years of the war came from covert assistance from France, Spain, and other European enemies of the British. See, e.g., A. DECONDE, *A HISTORY OF AMERICAN FOREIGN POLICY* 25 (2d. ed. 1971).

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

69. *Id.* It is perhaps worth noting at this point that the Congress of 1988 has approximately ten times as many members as the First Continental Congress of 1774.

70. For example, in his first annual message to Congress, President Jefferson misrepresented the instructions that had been given to the U.S. naval squadron sent to the Mediterranean to deal with the Barbary pirates. See, e.g., R. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 19-23 (1983) [hereinafter *WAR POWERS*].

71. Sayle, *supra* note 68, at 6.

72. One of the difficulties with intelligence information is that it is difficult to share it with the "American people" without in the process informing the nation's adversaries as well. If those who like to charge that the Government's efforts to mislead and conceal information from its adversaries constitutes "lying to the American people" would be kind enough to explain how such information may be shared with "the people" while still being kept from America's enemies, a great service would be done.

withstood attack from today's "investigative" journalists. Indeed, one might infer from Clinton Rossiter's *1787: The Grand Convention* that the United States might not even *have* a Constitution had the Founding Fathers been compelled to deal with an adversarial press asserting the people's "right to know." Rossiter writes:

The determination to succeed, the awareness of the underlying consensus of principle and purpose, and *the ingrained deference and even timidity of the press* all combined in this period to guard the Convention against *the one development that could have destroyed it: a major breach in the rule of secrecy . . .* The Convention's own awareness of the importance of privacy dictated a vote of July 25 forbidding "members of the house . . . to take copies of the resolutions which had been agreed to," and also probably led to a "leak" to the Philadelphia newspapers in early July of a completely dissembling report that was reprinted all over the country: "So great is the unanimity, we hear, that prevails in the Convention, upon all great federal subjects, that it has been proposed to call the room in which they assemble, *Unanimity Hall.*"⁷³

This "dissembling report" would appear to be still another example of "lying to the American people."

The Founding Fathers believed that the new nation's interests could best be served if the government had access to sensitive intelligence information about other countries, and they realized that foreign sources would be unlikely to share their information with the United States if it would be disclosed, even to a Senate of twenty-two members. John Jay, in *The Federalist* No. 64, explained this dilemma during the debate over ratification of the proposed Constitution:

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

73. C. ROSSITER, 1787: THE GRAND CONVENTION 203 (1966) (emphasis added, note omitted).

able to manage the business of intelligence in such manner as prudence may suggest.

They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. *So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.*⁷⁴

In June of 1807, Thomas Jefferson wrote:

All nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication. Hence, under our Constitution, in requests of papers, from the legislative to the executive branch, an exception is carefully expressed, as to those which he may deem the public welfare may require not to be disclosed The respect mutually due between the constituted authorities, in their official intercourse, as well as sincere dispositions to do for every one what is just, will always insure from the executive, in exercising the duty of discrimination confided to him, the same candor & integrity to which the nation has in like manner trusted in the disposal of it's [*sic*] judiciary authorities.⁷⁵

Indeed, the need for secrecy in certain governmental activities was seen as being so obvious that the delegates to the Federal Convention "readily adopted"⁷⁶ a series of "secrecy" rules, prohibiting members from taking copies of resolutions and providing that "nothing spoken in the House be printed, or otherwise published or communicated without

74. THE FEDERALIST No. 64, at 432, 433-35 (J. Jay) (J. Cooke ed. 1961) (emphasis added).

75. 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 9, at 57 n.1.

76. ROSSITER, *supra* note 73, at 168 (1966).

leave.”⁷⁷ James Madison made two noteworthy observations about the convention’s extensive precautions to guarantee secrecy: (1) although the public was clearly anxious to learn what was taking place in Philadelphia, Madison saw no evidence of any public “discontent . . . at the concealment”;⁷⁸ and (2) Madison was convinced that “no Constitution would ever have been adopted by the convention if the debates had been public.”⁷⁹

2. Executive Privilege

Related to the historic legislative deference in foreign affairs and the need for secrecy is the constitutional doctrine of executive privilege, which is at its strongest in the national security realm. In this respect, the superficial analysis and factual inaccuracy which characterized the discussion of “Powers of Congress and the President in the Field of Foreign Policy” in chapter 25 of the Iran-Contra Majority Report⁸⁰ were a disservice to the nation. Although both the Majority and Minority Reports acknowledged that a fundamental issue in the dispute was the allocation of constitutional powers between the two political branches,⁸¹ the majority devoted only *six pages*—substantially less than *two percent* of its report—to this critical issue.⁸² At least one legal scholar interviewed by Senate committee investigators offered to provide background materials on these issues, and was led to believe that such matters were not of interest to the committee.⁸³ Given this attitude, it is perhaps not surprising that the legal authority the Majority Report cited was, to put it charitably, sparse;⁸⁴ and the summary of historical practice was either grossly misleading or factually inaccurate. For example, the Majority Report states:

At the hearings, North cited to the circumstances surrounding Senate [*sic*] consideration of the Jay Treaty during the

77. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (1966).

78. Madison letter to Jefferson, July 18, 1787, reprinted in 11 THE PAPERS OF THOMAS JEFFERSON, *supra* note 44, at 600.

79. Quoted in ROSSITER, *supra* note 73, at 167.

80. See IRAN-CONTRA REPORT *supra* note 3, ch. 25.

81. *Id.*

82. *Id.* at 387-92. By contrast, the Minority Report devoted three of its fourteen chapters (and about 15 percent of its length) to these important issues. More important, in terms of *quality* the Minority Report was far superior to that of the majority.

83. The interview left the strong impression that the investigators perceived their mission to be digging up derogatory information about Lt. Colonel North and other administration officials.

84. For example, 40 percent of the fewer than a dozen court cases cited by the Majority Report in this chapter were to *inferior* courts—one of which the report acknowledges was subsequently vacated by the Supreme Court, and another of which was apparently relied upon in an effort to qualify the most frequently cited Supreme Court foreign affairs case. IRAN-CONTRA REPORT, *supra* note 3, at 388 n.12, 389 n.26.

presidency of George Washington as support for his claim that the President had the power to withhold information from Congress. There, President Washington "refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty."

