

COMMENTS

Cutting the President Off From Tin Cup Diplomacy

INTRODUCTION

In 1979 a Nicaraguan popular front led by the Sandinistas overthrew dictator General Anastasio Somoza Debayle.¹ After the revolution relations between the United States and the Sandinista Government deteriorated rapidly.² The Reagan Administration accused the Sandinistas of imposing a totalitarian state in Nicaragua and spreading Marxist revolution throughout Central America.³ By December 1981 the United States Government had

¹ SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT, S. Rep. No. 216, H.R. Rep. No. 433, 100th Cong., 1st Sess. 3, 25-26 (1987) [hereafter IRAN-CONTRA REPORT].

² *Id.* at 31-32.

³ *Id.* at 31. President Reagan and the Republican Party consistently asserted two themes in opposition to the Sandinistas: (1) the Sandinistas had imposed totalitarian rule in Nicaragua, and (2) the Sandinistas were serving as a Soviet/Cuban proxy in spreading Communist revolution. The minority report on the Iran-Contra affair provides a good summary of this position. *See id.* at 431, 483-88.

The Reagan Administration expressed these themes of totalitarianism and Communist expansionism for many years. As a presidential candidate in 1979, Ronald Reagan stated, "I'm sure he [Senator Steve Symms of Idaho] would agree that the troubles in Nicaragua bear a Cuban label also. While there are people in that troubled land who probably have justifiable grievances against the Somoza regime, there is no question but that most of the rebels are Cuban-trained, Cuban-armed and dedicated to creating another Communist country in this hemisphere." Hitchens, *Minority Report: Reagan on Nicaragua*, 242 NATION 542 (1986) (quoting Mar. and Apr. 1979

begun covertly supporting the Contras, armed opponents of the

recorded radio broadcasts made for Reagan's political action committee). The 1980 Republican Party Platform expressed a similar but more developed perspective:

We deplore the Marxist Sandinista takeover of Nicaragua and the Marxist attempts to destabilize El Salvador, Guatemala, and Honduras. We do not support United States assistance to any Marxist government in this hemisphere, and we oppose the Carter Administration aid program for the Government of Nicaragua. However, we will support the efforts of the Nicaraguan people to establish a free and independent government.

Excerpts from Platform to be submitted to Republican Delegates, N.Y. Times, July 13, 1980, § 1, at 14, col. 1.

Jeane Kirkpatrick's thesis that authoritarian regimes like that of Somoza pose less of a threat to human rights than do totalitarian regimes provided the political theory for the Reagan view on Central American. Kirkpatrick condemned President Carter for insufficiently supporting Somoza and facilitating the advent of a totalitarian regime which would be ultimately more dangerous than Somoza's to human rights. *See generally* KIRKPATRICK, *DICTATORSHIPS AND DOUBLE STANDARDS; RATIONALISM AND REASON IN POLITICS* (1982).

As the U.S. Government's covert support for the Contras became public knowledge, the Reagan Administration offered more sophisticated justifications for its aid policy. In February 1981 the Administration released a report entitled "Communist Interference in El Salvador," often referred to as the "White Paper." The White Paper purportedly showed definitive evidence of the Soviet Union's "well-coordinated, covert effort" to overthrow El Salvador's ruling junta. The White Paper alleged that nearly 200 tons of arms had been funneled to the rebels in El Salvador, mostly through Cuba and Nicaragua. U.S. DEP'T OF STATE, *COMMUNIST INTERFERENCE IN EL SALVADOR, DOCUMENTS DEMONSTRATING COMMUNIST SUPPORT OF THE SALVADORAN INSURGENCY* (Feb. 1981).

A number of journalists attacked the methodology and conclusions of the White Paper. They found that the State Department report contained factual errors, misleading statements, and ambiguities. *See, e.g.,* Kaiser, *White Paper on El Salvador is Faulty*, Washington Post, June 9, 1981, at A1, col. 2; Kwitny, *Apparent Errors Cloud U.S. "White Paper" on Reds in El Salvador*, Wall St. J., June 8, 1981, at A1, col. 6.

President Reagan also repeatedly asserted that the Sandinistas were violating the rights of the Nicaraguan people. In 1984 President Reagan stated that "[t]he Nicaraguan people are trapped in totalitarian dungeon." Taubman, *New Effort to Aid Nicaragua Rebels*, N.Y. Times, July 19, 1984, at A6, col. 1. Similarly, at a Nicaraguan Refugee Fund Dinner, President Reagan stated:

As you know, the Sandinista dictatorship has taken absolute control of the Government and the armed forces. It is a communist dictatorship, it has done what communist dictatorships do: cre-

Sandinista Government.⁴

Despite United States military aid, the Contras failed to win popular support or military victories in Nicaragua.⁵ Human rights groups in the United States and abroad condemned the Contras' use of torture and sabotage.⁶ Other Americans opposed Contra aid because they feared military escalation would lead to involvement in "another Vietnam."⁷ In 1982 Congress reacted by restricting the use of Contra aid. Congress provided that the aid could not be used for the purpose of overthrowing the Nicaraguan Government.⁸ In 1984 Congress further restricted Contra aid by limiting the total amount to \$24 million.⁹ Finally, after disclosure in April 1984 of the Central Intelligence Agency's (CIA) involvement in the mining of Nicaragua's harbors,¹⁰ Congress passed the Boland Amendment II to prohibit all United States assistance to the Contras.¹¹

ate a repressive state security and secret police organization assisted by Soviet, East German and Cuban advisers . . . harassed and in many cases expunged the political opposition and rendered the democratic freedoms of speech, press and assembly, punishable by officially sanctioned harassment, and imprisonment or death.

AMERICAS WATCH COMMITTEE, HUMAN RIGHTS IN NICARAGUA: REAGAN, RHETORIC AND REALITY 17 (1985) (quoting White House press release for Apr. 15, 1985). One human rights group in particular, Americas Watch, accused President Reagan of hypocritically distorting the human rights situation in Nicaragua. *See generally id.*

⁴ IRAN-CONTRA REPORT, *supra* note 1, at 32.

