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CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES
AND THE IRAN-CONTRA AFFAIR:
HOW SHOULD THE PRESIDENT DEAL WITH CONGRESS?

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, or any other governmental agency.

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April 1993

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ABSTRACT: During the Iran-Contra Affair, the President and some members of the National Security Council (NSC) staff failed to report to Congress that they were providing covert assistance to the Contras and selling arms to Iran despite the fact that such reports were required by law. The same members of the NSC staff lied to Congress about their support of the Contras, and destroyed documents and fabricated chronologies to cover up their involvement in such activities. In the end, Congress passed new laws to tighten existing statutory reporting and accountability requirements. However, these changes failed to address the real causes of the Iran-Contra Affair. The Iran-Contra Affair occurred, not because existing laws and procedures were flawed, but rather because the President failed to exercise strong, ethical leadership and to issue clear guidance on how he expected the NSC staff to deal with Congress. In addition, the President and some members of the NSC staff simply did not understand the necessity of congressional oversight and of cooperating with Congress. This paper's thesis is that congressional oversight of intelligence activities is necessary in a constitutional democracy; that those who engage in intelligence activities must cooperate with Congress in the conduct of its intelligence oversight responsibilities; and that the President alone can and should ensure this cooperation.

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. THE REASONS FOR CONGRESSIONAL OVERSIGHT	5
A. Early Congressional Oversight	5
B. Domestic Spying	7
1. The Rockefeller Commission	7
2. The Church Committee	8
C. Executive Order 11905	10
D. Permanent Intelligence Committees	11
E. Executive Order 12036	11
F. The Intelligence Oversight Act of 1980	13
G. Executive Order 12333	18
H. Historical and Policy Considerations	20
1. Required by Law	21
2. Preferable to Charter Legislation	21
3. Prevents Abuses	21
4. Protects Honesty and Objectivity	22
5. Ensures Accountability	22
III. THE NECESSITY OF COOPERATING WITH CONGRESS	26
A. The Case Against Cooperating with Congress	26
1. Unfair leverage	27

2. Increased Risk of Leaks	27
3. Third Country Cooperation	28
B. The Case for Cooperating with Congress	28
1. Executive Branch Leaks	28
2. A Question of Degree	30
3. Benefit of Advice	32
4. Joint Responsibility	32
5. A Measure of Public Support	33
6. Support on the Hill	33
7. Funding	34
8. Appointments and Promotions	34
IV. THE IRAN-CONTRA AFFAIR	36
A. Introduction	36
1. The Tower Commission	37
2. The Iran-Contra Committees	37
B. Support for the Contras	38
C. Arms Sales to Iran	39
D. The Diversion of Profits to the Contras	41
E. The Coverup	41
F. Lack of Leadership	43
G. Lack of Guidance	44
1. Telling the Truth	45
a. The Case for Lying	47
b. The Case Against Lying	49
2. Plausible Denial	53
3. Reporting to Congress	54

a. The Iran Initiative	54
b. Support for the Contras	56
H. Lack of Understanding	58
V. THE CONGRESSIONAL RESPONSE	59
A. A Statutory Inspector General	59
B. The 1991 Amendments	61
VI. CONCLUSION AND RECOMMENDATIONS	63
A. Leadership	63
B. Guidance	63
C. A Better Understanding	65
D. A New Congressional Oversight Provision	66
E. Final Words of Advice	67
ENDNOTES	70

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I. Introduction

In the years following the revelation of illegal domestic spying in 1974,¹ Congress and the President have attempted to redefine their proper roles in conducting and overseeing the intelligence activities of the United States.² For most of this country's history, the President was solely responsible for the conduct of intelligence activities. The founding fathers understood that potential sources of intelligence would be unwilling to provide information to the United States unless they could be guaranteed secrecy. The founding fathers also believed that the President alone could be trusted to keep the nation's secrets.³ Experience had shown that legislative bodies were simply unable to protect secrets. For these same reasons, until the mid-1970s, Congress showed great deference toward the President in the conduct of intelligence activities.⁴

Congress left the establishment of the intelligence community⁵ and the regulation of its activities almost entirely up to the President.⁶ Presidents Ford, Carter, and Reagan each issued executive orders governing the intelligence activities of

the United States. These executive orders established the structure of the intelligence community, and set out the authorities, duties, and limitations applicable to each department, agency, and other entity of the intelligence community.⁷ The last two executive orders also contained provisions for dealing with Congress concerning its intelligence oversight responsibilities. Executive Order 12333, issued by President Reagan on December 4, 1981, is still in effect.

Notwithstanding this long tradition of congressional deference, after the revelation of illegal domestic spying in 1974, Congress began to exercise its constitutional powers to oversee the intelligence community. Today, Congress wields considerable power and influence over the conduct of intelligence activities. Congress authorizes and appropriates funds for the intelligence community.⁸ The Senate confirms presidential nominees to head the departments, agencies, and other entities of the intelligence community.⁹ And, finally, the congressional intelligence oversight committees oversee the intelligence community's activities to ensure that they are legal and proper.¹⁰

To carry out its intelligence oversight function, Congress has enacted three important requirements. First, the President and the heads of the departments, agencies, and other entities of the intelligence community must keep Congress "fully and

currently informed" of all intelligence activities, including covert actions.¹¹ Second, the President is personally accountable for all covert actions.¹² Third, the intelligence community may expend appropriated funds only for the purposes specifically authorized by Congress.¹³

Of these three requirements, the first requirement is the most important. Congress is completely dependent on the President and the heads of the departments, agencies, and other entities of the intelligence community for information about intelligence activities. Without truthful and accurate information, Congress cannot ensure that the intelligence community's activities are legal and proper, cannot hold the President accountable for covert actions, and cannot ensure that the intelligence community expends funds for the purposes authorized by Congress. In short, congressional oversight depends on the full cooperation of the President. Since the President ultimately decides what information he will share with Congress, it is the President, not Congress, who has the initiative.

How then should the President and the heads of the departments, agencies, and other entities of the intelligence community deal with Congress concerning intelligence activities? This was the central issue of the Iran-Contra Affair.

During the Iran-Contra Affair, the President and some members of the National Security Council (NSC) staff failed to report to Congress that they were providing covert assistance to the Contras and selling arms to Iran despite the fact that such reports were required by law. The same members of the NSC staff lied to Congress about their support of the Contras, and destroyed documents and fabricated chronologies to cover up their involvement in such activities. In short, they showed complete contempt for the congressional oversight process. They justified their actions on the ground that such actions were necessary to protect classified information from unauthorized disclosure by members of Congress.¹⁴ It is true that Congress has a terrible record of leaking classified information, and that leaks can cause grave damage to the national security.¹⁵ But the NSC staff's disregard for the law and dishonesty are completely unacceptable in a constitutional democracy. Such conduct destroys the trust between the executive and legislative branches and severely hinders their ability to work together. In the long run, after the inevitable investigations and corrective actions have run their course and the secrets sought to be protected have been laid bare for all to see, not only does the national security suffer, but the relationship between Congress and the President is damaged as well.

This paper's thesis is that congressional oversight of intelligence activities is necessary in a constitutional

democracy; that those who engage in intelligence activities must cooperate with Congress in the conduct of its intelligence oversight responsibilities; and that the President alone can and should ensure this cooperation. Part II of this dissertation discusses the reasons for congressional oversight. Part III discusses the necessity of cooperating with Congress. Part IV examines the reasons why such cooperation failed during the Iran-Contra Affair. Part V examines the reasons why subsequent changes in the law did not solve the problems of the Iran-Contra Affair. Part VI contains the conclusion and recommendations.

II. The Reasons for Congressional Oversight

Why does Congress oversee the intelligence activities of the United States? As noted in the introduction, during most of this country's history, Congress left the conduct of intelligence activities almost entirely up to the President. What caused Congress to end its great deference toward the President? The answer to this question is critical to an understanding of the importance of congressional oversight and the necessity of cooperating with Congress.

A. *Early Congressional Oversight*

In 1974, Congress enacted section 662 of the Foreign Assistance Act of 1961, popularly known as the "Hughes-Ryan

Amendment."¹⁶ The Hughes-Ryan Amendment was the first statute to require the President to report intelligence activities--specifically covert actions--to Congress. Section 662 provided the following:

No funds appropriated under the authority of [the Foreign Assistance Act] or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives.¹⁷

Notwithstanding the Hughes-Ryan Amendment, congressional oversight of the intelligence community remained very informal.¹⁸ Congress as a whole had never explicitly voted on a budget for the intelligence community. The armed services and appropriations committees of both Houses of Congress determined the funding levels for most agencies within the intelligence community and concealed the amounts in the budget of the

Department of Defense, which was thereby inflated. Neither Congress as a whole nor the public could ascertain whether the funding levels were appropriate or whether the intelligence community was expending funds for the purposes for which those funds had been appropriated.¹⁹

B. *Domestic Spying*

On December 22, 1974, *The New York Times* reported that the CIA had engaged in illegal domestic spying operations.²⁰ This revelation, following on the heels of Watergate, caused grave concern among the American people and in Congress that the intelligence community was out of control. During the next fifteen months, the Ford Administration and both Houses of Congress conducted extensive investigations of the intelligence community.

1. *The Rockefeller Commission.* On January 4, 1975, President Ford established the Commission on CIA Activities within the United States, chaired by Vice President Nelson A. Rockefeller, to determine whether the CIA had exceeded its statutory authority.²¹ After a five-month long investigation, the Rockefeller Commission found that the CIA had indeed exceeded its statutory authority. In particular, the Rockefeller Commission found that the CIA had conducted illegal mail searches and covers; had amassed a vast amount of information on the lawful

domestic activities of American citizens; had engaged in illegal wiretaps, bugging, and break-ins; had provided alias documents, disguise material, a tape recorder, camera, and film to E. Howard Hunt of Watergate fame; had failed to cooperate fully with Watergate investigators; had destroyed material that may have contained information relevant to the Watergate investigation; and had administered LSD to persons who were unaware that they were being tested, resulting in the death of one person in 1953.²²

2. *The Church Committee.* On January 21, 1975, the Senate established the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Frank Church, Democrat of Idaho.²³ The House established a similar committee under Representative Otis G. Pike, Democrat of New York.

On April 26, 1976, the Church Committee concluded its fifteen-month long investigation and issued its final report.²⁴ The Church Committee found that members of the intelligence community had plotted to assassinate foreign leaders; had participated in the overthrow of an elected democratic government (Salvador Allende of Chile); had conducted drug testing on unwitting American citizens, resulting in two deaths; had read millions of private cables; had opened mail in violation of the law; had infiltrated the news media and book publishing industry;

frequently, though not deliberately, had fed propaganda to the American public; and had attempted to blackmail a civil rights leader (Dr. Martin Luther King, Jr.).²⁵

After recognizing that administrations from both parties were responsible for these abuses, the Church Committee placed much of the blame on Congress. According to the Church Committee,

The Committee finds that Congress has failed to provide the necessary statutory guidelines to ensure that intelligence agencies carry out their missions in accord with constitutional processes. Mechanisms for, and the practice of, congressional oversight have not been adequate. . . .²⁶

The Church Committee found that the National Security Act of 1947 did not provide an adequate charter for the CIA, and failed to provide any statutory charter for the other intelligence agencies. The Act did not create an overall structure for the intelligence community that ensured effective accountability, control, and legislative and executive oversight. Finally, the Act failed to establish clear and specific limits on intelligence activities. Ultimately, the Committee recommended sweeping reforms of the intelligence community which, if enacted, would have severely restricted the intelligence community's ability to

conduct intelligence activities.²⁷

C. *Executive Order 11905*

On February 18, 1976, before the Church Committee completed its investigation, President Ford issued Executive Order 11905²⁸ in an effort to forestall drastic congressional action. Executive Order 11905 clarified the authorities, duties, and responsibilities of the intelligence community,²⁹ imposed numerous restrictions and prohibitions on intelligence activities,³⁰ and established executive oversight to ensure compliance with the law.³¹ The executive order created an Intelligence Oversight Board, and required inspectors general, general counsels, and heads of the intelligence agencies to report to the Oversight Board any questions of legality or propriety. The executive order required the Oversight Board, in turn, to report serious questions of legality or propriety to the President, and serious questions of legality to the Attorney General.³² The executive order, however, did not mention congressional oversight and did not require the intelligence community to cooperate with Congress concerning intelligence matters.