Reliance on President Washington's position with respect to information about the Jay Treaty is erroneous. President Washington did not argue that he had the power to withhold documents from Congress. As the opinion in *Curtiss-Wright* makes clear, President Washington only withheld these "correspondence and documents" from one House of Congress, not from the entire legislative branch. He gave the documents to the Senate; he withheld them from the House because the documents related to a treaty negotiation, and the power to ratify [*sic*] or reject treaties is reserved under the Constitution to the Senate.⁸⁵

One hardly knows where to begin critiquing such a misleading and inaccurate summary. The problem is not the minor misstatements, such as the suggestion that the issue arose "surrounding Senate consideration of the Jay Treaty" (which had been approved by the Senate well before the issue arose in the House), or the misstatement that the Senate has "the power to ratify . . . treaties" (a power instead vested in the President by article II, section 2, subject only to the "advice and consent" of the Senate⁸⁶), although they do suggest either ignorance or carelessness about our constitutional system and its history. The real problem is in the statement that "President Washington did not argue that he had the power to withhold documents from Congress."⁸⁷ While it is true that the debate over House access to documents pertaining to the Jay Treaty centered around the contention that the House had no proper role in the treaty process, the issue of an executive privilege to deny national security information to either house of Congress had been addressed and resolved by President Washington years earlier. The initial debate over a national security executive privilege occurred in late March of 1792, after

85. *Id.* at 390 (citation omitted).

86. "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." U.S. CONST. art. II, § 2. The distinction being that, even after the Senate has granted its consent, the President has *complete discretion* to decide whether or not to proceed with the formal international act of ratification. As president of the Senate, Vice President Jefferson wrote *A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES* (2d ed. 1812) which in section 52 characterized the role of the Senate in treaty making as "a negative"—a term also commonly used during the period to describe the President's veto power over legislation. See also E. CORWIN, *THE PRESIDENT*, *supra* note 26, at 211 (describes the role of the Senate in the treaty process as "that of *veto*"(emphasis in original)).

87. IRAN-CONTRA REPORT, *supra* note 3, at 390.

the House of Representatives called for documents on the failed military expedition of Major General St. Clair. Washington was concerned that his response, "so far as it should become a precedent . . . should be rightly conducted," called a meeting of his cabinet.⁸⁸ Discussion continued over a two day period, with Washington concluding that he "could readily conceive there might be papers of so secret a nature as that they ought not to be given up."⁸⁹ The cabinet met again on April 2 and reached a unanimous agreement on the issue. As Jefferson explained:

We had all considered and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.⁹⁰

Jefferson "agreed . . . to speak separately to the members of the [House] committee, and bring them by persuasion into the right channel."⁹¹ As a result, the House rephrased its request, directing it to the President. The practice of addressing such requests to the President with the qualification "if not incompatible with the public interest" became standard procedure with respect to inquiries concerning national security matters.⁹²

It is perhaps worth noting that the Washington administration's unanimous viewpoint on what is now called "executive privilege" was not inconsistent with most of those expressed in the House of Representatives at the time. When the St. Claire resolution was first introduced it was challenged by legislators as incompatible with the Constitution. In its defense, Representative Boudinot explained: "The present proposition goes no further than a simple request. Having signified the wish of the House, the President may adopt such measures in relation to the subject as he may see proper."⁹³

88. Among many sources that discuss this incident see Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959), citing 1 JEFFERSON, WRITINGS 189 (Ford, ed. 1894).

89. 1 WRITINGS OF THOMAS JEFFERSON, *supra* note 44, at 303-04.

90. *Id.*

91. *Id.* at 305.

92. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 321 (1936), quoted *infra* note 104 and accompanying text; E. CORWIN, *THE PRESIDENT*, *supra* note 26, at 113.

93. 3 ANNALS OF CONG. 490 (1792).

The issue arose again in 1794, when the Senate sought copies of correspondence prepared by the United States Ambassador to France. Consistent with established practice, Attorney General William Bradford wrote that "it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed."⁹⁴

When the House in 1796 requested documents relative to the Jay Treaty in connection with an appropriations bill to implement the treaty, it was widely acknowledged in the House debate that the President had discretion to refuse to provide any sensitive parts of the requested information. Indeed, only one member of the House appeared to argue that the House had an absolute constitutional right to the documents.⁹⁵ The Iran-Contra Majority Report is technically correct in noting that, in this instance, Washington's refusal to provide the requested information was explained primarily in terms of the House not having a role in the making of treaties (although Washington also stressed the need for "secrecy").⁹⁶ Implicit in his refusal to turn over the information, however, was the conclusion that the President had *discretion* to deny sensitive national security information to Congress.

Indeed, although James Madison criticized the President's message, in the process he recognized the existence of a national security executive privilege. His objection was not that the President had denied information to Congress, but that the President's *justification* for so doing had involved a determination of the need of the House for such information. As reported in the *Annals of Congress*, Madison argued:

He thought it clear that the House must have a right, in all cases to *ask* for information which might assist their deliberations on the subjects submitted to them by the Constitution; being responsible, nevertheless, for the propriety of the measure. He was as ready to admit that *the Executive had a right, under a due responsibility, also, to withhold information* when of a nature that did not permit a disclosure of it at the time. And if the refusal of the President had been founded simply on a

94. Quoted in A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 84 (1976). Sofaer notes that Washington "accepted the view espoused by his Cabinet that he could withhold information in the public interest," and in his reply to the Senate's request for documents the President asserted that he had "directed copies and translations to be made [for the Senate]; except in those particulars which, in my judgment, for public considerations, ought not to be communicated." These included politically sensitive and highly critical comments by Governor Morris about French political leaders. Sofaer notes that "no further Senate action was taken to obtain the material withheld." *Id.* at 84-85.

95. 5 ANNALS OF CONG. 601 (1796) (Rep. Lyman).