⁵ W. LAFEBER, INEVITABLE REVOLUTIONS 315-16 (1984).

⁶ *See, e.g.*, AMERICA'S WATCH COMMITTEE, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA, 25-58 (1987); AMERICAS WATCH COMMITTEE, HUMAN RIGHTS IN NICARAGUA 71-88 (1985); AMERICAS WATCH COMMITTEE, HUMAN RIGHTS IN NICARAGUA 43-48 (1984); AMNESTY INTERNATIONAL, NICARAGUA: THE HUMAN RIGHTS RECORD 32-36 (1986).

⁷ IRAN-CONTRA REPORT, *supra* note 1, at 3.

⁸ Defense Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982) (sometimes referred to as Boland I); *see also* IRAN-CONTRA REPORT, *supra* note 1, at 33.

⁹ Department of Defense Appropriations Act, 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452, (1983); Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983); *see also* IRAN-CONTRA REPORT, *supra* note 1, at 35, 396-97.

¹⁰ IRAN-CONTRA REPORT, *supra* note 1, at 37.

¹¹ Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 (1984) (commonly referred to as Boland II); *see also* IRAN-CONTRA REPORT, *supra* note 1, at 41-42, 397-99. The following year Congress passed a series of statutes (commonly referred to as Boland

The Reagan Administration assured Congress and the public that it was upholding the letter and spirit of the Boland Amendment.¹² Privately, however, the Administration remained committed to supporting the Contras.¹³ The Administration utilized two primary sources to continue funding the Contras after Congress had prohibited U.S. assistance.¹⁴ First, the Administration solicited money from foreign countries and wealthy private individuals.¹⁵ Second, the Administration sold missiles to Iran at inflated prices and diverted the profits to the Contras.¹⁶

The Administration used two different public strategies to accomplish this secret funding. Initially, the Administration simply denied supporting the Contras.¹⁷ Eventually these denials

III) that collectively authorized limited humanitarian aid to the Contras but continued the prohibition on lethal aid. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, §§ 722(d)-(g), 99 Stat. 190, 254-55; Supplemental Appropriations, 1985, Pub. L. No. 99-88, § 102, 99 Stat. 293, 325; Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, § 105, 99 Stat. 1002, 1003 (1985); Act. of Dec. 19, 1985, Pub. L. No. 99-190, § 8050, 99 Stat. 1185, 1211; *see also* IRAN-CONTRA REPORT, *supra* note 1, at 404-05.

To minimize confusion and clarify analysis, this Comment uses the term "Boland Amendment" to refer to both Boland II (prohibiting any/all assistance) and Boland III (prohibiting only lethal assistance).

¹² IRAN-CONTRA REPORT, *supra* note 1, at 5.

¹³ *Id.* at 5, 31-58; *see also* Babcock, *Two Senators Briefed on Contra Links*, Washington Post, Sep. 6, 1985, at A18, col. 1; *Nicaragua Rebels Getting Advice from White House on Operations*, N.Y. Times, Aug. 8, 1985, at A1, col. 1.

¹⁴ IRAN-CONTRA REPORT, *supra* note 1, at 4, 38-43.

¹⁵ *Id.* at 4, 38-41, 85-100.

¹⁶ *Id.* at 4, 6-9, 213-36, 269-75. All together, the Administration received almost \$48 million from private and third-country contributions and from arms sales to Iran. The funds were deposited in secret Swiss bank accounts to be used for "the Enterprise." Director of Central Intelligence William J. Casey designed the Enterprise as a permanent, "off the shelf" force available to engage in covert operations on behalf of the United States. With its outside funding, Casey intended that the Enterprise remain free from congressional spending controls. *Id.* at 327-74.

¹⁷ *Id.* at 5, 117-36, 293-304. In the summer of 1985, the American press began to speculate on how the Contras had obtained funding during the time the Boland Amendment prohibited United States' military assistance. *Id.* at 122. In June 1985, the Miami Herald reported that the Administration had "helped organize" and continued to support "supposedly spontaneous" private fundraising organizations. Charty, *US Found to Skirt Ban on Aid to Contras*, Miami Herald, June 24, 1985, at 1A, col. 4; *see also* IRAN-CONTRA REPORT, *supra* note 1, at 122. By August, the Washington Post and New York Times had reported that Administration support for the Contras

lost all credibility.¹⁸ The Administration then asserted that Con-

went beyond fundraising. IRAN-CONTRA REPORT, *supra* note 1, at 122. The New York Times reported that a military officer on the National Security Council (NSC) staff had given "direct military advice" to the Contras, exercised "tactical influence" on military operations, and "facilitated the supplying of logistical help." *Nicaragua Rebels Getting Advice from White House on Operations*, N.Y. Times, Aug. 8, 1985, at A1, col. 1; *see also* IRAN-CONTRA REPORT, *supra* note 1, at 122. The officer was later identified as Marine Corps Lt. Col. Oliver L. North. Omang, *McFarlane Aide Facilitates Policy; Marine Officer Nurtures Connections With Contras, Conservatives*, Washington Post, Aug. 8, 1985, at A1 [hereafter Omang, *McFarlane Aide*] (available on LEXIS, NEXIS library, Majpap file).

When the press questioned President Reagan about the stories, he responded: "We're not violating any laws." Omang, *Rebels Move Back Into Nicaragua; White House Defends Legality of NSC Contact with Contras*, Washington Post, Aug. 9, 1985, at A1, col. 2, A18, col. 4 [hereafter Omang, *Rebels*]; *see also* IRAN-CONTRA REPORT, *supra* note 1, at 122. Later that day, the President released a statement promising to "continue to work with Congress to carry out the program [of humanitarian aid for the Contras] as effectively as possible and take care that the law [authorizing the exchange of intelligence with the Contras] be faithfully executed." Omang, *Rebels, supra*, at A18, col. 4; *see also* IRAN-CONTRA REPORT, *supra* note 1, at 122. In an August 11 article National Security Adviser Robert McFarlane stated that he had told his staff to comply with the Boland Amendment. McFarlane conceded that, "[w]e could not provide any support" to the Contras. Omang, *McFarlane Aide, supra*, at A1.