The Church Committee found that President Ford's Executive Order was inadequate. In its final report, the Church Committee stated that "[t]he need for . . . limits [on intelligence

activities] is a need for legislation. The need is not satisfied by [President Ford's] recent proposals and Executive Order."³³ As a result of the Church Committee's recommendation for stronger action, Congress created permanent intelligence oversight committees and considered comprehensive charter legislation for the intelligence community.

D. *Permanent Intelligence Committees*

In 1976, the Senate created the first permanent intelligence oversight committee, the Senate Select Committee on Intelligence (SSCI).³⁴ The next year, the House established the House Permanent Select Committee on Intelligence (HPSCI).³⁵ Together, these committees became known as the intelligence committees. While the intelligence committees were establishing themselves, the Carter Administration issued a new Executive Order.

E. *Executive Order 12036*

On January 24, 1978, President Carter issued Executive Order 12036.³⁶ The new executive order contained virtually the same restrictions and prohibitions on intelligence activities as had President Ford's executive order. President Carter also continued the President's Intelligence Oversight Board. Aware that Congress was still considering comprehensive charter legislation for the intelligence community which might

drastically restrict its activities, President Carter added some new provisions to the executive order.³⁷

The most significant change was the addition of a congressional oversight provision. When President Ford issued Executive Order 11905, Congress had not yet established permanent intelligence oversight committees. By the time President Carter issued Executive Order 12036, the intelligence committees were in existence, but had not yet enacted oversight legislation. Section 3-4 of Executive Order 12036 provided the following:

Under such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods, the Director of Central Intelligence and heads of departments and agencies of the United States involved in intelligence activities shall:

3-401. Keep the [HPSCI] and the [SSCI] fully and currently informed concerning intelligence activities, including any significant anticipated activities. . . . This requirement does not constitute a condition precedent to the implementation of such intelligence activities;

3-402. Provide any information or document in the possession, custody, or control of the department or agency . . . , within the jurisdiction of the [HPSCI] or the [SSCI], upon the request of such committee; and

3-403. Report in a timely fashion to the [HPSCI] and the [SSCI] information relating to intelligence activities that are illegal or improper and corrective actions that are taken or planned.³⁸

Thus, President Carter established the first formal procedures for congressional oversight. While requiring full cooperation with the intelligence committees, section 3-4 carefully reserved the President's constitutional authority to withhold information from the intelligence committees to the extent necessary to protect intelligence sources and methods.³⁹ By taking the initiative, President Carter was able to set the standard for congressional oversight.

F. The Intelligence Oversight Act of 1980

In 1978, the same year that President Carter issued Executive Order 12036, Congress enacted the Intelligence and Intelligence-Related Activities Authorization Act for Fiscal Year 1979, the first intelligence authorization act.⁴⁰ Congress also

enacted the Foreign Intelligence Surveillance Act of 1978.⁴¹ Neither the Senate,⁴² nor the House of Representatives,⁴³ however, was able to pass the comprehensive charter legislation recommended by the Church Committee.

In 1980, the Senate again considered comprehensive charter legislation for the intelligence community.⁴⁴ Ultimately, Congress passed the Intelligence Oversight Act of 1980, which added title V to the National Security Act of 1947.⁴⁵ In so doing, Congress indefinitely postponed action on the Church Committee's recommendations for a new charter for the CIA, statutory charters for other key intelligence agencies, an overall structure for the intelligence community, and clear and specific limits on the operation of America's intelligence organizations. President Carter's Executive Order was a *fait accompli*. Congress simply had waited too long to act. Recent world events, such as Iran's taking of American hostages and the Soviet Union's invasion of Afghanistan, were calling for more aggressive intelligence activities--not more limits.⁴⁶

The congressional oversight provisions which Congress finally enacted were substantially the same as those contained in Executive Order 12036. Section 501 of the National Security Act of 1947 began as follows:

(a) . . . 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 . . . , including any significant anticipated intelligence activity. . . .⁴⁷

Thus, section 501 expressly recognized the President's constitutional authority to withhold information from Congress. In addition, section 501 itself authorized the Director of Central Intelligence and the heads of all departments, agencies, or other entities involved in intelligence activities to withhold information if necessary to protect from unauthorized disclosure classified information and information relating to intelligence sources and methods.

In addition, subsection (a)(1)(B) authorized the President

to limit prior notice to eight members of Congress ("the gang of eight") if necessary to meet extraordinary circumstances affecting vital interests of the United States.⁴⁸ Subsection (a)(2) required the Director and the heads of all departments, agencies, and other entities to "furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities." To ensure the legality and propriety of all intelligence activities, subsection (a)(3) required the intelligence community to "report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure."

Finally, subsection (b) recognized the President's authority to withhold prior notice of covert actions. It required only that the President give the intelligence committees "timely" notice and "a statement of the reasons for not giving prior notice." The Intelligence Oversight Act of 1980 also amended the Hughes-Ryan Amendment. The new language limited the reporting of covert actions to the two intelligence committees and provided that covert actions are considered significant anticipated intelligence activities for the purpose of section 501 of the

National Security Act of 1947.⁴⁹

These were the requirements for congressional oversight as they existed at the time of the Iran-Contra Affair. They differed little from President Carter's arrangement. In short, they required the intelligence community to keep the intelligence committees fully and currently informed of all intelligence activities, including any significant anticipated intelligence activities, illegal intelligence activities, significant intelligence failures, and covert actions. They also authorized the intelligence community to withhold information from the intelligence committees if necessary to protect from unauthorized disclosure classified information and information relating to intelligence sources and methods.

Though quite detailed, the Intelligence Oversight Act of 1980 did not specify the length of time which the intelligence community could wait before reporting intelligence activities to Congress. As experience had shown, it was impossible to set a realistic time limit. For example, in 1979, several employees of the U.S. Embassy in Tehran escaped capture by the Iranians and sought refuge in the Canadian Embassy. The Government of Canada offered to smuggle the Americans out of Iran, but only if President Carter agreed not to tell Congress until the successful conclusion of the operation. President Carter agreed not to inform Congress, despite the Hughes-Ryan Amendment's requirement

that the President report such actions "in a timely fashion." President Carter withheld notification for nearly six months.⁵⁰ Thus, had Congress further defined "in a timely fashion," for example by requiring notification within 48 hours of the President's approval of an operation, this time limit would have impaired the President's ability to conduct covert actions.

In addition to the practical impossibility of setting a time limit, there was also a legal impediment. Whatever time limit Congress might set would still be subject to "the President's constitutional authority to withhold information the disclosure of which could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."⁵¹ Therefore, Congress was forced to rely on the President's good faith in complying with the spirit of the law and in reporting intelligence activities unless absolutely necessary to protect such information under one of the four constitutional grounds for withholding it. With these requirements and tacit understandings in place, the Reagan Administration came into office.

G. *Executive Order 12333*

In 1981, the Reagan Administration drafted a new executive order to replace Executive Order 12036. By now the intelligence committees were well established. Realizing the importance of

cooperating with the intelligence committees, the President sent them the third draft of the proposed executive order for their comments.⁵² After reviewing the draft, the intelligence committees recommended eighteen major changes, fifteen of which the President adopted.⁵³

On December 4, 1981, President Reagan issued Executive Order 12333⁵⁴ and Executive Order 12334, the latter establishing the President's Intelligence Oversight Board.⁵⁵ In his accompanying statement, President Reagan stressed that "[t]hese orders have been carefully drafted--in consultation with the intelligence committees of both Houses of the Congress--to maintain the legal protection of all American citizens."⁵⁶ There is no question that President Reagan understood the importance of cooperating with Congress. In the end, both chairmen of the intelligence committees endorsed Executive Order 12333.⁵⁷

Despite some changes, President Reagan's executive order kept virtually every significant restriction and prohibition contained in President Carter's executive order.⁵⁸ Executive Order 12333 also contained a congressional oversight provision.⁵⁹ Section 3.1 of Executive Order 12333 provided the following:

Congressional Oversight. The duties and responsibilities of the Director of Central Intelligence and the heads of other departments,

agencies, and entities engaged in intelligence activities to cooperate with the Congress in the conduct of its responsibilities for oversight of intelligence activities shall be as provided in title 50, United States Code, section 413. The requirements of section 662 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2422), and section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), shall apply to all special activities as defined in this Order.⁶⁰

In merely cross-referencing the congressional oversight statutes, President Reagan failed to establish his own standards for dealing with Congress. Notwithstanding the spirit of cooperation in which his Administration had drafted Executive Order 12333, President Reagan neither encouraged nor discouraged continued cooperation with Congress. A clear standard of cooperation might have helped prevent some of the problems which subsequently occurred during the Iran-Contra Affair.

H. *Historical and Policy Considerations*

The Intelligence Oversight Act of 1980 and Executive Orders 12333 and 12334 created the basic framework for executive and congressional oversight as it exists today. As the discussion of the historical basis and development of congressional oversight

has shown, congressional oversight is necessary for several reasons.

1. *Required by Law.* The most obvious reason why congressional oversight is necessary is that it is required by law and executive order.

2. *Preferable to Charter Legislation.* Congressional oversight is also preferable to comprehensive charter legislation, which might unduly restrict the intelligence community. Flawed or outdated executive orders are much easier to fix than flawed or outdated laws.

3. *Prevents Abuses.* Congressional oversight helps ensure that our nation's intelligence activities are legal and proper. In retrospect, it is clear that congressional oversight has helped prevent the recurrence of past abuses. A thorough search of *The Washington Post*, *The New York Times*, *Newsweek*, and *Time*, from December 1981 until the present, found no report of any illegal or improper United States intelligence activity--either in the United States or directed against a United States person abroad--since the Vietnam era. This is remarkable in an age of whistleblowers and investigative reporters. Furthermore, during the same time frame, no reported cases have arisen in which a federal court has found that any illegal or improper United States intelligence activity has occurred. Although it is

impossible to determine the extent to which congressional oversight, as opposed to executive oversight, has been responsible for preventing such abuses, congressional scrutiny has undoubtedly been a contributing factor.

There are two other reasons why congressional oversight is necessary. Those reasons have nothing to do with the historical basis for congressional oversight, but rather are policy considerations.

4. *Protects Honesty and Objectivity.* Congressional oversight helps protect the intelligence community against undue influence by Administration policymakers, who might otherwise distort intelligence estimates to support the Administration's policies rather than formulate those policies based on sound intelligence. While intelligence analysts might be reluctant to criticize their superiors in the Administration, members of Congress are not. In short, congressional oversight helps keep the intelligence community honest and objective.⁶¹

5. *Ensures Accountability.* Congressional oversight ensures accountability for intelligence activities. A democratic system of government is founded on the idea that elected officials are accountable to the people. Without congressional oversight, however, there would be no real accountability for intelligence activities.

Some members of Congress who investigated the Iran-Contra Affair argued that the President is just as accountable as Congress is. They stated the following:

We emphatically reject the idea that through these mistakes, the executive branch subverted the law, undermined the Constitution, or threatened democracy. The President is every bit as much of an elected representative of the people as is a Member of Congress. In fact, he and the Vice President are the only officials elected by the whole Nation.⁶²

But this misses the point. As other members of Congress pointed out, "Officials who make public policy must be accountable to the public. But the public cannot hold officials accountable for policies of which the public is unaware."⁶³ The American people do not have access to classified information about this nation's intelligence activities,⁶⁴ except when such information is leaked, which, ironically, is the excuse most often used for keeping Congress in the dark. The intelligence community has actually justified keeping secrets from the American people on the ground that Congress has access to all classified information and is keeping a watchful eye on all intelligence activities. For example, in 1982, then Director of Central Intelligence William J. Casey wrote *The New York Times* as

follows:

[T]here is an inherent incompatibility in applying an openness in government law to intelligence agencies whose missions must be carried out in secrecy. . . . I fail to see how releases of bits of information serve the purpose of the [Freedom of Information Act] to provide Government accountability. The intelligence agencies have more direct executive branch and Congressional oversight than any other agency within our Government. Thus, the necessary accountability and oversight of intelligence activities is fully provided for by our elected officials, who, unlike the public, have access to all classified information.⁶⁵

If the President is not directly accountable to the American people for his conduct of intelligence activities, then to whom is he accountable? The federal courts play a very small role in overseeing the intelligence community. The court created by the Foreign Intelligence Surveillance Act of 1978 hears applications for, and grants orders authorizing, electronic surveillance in the United States for foreign intelligence purposes.⁶⁶ But the courts generally have avoided cases involving intelligence activities, either because they are nonjusticiable,⁶⁷ or, as a practical matter, because potential plaintiffs lack access to the classified information needed to bring such actions.