96. Washington Message to the House of Representatives, March 30, 1796, reprinted in 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 186-88 (1896).

representation, that the state of the business within his department, and the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticize it It belonged, he said, to each department to judge for itself. *If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department.*⁹⁷

One of the great Senate debates over separation of powers in foreign affairs occurred in 1906, when Senator Augustus Bacon proposed a resolution calling upon President Roosevelt to provide the Senate with negotiating instructions and other background materials regarding Morocco. Bacon's motion was opposed as an invasion of the President's constitutional powers by Senator John Coit Spooner, a three-term veteran of the Senate and one of the best constitutional lawyers of his time.⁹⁸ In a major statement on the power of the Senate and the President in foreign affairs, Senator Spooner told his colleagues:

Mr. President, the three great coordinate branches of this Government are made by the Constitution independent of each other except where the Constitution provides otherwise. We have no right to assume the exercise of any executive power save under the Constitution We as the Senate, a part of the treaty-making power, have no more right under the Constitution to invade the prerogative of the President to deal with our foreign relations, to conduct them, to negotiate treaties, and that is not all—the conduct of our foreign relations is not limited to the negotiation of treaties—we have no more right under the Constitution to invade that prerogative than he has to invade the prerogative of legislation.⁹⁹

At the end of Spooner's lengthy presentation, which cited a wealth of historic precedent and legal authority, Senator Henry Cabot Lodge—a Harvard Law School graduate who ultimately served six terms in the Senate, became its majority leader, and was a leader of the Senate's successful effort to reject the Versailles Treaty (thus keeping the United States out of the League of Nations)¹⁰⁰—observed: "Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty

97. 5 ANNALS OF CONG. 773 (1796) (emphasis added).

98. Senator Spooner declined invitations to serve as U.S. Attorney General in the McKinley administration, and to serve as Secretary of State under President Taft.

99. 40 CONG. REC. 1420 (1906).

100. Although in retrospect politically controversial, the Senate's decision to refuse to consent to the ratification of the Versailles Treaty was clearly within its constitutional powers.

making . . . which we have heard from the Senator from Wisconsin [Mr. Spooner] this afternoon.”¹⁰¹

The late Professor Edwin S. Corwin noted that, during this debate, even Senator Bacon “conceded that ‘the question of the President’s sending or refusing to send any communication to the Senate is not to be judged by legal rights, but [is] . . . one of courtesy between the President and that body.’ ”¹⁰²

Consider also this excerpt from volume three of Professor Westel Willoughby’s classic treatise, *The Constitutional Law of the United States*:

§ 968. Information to Congress

The constitutional obligation that the President “shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient,” has, upon occasion, given rise to controversy between Congress and the President as to the right of the former to compel the furnishing to it of information as to specific matters. As a result of these contests it is practically established that the President may exercise a full discretion as to what information he will furnish, and what he will withhold.

The discretionary right of the President to refuse information to Congress has been exercised from the earliest times.¹⁰³

The Supreme Court, too, has recognized the existence of a constitutional power of the President to deny national security information to Congress. In the landmark 1936 case of *United States v. Curtiss-Wright Export Corp.*, the Court noted:

[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives

101. 40 CONG. REC. 1421 (1906).

102. E. CORWIN, *THE PRESIDENT*, *supra* note 26, at 211-12. Corwin concluded:

The record of practice amply bears out this statement So far as practice and weight of opinion can settle the meaning of the Constitution it is today established that the President . . . is final judge of what information he shall entrust to the Senate as to our relations with other governments.

Id.

103. 3 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1488 (2d ed. 1929).

the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . .

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information “if not incompatible with the public interest.” A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.¹⁰⁴

Another important Supreme Court case in this regard is *United States v. Nixon*, which was referenced in the Iran-Contra committee’s Majority Report under the subheading “Judicial Decisions Recognize a Shared Power” in these terms:

Congress’s role in obtaining and protecting confidential information relating to foreign policy has also been recognized in judicial opinions. In *United States v. Nixon*, the Supreme Court recognized that “military, diplomatic, or sensitive national security secrets” may be entitled to specially privileged status in certain contexts, but went on specifically to state that the case had nothing to do with the balance between the President’s “generalized interest in confidentiality . . . and congressional demands for information.”¹⁰⁵

In all candor, it is difficult to comprehend what the committee majorities were trying to say. The opening sentence misstates the issue. No one questions that Congress often “obtains” and “protects” confidential information (although its record of “protection” in recent years is hardly admirable). The issue is whether Congress may by statute *compel* the President to provide such information when the President believes to do so would harm the national interest. Certainly the Court in *United States v. Nixon* did not say that “the case” (*United States v. Nixon*) had “nothing to do with” balancing the President’s “generalized interest in confidentiality,” for that was precisely at issue before the Court. That “general interest” was balanced against the needs of the judiciary for evidence to promote justice in a criminal proceeding. The case did not involve a demand by *Congress* for information, but rather was a dispute

104. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 321 (1936) (emphasis in original).

105. IRAN-CONTRA REPORT, *supra* note 3, at 388 (note omitted).

between the President and a federal district court. But the suggestion that the *Nixon* decision “recogniz[ed] a shared power,” as the subheading for the Majority Report’s discussion of this case characterized it, is simply inaccurate. On the contrary, although the specific issue was not decided (because not raised in the case before the Court), several passages in the *Nixon* opinion suggested that there might well be an *absolute* constitutional privilege for the President to protect *national security* information from other branches of government. Consider these excerpts from the unanimous decision of the Court:

[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President’s need for complete candor and objectivity from advisers calls for great deference from the courts. However, *when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide. . . . To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of “a workable government” and gravely impair the role of the courts under Art. III In this case the President . . . does not lace his claim of privilege on the ground that they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibility No case of the Court, however, has extended this high degree of deference to a President’s generalized interest in confidentiality. Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.*¹⁰⁶

106. *United States v. Nixon*, 418 U.S. 683, 706-11 (1974) (emphasis added); see also *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

3. Congressional Control Over Presidential Staff

In criticizing the position taken by Lt. Colonel North, the Majority Report stated:

Key participants in the Iran-Contra Affair had serious misconceptions about the roles of Congress and the President in the making of foreign policy In Poindexter's and North's view, Congress trespassed on the prerogatives and policies of the President and was to be ignored or circumvented when necessary If Congress sought to investigate activities which were secretly taking place, they believed executive branch officials could withhold information to conceal operations [T]he attitude that motivated this conduct was based on a view of Congress' role in foreign policy that is without historical or legal foundation.