The press reports raised concerns within Congress that the NSC had violated Boland Amendment restrictions. In the third week of August, Representative Michael Barnes, Chairman of the Subcommittee on Western Hemisphere Affairs of the House Committee on Foreign Affairs, and Representative Lee Hamilton, Chairman of the House Permanent Select Committee on Intelligence, separately wrote to McFarlane to obtain specific accounts of NSC activity in support of the Contras. IRAN-CONTRA REPORT, *supra* note 1, at 122. McFarlane wrote back to Hamilton on September 5: "I can state with deep personal conviction that at no time did I or any member of the National Security Council staff violate the letter or spirit" of congressional restrictions on aid to the Contras. *Id.* at 123. McFarlane also wrote: "I am most concerned . . . that there be no misgivings as to the existence of any parallel efforts to provide, directly or indirectly, support for military or paramilitary activities in Nicaragua. There has not been, nor will there be, any such activities by the NSC staff." *Id.* McFarlane's letter to Hamilton served as a model for five additional letters sent in September and October to members of Congress. *Id.*

¹⁸ *See* IRAN-CONTRA REPORT, *supra* note 1, at 137-53. As NSC activities on behalf of the Contras continued, U.S. support for the Contras became progressively more difficult to deny. *Id.* at 137. Two specific events greatly reduced deniability. In September of 1986, a new Costa Rican Government led by President Arias threatened to reveal an airfield in Santa Elena, Costa Rica. The NSC used the airfield to resupply the Contras in violation of the

gress had no authority to restrict the President's foreign policy in

Boland Amendment. *Id.* at 137, 142. In response to the threatened disclosure, North arranged a conference call with Elliott Abrams, Assistant Secretary of State for Inter-American Affairs, and Louis Tambs, U.S. Ambassador to Costa Rica. *Id.* at 142. According to North's "PROF notes" to Poindexter, the three agreed that North should call and threaten Arias. *Id.* (After several congressional requests for documents, North had begun to use PROF notes to communicate with his supervisor and McFarlane's successor National Security Adviser John Poindexter. PROF notes are IBM's mainframe electronic-mail messages. Wilkinson, *A Widows Application in a Mainframe World*, PC WEEK, Mar. 4, 1991 (available on LEXIS, NEXIS library, Mags file). North incorrectly assumed that the notes would be irretrievable. IRAN-CONTRA REPORT, *supra* note 1, at 138.) The three agreed that North tell Arias that, if he proceeded with the press conference, Arias would not be permitted to meet with President Reagan and would never receive the \$80 million that Agency for International Development Director M. Peter McPherson had promised him. *Id.* at 142. North's PROF notes also stated that Abrams and another Government official applied the same pressure to Arias. *Id.* at 143. North's notebooks described the same threat. *Id.* at 142-43. In testimony, however, Abrams, North, and Tambs all denied that the call to Arias had ever occurred. *Id.* President Arias cancelled the press conference but later in September revealed the presence of the airfield. *Id.* On September 26, 1986, the Costa Rican Interior Minister told reporters that his government had discovered and closed down an airfield that had been used for resupplying the Contras, for trafficking drugs, or both. *Id.* Efforts by North and others to prevent discovery of the link between the airfield and the NSC were successful until late October. *Id.* at 144.

By that time, another serious leak had occurred. On October 5, 1986, one of the aircraft belonging to the Enterprise, *see supra* note 16, departed from an undisclosed operational base with 10,000 pounds of ammunition and gear for the Contras. *Id.* Sandinista forces shot down the plane with a SAM-7 missile in Nicaragua. Three crew members died in the crash and the Sandinistas captured Eugene Hasenfus, an American "advisor." *Id.* The NSC and CIA personnel involved attempted to remove all indications of U.S. Government control of the operation. *Id.* at 144-45. When asked whether the Hasenfus plane had anything to do with the U.S. Government, the President replied, "Absolutely none." Informal Exchange with Reporters, 22 WEEKLY COMP. PRES. DOC. at 1348-49 (Oct. 8, 1986); *See also* McManus, *Elaborate System Supplies Contras*, L.A. Times, Aug. 9, 1986, pt. 1, at 1, col. 5. Similarly Secretary of State Schultz stated that the Hasenfus aircraft was "hired by private people" who "had no connection with the U.S. Government at all." Omang, *Captured American Put on Display by Nicaragua*, Washington Post, Oct. 8, 1986, at A1, col. 4; *see also* Miller, *Downed Plane Not Ours, Schultz Says*, L.A. Times, Oct. 8, 1986, pt. 1, at 1, col. 6.

Similarly Elliott Abrams, whom North described as being fully aware of the Contra operation, provided categorical denials. IRAN-CONTRA REPORT, *supra* note 1, at 146. Abrams gave publicly assurances that Hasenfus had not been part of any U.S. Government operation. Abrams acknowledged such

Nicaragua through the spending prohibitions of the Boland Amendment.¹⁹

This Comment examines the critical constitutional issue raised by the Iran-Contra affair: does the executive branch have the inherent authority to spend funds in defiance of a statutory prohibition? After concluding that the executive does not have such authority, the Comment proposes a statute designed to prevent future administrations from ignoring spending prohibitions such as the Boland Amendment. Part I describes the crucial events of the Iran-Contra affair that raise the issue of inherent executive authority.²⁰ Part II analyzes the executive and congressional powers implicated by spending prohibitions; specifically, the President's foreign affairs power and Congress' power of appropriations.²¹ Part III describes how judicial deference has affected the balance of power in foreign affairs.²² Part IV proposes an antidiversion statute designed to re-establish Congress' constitu-

activities would be illegal and flatly denied any involvement by any U.S. agency including the NSC. *Id.* at 145 (quoting interview on *Evans & Novak* (CNN television broadcast, Oct. 11, 1986)).