If the President is not directly accountable to the voters and is not answerable to the courts, that leaves only the intelligence committees. As former Director of Central Intelligence William H. Webster stated, Congress is the "surrogate" of the American people in overseeing the intelligence community. In an address at the University of Miami, Mr. Webster said: "[T]here must exist a trustworthy system of oversight and accountability that builds, rather than erodes, trust between those in the executive branch who have the intelligence responsibility and those in the legislative branch who act as surrogates for the American people."⁶⁸

Taken together, these are compelling reasons for congressional oversight. First, congressional oversight is required by law and Executive Order. Second, congressional oversight is preferable to comprehensive charter legislation which might unduly restrict the intelligence community. Third, congressional oversight helps ensure that our nation's intelligence activities are legal and proper. Fourth, congressional oversight helps protect the honesty and objectivity of the intelligence community. Finally, congressional oversight is the only means yet devised for holding the President accountable for the conduct of intelligence activities. In short, congressional oversight is essential to a healthy democracy.

The key to congressional oversight is the President's willingness to cooperate with Congress. An understanding of the historical basis and importance of congressional oversight can go a long way toward ensuring this cooperation.

III. *The Necessity of Cooperating with Congress*

Part II examined the historical basis for congressional oversight and its importance in ensuring that the President is held accountable for the conduct of intelligence activities. But is congressional oversight worth the risk of congressional leaks, which can significantly impair the President's ability to conduct intelligence activities? As noted in the introduction, the founding fathers contemplated that the President would be solely responsible for the conduct of intelligence activities in order to protect our nation's secrets. It would be impossible to conduct intelligence activities without the ability to protect the secrecy of intelligence sources and methods. Potential sources of information and assistance would simply refuse to cooperate if the United States could not guarantee them secrecy. Congressional leaks remain the single greatest impediment to the executive branch's cooperation with Congress.⁶⁹

A. *The Case Against Cooperating with Congress*

Congress has long been notorious for leaking secrets. Why else would Canada, in return for its help in getting our embassy employees safely out of Iran, insist that the President not inform Congress? Some members of Congress who investigated the Iran-Contra Affair recounted the history of congressional leaks. According to those members, "President Washington learned quickly that once information is shared with Congress, it is up to Congress--often the opposition party in Congress--to decide when or how it will be made public."⁷⁰ Those same members of Congress cited the Iran-Contra Committees themselves for a number of leaks that occurred despite the existence of rules requiring members to obtain the authorization of the committees before releasing classified information.⁷¹

1. *Unfair Leverage.* Consultation with Congress gives Congress unfair leverage over the President. Since most intelligence activities require secrecy to succeed, members of Congress can block intelligence activities with which they disagree merely by threatening to disclose those activities to the public. Differences of opinion over the conduct of intelligence activities should be resolved in private based on principled confrontation and the ability to persuade, not blackmail.

2. *Increased Risk of Leaks.* Just as in the executive branch, there is always the risk that well-meaning members of Congress will inadvertently leak classified information through a slip of

the tongue. It is a truism that the more people who know about a secret, the harder it is to keep that secret. Sharing classified information with members of Congress and congressional staffers increases the number of knowledgeable people and therefore increases the risk of compromise. The executive branch has a legitimate interest in keeping the number of knowledgeable people to an absolute minimum.

3. *Third Country Cooperation.* Finally, as noted above, other nations, concerned for the safety of their citizens and the success of their operations, may agree to assist the United States in the conduct of intelligence activities only on condition that the President not inform Congress of those activities. When American lives or vital American interests are at stake, this is an offer which the President cannot refuse.

B. *The Case for Cooperating with Congress*

Given these arguments against sharing classified information with Congress, why should the President nevertheless consult Congress concerning the conduct of intelligence activities? Congressional oversight may be important to our system of government, but reliable intelligence is critical to the survival of our nation.

1. *Executive Branch Leaks.* The executive branch is just as bad

as Congress in leaking classified information.⁷² Oliver North himself leaked secrets.⁷³ According to the Tower Commission,

There is a natural tension between the desire for secrecy and the need to consult Congress on covert operations. Presidents seem to become increasingly concerned about leaks of classified information as their administrations progress. They blame Congress disproportionately. Various cabinet officials from prior administrations indicated to the Board that they believe Congress bears no more blame than the Executive Branch.⁷⁴

In the Iran-Contra Report, even the minority acknowledged that "[e]xecutive branch leaks are every bit as serious as legislative branch ones."⁷⁵ Thus, the same arguments which the executive branch uses to justify withholding classified information from Congress can be used to justify withholding classified information from officials in the executive branch. Obviously, the CIA's intelligence activities would be much more secure if the CIA did not have to report them to anyone. Yet the CIA must do so. It comes down to a fundamental value judgment. Is ensuring that our nation's intelligence activities are legal and proper worth the risk of leaks? Until it is shown that congressional leaks truly threaten our national security, some leaks are preferable to the alternative of living in a society in

which the intelligence services are unaccountable.

2. *A Question of Degree.* Fortunately, consultation is not an all or nothing proposition. Not all of the intelligence community's activities, secret or not, are so sensitive that their unauthorized disclosure could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. To the extent that the disclosure of information could significantly impair one of these four functions, the President has the constitutional authority to withhold such information from Congress. However, he is not required to do so. He can still consult Congress if he believes that consultation is in his best interest. In making that decision, the President should weigh the risk of compromise against both the advantages of consulting Congress and the disadvantages of not consulting Congress.

Before withholding information from Congress, the President should attempt to ascertain whether any member of the intelligence committees, their staffs, or, in the case of a covert action, the 'gang of eight, is likely to leak the information or threaten to leak the information. In assessing this risk, the President should consider the amount of public support for his policy objectives. The greater the public's support for the President's stated policy objectives, the less

likely it is that a member of Congress will risk the public backlash likely to follow if he or she leaks details of the President's secret initiatives in support of those policy objectives. For example, during World War II, both the American people and Congress strongly supported the President's stated policy objective of defeating Nazi Germany. Therefore, it was highly improbable that a member of Congress would have risked scuttling the invasion of Normandy and causing the loss of American lives by leaking details of the planned invasion.

It is surprising that President Reagan risked so much to conceal the Iran initiative and the NSC staff's support of the Contras from Congress.⁷⁶ The Administration's Contra support activities were poorly kept secrets to begin with.⁷⁷ Ultimately, the Lebanese blew the cover off the Iran initiative. In retrospect, why were the Iranians and the Lebanese more trustworthy than Congress? In deciding not to report these activities to Congress, the President should have taken into account the risk of exposure, not only by members of Congress, but by whistleblowers in the Administration, by the Iranians and the Lebanese, and by the press. In short, the President should have considered the advantages of having his Administration present the issues to Congress as opposed to members of the press.

Nevertheless, when the success of an operation or the lives

of persons involved in the operation depend on absolute secrecy, even a slight risk of compromise is arguably too much. In this case, the President has the constitutional authority to withhold information until after the conclusion of the operation or until the danger has passed, e.g., after the Allied forces have hit the beach.

After assessing the risk of compromise, the President should weigh the advantages of consulting Congress and the disadvantages of not consulting Congress. There are many of both.

3. *Benefit of Advice.* Consultation gives the President the benefit of congressional advice. As President Reagan demonstrated when he consulted the intelligence committees concerning the drafting of Executive Order 12333, consultation can inform the President of the sense of Congress and help him tailor his initiatives to avoid embarrassing disputes with Congress. Furthermore, the collective experience and judgment of the intelligence committees can be especially useful in navigating the often uncharted waters of the world of intelligence.

4. *Joint Responsibility.* Through consultation, the President shares responsibility with Congress. By convincing the intelligence committees to endorse his actions, the President helps protect his Administration from the inevitable

congressional backlash in the event of failure. Of course, the President should ask for the intelligence committees' endorsements on the record, which means having to brief them on the record.

5. *A Measure of Public Support.* Consultation is one way to measure public support for the President's policies. This is especially true in the case of secret policies which the President cannot take directly to the American people. As the Tower Commission noted after the Iran-Contra Affair:

"Consultation with Congress could have been useful to the President, for it might have given him some sense of how the public would react to the [Iran] initiative. . . ." ⁷⁸

6. *Support on the Hill.* Despite occasional differences of opinion over funding or policy, the intelligence committees often act as advocates for the intelligence community on the Hill. ⁷⁹ According to John N. McMahon, Deputy Director of the CIA under William J. Casey,

I was looking for an advocate because we had no one beating the bushes up on the Hill for us. . . . We were left without a father, so to speak, and I wanted an oversight committee much like the Joint Atomic Energy Committee, so that someone up on the Hill who understood and appreciated us could carry our message

to the rest of Congress.⁸⁰

On the other hand, the failure to consult Congress can alienate even the President's staunchest supporters in Congress. For example, in 1984, the CIA mined Nicaragua's harbors without adequately informing the SSCI. On April 4, 1984, Senator Barry Goldwater, chairman of the SSCI and a strong supporter of the Reagan Administration, wrote an angry letter to William J. Casey, Director of Central Intelligence, in which Goldwater said: "It gets down to one, little, simple phrase--I am pissed off!"⁸¹

7. *Funding.* The Administration must ask Congress for the funds with which to conduct intelligence activities.⁸² As Senator Daniel Patrick Moynihan, Democrat of New York and former ranking minority member of the SSCI, once said, "Anyone who has followed American Government knows that an activity that wishes to prosper in the executive branch gets itself a pair of committees to look after it in the legislative branch."⁸³ Ultimately, the Administration's refusal to cooperate with Congress risks a cutoff in funding.⁸⁴

8. *Appointments and Promotions.* The failure or refusal to consult Congress can have direct adverse consequences for individuals in the intelligence community. The Senate can block the appointment or promotion of any officer who obstructs Congress's efforts to inquire into the conduct of intelligence

activities or who otherwise exhibits a lack of understanding of Congress's intelligence oversight role.⁸⁵

This brief overview has shown that cooperation with Congress is essential to the success of our intelligence activities. Cooperation is in the public's best interest and it is in the President's best interest. The benefits of consulting Congress on important policy matters clearly outweigh the risk of leaks except in those rare instances when disclosure could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.

Thus, the real issue is not whether the President should consult Congress, but rather when and to what extent. In deciding to withhold information from Congress, the first step is to determine whether the disclosure of such information could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. If the answer is "no," then the President has no constitutional authority to withhold such information and must comply with the congressional reporting requirements. If the answer is "yes," then the President should weigh the risk of significant impairment against both the advantages of consulting Congress and the disadvantages of not consulting Congress. The President should withhold information

from Congress only as long as necessary to protect our foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. There is simply nothing to be gained by withholding information from Congress any longer than is absolutely necessary.

One of the great ironies of the Iran-Contra Affair was that the Administration's penchant for secrecy and decision to withhold information from Congress resulted in a public expose comparable to the Watergate and Church Committee hearings. It is doubtful whether any congressional leak would have caused as much damage to the Administration as the hearings and reports did. The public spectacle alone provided future Presidents with ample reason to consult Congress early about activities which might prove embarrassing if exposed. Congress was probably well aware of the deterrent effect its hearings and public report would have on reluctant Presidents in the future.