North . . . repeatedly stated his view that "it was within the purview of the President of the United States to conduct secret activities . . . to further the policy goals of the United States." North claimed that the President had the power under the Constitution to conduct "secret diplomacy" because "the President can do what he wants with his own staff."¹⁰⁷

Several of these points have already been addressed, but the final one warrants further comment. In so doing, one can not help but wonder where the authors of the Majority Report were when their law school classmates took up perhaps the most famous of all Supreme Court decisions, *Marbury v. Madison*. In that landmark 1803 case, Chief Justice John Marshall observed: "By the constitution . . . the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience."¹⁰⁸

Chief Justice Marshall noted that the subject of these powers was "political," and that "[t]hey respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive." Marshall reasoned that "whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."¹⁰⁹ He continued:

To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in

107. IRAN-CONTRA REPORT, *supra* note 3, at 387 (footnote omitted).

108. 5 U.S. (1 Cranch) 137, 166 (1803).

109. *Id.* at 165-66.

which executive discretion may be used, still there exists, and can exist, no power to control that discretion

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely . . . to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.¹¹⁰

4. Congressional Dishonesty?

The overall Majority Report is so inaccurate and misleading that it raises fundamental questions about the intellectual integrity of its authors. While accusing Lt. Colonel North and his colleagues of “lying to the Congress” to protect sensitive foreign policy initiatives, did the congressional committees “lie” to the American people in an effort to embarrass the President and “settle a score” with some of his most enthusiastic and effective aides?

There are portions of the Majority Report which strongly suggest a lack of candor bordering on dishonesty. For example, on page 415 of the Majority Report, section 501 of the National Security Act of 1947, as amended, is quoted as providing: “To the extent consistent with all applicable authorities and duties, including those conferred upon the executive and legislative branches of the Government.” This quotation conveniently drops the words “*by the Constitution*”—words some members of Congress find inconvenient and have moved to amend out of the statute. The actual language of section 501 reads:

To the extent consistent with all applicable authorities and duties, including those conferred *by the Constitution* upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall: (1) keep the . . . “intelligence committees” . . . fully and currently informed of all intelligence activities.¹¹¹

110. *Id.* at 166; *see also*, W. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES 459-60 (1904), which states:

Under the constitution certain political powers are vested in the President which are to be exercised by him in his discretion without any hindrance or control on the part of the judiciary, and so far as he derives his powers from the constitution, he is beyond the reach of any other department of government, except by impeachment in the mode prescribed in the constitution.

111. National Security Act of 1947, § 501; 50 U.S.C. § 413 (1982). Discussing this provision of the law, which was added by the Intelligence Authorization Act of 1980, a scholar from

The deletion of the words “*by the Constitution*” could *conceivably* have been simply a “typographical error”, but given its critical importance to the statute, and the fact that members of the Iran-Contra committee majority have cosponsored legislation which would eliminate these inconvenient words, it would have been an incredibly convenient “typo.”

One could argue that the words do not matter. After all, despite repeated attempts in the national security field in recent years, the Congress in the final analysis lacks the constitutional *power* to deprive the President of his independent constitutional authority by simple statute. Article V of the Constitution is quite clear on the amendment process. So long as we have our Constitution, Congress may not usurp the powers of other branches by simply deleting references to them in statutory provisions.

Nevertheless, this convenient omission had political value. Most Americans who might read the Majority Report, including members of the press, are not familiar with the detailed provisions of either the intelligence laws or the Constitution itself. By deleting an acknowledgement by a previous Congress that the President has constitutional powers which can not be usurped by Congress, the Majority Report helped to conceal the fatal flaw in its entire position.

If the American people should be outraged at Lt. Colonel North for his lack of candor—which appears to have been motivated by a desire to save American lives, to deter international terrorism, to protect intelligence sources and methods, and to keep the Persian Gulf from falling into the hands of the Soviet Union—one wonders how they should react to this apparent effort at deception by the majorities of the Iran-Contra committees. Article I, section 6 of the Constitution properly immunizes the official conduct of legislators (speech or debate) from executive branch scrutiny. Unfortunately, in recent years Congress has displayed a shameful reluctance to act seriously to discipline misconduct by members.¹¹² Like the President, however, members of Congress may be held accountable by the voters through the political process.

5. The Boland Amendment

It is not my intention to deliver a comprehensive legal evaluation of

the Congressional Research Service of the Library of Congress wrote: “this language means little more than that the intelligence committees will be informed if the executive branch feels like it.” L. FISHER, *The Legitimacy of the Congressional National Security Role 13*, (Nov. 19-20, 1987) (unpublished paper prepared for delivery at the National Defense University symposium “Congress, the Presidency, the Judiciary, and National Security: A View from the Bicentennial of the Constitution,” Washington, D.C.).

112. See, e.g., *supra* note 4 and accompanying text.

the so-called "second Boland amendment" (Boland II), however some general observations might be useful. The Amendment, which was enacted as section 8066 of the Continuing Appropriations Act for Fiscal Year 1985, provided *inter alia*:

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.¹¹³

Much of the debate that has occurred thus far has focused on whether the language "or any other agency or entity of the United States involved in intelligence activities" included the National Security Council (NSC). Even assuming, *arguendo*, that Congress intended the statute to apply to the NSC, this is hardly dispositive of the legal question before us. At least as interesting is the question of the *authority* of Congress to enact this kind of restriction on the President's conduct of foreign policy.

As already discussed, in the general conduct of foreign affairs the President has a great deal more independence and discretion than he does in domestic affairs. Congress may not limit his ability to negotiate with foreign governments, or control the content of such discussions. The Senate may refuse its consent to the ratification of any treaty which results from such negotiation, and Congress may arguably—although this is *far* from established¹¹⁴—refuse to *fund* any agreement reached through such negotiations. But Congress has no constitutional power to prevent the President from seeking to influence the actions of foreign governments as he deems appropriate to further U.S. foreign policy interests.