By this time the mainstream American press had grown openly skeptical of Administration denials of support for the Contras. *See, e.g., id.* The Hasenfus crash marked the beginning of the end for the Administration's policy of denial. Documents on board the Hasenfus plane linked it to Southern Air Transport (SAT), a former CIA proprietary airline based in Miami, Florida. *Id.* at 287. The Federal Bureau of Investigations (FBI) and the U.S. Customs Service began investigations of the crash. *Id.* North and Poindexter attempted unsuccessfully to slow the investigations. *Id.* at 287-88. By December 1986 the Attorney General had appointed an Independent Counsel to investigate the allegations. *Id.* at 288. By January 1987 both houses of Congress had launched their own investigations. *Id.* at xv.

¹⁹ *Id.* at 406. The actions of Reagan Administration officials at the time, however, suggest that they acknowledged the authority of Congress to prohibit United States support for the Contras. While President Reagan and the National Security Council secretly solicited contributions on behalf of the Contras, Assistant Secretary of State A. Langhorne Motley, uninformed about the fund raising, assured Congress that the Administration was not "soliciting and/or encouraging third countries" to fund the Contras. *Id.* at 4. Motley conceded that the Boland Amendment prohibited such solicitation. *Id.* Oliver North, who knew of the solicitations, told the House Intelligence Committee at the time that he was not involved in fundraising for the Contras. North later conceded that this testimony was "false," "misleading," "evasive and wrong." *Id.*, at 5.

²⁰ *See infra* notes 24-39 and accompanying text.

²¹ *See infra* notes 40-96 and accompanying text.

²² *See infra* notes 97-139 and accompanying text.

tional role in foreign affairs.²³

I. THE IRAN-CONTRA AFFAIR

The Iran-Contra affair provides a dramatic example of the struggle between Congress and the President over foreign affairs spending. This Part describes the crucial aspects of this example: the spending prohibitions of the Boland Amendment, executive branch violations of the Amendment, and the resolution of these violations. This Part then places the Iran-Contra affair in historical context.

During the period of the Iran-Contra fund diversions, Congress imposed strict restrictions on aid to the Nicaraguan Contras.²⁴ The statutory restrictions, known collectively as the Boland Amendment, regulated the activities of the CIA, the Department of Defense, and all other United States agencies involved in intelligence activities.²⁵ The Boland Amendment remained in force from October 12, 1984, to October 17, 1986.²⁶ During this period, the Boland Amendment prohibited intelligence agencies from expending funds, regardless of their source, to provide lethal aid to Contras.²⁷

In violation of the Boland Amendment, the National Security Council (NSC) raised \$34 million from foreign countries for lethal aid to the Contras between June 1984 and February 1986.²⁸

²³ See *infra* notes 140-67 and accompanying text.

²⁴ *Id.* at 398; see also *supra* text accompanying notes 9-10. From the first years of Ronald Reagan's presidency, Congress vigorously debated the wisdom of funding the Contras in Nicaragua. Opponents of Contra aid refused to finance the overthrow of the Sandinista Government. See, e.g., 130 CONG. REC. H8,281-82 (daily ed. Aug. 2, 1984) (statement of Representative Panetta). Proponents of Contra aid asserted that the Sandinistas were Marxist-Leninist allies of the Soviet Union determined to spread revolution throughout Latin America. See, e.g., 128 CONG. REC. S15,363-64 (Dec. 18, 1982) (statement of Senator Helms). Restrictions on Contra aid varied on an annual basis according to which congressional perspective prevailed. See *supra* notes 8-11 and accompanying text (describing various provisions affecting Contra aid); see also IRAN-CONTRA REPORT, *supra* note 1, at 395-99 (same).

²⁵ IRAN-CONTRA REPORT, *supra* note 1, at 401-05.

²⁶ See *id.* at 397-405.

²⁷ See *id.*; *supra* note 11 (describing various provisions of Boland Amendment).

²⁸ IRAN-CONTRA REPORT, *supra* note 1, at 4-5, 37-58, 85-103. The Iran-Contra Report identified the foreign countries that provided funding only by number. *Id.* at 37-58. The Report, however, did disclose that Brunei

Private U.S. citizens, some of whom received White House briefings, private presentations by Lieutenant Colonel Oliver North, and photo opportunities with President Reagan, donated an additional \$10 million to the NSC in 1985 and 1986.²⁹ Profits from the sale of arms to Iran between August 1985 and October 1986 provided the NSC with another \$16.1 million.³⁰ Oliver North,

contributed \$10 million for the Contras. *Id.* at 71. Elliott Abrams, while traveling under an alias, personally solicited the contribution from Brunei. The Sultan of Brunei transferred the \$10 million to a designated Swiss bank account number but the funds never reached the Contras. Either North or his secretary, Fawn Hall, inadvertently transposed the account number. *Id.*

North, McFarlane, and Casey organized the foreign country solicitations. *Id.* at 37-58. At a National Security Planning Group meeting on June 25, 1984, Secretary of State George Schultz advised all present that Chief of Staff James Baker had stated that it would be an impeachable offense if the U.S. Government served as a conduit for third-country funding to the Contras. *Id.* at 39. President Reagan, Vice President Bush, Secretary of State Schultz, Secretary of Defense Caspar Weinberger, Director Casey, Counselor to the President Edwin Meese III, and McFarlane were present at the meeting. Casey said that such funding would be permissible if the contributions went directly from the third countries to the Contras. Meese thought there might be an opinion by Attorney General William F. Smith to that effect. McFarlane advised no further activity be undertaken without a Justice department decision but the meeting ended without any firm conclusion. *Id.* at 39. Nonetheless, the solicitations and the transfer of funds continued. *Id.* at 39.

²⁹ *Id.* at 85. Carl "Spitz" Channell and Richard Miller formed a network of private foundations and organizations to fund the Contras. Channell founded and controlled the tax-exempt National Endowment for the Preservation of Liberty (NEPL). The NEPL used the briefings, private presentations, and private meetings, to raise over \$10 million from private contributors. Twelve contributors donated 90% of this total. *Id.* at 85.