IV. The Iran-Contra Affair

A. *Introduction*

On November 3, 1986, *Al-Shiraa*, a Lebanese magazine, reported that the United States had sold arms to Iran. The American press soon reported the story, prompting a storm of

accusations that the Administration had given in to terrorists and had violated the law.⁸⁶

1. *The Tower Commission.* On December 1, 1986, President Reagan established the President's Special Review Board, popularly known as the "Tower Commission" after its chairman, former Senator John Tower. Edmund S. Muskie and Brent Scowcroft were the Tower Commission's other two members. The primary function of the Tower Commission was to conduct a comprehensive study of the future role and procedures of the NSC staff in the aftermath of the Iran-Contra Affair.⁸⁷ Although the Tower Commission had no authority to subpoena documents, compel testimony, swear witnesses, or grant immunity,⁸⁸ it was able to piece together events from the testimony of cooperating witnesses and from available documents. On February 26, 1987, the Tower Commission published its final report.⁸⁹

2. *The Iran-Contra Committees.* Before the Tower Commission published its report, both Houses of Congress established their own committees to investigate the Iran-Contra Affair. The House of Representatives established the House Select Committee to Investigate Covert Arms Transactions with Iran. The Senate created the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition.⁹⁰ The Iran-Contra Committees conducted joint, highly publicized hearings and, on November 13, 1987, issued a joint report entitled, "Report of the

Congressional Committees Investigating the Iran-Contra Affair" (the Iran-Contra Report). Because of the highly politicized nature of the proceedings and the inability of the members to reach bipartisan agreement on the findings and recommendations, the minority submitted a dissenting report.⁹¹

B. Support for the Contras

On October 12, 1984, President Reagan signed into law the fiscal year 1985 omnibus appropriations bill, which included the now famous Boland Amendment. The Boland Amendment cut off all military and paramilitary funding for the Contras in Nicaragua. Nevertheless, President Reagan ordered the NSC staff to continue supporting the Contras.⁹²

From June 1984 until the beginning of 1986, Lieutenant Colonel Oliver L. North and other members of the NSC staff raised \$34 million from third countries and \$2.7 million from private contributors to support the Contras. In 1985, at North's direction, Richard V. Secord, a retired Air Force major general, and Albert Hakim created the "Enterprise," a private entity that North secretly used to carry out covert actions in support of the Contras and to sell arms to Iran. Although President Reagan knew about the NSC staff's support of the Contras, he never signed a Finding approving such support and never notified Congress about such support as required by law.⁹³

In 1985, in response to questions by members of Congress, Robert C. McFarlane, the National Security Adviser, repeatedly told Congress that the NSC staff was complying with both the letter and the spirit of the law, and was not raising money or providing military support to the Contras. In 1986, Vice Admiral John Poindexter, McFarlane's successor as National Security Adviser, and North repeated the same assurances to Congress.⁹⁴

C. Arms Sales to Iran

In the summer of 1985, President Reagan authorized the Israelis to sell TOW antitank missiles (TOWs) to Iran. Although the President's immediate objective was to improve relations with Iran, his ultimate objective was to secure the release of the seven American hostages held by Lebanese terrorists. The Israelis, with U.S. assistance, delivered a total of 504 TOWs to Iran. In return, the Lebanese freed Reverend Benjamin Weir. In November 1985, the President authorized the Israelis to sell 80 HAWK antiaircraft missiles (HAWKs) to Iran. President Reagan also promised to replenish Israel's HAWKs and to send 40 additional HAWKs to Iran. Although Israel delivered 18 HAWKs to Iran, the Lebanese did not release any hostages.⁹⁵

In December 1985, President Reagan signed a Finding retroactively approving "[a]ll prior actions taken by U.S.

Government officials in furtherance of [Israel's arms sales to Iran]" and authorizing future U.S. assistance. The Finding further provided that, "Because of the extreme sensitivity of these operations, in the exercise of the President's constitutional authorities, I direct the Director of Central Intelligence not to brief the Congress of the United States, as provided for in Section 501 of the National Security Act of 1947, as amended, until such time as I may direct otherwise."⁹⁶

On January 6, 1986, President Reagan signed another Finding authorizing the Israelis to sell more missiles to Iran. However, the CIA General Counsel opined that the Israeli arms sales might violate the Arms Export Control Act. Therefore, on January 17, 1986, President Reagan signed a Finding authorizing the United States to sell arms directly to Iran.⁹⁷ Both the January 6 and January 17 Findings provided that, "due to its extreme sensitivity and security risks, I [President Reagan] determine it is essential to limit prior notice, and direct the Director of Central Intelligence to refrain from reporting this Finding to the Congress as provided in Section 501 of the National Security Act of 1947, as amended, until I otherwise direct."⁹⁸

In February 1986, the Enterprise sold 1,000 TOWs to Iran. Again, the Lebanese did not release any hostages. In May 1986, McFarlane personally delivered HAWK parts to Iran. Shortly thereafter, the Lebanese released Father Lawrence Jenco. In

October 1986, the Enterprise sold 500 TOWs to Iran. On November 2, 1986, the Lebanese released the third and final hostage, David Jacobsen. President Reagan never notified the intelligence committees of the arms sales to Iran as required by law.⁹⁹

In the end, both the Tower Commission and the Iran-Contra Committees found that the President failed to report to Congress the NSC staff's support of the Contras and arms sales to Iran as required by section 501 of the National Security Act of 1947.¹⁰⁰

D. The Diversion of Profits to the Contras

In November 1985, North directed Secord to divert profits from the arms sales to the Contras. In all, the Enterprise made \$16.1 million in profits from arms sales, and gave \$3.8 million to the Contras. There was no evidence that the President knew of the diversion.¹⁰¹

E. The Coverup

In his first public statement after the press reported that the United States had sold arms to Iran, President Reagan said that the reports had "'no foundation.'" On November 13, 1986, the President admitted that the United States had sold arms to Iran, but denied that the United States had exchanged arms for hostages. At a press conference on November 19, 1986, the

President denied that the United States was involved in the Israeli arms sales.¹⁰²

After the press conference, McFarlane and North fabricated a chronology of events. Casey and Poindexter misled congressional committees. McFarlane told the Attorney General that the United States had not knowingly participated in the Israeli arms sales. On November 21, 1986, Poindexter destroyed the presidential Finding that had retroactively approved the Israeli arms sales.¹⁰³

On November 21, 1986, President Reagan authorized the Attorney General to investigate the arms sales to Iran. Poindexter and North began destroying documents, including those concerning the diversion of profits to the Contras. However, on November 22, 1986, investigators found a memorandum that mentioned the diversion. Nevertheless, North concealed the Enterprise's existence until the public hearings of the Iran-Contra Committees, and told the Attorney General that the proceeds from the Iranian arms sales had been deposited directly into the Contras' accounts.¹⁰⁴

In short, the President and some members of the NSC staff failed to report to Congress that they were providing covert assistance to the Nicaraguan Contras and selling arms to Iran despite the fact that such reports were required by law. Furthermore, some members of the NSC staff lied to Congress about

their support of the Contras, and destroyed documents and fabricated chronologies to cover up their involvement in such activities. Why did they do these things? Their stated reason was to protect classified information from unauthorized disclosure by members of Congress.¹⁰⁵ However, this reason alone does not account for their actions. Even if they honestly believed that protecting secrets justified such conduct, they were wrong. The real reasons why members of the NSC staff engaged in such conduct were because the President failed to exercise strong, ethical leadership and to issue clear guidance on how he expected the NSC staff to deal with Congress. In addition, the President and those members of the NSC staff simply did not understand the necessity of congressional oversight and of cooperating with Congress. A discussion of each of these points is necessary to understand the corrective action needed to prevent such mistakes in the future.

F. Lack of Leadership

The President himself made several misleading statements to the public. Whether he did this deliberately, forgot about his prior actions, or simply was misinformed is unknown. In any event, he set a poor example for the NSC staff.

The President also failed to report to Congress that the NSC staff was supporting the Contras and selling arms to Iran as

required by section 501 of the National Security Act of 1947. Again, the President set a poor example and encouraged his subordinates to view the law with similar disdain. As the Iran-Contra Committees noted, the problems of the Iran-Contra Affair resulted, not from any failure of the law,¹⁰⁶ but rather from a failure in leadership.¹⁰⁷

Strong, ethical leadership, beginning with the President and continuing down through the heads of the departments, agencies, and other entities of the intelligence community, is arguably the single most important factor in preventing another Iran-Contra Affair. For example, in the opinion of some, former Director of Central Intelligence William Webster's strong, ethical leadership of the intelligence community in the aftermath of the Iran-Contra Affair is the primary reason why the mistakes of the Iran-Contra Affair are largely behind us.¹⁰⁸ The President must lead by personal example. His subordinates will look not only at what he says, but at what he does. They will regard as important those things which he regards as important. If he cooperates with Congress, they will cooperate with Congress. The President must also tell his subordinates what he expects of them.

G. Lack of Guidance

The President failed to provide clear guidance to the NSC staff.¹⁰⁹ By failing to set clear standards of conduct, the

President virtually guaranteed the problems which followed.¹¹⁰

There is no evidence that President Reagan ever authorized members of the NSC staff to lie to Congress or cover up their activities.¹¹¹ By the same token, there is no evidence that he ever told them not to lie or cover up. This is not to say that the President should lecture every member of his Administration like a child on the importance of telling the truth and obeying the law. This would be demeaning for the President and insulting to most people. It would be nice if officials employed at that level of responsibility did not need to be told these things. But under the particular circumstances of the Iran-Contra Affair, and in the case of intelligence activities in general, in which secrecy and deception are normal, everyday occurrences, the President should have set a better example and guided his people more.

1. *Telling the Truth.* When the President decided not to report the NSC staff's support of the Contras to the intelligence committees, he probably did not consider what would happen if members of Congress asked members of the NSC staff the simple question: "Are you raising funds or providing military support for the Contras?" In fact, over the course of one year, members of Congress repeatedly asked McFarlane, Poindexter, and North this question.¹¹² There were four possible answers. First, they could have told the truth and answered "yes." Second, they could

have lied and answered "no." Third, they could have attempted to evade the question. And fourth, the President could have exercised his constitutional authority to withhold information from Congress and ordered them not to respond. However, the President never exercised the last option. In the end, McFarlane, Poindexter, and North attempted to exercise option number three, but ended up exercising option number two.¹¹³

The President should have foreseen this eventuality and ordered the NSC staff either (1) to tell Congress that they were not at liberty to answer the question or, if push came to shove, (2) to tell Congress the truth. This might have caused the President to reevaluate the wisdom of his decision to keep Congress in the dark. By failing to guide his staff in the right direction, the President put McFarlane, Poindexter, and North between a rock and a hard place, forcing them to choose between their loyalty to the President and their integrity and fidelity to the law. When members of Congress subsequently asked McFarlane, Poindexter, and North whether they were supporting the Contras, they chose loyalty to the President and lied to Congress.

There are those who might argue that it is impractical for an Administration official to tell Congress that he is not at liberty to answer a question. Congress can hold the witness in contempt. But if the President, in exercising his constitutional

authority to withhold information from Congress, has ordered the witness not to disclose certain information, Congress does not have the power to compel the witness to answer the question or to punish the witness for refusing to answer the question.

It can also be argued that it is impractical for an Administration official to tell Congress that he is not at liberty to answer a question because such a response might give away the answer. For example, if McFarlane had told Congress that he was not at liberty to say whether the NSC staff was supporting the Contras, it would have been obvious that the NSC staff was supporting the Contras; otherwise, McFarlane would have answered with a straightforward "no." It should be remembered, however, that the only reason Congress asked McFarlane, Poindexter, and North about their support of the Contras was because the press kept reporting such stories.¹¹⁴ In other words, the cat was already out of the bag. What was the point in lying? Again, the President should have ordered his subordinates to tell the truth.

a. *The Case for Lying.* This leads to a brief discussion of the justification for lying to Congress. Notwithstanding the fact that lying to Congress is a crime,¹¹⁵ there are some arguments in support of the proposition that lying to Congress is justified under certain circumstances.

First of all, if you believe Peter Carlson, lying is as American as apple pie, so what is the big deal? According to Mr. Carlson,

America is the land of the free and the home of the whopper. Lies are as American as Beech-Nut apple juice, as patriotic as Ollie North. America is the birthplace of the snake-oil salesman, the riverboat gambler, the shyster lawyer, the stock market swindler, the used-car dealer and the friendly stranger who'd be glad to give you a good deal on the Brooklyn Bridge or some scenic underwater Florida real estate. The good ol' U.S.A. is the home of the tall tale, the campaign promise, the loophole, and the small print that taketh what the large print giveth.

Remember: If it weren't for official lies, Indians would still own your backyard, and they'd have legal title to it "as long as grass grows and water flows."¹¹⁶

One of the most famous advocates of the lie was Niccolo Machiavelli (1469-1527). According to Machiavelli,

How praiseworthy it is for a prince to keep his word and to live by integrity and not by deceit

everyone knows; nevertheless, one sees from the experience of our times that the princes who have accomplished great deeds are those who have cared little for keeping their promises and who have known how to manipulate the minds of men by shrewdness; and in the end they have surpassed those who laid their foundations upon honesty.

. . . .

But it is necessary to know how to disguise this nature well and to be a great hypocrite and a liar: and men are so simpleminded and so controlled by their present necessities that one who deceives will always find another who will allow himself to be deceived.¹¹⁷

b. *The Case Against Lying.* As Machiavelli pointed out, lying is one thing, getting away with lying is another. What good is a lie if you get caught? Members of Congress are neither simpleminded nor controlled by their present necessities, and are unlikely to allow themselves to be deceived for long.

Nevertheless, suppose a situation arose in which a member of Congress asked a question the truthful answer to which would compromise a sensitive operation or cost innocent lives. And suppose that the answer--"I'm not at liberty to answer that

question"--would also compromise the operation or cost innocent lives. Would it be acceptable to lie? Again, the answer is no.