The President would certainly seem to have some discretion in dealing with Nicaraguan aggression against its neighbors. That such aggression has occurred does not appear to be disputed by the Congress. When

113. Pub. L. 98-473, § —, — Stat. —, — (19—). (emphasis added).

114. Although beyond the scope of this paper, it is perhaps worth noting that during the early days of our Constitution there was a widespread, but far from unanimous, belief that Congress had no discretion in funding treaties properly approved by the Senate. See, e.g., L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 161-62 (1972). The debate continues to this day. Although generally supportive of legislative authority in foreign affairs, Professor Henkin writes:

The international obligations of the United States are the responsibility of the treaty-makers. The Senate was given a part in the process but the House, and Congress as a whole, were purposely denied any say. Congress . . . probably has a constitutional obligation to implement the treaties which the President and Senate make.

Id. at 164.

Representative Boland chaired the House Permanent Select Committee on Intelligence it regularly acknowledged the overwhelming nature of the intelligence evidence of Nicaraguan efforts to overthrow its neighbors. For example, in its May 1983 report the committee said:

At the time of the filing of this report, the committee believes that the intelligence available to it continues to support the following judgments with certainty:

A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas.

The Salvadoran insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material, and propaganda activities.

The Sandinista leadership sanctions and directly facilitates all of the above functions.

Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.

In addition, Nicaragua and Cuba have provided—and appear to continue providing—training to the Salvadoran insurgents.¹¹⁵

It is beyond reasonable question that these acts by Nicaragua are in flagrant violation of provisions of the United Nations Charter¹¹⁶ and the

115. U.S. CONGRESS, HOUSE, PERMANENT SELECT COMM. ON INTELLIGENCE AMENDMENT TO THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1983, H. Rep. No. 98-122, 98th Cong., 1st Sess. at 6 (1983). For more information see R. TURNER, *Nicaragua v. United States: A LOOK AT THE FACTS* 84-86 (1987) [hereinafter A LOOK AT THE FACTS].

116. "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 other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER, art. 2, para. 4. Note in connection with U.S. support for Nicaraguan armed opposition (*Contras*) that an exception to this provision (or, viewed more correctly, a complementary provision of the Charter which is not in conflict with article 2, paragraph 4) is found in article 51, which states that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" (rather than "armed attack," the French text to the Charter—which is equally authentic—uses the term "armed aggression.") *Id.* El Salvador has stated publicly that it requested assistance from the United States after the commencement of Nicaraguan aggression and before the U.S. decision to give support to the *Contras*. See A LOOK AT THE FACTS, *supra* note 115, at 112-19 (especially 116); see also, Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 VAND. J. TRANSNAT'L L. 53 (1987).

Revised Charter of the Organization of American States.¹¹⁷ Indeed, Congress has found as a matter of United States law that Nicaragua: "Has committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention."¹¹⁸

Under the United States Constitution these treaties are as much a part of the "supreme Law of the Land"¹¹⁹ as is the Boland amendment. Both legislative enactments (like the Boland amendment) and treaties are among the "laws" which the President under the Constitution has a duty to see are "faithfully executed."¹²⁰ Thus, subject to certain narrowly construed constraints set forth in the Constitution, the President would seem to have a duty to try to deter Nicaraguan aggression against its neighbors. However, to the extent that the Boland amendment is in conflict with U.S. obligations under these various treaties it would take precedence—because of its later date of approval—as a matter of internal United States "law."¹²¹

However, there is another potential problem with the Boland amendment. As already discussed, in fulfilling his duties as the nation's Executive and Commander in Chief, the President has a wide range of discretionary powers which may not be limited by Congress.¹²² Congressional restrictions on the President's conduct of foreign relations must be supported by an affirmative grant of constitutional power,¹²³ and as "exceptions" to the general grant of executive power to the President these

117. No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed forces but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

REVISED CHARTER OF THE ORGANIZATION OF AMERICAN STATES, art. 18. Note in connection with U.S. support for the armed opposition in Nicaragua that this provision is qualified by art. 22 which states: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 18 and 20."

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

119. U.S. CONST., art. VI, *quoted supra* note 31.

120. U.S. CONST., art. II, § 3.

121. The Supreme Court has held that treaties and statutes are of equal dignity under the Constitution, and thus when they come into irreconcilable conflict, "the last expression of the sovereign will must control." *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 600 (1889). This would seem to support a view that a treaty obligation may be preempted by a subsequent restrictive statute, even though such a result may leave the nation in violation of its treaty obligations under international law—which as a matter of domestic U.S. constitutional law is clearly true.

122. *See supra* notes 99 & 101 and accompanying text.

123. *See supra* text accompanying note 27.

legislative (or Senate) powers are to be construed strictly.¹²⁴

Congress has, as a matter of law, found that Nicaragua is engaged in aggression against its neighbors in violation of treaties to which the United States is a party. It has clearly approved some U.S. covert assistance to the so-called *Contras* as a means of pressuring Nicaragua to cease its aggression. Even in cases involving the use of direct U.S. armed forces, the Supreme Court has recognized that subsequent congressional funding provides implicit authorization.¹²⁵ At issue is the extent to which—having recognized the international threat to United States national security and the treaty violations and approved a United States response to assist the victims of aggression—Congress may “micromanage” the President’s actions in responding to that aggression.

In certain situations such an effort by Congress would be *clearly* unconstitutional. Congress has a constitutional right to veto a Presidential decision to initiate an offensive war,¹²⁶ and can no doubt place at least *some* constraints on the scope of hostilities. However, the decisions associated with actually conducting hostilities are vested by the Constitution in the Commander in Chief—and, indeed, the draft constitution was specifically amended on August 17, 1787, to make this separation of powers more clear.¹²⁷ Should Congress, therefore—to give an extreme hypothetical—seek to direct the President to attack a certain hill on a specified date with a specified military unit, such an effort would unquestionably be an unconstitutional infringement upon the powers of the President as Commander in Chief.

As congressional constraints become more general, the case may become less clear. The principles which should govern any decision in this area would include: (1) the President may not initiate an offensive¹²⁸

124. See *supra* notes 48, 51, 56 and accompanying text.

125. See, e.g., *The Prize Cases*, 67 U.S. (2 Blk.) 635 (1863). Note that § 8(a)(1) of the 1973 War Powers Resolution, 50 U.S.C. §§ 1541-48 (1973), seeks to prevent such an interference with respect to decisions to commit U.S. armed forces “into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances.” See *WAR POWERS*, *supra* note 70, at 14. However, this provision does not address the present situation—which does not involve the commitment of U.S. armed forces.