Of the \$10 million raised by NEPL, the Contras received only approximately \$4.5 million. Channell and Miller took the rest in salaries, fees and expenses. Miller laundered \$1.7 million through his business entities in the United States and Cayman Islands then directed it to the Enterprise. *Id.* Miller directed another \$1 million to North through accounts controlled by a prominent Contra spokesman in Washington, D.C., and \$500,000 to other persons and entities involved in efforts on behalf of the Contras. *Id.* NEPL spent an additional \$1 million on a Contra lobbying and a "public education" campaign. *Id.* at 85-98. The campaign included television advertising, press conferences, speaking tours, and letter writing. It targeted the constituents of the "swing votes" in Congress and vocal opponents of Contra aid. *Id.* at 99.

³⁰ *Id.* at 9, 274, 277-81. By January 1986 North and Secord had adopted a policy of selling weapons to Iran at a markup of over 200%. This increased the amount of profits available to support the Contra operation.

supported first by National Security Adviser Robert McFarlane, and then by McFarlane's successor, John Poindexter, supervised the funds.³¹ With the logistical support of CIA personnel, North used the funds to conduct covert military operations in support of the Contras.³²

On November 3, 1986, Congress learned that the Reagan Administration had secretly sold arms to Iran.³³ On November 25, 1986, Attorney General Edwin Meese revealed that the Administration had diverted the proceeds from the Iranian arms

Id. at 280. Of the \$16.1 million profit from these sales, \$3.8 million was diverted to the Contras. *Id.* at 274.

The arms sales were also intended to obtain the release of hostages. *Id.* at 278-79. During the period of the arms sales, three hostages were released and three more were taken. *Id.* at 280. During this period, the United States sold Iran a total of 2,004 TOW missiles and 200 vital spare parts to HAWK missiles. *Id.*

³¹ *Id.* at 4, 31.

³² *Id.* The Enterprise funded a number of different covert operations under North's direction. *Id.* at 361. "Covert operations" are clandestine activities that go beyond secret intelligence gathering. *Id.* at 375. The \$48 million raised by the Enterprise during the Iran-Contra affair was disbursed as follows: to the following covert activities: \$16.5 million to the Contras, \$15.2 million spent on Iran, \$6.6 million to participants as commissions and profits, \$1 million to other covert operations run by North, \$4.2 million in reserve for future operations, \$1.2 million in Swiss bank accounts, and \$16 thousand to purchase a security system for North's home. *Id.* at 9, 337-43, 346. The principal private individuals who received profits were Richard Secord, Albert Hakim, and Thomas Clines. *Id.* at 347.

³³ *Id.* at xv-xvi, 293-303. Congress, and the rest of the world, learned of the secret arms sales to Iran when Al-Shire'a, a Lebanese weekly newspaper, exposed the covert activities. *Id.* at xv. The Administration responded to the allegations initially with denial. *Id.* at 294. At an unrelated bill-signing ceremony on November 6, President Reagan stated, "the speculation, the commenting on [the] story that came out of the Middle East . . . has no foundation." Schwartz, *An Iran-Contra Chronology*, Washington Post, Feb. 23, 1990, at A10, col. 1, A11, col. 2; see also IRAN-CONTRA REPORT, *supra* note 1, at 294.

When it became apparent that the arms sales could not credibly be denied, the Administration began a program of limited disclosure. *Id.* 298-303. While Secretary of State Schultz urged disclosure of all crucial facts, other key Administration officials opposed Schultz' approach. *Id.* at 293. The President, Attorney General Meese, and Director Casey decided to downplay any attempt to trade arms for hostages in Iran while emphasizing the strategic importance of the arms sales. *Id.* at 295. This approach led to continued efforts to distort the truth. See *id.* at 295-303. See generally *High Crimes and Misdemeanors, A Bill Moyers' Special Report* (PBS documentary) (providing excellent summary of lies and distortion of Iran-Contra affair).

sales to the Contras in Nicaragua.³⁴ To investigate the arms sales and fund diversions, the United States House of Representatives and the United States Senate established committees in January 1987.³⁵ The committees' final report detailed the Reagan Admin-

³⁴ IRAN-CONTRA REPORT, *supra* note 1, at 11, 317. The Attorney General launched his investigation of the Iranian arms sales on November 21, 1986, after obtaining authorization from the President to obtain the wide range of facts that had previously been compartmentalized within the Administration. *Id.* at 305. On the first day of his investigation, Meese met with FBI Director William Webster on an unrelated matter. *Id.* Meese declined an offer of assistance and the two agreed that the FBI should not become involved because there was no evidence of crime. Meese did not mention his knowledge that Director Casey had planned to deliver false testimony to the Intelligence Committees or the possibility that the arms sales to Iran violated the Arms Export Control Act. *Id.* at 301-02, 306; Arms Export Control Act, Pub. L. No. 80-629, 82 Stat. 1320 (1968) (current version at 22 U.S.C. §§ 2751-2796d (1988)).

According to North's deputy, Robert Earl, North and Meese spoke on November 21st and North requested 24-48 hours before the Justice Department arrived to begin its investigation. Meese responded that North might not have that much time. Meese does not recall the conversation and North denies that it took place. IRAN-CONTRA REPORT, *supra* note 1, at 306. North and his secretary, Fawn Hall, commenced shredding documents on the 21st. *Id.* at 306-07.