First of all, the question would have to be very specific for the response--"I'm not at liberty to answer that question"--to give anything away. If a member of Congress ever asks such a specific question, as in the case of Congress's questions about the Administration's support of the Contras, the operation has already been compromised.

Second, the executive branch employee can explain to the member of Congress the dire consequences that would inevitably result if the member of Congress were to leak the information. It is hard to believe that a member of Congress would still leak the information.

Third, lies are short-term solutions that cause long-term adverse consequences. In lying to Congress, the President risks not only the secret, but the lie. If Congress finds out about one, it will necessarily find out about the other, and in so doing, not only will the secret be exposed, but the President's future ability to persuade Congress will be destroyed. The first time the President gets away with lying to Congress, shame on him. The second time the President gets away with lying to Congress, shame on Congress. As the minority aptly pointed out in the Iran-Contra Report, "persuasion is at the heart of a

vigorous, successful presidency."¹¹⁸

Fourth, lies destroy accountability. As noted above, our entire system of government is based on accountability to the American people and, in the case of secret policies, to Congress, the surrogate of the American people. Congress cannot perform its intelligence oversight duties if it cannot believe what the Administration tells it.

Finally, both Directors of Central Intelligence under President Bush repudiated the idea of lying to Congress. Former Director of Central Intelligence William H. Webster wrote the following:

Our relationship with Congress must be based on truth, not deception. There is so much confusion about deniability and deception that it is important to make one legitimate distinction. Often in covert activity, there is deception to conceal the source of the activity. This deception permits us to implement our foreign policy through means that we believe to be appropriate, but which by necessity must be covert. In dealing with the Congress, however, there is absolutely no excuse for deception. There will be occasion when I may not be in a position to respond to a particular question, especially in an open session of the

Congress. But it is possible to tell the Members of Congress, and I have done so on occasion, that I am just not at liberty to answer the question. This is very different from trying to answer the question narrowly or cutely, or pretending that they have failed to ask the question precisely enough, when I know what the Congress wants to hear from me. We have an obligation to speak to each other as individuals doing business, knowing what the other wants to know and being honest about what we are going to tell or not tell one another. If I decline to answer for reasons that seem legitimate to me, there are always opportunities to elevate the issue. Congress can appeal my decision to a higher authority, or it can make it sufficiently rough on me that I might conclude I have to answer. But a level of honesty, a recognition that nothing is being withheld by deception, is vitally important in the sharing of power. . . .¹¹⁹

Before leaving office in January 1993, former Director of Central Intelligence Robert Gates issued guidance to every employee of the intelligence community who might have to testify before Congress. He stressed four principles of testifying-- "candor, completeness, correctness, and consistency."¹²⁰

The views of Mr. Webster and Mr. Gates are not based solely on moral value judgments. Their views recognize that the intelligence community cannot accomplish its critical mission without the support of Congress, and that the intelligence community will not have the support of Congress for very long if it loses Congress's trust.

2. *Plausible Denial.* One more issue concerning truthfulness with Congress needs to be cleared up. Oliver North used the "Enterprise" to provide support to the Contras, sell arms to Iran, and divert profits from those arms sales to the Contras. The use of a private "cut-out," in and of itself, was not improper. However, the concealment of the existence of the Enterprise and its activities from Congress was improper.¹²¹ Because there was no apparent link between the NSC staff and the Enterprise, the Administration was able to "plausibly deny" to Congress that the Administration was supporting the Contras. For example, on October 5, 1986, after the Nicaraguans shot down one of Secord's aircraft and captured Eugene Hasenfus, President Reagan and members of his Administration assured Congress and the American people that there was no connection between the U.S. Government and the downed aircraft.¹²² Through the Enterprise, North was able to avoid the normal scrutiny and accountability of executive and legislative oversight. According to the Iran-Contra Committee,

"Plausible denial," an accepted concept in intelligence activities, means structuring an authorized covert operation so that, if discovered by the party against whom it is directed, United States involvement may be plausibly denied. . . . In no circumstance, however, does "plausible denial" mean structuring an operation so that it may be concealed from--or denied to--the highest elected officials of the United States Government itself."¹²³

Although deceit and illegality may be unavoidable in conducting intelligence activities directed against foreign powers,¹²⁴ for the reasons already discussed, these tactics should never be directed against this country's elected officials.

3. *Reporting to Congress.* The President should have established a realistic standard for determining how long reports to Congress may be delayed. As previously noted, neither the Hughes-Ryan Amendment nor section 501 of the National Security Act of 1947 specified how long the President could delay notification. This issue surfaced in two entirely different contexts, with arguably different results.

a. *The Iran-Initiative.* The Tower Commission found that the President waited too long to notify Congress of the arms sales to Iran. In so finding, the Tower Commission provided some guidance

as follows:

In the case of Iran, because release of the hostages was expected within a short time after the delivery of equipment, and because public disclosure could have destroyed the operation and perhaps endangered the hostages, it could be argued that it was justifiable to defer notification of Congress prior to the first shipment of arms to Iran. The plan apparently was to inform Congress immediately after the hostages were safely in U.S. hands. But after the first delivery failed to release all the hostages, and as one hostage release plan was replaced by another, Congress certainly should have been informed. This could have been done during a period when no specific hostage release plan was in execution.¹²⁵

Thus, the Tower Commission viewed each arms sale as a separate operation requiring separate notification of Congress. According to the Tower Commission, the President was justified in delaying notification of the first arms sale until after the Lebanese released the hostages. However, the President should have notified Congress before initiating the second arms sale. Even the Minority Report labeled as a "mistake" the President's decision "to use a necessary and constitutionally protected power of withholding information from Congress for unusually sensitive

covert operations, for a length of time that stretches credulity." ¹²⁶

But in all fairness to the President, it can be argued that he did not unduly postpone notification of Congress. If the President had notified the intelligence committees of the first arms sale, he would have risked compromising any future arms transactions. Whatever one might think about the merits of exchanging arms for hostages, the President did succeed in freeing two additional hostages. What chance would he have had to secure their release if a member of Congress had leaked details of the operation? The decision to withhold information should not depend on the merits of the proposed operation. The purpose of withholding information is solely to protect the security of the operation and the safety of those involved in the operation.

How long, then, may the President delay notification? Obviously, it would be improper for the President to delay notification forever. But the President should be able to delay notification long enough to guarantee the security of the operation and the safety of persons involved in the operation, however long that might be, as long as he notifies Congress once the danger has passed.

b. *Support for the Contras.* Although the President was arguably

justified in delaying notification of the arms sales to Iran, he was clearly wrong in failing to report the NSC staff's support of the Contras. The Reagan Administration made no secret of the fact that it supported the Contras until Congress passed the Boland Amendment, cutting off military and paramilitary funding for the Contras. From that moment on, the Administration not only failed to report its continued support of the Contras, but denied that it was providing such support.¹²⁷

The President's rationale for not reporting the NSC staff's support of the Contras simply does not fit the purpose for the President's constitutional authority to withhold information from Congress. As previously stated, the purpose of that authority is to protect information the disclosure of which could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. The President, however, was not concerned about protecting the security of any operation or the safety of any person, nor was he acting at the request of a third country. On the contrary, the President was motivated by a desire to conceal from Congress the fact that the NSC staff was circumventing the Boland Amendment.¹²⁸ Overt support does not magically become covert support requiring protection from Congress as soon as Congress expresses its opposition to the overt support.

H. *Lack of Understanding*

The President's inaction did not relieve his subordinates of responsibility for their own conduct. They should have done the right thing anyway. Moreover, they should have tried to convince the President to do the right thing. By failing to report to Congress that they were providing covert assistance to the Contras and selling arms to Iran, by lying to Congress about their support of the Contras, and by destroying documents and fabricating chronologies to cover up their involvement in such activities, they showed complete contempt for the congressional oversight process. Their explanation that they did these things to protect classified information is too easy. They obviously did not understand or appreciate the necessity of congressional oversight and of cooperating with Congress.

Those who serve in the government, especially in the military, must have absolute fidelity to the law. Officers swear an oath to the Constitution, not to the President. Whatever you might think about Congress's ability to keep secrets, lying to Congress is not an acceptable option. Yet there always seem to be a few who are able to rationalize illegal or immoral conduct as their public duty. It is interesting how history repeats itself. More than a decade earlier, the Church Committee noted in its final report the following:

[M]any of the unlawful actions taken by officials of the intelligence agencies were rationalized as their public duty. It was necessary for the Committee to understand how the pursuit of the public good could have the opposite effect. As Justice Brandeis observed:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928).¹²⁹

V. The Congressional Response

Despite the apparent consensus that men, not laws, were to blame for the Iran-Contra Affair, Congress eventually enacted new legislation to tighten congressional oversight of intelligence activities, especially covert actions.

A. A Statutory Inspector General

In response to the lackluster performance of the CIA's Office of the Inspector General during its internal investigation of the Iran-Contra Affair,¹³⁰ the Intelligence Authorization Act for Fiscal Year 1990 established in the CIA an Office of Inspector General, headed by an Inspector General appointed by the President with the advice and consent of the Senate. One of the Act's stated purposes was to "create an objective and effective office, appropriately accountable to Congress, to initiate and conduct independently inspections, investigations, and audits relating to programs and operations of the Agency."¹³¹

But the new statute contained three loopholes which would enable the Director of Central Intelligence to circumvent the congressional reporting requirements, as President Bush clearly pointed out on signing the Intelligence Authorization Act for Fiscal Year 1990. President Bush stated the following:

I . . . have signed H.R. 2748 because Title VIII includes three provisions enabling me and the Director of Central Intelligence to minimize the harm Title VIII otherwise would do to the national security and the effectiveness of the CIA. These provisions require the Inspector General to report directly to the Director, under whose general supervision he will operate; permit the Director to prohibit Inspector General

investigations if necessary to protect vital national security interests; and require the Inspector General to take due regard for the protection of intelligence sources and methods. We intend vigorously to assert these authorities. . . .¹³²

Because of these loopholes, it is difficult to see how the statutory inspector general is going to make a difference without the full cooperation of the Director of Central Intelligence and the President.

B. *The 1991 Amendments*

The next year, President Bush withheld his signature from the Intelligence Authorization Act for Fiscal Year 1991 because of its overly broad definition of covert action.¹³³ Nine months later, President Bush signed into law a revised version of the Intelligence Authorization Act for Fiscal Year 1991.¹³⁴ The Authorization Act consolidated all congressional intelligence oversight provisions in title V of the National Security Act of 1947, and repealed the Hughes-Ryan Amendment.¹³⁵

Congress deleted former section 501's prefatory language-- "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."¹³⁶

Nevertheless, by omitting this language, Congress did not, and could not, detract from the President's constitutional authority to withhold information from Congress.¹³⁷ As President Bush stated on signing the new provisions into law,

Several provisions of the Act requiring the disclosure of certain information to the Congress raise constitutional concerns. These provisions cannot be construed to detract from the President's constitutional authority to withhold information the disclosure of which could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.¹³⁸

Furthermore, the new reporting requirements were substantially the same as the old reporting requirements.¹³⁹ The new provisions, however, did tighten presidential accountability for covert actions;¹⁴⁰ required the reporting of significant changes in, or undertakings pursuant to, previously approved covert actions;¹⁴¹ and authorized the use of nonappropriated funds for intelligence or intelligence-related activities only if those activities are reported to Congress.¹⁴²

While these changes may have tightened accountability for covert actions and clarified reporting requirements, they did not

eliminate the President's constitutional authority to withhold information from Congress, nor did they address the underlying causes of the Iran-Contra Affair. As already discussed, the Iran-Contra Affair occurred, not because existing laws and procedures were flawed, but because the President failed to exercise strong, ethical leadership and issue clear guidance on how he expected the NSC staff to deal with Congress. In addition, the President and some members of the NSC staff simply did not understand the necessity of congressional oversight and of cooperating with Congress.

VI. Conclusion and Recommendations

A. *Leadership*

As previously noted, strong, ethical leadership, beginning with the President and continuing down through the heads of the departments, agencies, and other entities of the intelligence community, is arguably the single most important factor in preventing another Iran-Contra Affair. The President must personally cooperate with Congress in fulfilling its intelligence oversight responsibilities.

B. *Guidance*

The President should also issue clear guidance to every

employee of the executive branch who is involved in intelligence activities. Such guidance should state what the President expects of each employee when dealing with Congress concerning intelligence activities. The guidance of former Director of Central Intelligence Robert Gates applies only to employees of the intelligence community. This is too narrow. As the Iran-Contra Affair illustrated, there may be times when employees outside the intelligence community, such as the NSC staff,¹⁴³ become involved in intelligence activities. In addition, the President should encourage the Director of Central Intelligence and the head of each department, agency, or other entity involved in intelligence activities to take the initiative in implementing this guidance.