126. U.S. CONST., art. I, § 8; see *supra* note 20 and *infra* note 128.

127. J. MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* 476 n.* (1966).

128. The records of the Federal Convention of 1787 establish that the Founding Fathers drew a distinction between the constitutional power of the Commander in Chief to defend the nation against “sudden attacks” and the requirement in art. I, § 8, that a decision to “declare war” be approved by both Houses of Congress. As Roger Sherman argued during the convention: “The Executive sh[ould] be able to repel and not to commence war.” 2 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787* 318 (1966). Alexander Hamilton argued in 1801:

It is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received: in other words, it belongs to Congress only, *to go*

“war” by the United States against a foreign state without the approval of both houses of Congress; (2) in other matters of foreign affairs, Congress may restrict the President only pursuant to expressed or reasonably implied grants of constitutional power; (3) such “exceptions” to the general grant of “executive power” to the President must be construed strictly; and (4) to the extent that the question is how to best accomplish a desired end, rather than establishing the policy “end” itself, the case for Presidential discretion under the Constitution would appear to be at its peak.

To take just one of the issues involved in this dispute, it is difficult to find in the Constitution authority for Congress to prohibit the President from urging other states to provide assistance to the *Contras*. To the extent it sought to do that, the Boland amendment would seem to have exceeded the proper limits of congressional authority. The normal rule of statutory interpretation would be to construe the language sufficiently narrowly to avoid this constitutional problem.

Equally clear in my view—despite an apparently contrary conclusion by my immediate successor as counsel to the President’s Intelligence Oversight Board¹²⁹—is that Congress may not *indirectly* control independent discretion vested by the Constitution in the President by placing conditions on appropriations for the *salaries* of executive branch employees. The “great principle” that “what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result”¹³⁰ has been affirmed time and again by the Supreme Court.¹³¹ For example, when Congress sought to use its legitimate control over the jurisdiction of the Court of Claims to deprive the President of his pardon power, the Court held that Congress had “inadvertently” violated the separation of powers doctrine. The Court explained:

to War. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary.

7 WORKS OF ALEXANDER HAMILTON 746-47 (J. Hamilton, ed. 1851) (emphasis in original). Historically, as a matter of international law, the requirement for a formal “declaration of war” has been associated with offensive and not defensive hostilities—and the type of aggressive war generally associated with such declarations has been outlawed by various international agreements. See, e.g., U.N. CHARTER, art. 2, para. 4.

129. “Sciaroni noted that if North’s salary was borne by the Department of Defense, an entity expressly named in Boland II, he could be subject to its restrictions.” IRAN-CONTRA REPORT, *supra* note 3, at 400.

130. *Fairbank v. United States*, 181 U.S. 283, 294 (1901).

131. See sources cited in Turner, *The Power of the Purse: Controlling National Security Policy by Conditional Appropriations* (Nov. 20, 1987) (unpublished paper delivered to a symposium entitled “Congress, the President, the Judiciary, and National Security: A View from the Bicentennial of the Constitution,” sponsored by the National Defense University).

It is the intention of the Constitution that each of the great coordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit Now it is clear that the legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration.¹³²

When in past years Congress has sought to abuse its “power of the purse” to accomplish unconstitutional ends, the Court has not hesitated to strike the measure down. During World War II, when Congress enacted a statute seeking to use what it claimed to be its “plenary” power over appropriations to deny funds to pay the salary of three named alleged “communists” in the executive branch, the Supreme Court in *United States v. Lovett* struck down the measure as a bill of attainder.¹³³

The “power of the purse” is important, but it is not a tool through which Congress may properly seize control of all powers of government. Indeed, if the use of conditional appropriations measures—like the Bolland amendment—allowed Congress to direct the manner in which the President exercised his discretionary responsibilities under the Constitution, the same vehicle could be used to deprive the judiciary branch of its independent powers as well. The same logic which would permit Congress to deny funds (either directly or for payment of staff salaries) to the President to conduct foreign relations other than as dictated by the legislative branch could be turned on the Supreme Court with equal ease to shut down its operations if any measure on a lengthy list of new legislation were held unconstitutional. To argue that the “power of the purse” permits Congress to seize either executive powers or judicial review is to argue that the Founding Fathers did not establish three coequal, independent branches of government; but ultimately vested all powers of government in the legislature. Such a view is both wrong and dangerous.

6. A Few Policy Observations

Before concluding, perhaps a few words are in order about policy. I am not here addressing the wisdom of the Administration’s decision to sell arms to Iran (which I think in retrospect was clearly a mistake), or what I view as the incredibly immoral and harmful action of Congress in authorizing or prohibiting assistance to the Contras every few months on

132. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1872).

133. *United States v. Lovett*, 328 U.S. 303 (1946).

the basis of the prevailing “mood of Congress”¹³⁴ at the moment (precisely one of the dangers *The Federalist Papers* warned us against¹³⁵). This has prolonged the suffering, undermined deterrence in this specific situation, and (along with many other actions of Congress) virtually destroyed the credibility of the United States as a reliable ally throughout the world.¹³⁶ I am rather questioning what ought to be the proper relationship between Congress and the President in national security affairs.

Having seen legislative-executive relations from diverse perspectives over nearly fifteen years, I am convinced that the absence of a genuine bipartisan foreign policy is one of the major impediments to peace in the modern era. I believe it is important for both political branches of government to work closely together in an effort to reestablish such a relationship, and to that end—as a matter of comity—I believe it is desirable for the President to provide adequate national security information to Congress to assist it in its important work.