Meese's preliminary investigation consisted of a series of interviews with North, Poindexter, McFarlane, Schultz, Secretary of Defense Weinberger Casper, and Bush. *Id.* at 306. Initially, Meese conducted all interviews with another Justice Department official present and notes were taken. On November 22, Meese interviewed Schultz. *Id.* at 309. Schultz recalls expressing concern that profits from the arms sales were possibly being diverted to the Contras. The notes of the interview taken by Schultz' assistant, Charles Hill, corroborate this. The notes describe Schultz as stating, "Another angle worries me. Could get mixed up with help for freedom fighters in Nicaragua. One thing may be overlapping with another. May be a connection." *Id.* at 309. In testimony, Meese denied that Schultz mentioned any such connection. *Id.*

Subsequent to the interview with Schultz, Meese's assistants reviewed documents at the NSC and discovered a memo on diversion to the Contras. *Id.* at 310. After having been alerted to this, Meese decided to conduct all interviews by himself with no notes taken. *Id.* Meese failed to secure North's office and it remained unsecured for three days until November 25. *Id.* at 320. On November 25, Meese made the disclosure about the diversion at a press conference. *Id.* at 317. FBI Director Webster learned of the diversion only through this press conference. Webster immediately went personally to inform Meese that a criminal investigation was warranted. *Id.* at 318.

³⁵ IRAN-CONTRA REPORT, *supra* note 1, at XV. The House formed the "Select Committee to Investigate Covert Arms Transactions with Iran."

istration's covert funding of the Contras.³⁶ The committees found that, "By circumventing Congress' power of the purse through third-country and private contributions to the Contras, the Administration undermined a cardinal principle of the Constitution."³⁷ Instead of addressing the institutional problems revealed by the scandal, however, the congressional report blamed the "cabal of the zealots" within the executive branch.³⁸

Lee Hamilton (D-Ind.), chaired the committee and Dante Fascell (D-Fla.), served as vice-chairperson. Dick Cheney (R-Wyo.) was "Ranking Republican." John Nields, Jr. served as Chief Counsel for the House committee. *Id.* at VI. The Senate established the "Select Committee on Secret Military Assistance To Iran and the Nicaraguan Opposition." Daniel Inouye (D-Haw.) chaired the committee; Warren Rudman (D-N.H.) served as vice-chairperson; and Arthur Liman served as Chief Counsel. *Id.* at VII. Several of the Republicans committee-members filed a separate Minority Report. *Id.* at 431.

³⁶ See generally *id.*

³⁷ *Id.* at 16.

³⁸ *Id.* at 22 (Congress used the term "cabal of the zealots" describing NSC staff). Although the committees concluded that the diversions violated United States law and the Constitution, few of the subsequent criminal prosecutions yielded serious convictions. Ostrow, *Frustrated Walsh Held Set to Take Administration to Court to get Data*, L.A. Times, Oct. 26, 1990, at A4, col. 1.

The Justice Department's refusal to release many documents on "national security" grounds hampered the prosecution's case. *Id.* Oliver North was found guilty of altering and destroying documents, accepting an illegal gratuity and aiding, and abetting in the obstruction of Congress. *Id.* The court sentenced North to a three-year suspended prison term, two years probation, \$150,000 in fines and 1,200 hours of community service. *Id.* The United States Court of Appeals for the District of Columbia Circuit set aside North's three felony convictions. The Court of Appeals reversed one conviction outright on the grounds that Judge Gerhard A. Gesell improperly instructed the jury on the destruction of documents charge. *Iran-Contra Prosecutor is Seeking High Court Review in North Case*, N.Y. Times, Jan. 16, 1991, at A19, col. 1. The court remanded the other two convictions so that Judge Gesell could determine whether any of the references to North's congressional testimony tainted the convictions. North gave his congressional testimony under a grant of limited immunity. *Id.* The prosecutor, Lawrence Walsh, plans to appeal the appellate court decision to the Supreme Court. *Id.*

Robert McFarlane, President Reagan's National Security Adviser, pleaded guilty to withholding information from Congress. The court sentenced McFarlane to two years of probation, a \$20,000 fine, and 200 hours of community service. Ostrow, *supra*, at A4, col. 1. McFarlane's successor, John Poindexter, was convicted of five felonies — involving conspiracy, obstruction of Congress, and false statements — and was sentenced to six

Congress' assertion that overzealous individuals caused the Iran-Contra scandal overlooks the persistent historical trend toward executive dominance in foreign policy. Most importantly, this congressional conclusion underestimates the increased willingness of presidents to circumvent congressional spending controls.³⁹

months in prison. Poindexter appealed his convictions before a three-judge panel of the District of Columbia Circuit on February 28, 1991. Carmichael, *Poindexter Tries to Overturn Convictions*, UPI, Mar. 1, 1991, Washington News (available on LEXIS, NEXIS library, Wires file).

Albert Hakim, one of the businessmen involved in the Enterprise, received two years probation and a \$5,000 fine for "supplementing" Oliver North's salary. Ostrow, *supra*, at A4, col. 1. Hakim's business, Lake Resources Inc., pleaded guilty to theft of government property. The court ordered the company dissolved. *Id.* Richard Secord, another businessman involved in the arms shipments, received two years probation for making a false statement to the Iran-Contra congressional committees. *Id.* Thomas Clines, a former CIA official who assisted in the arms sales to Iran and diversions to the Contras, was convicted of four federal income tax violations. Wines, *Iran-Contra Aide Gets Prison Term*, N.Y. Times, Dec. 14, 1990, at A36, col. 1. Clines was sentenced to 16 months in prison and \$40,000 in fines. Prosecutors charged that Clines had failed to report \$194,000 of the profits that he received from the arms sales. *Id.*

Richard Miller, who assisted in the private domestic fund-raising effort, pleaded guilty to conspiracy in connection with raising money to arm the Contras. Miller was sentenced to two years probation. Ostrow, *supra*, at 4, col. 1. Carl Channell, also involved in domestic fund-raising, pleaded guilty to conspiring to defraud the United States and received two years of probation. *Id.*

Head prosecutor Lawrence Walsh had been seeking documents involving the role of former Vice President Bush and his office in supplying arms to the Contras. Walsh charged that Bush had attempted to delay and block his investigation. *Id.*; see also *North Gives Iran-Contra Testimony*, Chicago Tribune, Jan. 19, 1991, News Section, at 12, col. 1. The grand jury is no longer investigating Bush's involvement directly. Drew, *Probe Targets Aide to VP Bush; Role in Sales to Contras Questioned*, Chicago Tribune, May 8, 1991, § 1, at 1, col. 2. Walsh is now concentrating the investigation on whether Donald Gregg, former top national security aide to George Bush and current U.S. Ambassador to South Korea, and Elliott Abrahms lied when they denied knowledge of the arms sales to the Contras. *Id.*