The current congressional oversight provision in Executive Order 12333 is overdue for change.¹⁴⁴ As previously discussed, section 3.1 of Executive Order 12333 merely cross-references the congressional oversight statutes which existed when President Reagan issued Executive Order 12333. Since that time, the Hughes-Ryan Amendment has been rescinded. Therefore, section 3.4 should be changed to reflect the current law.

The President should provide guidance on making statements to Congress. Such guidance should be clear and concise, and should state a positive standard of conduct rather than a negative standard of conduct.¹⁴⁵ The problem with prohibiting

false statements to Congress is that such conduct is already prohibited by law.¹⁴⁶ Therefore, such a standard would add nothing new. Robert Gates' principles of "candor, completeness, correctness, and consistency" are perfect. They are clear, concise, and positive. Therefore, the President should adopt them.

The President must make it clear that there are only two acceptable answers in response to a question by a member of Congress: (1) the truth or (2) a statement that the employee is not at liberty to answer the question and a brief explanation why.

Because any decision to withhold information from Congress is ultimately up to the President, the President should require the Director of Central Intelligence and the head of each department, agency, or other entity involved in intelligence activities to inform the President of any withholding from Congress of information required by law to be provided to Congress. This requirement would not only ensure that the decision to withhold information is made at the appropriate level, but would discourage employees from withholding information.

C. A Better Understanding

The President should also ensure that employees of the executive branch who are involved in intelligence activities are familiar with their duty to cooperate fully with Congress. The Director of Central Intelligence and the head of each department, agency, or other entity involved in intelligence activities should require such familiarization as part of their employees' regular training.

D. A New Congressional Oversight Provision

Based on the foregoing discussion, section 3.4 of Executive Order 12333 should be amended to read as follows:

Congressional Oversight. Every employee of the executive branch shall cooperate fully with Congress in the conduct of its responsibilities for the oversight of intelligence activities as provided in title 50, United States Code, sections 413 through 415. Every employee shall ensure that his or her statements to Congress are candid, complete, correct, and consistent. If an employee is not at liberty to answer a question, the employee shall so state and give the reason why. The Director of Central Intelligence and the head of each department, agency, or other entity involved in intelligence activities shall ensure that their employees are familiar with their duty to cooperate

fully with Congress, and shall immediately inform the President of the withholding from Congress of any information required by law to be provided to Congress.

E. *Final Words of Advice*

Congressional oversight of intelligence activities is necessary in a democratic society. But Congress cannot perform its oversight duties without the full cooperation of those who conduct intelligence activities. The President alone can and should ensure that those who conduct intelligence activities cooperate with Congress.

In deciding whether to withhold information from Congress, the President should first determine whether the disclosure of such information could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. If the answer is "no," then the President should disclose the information. If the answer is "yes," then the President should weigh the risk of disclosure against both the advantages of consulting Congress and the disadvantages of not consulting Congress.

The President should never lose sight of the fact that consultation with Congress gives him the benefit of congressional

advice, gets Congress to share responsibility, is one way to measure public support, helps win the support of Congress, and is ultimately necessary to justify the continued funding of intelligence activities. Even when the President decides to withhold information from Congress, he should do so only as long as necessary to protect our foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. There is simply nothing to be gained by withholding information from Congress any longer than is absolutely necessary.

The President should also remember that congressional oversight is required by law, one of the many laws which the Constitution requires the President to faithfully execute. Congressional oversight is preferable to the comprehensive charter legislation that Congress may enact someday if the President does not live up to his responsibility to cooperate with Congress in carrying out its intelligence oversight responsibilities. Congressional oversight helps ensure that intelligence activities are legal and proper, and that intelligence products are honest and objective. Finally, congressional oversight may not always be agreeable to the President, but it is the only means yet devised for holding the President accountable for the conduct of intelligence activities. In short, the President's cooperation with Congress is in the nation's best interest and it is in the President's best

interest. Strong, ethical leadership, clear guidance, and a better understanding of the necessity of congressional oversight and the need to cooperate with Congress will hopefully ensure the continued success of the nation's intelligence activities within the constitutional framework of a democratic society.

ENDNOTES

1. Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years; Files on Citizens; Helms Reportedly Got Surveillance Data in Charter Violation*, N.Y. TIMES, Dec. 22, 1974, § 1, at 1.
2. See Exec. Order No. 12,333, § 3.4(e), 3 C.F.R. 200 (1981), reprinted in 50 U.S.C.A. § 401 note (1982) ("*Intelligence activities* means all activities that agencies within the Intelligence Community are authorized to conduct pursuant to this Order"). These activities include the collection of foreign intelligence and counterintelligence information, the analysis of that information and production of finished intelligence, and the conduct of covert actions (also called "*special activities*"). "*Foreign intelligence* means information relating to the capabilities, intentions and activities of foreign powers, organizations or persons, but not including counterintelligence except for information on international terrorist activities." *Id.* § 3.4(d). "*Counterintelligence* means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs." *Id.* § 3.4(a). "*Special activities* means activities conducted in

support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media, and do not include diplomatic activities or the collection and production of intelligence or related support functions." *Id.* § 3.4(h).

3. *The Federalist No. 64*, John Jay wrote the following:

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

THE FEDERALIST NO. 64 (John Jay) (Garry Wills ed., 1982).

4. Robert F. Turner, *The Constitution and the Iran-Contra Affair: Was Congress the Real Lawbreaker?*, 11 HOUS. J. INT'L L. 83, 99-104 (1988) (discussing Congress's traditional deference toward the President in the conduct of foreign affairs, including intelligence activities).

5. *Intelligence Community* and agencies within the Intelligence Community refer to the following agencies or organizations:

- (1) The Central Intelligence Agency (CIA);
- (2) The National Security Agency (NSA);
- (3) The Defense Intelligence Agency (DIA);
- (4) The offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs;
- (5) The Bureau of Intelligence and Research of the Department of State;
- (6) The intelligence elements of the Army, Navy, Air Force, and Marine Corps, the Federal Bureau of Investigation (FBI), the Department of the Treasury, and the Department of Energy; and

(7) The staff elements of the Director of Central Intelligence.

Exec. Order No. 12,333, § 3.4(f), 3 C.F.R. 200 (1981), reprinted in 50 U.S.C.A. § 401 note (1982).

6. The Central Intelligence Agency is the only intelligence agency which has a statutory charter. See 50 U.S.C. § 403 (1988).

7. President Ford issued the first executive order on February 18, 1976. Exec. Order No. 11,905, 41 Fed. Reg. 7703 (1976). President Carter issued Executive Order 12036 on January 24, 1978. Exec. Order No. 12,036, 43 Fed. Reg. 3674 (1978). Three years later, President Reagan issued Executive Order 12333. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in 50 U.S.C.A. § 401 note (1982).*

8. Congress's greatest power is its constitutional power of the purse. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . [and] To borrow Money on the credit of the United States." U.S. CONST. art. I, § 8, cl. 1-2. No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of

all public Money shall be published from time to time. U.S. CONST. art. I, § 9, cl. 7.

9. U.S. CONST. art. II, § 2, cl. 2.

10. 50 U.S.C.A. §§ 413-415 (West Supp. 1993).

11. 50 U.S.C.A. §§ 413-413b (West Supp. 1993).

12. *Id.* § 413b.

13. 50 U.S.C.A. § 414 (West Supp. 1993).

14. *See infra* part IV.

15. *See infra* note 71 and accompanying text.

16. Pub. L. No. 93-559, 88 Stat. 1804 (1974) (codified at 22 U.S.C. § 2422 (1982)) (repealed 1991).

17. *Id.*

18. In 1986, Senator Daniel K. Inouye, Democrat of Hawaii, the first chairman of the Senate Select Committee on Intelligence, stated the following:

"I recall when we came to classified programs, we would all look over at Richard Russell, the chairman of the Armed Services Committee, and he would say, 'I have discussed this matter with the appropriate officials

and I have found everything is in order.' . . . But no one ever told us what was in order."

Leslie H. Gelb, *Overseeing of C.I.A. by Congress Has Produced Decade of Support*, N.Y. TIMES, July 7, 1986, at A1.

According to Senator Daniel Patrick Moynihan, "Ten years ago there was no oversight, no budget review process, no reporting of covert activities except to one or two senators who championed the C.I.A. Now we're informed in minute detail about the budget which is a very powerful mechanism of control. . . ." Philip Taubman, *Serious Problems Seen in Senate Intelligence Unit*, N.Y. TIMES, May 28, 1982, at A14.

19. H.R. REP. NO. 433, 100th Cong., 1st Sess. 469 (1987).

20. Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years; Files on Citizens; Helms Reportedly Got Surveillance Data in Charter Violation*, N.Y. TIMES, Dec. 22, 1974, § 1, at 1.

21. Statement Announcing Establishment of a Commission on CIA Activities Within the United States, PUB. PAPERS at 19 (Jan. 4, 1975).

22. COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 271-74 (1975); Statement Announcing Release of Report of

the Commission on CIA Activities Within the United States, PUB. PAPERS at 789 (June 9, 1975).

23. S. RES. 21, 94th Cong., 1st Sess., 121 CONG. REC. 1416 (1975).

24. FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 755, 94th Cong., 2d Sess., Book I (1976).

25. *Id.* at 12.

26. *Id.* at 425-26.

27. *Id.*

28. Exec. Order No. 11,905, 41 Fed. Reg. 7703 (1976).

29. *Id.* §§ 3-4.

30. *Id.* § 5.

31. *Id.* § 1.

32. *Id.* § 6.

33. FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 755, 94th Cong., 2d Sess., Book I, at 425-26 (1976).

34. S. Res. 400, 94th Cong., 2d Sess., 122 CONG. REC. 4754 (1976).

35. H.R. Res. 658, 95th Cong., 1st Sess., 123 CONG. REC. 22,932 (1977).

36. Exec. Order No. 12,036, 43 Fed. Reg. 3674 (1978).

37. For example, President Ford required attorney general approval of procedures for electronic surveillance and physical searches. Exec. Order No. 11,905, § 5, 41 Fed. Reg. 7703 (1976). President Carter expanded this list to include concealed monitoring, mail surveillance, and undisclosed participation in domestic organizations. President Carter also established the rule that intelligence organizations must gather information about United States persons by the least intrusive means possible. Exec. Order No. 12,036, § 2, 43 Fed. Reg. 3674 (1978).

38. Exec. Order No. 12,036, § 2, 43 Fed. Reg. 3674 (1978).

39. See *United States v. Nixon*, 418 U.S. 683, 710-14 (1974) (the President's communications are presumptively privileged against disclosure to a prosecutor in a criminal case based on the public interest in the confidentiality of the deliberative process of the executive branch; in dictum, to the extent that the President's communications involve military or diplomatic secrets, they may be absolutely privileged).

40. Pub. L. No. 95-370, 92 Stat. 626 (1978).
41. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. § 1801 (1988)).
42. S. 2525, 95th Cong., 2d Sess. (1978).
43. H.R. 11,245, 95th Cong., 2d Sess. (1978).
44. S. 2284, 96th Cong., 2d Sess. (1980).
45. Pub. L. No. 96-450, 94 Stat. 1981 (1980) (codified at 50 U.S.C. § 413 (1988)) (amended 1991).
46. *The Washington Post* reported the following:

The impetus for reform [of the intelligence community] began to dissipate in the winter of 1975-76, before the Church committee had even finished its work. Former congressman Otis G. Pike (D-N.Y.), who then headed a parallel House investigation, stated the problem succinctly: "It all lasted too long, and the media, the Congress and the people lost interest." In mid-1978, Church commented: "Reforms have been delayed to death." The Center for National Security Studies, a critic of the CIA, stated that the charter bill introduced by Senator Walter D. Huddleston, Democrat of Kentucky, chairman of the SSCI, in February 1980, ". .

. reads the way one might imagine the Fourth Amendment to read if it were drafted by a committee of police chiefs." [Association of Former Intelligence Officers] Chairman David Phillips, a former CIA officer who frequently travels about the country making speeches, reports: "The change in public attitude since Iran and Afghanistan has really been something. Now people say to me: "Unleash the CIA? Great. That will solve our problems."

George Lardner, Jr., *As Congress' Resolve Faded, So Did Proposed CIA Charter*, WASH. POST, May 5, 1980, at A6.