During my service in the Department of State I was a frequent critic of the all too common practice of “notifying” Congress of executive decisions in the guise of “consultation.” Genuine consultation ought to involve a sincere solicitation of views about broad policy options and specific problem areas, with a summary of congressional views and recommendations being shared with the President, the Secretary of State, or other decisionmakers *prior* to the formulation of policy. This is not to say that the President should yield ultimate decisionmaking authority in the Congress (beyond that already contained in the Constitution), but that he should have the benefit of congressional thinking and should factor that in to his analytical equation with the knowledge that major policies which do not have the support of Congress and the American people

134. IRAN-CONTRA REPORT, *supra* note 3 at 405.

135. In arguing against giving the House of Representatives any role in the formation of treaties, Hamilton wrote:

The fluctuating, and taking its future increase into the account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; *a steady and systematic adherence to the same views*; a nice and uniform sensibility to national character, decision, *SECRECY* and dispatch; are incompatible with the genius of a body so variable and so numerous.

THE FEDERALIST No. 75, at 507 (A. Hamilton) (J. Cooke ed. 1961) (small italics added, capital italics in original).

136. One reason the noncommunist governments of Central America are trying to cut the best deal they can with Nicaragua is that they perceive Moscow, Havana, Hanoi, and the other backers of the Sandinista regime will be far more likely to stand by their ally when things get tough than will the United States. This is a direct consequence of congressional decisions to abandon U.S.-supported movements in Vietnam, Laos, Cambodia, Angola, and elsewhere; and has *substantially* increased the likelihood that the United States will eventually be forced to deter further aggression with the lives of its own young men.

are unlikely to succeed. Thus, regardless of the constitutional prerogatives of the two branches, there are strong prudential considerations which mitigate in favor of keeping a responsible Congress informed about national security policy issues.

Obviously, these considerations must be weighed against the risks of congressional irresponsibility. Ideally, an informal sort of "checks and balances" should exist based on these principles:

- (1) Both Congress and the President should recognize the dangers to the nations which are present in the modern world, and should in the name of peace insist that "politics" stop at the water's edge.
- (2) Although he has a great deal of independent constitutional discretion in national security affairs which is beyond the direct control of Congress, the President should recognize a self-interest in cooperating with Congress and keeping a *responsible* Congress adequately informed to facilitate rational cooperation and support.
- (3) The Congress should recognize the importance and special nature of national security problems, insist that these be handled on a higher level than simply "politics as usual," display a due respect for the independent constitutional powers of the President—even in circumstances where individual members believe they might well exercise that discretion differently and more effectively were they President—and should recognize that responsible congressional behavior is a *precondition* for substantial Executive cooperation with respect to sensitive national security information.

The benefits to both branches—and, more importantly, to the Nation—of a genuine bipartisan cooperation in the national security field should be so obvious as to require no elaborate discussion. However, a President who is virtually under siege from a Congress which seems determined to grab all powers of government for itself is hardly in a position to make further concessions to improve the overall relationship. The primary fault is with Congress—both for the Iran-Contra Affair,¹³⁷ and for the overall deterioration of legislative-executive relations in the national security field—and it is Congress which must, of necessity, make the first steps if the situation is going to be corrected.

To provide a rough idea of how active Congress has become in trying to micromanage foreign affairs in the post-Vietnam era, in the years since the Gulf of Tonkin Resolution was enacted into law in August 1964, the congressional compilation of *Legislation on Foreign Relations* increased from one volume of 659 pages to three volumes averaging

137. See *supra* note 4 and accompanying text.

nearly 1,500 pages *each*. The Founding Fathers would be *shocked* at this development.¹³⁸ They placed great value on unity of decision in foreign affairs, and this simply is not possible when we have 536 individuals who want to play Secretary of State.¹³⁹

Congress needs to recognize that its insistence upon having access to the nation's most sensitive national security secrets is not cost-free to the nation. As John Jay noted in explaining to the American people in March of 1788 why the proposed Constitution had left the President free "to manage the business of intelligence in such manner as prudence may suggest":

There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly.¹⁴⁰

Recent history has affirmed the wisdom of this analysis. During the Iran hostage crisis in 1979, for example, several U.S. Embassy employees managed to evade capture and reach the safety of the Canadian Embassy in Tehran. The Government of Canada was willing to provide false documentation and take other steps to assist those Americans to safety, but only if in the process its own people in Tehran were not put at risk. Knowing that the U.S. Congress does not have a good record of keeping secrets, the Government of Canada insisted as a *condition* of its cooperation that the U.S. Congress not be immediately informed of the operation. In order to rescue the Americans, whose lives were thought to be in

138. See, e.g., *supra* note 63 and accompanying text.

139. The modern effort by Congress to enact the most detailed laws to "protect" the nation against every conceivable form of executive misconduct is reminiscent of a short-lived proposal by Elbridge Gerry, in the Constitutional Convention, to fix the maximum size of the peacetime army in the nation's fundamental law. As described by Harvard Professor Charles Warren:

[Gerry] thought an army in time of peace to be dangerous, and he moved that "in time of peace the army shall not consist of more than—men", suggesting that 2,000 or 3,000 should be sufficient. Luther Martin supported him. At this point in the Convention, as later narrated by General Mercer, General Washington, who was in the Chair and therefore could offer no motion, turned to a delegate who stood near and in a whisper made the satirical suggestion that he move to amend the motion so as to provide that "no foreign enemy should invade the United States at any time, with more than three thousand troops." . . . Gerry's motion was unanimously rejected.

C. WARREN, *THE MAKING OF THE CONSTITUTION* 482-83 (1937).

140. *THE FEDERALIST* No. 64, at 434-35 (J. Jay) (J. Cooke ed. 1961), *quoted supra* text accompanying note 74.

serious danger, President Carter *agreed* to the Canadian condition—despite the fact that a United States “law”¹⁴¹ required “timely” notification of the Intelligence Committees about all such activities—and did not notify Congress for about six months. Indeed, this was one of several occasions when President Carter failed to comply promptly with the notification requirement of the law.¹⁴² Other governments have not asked the American President to “break the law”—they have simply refused to cooperate with the United States in sensitive intelligence matters because of the perception that Congress will be told and their cooperation with the United States will shortly thereafter come to the attention of their enemies via the American press.¹⁴³

Today, in response to the “abuses” of the Iran-Contra Affair, Congress is moving quickly to amend the law in question to eliminate any acknowledgment of the President’s independent constitutional powers in this area and to mandate notification in all cases within forty-eight hours. This may ultimately force future Presidents to choose between becoming “lawbreakers” in the eyes of Congress or abandoning American lives and interests to international terrorists.¹⁴⁴ Aside from the constitutional difficulties with such a statute, the Congress—or, if it refuses, the American

141. A law which in this writer’s view is only constitutional because it essentially recognizes that the President has independent constitutional authority to ignore it. *See supra* note 111.