³⁹ Koh, *Why The President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1259, 1292-97 (1988). Koh cites three factors that have led to the increase in executive power: executive initiative, congressional acquiescence, and judicial tolerance. *Id.* at 1291-1317. Koh states that the executive branch is ideally structured for the exercise of power. The presidency has capabilities of speed, secrecy, and efficiency beyond those of any other branch. *Id.* at 1292. The Congress, on the other hand, is poorly structured for initiative and leadership. *Id.* In addition,

II. FOREIGN AFFAIRS SPENDING

The struggle between Congress and the President over foreign affairs spending implicates two competing constitutional powers: the President's foreign affairs power and Congress' power of appropriations.

A. *The President's Foreign Affairs Power*

During the Iran-Contra investigation, the Reagan Administration claimed that Congress lacked the authority to interfere with the President's conduct of foreign policy by withholding appropriations.⁴⁰ If that were the case and the Constitution vests such

Congress has continually focused on past rather than future foreign policy events. *Id.* at 1297. Congress has also lacked the political will to take responsibility for foreign policy decisions. *Id.* at 1304.

Consistent with this expansion of executive power, recent presidents have become increasingly unwilling to obey even express prohibitions on spending. *See e.g., id.* at 1267-68. President Richard Nixon spent millions of dollars on various bombing missions and incursions into Cambodia without congressional authorization. L. FISHER, *PRESIDENTIAL SPENDING POWER* 110-21 (1975). Nixon also funded paramilitary operations in Cambodia, Vietnam, and Laos in direct violation of congressional prohibitions. Koh, *supra*, at 1267-68. Similarly, President Gerald Ford violated Vietnam spending restrictions during his presidency. *Id.* at 1268. The Ford Administration's paramilitary aid to Angola violated spending restrictions imposed by the Hughes-Ryan Amendment less than a year earlier. *Id.* Congress passed the Hughes-Ryan Amendment to condition CIA expenditures of appropriated funds on prior reporting. *Id.*; Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804-05 (1974), *amended by* Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, § 407, 94 Stat. 1795, 1801, (1980) (codified at 22 U.S.C. § 2422 (1988)). Pub. L. No. 96-450 struck the reporting requirement of the Hughes-Ryan Amendment.

The Reagan Administration's violations of the Boland Amendment thus provide but one recent example of the executive branch's increased willingness to violate congressional spending prohibitions.

⁴⁰ IRAN-CONTRA REPORT, *supra* note 1, at 406; *see also* Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L LAW 758, 758 (1989). President Reagan's assertion of exclusive foreign policy control reflect a shifting balance of power in foreign affairs. The increase in presidential control over spending corresponds with a general increase in the executive branch's power in foreign affairs. Koh, *supra* note 39, at 1259-75. Since America ascended to superpower status after World War II, the balance of foreign affairs power has shifted increasingly toward the executive branch. *Id.*

Some Americans perceive the steady growth of executive emergency power as a necessary response to a more dangerous world threatened by

an expansive foreign affairs power in the President, statutes like the Boland Amendment would indeed unconstitutionally interfere with that executive authority.⁴¹

The Constitution, however, contains no language expressly granting a foreign affairs power to the President.⁴² Nor do any

communism, drugs, terrorism, and refugees. Cf. Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 7 (1961) (stating "the price of democratic survival in a world of aggressive totalitarianism is to give up some of the democratic luxuries of the past"). See generally Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1400 (1989) (arguing undermining of liberal constitutional restraints on executive emergency power is due in large part to America's rise to superpower status). Oliver North explained the reasoning behind his covert aid to the Contras in defiance of Congressional prohibitions: "[T]his nation is at risk in a dangerous world. *Id.* at 1401 n.77 (quoting from North's testimony at *Joint Hearings Before the House Select Comm. to Investigate Covert Arms Transactions With Iran and Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Cong., 1st Sess. I-100-07 (1987)).

In an attempt to reverse the trend toward executive power, Congress passed the War Powers Resolution. H.R.J. Res. 542, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1988)); see Koh, *supra* note 39, at 1260. The Resolution has proved ineffective, however. Successive Presidents have ignored the Resolution's reporting requirements despite American involvement in several armed conflicts including Libya, Grenada, Lebanon, and the Persian Gulf. *Id.* at 1260 nn.14, 15.

Courts have refused to enforce the War Powers Resolution during several conflicts. See, e.g., *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (dismissing suit by 29 members of Congress challenging U.S. military involvement in El Salvador); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (dismissing similar suit by more than 100 members of House seeking to compel President's compliance with War Powers Resolution's reporting requirement during Persian Gulf involvement). The War Powers Resolution has also proved ineffective against covert wars and short-term military strikes. Koh, *supra* note 39, at 1260.

⁴¹ Cf. Fisher, *supra* note 40, at 758 (concluding that Congress lacks authority to control foreign affairs through treasury "purse strings" as contrary to framers' intent and constitutional language).

⁴² See U.S. CONST., art. II; see also Koh, *supra* note 39, at 1263 (noting that foreign affairs powers exercised by President are not inherent constitutional powers but specific grants of power legislated by Congress). The Constitution grants specific powers to the President but none of these sweeps so broadly as a "foreign affairs power." The President is vested with the "executive Power," U.S. CONST. art. II, § 1, cl. 1, and is "Commander in Chief of the Army and Navy of the United States," *Id.* art. II, § 2, cl. 1. The President has the power "with the Advice and Consent of the Senate, to make Treaties," and to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint Ambassadors, other public Ministers and

statutes provide the President with general authority in foreign affairs.⁴³ Therefore, one must examine case law to determine whether the courts have implied a general foreign affairs power in the President.⁴⁴

Two seminal Supreme Court cases describe the scope of presidential power in foreign affairs.⁴⁵ The Court's holdings in these cases resolve the issue of whether the President has the inherent authority to divert funds to activities for which Congress has prohibited funding.⁴⁶

In *United States v. Curtiss-Wright Export Corp.*,⁴⁷ the Court addressed a presidential assertion of foreign affairs power. Two years prior to the case, Congress had passed a joint resolution authorizing the President to ban arms sales to certain South American countries if the President determined that a ban would promote regional peace.⁴⁸ Pursuant to the resolution, the President made the required finding thus prohibiting arms sales to

Consuls, . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." *Id.* art. II, § 2, cl. 2. The President has the power to "receive Ambassadors and other public Ministers," and to "take care that the laws be faithfully executed." *Id.* art. II, § 3, cl.3.