47. 50 U.S.C. § 413(a) (1988).

48. The eight members were the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. 50 U.S.C. § 413(a)(1)(B) (1988).

49. Pub. L. No. 96-450, 94 Stat. 1981 (1980) (codified at 22 U.S.C. § 2422 (1988)) (repealed 1991).

50. Robert F. Turner, *The Constitution and the Iran-Contra Affair: Was Congress the Real Lawbreaker?*, 11 HOUS. J. INT'L L. 83, 123-24 (1988).

51. Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991, PUB. PAPERS, at 1043, 1044 (Aug. 14, 1991).

In a Memorandum to the Attorney General, dated December 17, 1986, and entitled "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act," Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, concluded that the President has "virtually unfettered discretion to choose the right moment for making the required notification." *Reprinted in Hearings before the Select Committee on Intelligence, Oversight Legislation, 100th Cong., 2d Sess., 126-52 (1987).*

52. Judith Miller, *Senators Encouraged by Revisions in C.I.A. Order*, N.Y. TIMES, Nov. 14, 1981, § 1, at 24.

53. George Lardner, Jr., *President Eases Restrictions on Gathering of Intelligence*, WASH. POST, Dec. 5, 1981, at A1.

54. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C.A. § 401 note (1982).

55. Exec. Order No. 12,334, 3 C.F.R. 216 (1981), *reprinted in* 50 U.S.C.A. § 401 note (1982).

56. Statement on United States Intelligence Activities, PUB. PAPERS, at 1126 (Dec. 4, 1981).

57. Senator Barry Goldwater, Republican of Arizona, chairman of the SSCI, stated that Executive Order 12333 provided "'adequate safeguards against improper intelligence operations within the United States while allowing the agencies to perform the functions that are needed to protect our national security.'"

Judith Miller, *Reagan Broadens Power of C.I.A., Allowing Spying Activities in U.S.*, N.Y. TIMES, Dec. 5, 1981, § 1, at 1.

Likewise, Representative Edward P. Boland, Democrat of Massachusetts, chairman of the HPSCI, wrote: "The President has signed a respectable executive order. The intelligence chiefs should insure that the all-important implementing procedures reflect similarly cautious judgment." Edward P. Boland, *From Reagan to C.I.A., to Treat with Care*, N.Y. TIMES, Dec., 20, 1981, § 4, at 16.

58. Editors at *The Washington Post* wrote the following:

What is surprising, perhaps, is that so little of the content of the old Jimmy Carter order has been changed. Controlling intelligence is mostly a matter of making calibrations in the gray areas, and in some of those areas the Reagan order moves the marker a bit to the right on the individual liberty-national security scale. It takes a rather vivid imagination, however, to think that he has moved it much. Almost all of the darker dangers perceived during the drafting

period by those fearful of fresh inroads on citizens' liberties seem to have evaporated.

Mr. Reagan and the CIA, WASH. POST, Dec. 6, 1981, at C6.

59. Exec. Order No. 12,333, § 3.1, 3 C.F.R. 200 (1981), reprinted in 50 U.S.C.A. § 401 note (1982).

60. *Id.*

61. Robert M. Gates, *Strengthening Congressional Oversight of Intelligence*, 1993, 15 A.B.A. NAT'L SEC. L. REP. 2. According to Robert M. Gates, the last Director of Central Intelligence under President Bush, "Congressional oversight, in the eyes of the intelligence professional, is a protection against the misuse of the [CIA] by executive authority; and congressional review of our intelligence publications and analysis helps guard our objectivity." *Id.*

62. H.R. REP. NO. 433, 100th Cong., 1st Sess. 449 (1987).

63. *Id.* at 16.

64. See *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (the government's military secrets are absolutely privileged against disclosure to a plaintiff in a civil proceeding).

65. William J. Casey, *Freedom of Information Harmful to the C.I.A.*, N.Y. TIMES, Oct. 1, 1982, at A30 (emphasis added). In

1984, Congress passed the Central Intelligence Agency Information Act, adding title VII to the National Security Act of 1947. Title VII authorizes the Director of Central Intelligence to exempt the operational files of the CIA from the Freedom of Information Act. Pub. L. No. 98-477, 98 Stat. 2209 (1984) (codified at 50 U.S.C. § 431 (1988)).

66. See 50 U.S.C. §§ 1801-1811 (1988).

67. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (defining political question); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 198), *aff'd*, 770 F.2d 202 (D.C. Cir. 198) (12 members of Congress who complained that the President had violated the War Powers Resolution, the Hughes-Ryan Amendment, and the Boland Amendment in conducting an undeclared war against the government of Nicaragua presented a nonjusticiable political question); *United Presbyterian Church v. Reagan*, 557 F. Supp. 61, 65-66 (D.D.C. 1982), *aff'd*, 738 F.2d 1375 (D.C. Cir. 1984) (congressman, religious and political organizations, journalists, academics, and other individuals failed to allege any redressable concrete injury attributable to Executive Order 12333 and therefore lacked standing to challenge its constitutionality); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1973) (plaintiffs who complained that the mere existence of the Army's intelligence gathering and disseminating activities in the United States chilled their exercise of First Amendment rights did not present

a justiciable controversy). *But see* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 149-51, 160-62 (D.D.C. 1976) (plaintiffs who complained that the Army was defaming them, illegally wiretapping their private conversations, and disrupting their lawful activities presented a justiciable controversy; damages could be recovered for violations of plaintiffs' First and Sixth Amendment rights).

68. William H. Webster, *The Role of Intelligence in a Free Society*, 43 U. MIAMI L. REV. 155, 156 (1988).

69. "Much of the executive branch's recalcitrance about sharing sensitive information derives from a legitimate fear that some 'leaks' of such materials, whether inadvertent or deliberate, have been attributable to committee members or staff." Henry J. Hyde & Daniel E. Lungren, *Tightening Up the Hill's Loose Lips*, WASH. POST, June 2, 1987, at A19.

70. H.R. REP. NO. 433, 100th Cong., 1st Sess. 576 (1987).

71. The minority blamed the intelligence committees for leaking information which tipped the government of India that it had a high-level security breach, enabling it to shut down a French intelligence ring, and for leaking U.S. plans to topple Qadhafi. The minority claimed that the Iran-Contra Committees leaked misleading information about a witness's expected testimony, the identities of undercover personnel, intelligence methods, and the

names of countries which were discreetly trying to assist the United States. H.R. REP. NO. 433, 100th Cong., 1st Sess. 577-78 (1987).

72. The former Deputy Director of Central Intelligence, retired Admiral Bobby Ray Inman, said on ABC News' *Nightline* that Bob Woodward reported details of briefings that Inman gave Casey when Inman directed the NSA, "adding that the details didn't come 'from me.'" David B. Ottaway, *3 Ex-CIA Directors Divided on Casey and Leaks; Late Chief's Predecessors Are Not Surprised He Repeatedly Met with Journalist*, WASH. POST, Oct. 4, 1987, at A4.

73. After North's testimony before the Iran-Contra Committees, *Newsweek* reported:

As Oliver North explained it, he lied to Congress because he thought it could not be trusted with sensitive intelligence. When asked by a congressman last week to provide examples to support that contention, North cited . . . the terrorist seizure of the cruise ship *Achille Lauro* in 1985, in which an American tourist was murdered. Afterward, in a daring operation, the United States intercepted an Egyptian plane containing the terrorists. North complained last week that after the capture, "a number of members of Congress" made revelations "that very seriously

compromised our intelligence activities." But the colonel did not mention that details of the interception, first published in a *NEWSWEEK* cover story, were leaked by none other than North himself.

Two Leaks, But by Whom, *NEWSWEEK*, July 27, 1987, at 16.

74. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, at V-6 (1987).

75. H.R. REP. NO. 433, 100th Cong., 1st Sess. 575 (1987).

76. *See infra* part IV.

77. "A review of the leading U.S. newspapers, magazines and wire services shows that [Lieutenant Colonel Oliver L. North] was mentioned by name in 62 separate stories from 1983 through 1985. His contra-funding effort was the worst-kept secret in town." David Ignatius, *Contra-Funding Affair Illustrates Failure of the Oversight Process; Concerned Lawmakers Didn't Follow Through in 1985*, *WASH. POST*, Dec. 16, 1986, at A16.

78. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, at IV-7 (1987).

79. Leslie H. Gelb, *Overseeing of C.I.A. by Congress Has Produced Decade of Support*, *N.Y. TIMES*, July 7, 1986, at A1.

80. *Id.*

81. Stansfield Turner, *Secrecy and Democracy*, *NEWSWEEK*, May 20,

1985, at 78. Stansfield Turner, Director of Central Intelligence under President Carter, wrote the following:

Whether the administration was remiss or Goldwater not alert in this situation can be argued; according to Sen. Daniel Moynihan of the Senate intelligence committee, there was only one sentence on mining in an 84-page transcript of a briefing given the committee. The bottom line is that the administration's inept handling of Congress had alienated one of its strongest supporters. Why? Because the administration had fulfilled the letter, but hardly the intent, of procedures for notifying Congress "in a timely manner" of covert operations. *Id.*

82. Former Director of Central Intelligence Robert Gates wrote the following:

Intelligence and appropriations committees of the House and Senate take very seriously their responsibilities to review the intelligence community budgets and examine planned intelligence expenditures in the billions of dollars. They scrutinize budget line items by the thousands, and in so doing they pass judgment on every plan and program. And congressional oversight of the budgeting process for intelligence

does not end once the budget has been approved. The intelligence community must gain the approval of up to six congressional committees when it reprograms money beyond a minimal amount, and it must notify four congressional committees of any withdrawal of money from CIA reserve funds for contingencies. Furthermore, both intelligence authorizing committees and the House Appropriations Committee have created their own audit units, and these have access both at CIA headquarters and in the field to CIA's books and expenditures.

Robert M. Gates, *Strengthening Congressional Oversight of Intelligence*, 1993, 15 A.B.A. NAT'L SEC. L. REP. 2.

83. Leslie H. Gelb, *Overseeing of C.I.A. by Congress Has Produced Decade of Support*, N.Y. TIMES, July 7, 1986, at A1.

84. Edward P. Boland, *The Job of Congressional C.I.A. Overseers*, N.Y. TIMES, Apr. 24, 1984, at A26. According to Representative Boland, then chairman of the HPSCI,

[T]he intelligence oversight committees are not powerless. They have two principal options for disagreeing with secret Administration policies. They can attempt to persuade the President to change that policy. This method has met with only limited success

under two Presidents--Carter and Reagan--but it can work. The committee also controls the purse strings of the intelligence agencies. It can recommend a cutoff in funding--as it has done in the case of the war in Nicaragua. Efforts at persuasion and budgetary action need not be limited to the two committees. Neither of them has hesitated to request secret sessions of their respective bodies to inform colleagues of events in Nicaragua. . . . *Id.*

85. John M. Goshko, *Sen. Dodd Blocks Promotion of Two Latin Envoys*, WASH. POST, Oct. 25, 1988, at A19. In October 1988, Senator Christopher J. Dodd, Democrat of Connecticut, chairman of the Foreign Relations Subcommittee on Western Hemisphere Affairs, blocked promotion in the Senior Foreign Service of Everett E. Briggs, Ambassador to Honduras, and David B. Dlouhy, formerly acting head of the U.S. Embassy in El Salvador. According to an aide to Senator Dodd,

The senator believes their lack of cooperation with the committee and their systematic obstruction of the committee's efforts to inquire into U.S. activities in Honduras shows a lack of understanding for Congress' constitutional role in the foreign policy process. . . . The senator believes his action was not a policy

reprisal but a personnel action against officers whose performance did not merit promotion. *Id.*

86. H.R. REP. NO. 433, 100th Cong., 1st Sess., at 3-4 (1987).

87. Exec. Order No. 12,575, 51 Fed. Reg. 43,718 (1986).

88. Several witnesses, including Poindexter, Secord, and North, refused to appear. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, at III-1 (1987).

89. *Id.* at A-1 (1987).

90. H.R. Res. 12, 100th Cong., 1st Sess. (1987) and S. Res. 23, 100th Cong., 1st Sess., 133 CONG. REC. 782 (1987).

91. H.R. REP. NO. 433, 100th Cong., 1st Sess., at 431-586 (1987).

92. *Id.* at 3-4.

93. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, at C-14 (1987); H.R. REP. NO. 433, 100th Cong., 1st Sess., at 4-5 (1987).

94. H.R. REP. NO. 433, 100th Cong., 1st Sess., at 5 (1987).

95. *Id.* at 6-7.

96. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, at B-39 (1987).

97. *Id.* at 7.

98. H.R. REP. NO. 433, 100th Cong., 1st Sess., at 38-40, 57-65 (1987).

99. *Id.* at 9.

100. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, at IV-7 (1987); H.R. REP. NO. 433, 100th Cong., 1st Sess., at 15-16 (1987).

101. H.R. REP. NO. 433, 100th Cong., 1st Sess., at 15-16, 439, 449 (1987).

102. *Id.* at 285.

103. *Id.*

104. *Id.* at 286.

105. *Id.* at 13-14.

106. The Iran-Contra Committee concluded that "the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance." *Id.* at 423.

107. The Iran-Contra Committee stated the following:

In a Constitutional democracy, it is not true, as one official maintained, that "when you take the King's shilling, you do the King's bidding." The idea of monarchy was rejected here 200 years ago and since

then, the law--not any official or ideology--has been paramount. For not instilling this precept in his staff, for failing to take care that the law reigned supreme, the President bears the responsibility.

Id. at 21-22.

Likewise, the Tower Commission concluded that, "In the case of the Iran initiative, the NSC process did not fail, it simply was largely ignored. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, at I-2 (1987).

108. According to Professor Lester G. Paldy, State University at Stony Brook, a physicist who has served on the Arms Control Intelligence Staff at Langley, Virginia, and with State Department negotiators in Geneva, and who teaches a course called Intelligence Organizations, Technology and Democracy,

"It appears to me that the corrective measures that followed [the revelations of domestic spying in 1974] have worked. For instance, we don't hear any more about the manipulation of faculty and students or recruiting of reporters. My own experience of the intelligence community has been that it now seems to bend over backward to avoid anything questionable. . . . The intelligence community should be able, in the

words of former Deputy Director of Central Intelligence Robert Gates, to speak truth to power. . . . The person who directs Central Intelligence is also in a position to set the tone for intelligence activities. When I worked in Washington, I had a very positive impression of director William Webster, a former Federal judge who appears very straight-arrow."

Sandra J. Weber, *Long Island Q&A: Lester G. Paldy; The Library Is a Potent Tool for an Intelligence Operative*, N.Y. TIMES, June 2, 1991, § 12LI, at 2.

Likewise, in June 1990, Senator David L. Boren, Democrat of Oklahoma, chairman of the SSCI, wrote *The New York Times*:

Intelligence excesses are largely behind us. We now have a body of laws and a process of Congressional intelligence oversight that aggressively seeks to insure that the C.I.A. operates in a manner consistent with the fundamental values of the American people. Critics should not ignore the fact that the intelligence community today is led by a man, Judge William Webster, who is committed to telling the truth and obeying the law.

David L. Boren, *New World, New C.I.A.*, N.Y. TIMES, June 17, 1990, § 4, at 21.

109. The Tower Commission noted that the National Security Act of 1947 gives the President wide latitude. Therefore, it is incumbent upon him to give his subordinates clear direction. The Tower Commission stated the following:

A President must at the outset provide guidelines to the members of the National Security Council, his National Security Advisor, and the National Security Council staff. These guidelines, to be effective, must include how they will relate to one another, what procedures will be followed, *what the President expects of them.*

REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, at V-1, V-2 (1987).

110. According to the Iran-Contra Committee,

The President created or at least tolerated an environment . . . [that] enabled a secretary who shredded, smuggled, and altered documents to tell the Committees that "sometimes you have to go above the written law;" and it enabled Admiral Poindexter to testify that "frankly, we were willing to take some

risks with the law." It was in such an environment that former officials of the NSC staff and their private agents could lecture the Committees that a "rightful cause" justifies any means, that lying to Congress and other officials in the executive branch itself is acceptable when the ends are just, and that Congress is to blame for passing laws that run counter to Administration policy. What may aptly be called the "cabal of the zealots" was in charge.

H.R. REP. NO. 433, 100th Cong., 1st Sess., at 22 (1987).

111. *Id.* at 447-48.

112. *Id.* at 5.

113. *Id.*

114. *See supra* note 77.

115. Oliver North was convicted in May 1989 of aiding and abetting an endeavor to obstruct Congress in violation of 18 U.S.C. § 1505 (count 6); destroying, altering, or removing official NSC documents in violation of 18 U.S.C. § 2071 (count 9); and accepting an illegal gratuity, specifically, a security system for his home, in violation of 18 U.S.C. § 201(c)(1)(B) (count 10). On appeal, his convictions on counts 6, 9, and 10 were vacated and remanded for a *Kastigar* hearing to ensure that

the Independent Counsel did not use North's immunized testimony at trial; North's conviction on count 9 was reversed on other grounds. *United States v. North*, 910 F.2d 843, 851-52 (D.C. Cir. 1990). John Poindexter was convicted of, among other things, making false statements to Congress in violation of 18 U.S.C. § 1001. On appeal, this conviction was reversed because the Independent Counsel failed to show that he did not use Poindexter's immunized testimony at trial. *United States v. Poindexter*, 951 F.2d 369, 371, 385-88 (D.C. Cir. 1991).

116. Peter Carlson, *The Academy Awards of Untruth. Remember: If It Weren't for Official Lies, Indians Would Still Own Your Backyard*, WASH. POST, Dec. 27, 1987, (Magazine) at W29.

117. Niccolo Machiavelli, *The Qualities of the Prince*, reprinted in *A WORLD OF IDEAS: ESSENTIAL READINGS FOR COLLEGE WRITERS* 39, 50-52 (Lee A. Jacobus ed., 1983).

118. *Id.* at 450.

119. William H. Webster, *The Role of Intelligence in a Free Society*, 43 U. MIAMI L. REV. 155, 160-61 (1988). Louis Fisher of the Congressional Research Service wrote the following:

The claim by Colonel North that . . . Congress cannot be trusted with sensitive information, is unfounded. . . .

In closed testimony, this philosophy--if it can be called that--was strongly repudiated by Claire George, a 32-year veteran of the CIA's Operations Division. He told the Iran-contra Committees: "I disagree with Colonel North, as strongly as I can disagree with anyone. This is a business . . . of trust. This is a business that works outside the law, outside the United States. It is a business that is very difficult to define by legal terms because we are not working inside the American legal system. It is . . . a business of being able to trust and have complete confidence in the people who work with you. And to think that because we deal in lies, and overseas we may lie and we may do other such things, that therefore that gives you some permission, some right or some particular reason to operate that way with your fellow employees, I would not only disagree with, I would say it would be the destruction of a secret service in a democracy. . . [sic] I deeply believe with the complexities of the oversight process and the relationship between a free legislative body and a secret spy service, that frankness is still the best and the only way to make it work.

Louis Fisher, *The Legitimacy of the Congressional National Security Role*, in *THE CONSTITUTION AND NATIONAL SECURITY* 243, 256-57 (Howard E. Schuman & Walter R. Thomas eds., 1990) (citations omitted).

120. Robert M. Gates, *Strengthening Congressional Oversight of Intelligence*, 1993, 15 A.B.A. NAT'L SEC. L. REP. 5.

121. H.R. REP. NO. 433, 100th Cong., 1st Sess., at 286 (1987).

122. *Id.* at 5.

123. *Id.* at 15-16.

124. Tom Polgar, who retired from the CIA in 1981 after 35 years of service, wrote the following:

Clandestine collection of secret intelligence is always illicit. Whether it is evil depends on the eyes of the beholder. We look with greater kindness on those who spy for the United States than on those who spy against us. But let us not fool ourselves: What is illegal under U.S. law when carried out against American interests is also likely to be illegal under the laws of foreign countries when carried out against their interests.

. . . But little thought has been given to the natural dichotomy between the requirements of effective espionage--conspiracy, stealth and deceit--and the conventional legal and regulatory framework of public administration.

Tom Polgar, *Has Webster's No-Risk CIA Lost Its Punch?*, WASH. POST, June 5, 1988, at C1.

125. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, at IV-7 (1987).

126. H.R. REP. NO. 433, 100th Cong., 1st Sess., at 449 (1987).

127. *Id.* at 15-16.

128. *Id.*

129. FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 755, 94th Cong., 2d Sess., Book I, at 2 (1976).

130. H.R. REP. NO. 433, 100th Cong., 1st Sess., at 425 (1987).

131. Pub. L. No. 101-193, 103 Stat. 1711 (1989) (codified at 50 U.S.C. § 403q (1988)).

132. Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990, PUB. PAPERS, at 1609 (Nov. 30, 1989).

133. Memorandum of Disapproval for the Intelligence Authorization Act, Fiscal Year 1991, PUB. PAPERS, at 1729, 1730 (Nov. 30, 1990).

134. Pub. L. No. 102-88, 105 Stat. 441 (1991) (codified at 50 U.S.C.A. §§ 413-415 (West Supp. 1993)).

135. The Intelligence Authorization Act for Fiscal Year 1991 redesignated sections 502 and 503 as sections 504 and 505, respectively, and replaced section 501 with new sections 501 through 503. *Id.*

136. See 50 U.S.C.A. §§ 413a-413b (West Supp. 1993).

137. Article V of the Constitution prescribes the procedures for amending the Constitution. U.S. CONST. art. V. In their report on the Intelligence Authorization Act for Fiscal Year 1991, the House and Senate conferees rejected the President's assertion that he has the constitutional authority to withhold information from Congress. In acknowledging that Congress is powerless to prevent the President from asserting that authority, the conferees stated the following:

The conferees recognize that this is a question that neither they nor the Congress itself can resolve. Congress cannot diminish by statute powers that are granted by the Constitution. Nor can either the

legislative or executive branch authoritatively interpret the Constitution, which is the exclusive province of the judicial branch.

While the conferees recognize that they cannot foreclose by statute the possibility that the President may assert a constitutional basis for withholding notice of covert actions for periods longer than "a few days," they believe that the President's stated intention to act under the "timely notice" requirement of existing law to make a notification "within a few days" is the appropriate manner to proceed under this provision, and is consistent with what the conferees believe is its meaning and intent.

H.R. CONF. REP. NO. 166, 102d Cong., 1st Sess. (1991).

138. Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991, PUB. PAPERS, at 1043, 1044 (Aug. 14, 1991).

President Bush had previously sent a letter to the chairman of the HPSCI, in which he stated the following:

I anticipate that in almost all instances, prior notice [of covert action] will be possible. In those rare instances where prior notice is not provided, I

anticipate that notice will be provided within a few days. Any withholding beyond this period will be based upon my assertion of authorities granted this office by the Constitution.

H.R. CONF. REP. NO. 166, 102d Cong., 1st Sess. (1991).

139. The requirement to keep the intelligence committees "fully and currently informed" of all intelligence activities, significant anticipated intelligence activities, and covert actions applies only "[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." 50 U.S.C.A. §§ 413a(1), 413b(b)(1) (West Supp. 1993). Normally, the President must report a covert action finding to the intelligence committees as soon as possible and before initiation of the covert action. 50 U.S.C.A. § 413b(c)(1) (West Supp. 1993). If the President determines that "it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States," the President may report the finding to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. 50 U.S.C.A. § 413b(c)(2) (West Supp. 1993). "Whenever a finding is not reported pursuant to [these

provisions], the President shall fully inform the intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice." 50 U.S.C.A. § 413b(c)(3) (West Supp. 1993).

140. The President may not authorize a covert action unless the President finds that this action is "necessary to support identifiable foreign policy objectives" and is "important to the national security." 50 U.S.C.A. § 413b(a) (West Supp. 1993). Each finding must be reduced to writing as soon as possible but not later than 48 hours after the President approves a covert action. 50 U.S.C.A. § 413b(a)(1) (West Supp. 1993). A finding may not approve a covert action that is more than 48 hours old. 50 U.S.C.A. § 413b(a)(2) (West Supp. 1993). A finding must specify each department, agency, or entity of the United States Government, and any third party, that will be used to fund or otherwise participate in any significant way in the covert action. 50 U.S.C.A. §§ 413b(3)-(4) (West Supp. 1993).

141. 50 U.S.C.A. § 413b(d) (West Supp. 1993).

142. 50 U.S.C.A. § 414(d) (West Supp. 1993).

143. The NSC staff is not part of the intelligence community. See the definition of intelligence community *supra*, note 5.

144. See *supra* note 60 and accompanying text.

145. Rule 4.1 of the Department of the Army's *Rules of Professional Conduct for Lawyers* provides a good example of a negative standard. It provides the following:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [Confidentiality of Information].

DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS
Rule 4.1 (1 May 1992).

146. See *supra* note 115 and accompanying text.