142. IRAN-CONTRA REPORT, *supra* note 3, at 545.

143. No purpose would be served by disclosing details of such incidents that would outweigh the damage done to the countries involved. However, one related example is referred to in the press account quoted *supra* text accompanying note 4.

144. In practice, Congress doesn’t seem to mind when the President “breaks the law” in foreign affairs matters if the public ultimately concludes that the Presidential action was a success. However, these legal constraints serve a wonderful purpose when a Presidential initiative fails—because Congress can avoid any accountability itself (and the partisan opposition can have a field day) by charging that the President “broke the law.” To illustrate this rather consistent congressional practice, consider the fact that when President Ford clearly violated several statutes (known collectively as the “Cooper-Church amendment”) prohibiting the expenditure of funds to deploy U.S. armed forces into combat off the shore, in the air, or on the ground of Cambodia—in connection with the May 1975 Mayaguez rescue—the Senate Foreign Relations Committee *unanimously* passed a resolution praising the operation and saying that it had been conducted in accordance with the spirit of the War Powers Resolution. Yet when a similar rescue attempt by President Carter in Iran failed, the chairman and ranking Republican of the same committee held a press conference denouncing Carter for *violating* the War Powers Resolution. *See, WAR POWERS, supra* note 70. An even better example occurred following the October 1983 Grenada operation, when House Speaker O’Neill and other key leaders of the opposition party immediately denounced the President for “violating the law” until polls from both Grenada and the United States showed greater than 80 percent public support for the operation. Most of the critics—including the Speaker of the House—immediately shifted their ground and announced that they had “reconsidered” and believed the President had acted properly. These are not reactions based upon constitutional or legal principle, but upon political expediency and a desire to avoid being held accountable for any future “Vietnam.” Sadly, the signal of national disunity which Congress routinely sends around the globe at the first hint of danger seriously undermines the nation’s deterrent ability, and thus greatly increases the likelihood that U.S. combat troops will again wind up dying on foreign soil.

voters—should contemplate the policy consequences of such an approach.

III. CONCLUSION

The Founding Fathers understood that legislative bodies were not good at keeping secrets. In dividing constitutional powers between the political branches of the new government, they sought to benefit from the natural strength of each, while at the same time incorporating appropriate “checks” against abuse. In explaining to the American people the decision by the Constitutional Convention to establish a “vigorous executive”—consisting of a single President who could act without needing to obtain the approval of even an executive “council”—and invest the office with certain exclusive powers relating to the national security, Alexander Hamilton wrote in *The Federalist* No. 70 in March of 1788:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the controul and co-operation of others, in the capacity of counsellors to him

In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favourable circumstances palliate or atone for the disadvantages of dissention in the executive department. Here they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure, to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the executive, which are the most necessary ingredients in its composition, vigour and expedition, and this without any counterbalancing good. In the

conduct of war, in which the energy of the executive is the bulwark of the national security every thing would be to be apprehended from its plurality.¹⁴⁵

Similarly, in *The Federalist* No. 74, Hamilton argued that the Constitution's concentration of "military authority" in the President was consistent with the practice of most of the colonial State constitutions. He wrote:

The President of the United States is to be "Commander in Chief of the army and navy of the United States . . ." The propriety of this provision is so evident in itself; and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them, which have in other respects coupled the Chief Magistrate with a Counsel, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part of the definition of the executive authority.¹⁴⁶

This is not to say that the President was created as a "king" or "dictator." Although the President was given exclusive control over the military force of the nation, he was dependent upon Congress for both the *existence* of a military force and for approval to use that force to launch a "war" against another state. But while both branches—or all three branches, if the President and Senate can be viewed separately as the treaty authority—were given important roles in the national security process, the role of each was distinct and was designed to benefit from its relative strengths.

In the post-Vietnam era, Congress has abandoned this concept of separation of powers and has sought to seize control of powers vested by the Founding Fathers exclusively in the Executive. As a matter of constitutional law, this is unlawful. The President—if he is to be faithful to his duty to protect the Constitution and to see that the "laws" are faithfully executed—must resist these attempts.

In the Iran-Contra Affair, key members of the President's staff (including the assistant to the President for national security affairs) sought to carry out the President's constitutional responsibilities by bypassing the normal administrative machinery of the government—which had

145. *THE FEDERALIST* No. 70, at 471-73, 475-76 (A. Hamilton) (J. Cooke ed. 1961).

146. *Id.* No. 74, at 500.

been weakened by the improper conduct of Congress.¹⁴⁷ Few can deny that this led to tragic consequences, or that it did not result from a constitutional crisis. But the Majority Report of the Iran-Contra committees of Congress was wrong in attributing primary responsibility for the crisis to the President or his staff. The crisis clearly resulted from the unconstitutional efforts of Congress to deny the President his independent constitutional powers; in short *Congress* was the real "lawbreaker."

There are those who say that "what is done, is done," and—regardless of the intent of the Founding Fathers and the text of the Constitution—the President must simply accept the new congressional role and try to reach an accommodation with the Congress under new ground rules. But I would argue that for the President to continue to acquiesce in congressional efforts to seize his independent constitutional powers would be a violation of his oath of office to "defend the Constitution," and his constitutional obligation to "take care that the Laws be faithfully executed."¹⁴⁸ But here I've used the wrong pronoun; the powers of the presidency are not really "his," at all, if by "his" we mean Ronald Reagan. These are powers of the American people.

Let me close with a short quotation from the distinguished Harvard Law School Professor Charles Warren:

Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people Defence by the Executive of his constitutional powers becomes in very truth, therefore, defence of popular rights—defence of power which the people granted him In maintaining his rights against a trespassing Congress, the President defends not himself, but popular Government; he represents not himself, but the People.¹⁴⁹

147. See *supra* notes 2, 4 and accompanying text.

148. After all, the first "law" mentioned in the supremacy clause is the Constitution itself.

149. Warren, *Presidential Declarations of Independence*, 10 B.U.L. REV. 1, 35 (1930).