⁴³ See Koh, *supra* note 39, at 1263-65, 1267-68. Congress has delegated foreign affairs authority to the President but these delegations have contained procedural constraints. *Id.* 1263-64. Successive presidents have successfully ignored many of these procedural constraints. *Id.* at 1264. Notably, Congress expressly had not delegated any new authority to the President in the war-making realm. *Id.* 1264 n.34.

⁴⁴ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 reporter's notes 3-4, at 9-13 (1987) (noting that allocation of power in foreign affairs not clearly defined necessitating reliance on case law to resolve ambiguities).

⁴⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); see 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 reporter's notes 3-4, at 9-13 (1987) (discussing *Curtiss-Wright* and *Youngstown* as seminal cases in foreign affairs); M. GLENNON, CONSTITUTIONAL DIPLOMACY 3-34 (1990) (same); Trimble, *The President's Foreign Affairs Powers*, 83 AM. J. INT'L L. 750, 754 (1989) (same).

⁴⁶ *Curtiss-Wright*, 299 U.S. 304 (addressing President's power in foreign affairs); see *infra* notes 47-58 and accompanying text (discussing *Curtiss-Wright*); *Youngstown*, 343 U.S. 579 (addressing President's and Congress' powers in foreign affairs); see *infra* notes 59-71 and accompanying text (discussing *Youngstown*).

⁴⁷ 299 U.S. 304 (1936).

⁴⁸ *Id.* at 312.

Paraguay and Bolivia.⁴⁹ Several arms merchants including Curtiss-Wright Export Corporation were indicted for violations of the ban. The arms merchants demurred to the indictment asserting that the joint resolution unconstitutionally delegated legislative power to the President.⁵⁰

The Court in *Curtiss-Wright* upheld the President's exercise of the power delegated to him by Congress to ban arms sales.⁵¹ The Court asserted that the federal government has very expansive powers in the realm of foreign affairs.⁵² These powers are not derived from the federal government's enumerated powers in the Constitution.⁵³ Instead, foreign affairs powers derive from the sovereignty of the United States.⁵⁴

Significantly, the Court in *Curtiss-Wright* described the President as the "sole organ" of the federal government in external affairs.⁵⁵ The statement referred, however, to the President's power to negotiate with foreign governments rather than to any general foreign affairs power.⁵⁶ While the Court did endorse a

⁴⁹ *Id.* at 312-13.

⁵⁰ *Id.* at 314.

⁵¹ *Id.* at 333.

⁵² *Id.* at 317-18.

⁵³ *Id.* at 318.

⁵⁴ *Id.* Several scholars have severely criticized the Court's opinion in *Curtiss-Wright* on the grounds that its rationale (that the federal government's foreign powers are inherent and extra-constitutional) undermines the doctrine that the United States is a constitutionally limited federal state. See, e.g., Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-33 (1972); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 490, 493, 496-97 (1946); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 28-32 (1973).

⁵⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). *Curtiss-Wright* is often cited to support broad assertions of presidential foreign affairs power. See, e.g., 135 CONG. REC. S8034-35 (daily ed. July 17, 1989) (letter from Ass't Attny. Gen. C. Crawford). This reliance fails to recognize, however, that *Curtiss-Wright* dealt with an express delegation of power by Congress to the President. *Curtiss-Wright*, 299 U.S. at 312, 322.

⁵⁶ *Id.* at 321-22. Justice Sutherland's opinion for the Court in *Curtiss-Wright* quoted from John Marshall's argument of March 7, 1800 in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Id.* at 319. Both Justice Sutherland and John Marshall referred to the President as "the sole organ" only in the context of the President's authority to negotiate for the Government. *Id.* at 319-20.

sweeping federal government power, it did not endorse unrestricted presidential power.⁵⁷ Instead, the Court stated that the President could only exercise the negotiations power in subordination to the applicable provisions of the Constitution.⁵⁸ Moreover, the facts before the *Curtiss-Wright* Court did not provide an opportunity for the Court to decide how to resolve a dispute between the branches on an issue of foreign affairs.

Unlike *Curtiss-Wright*, a later Supreme Court decision did resolve a direct conflict between the executive and legislative branches on a foreign affairs issue. In *Youngstown Sheet & Tube Co. v. Sawyer*⁵⁹ the Court refused to uphold a presidential seizure of steel mills during the Korean War despite President Truman's assertion that the seizure was necessary to avert a national catastrophe.⁶⁰ Justice Black, writing for a divided Court, held that the President's power to issue the order must be based on an act of Congress or the Constitution.⁶¹ Justice Black found no constitutional or congressional authorization for the seizure and thus invalidated the President's action.⁶²

Justice Jackson in his concurring opinion in *Youngstown* utilized a more fluid analysis that subsequent courts have often adopted as a framework for analyzing foreign affairs cases.⁶³ Justice Jackson's opinion established three categories for analyzing the constitutionality of presidential action: 1) presidential acts pursuant to authority delegated by Congress, 2) presidential acts in the absence of a congressional grant or denial of authority, and 3)

⁵⁷ *Id.* at 320.

⁵⁸ *Id.*

⁵⁹ 343 U.S. 579 (1952).

⁶⁰ *Id.* at 582, 587-89.

⁶¹ *Id.* at 585. Justices Reed, Minton, and Vinson dissented from the opinion. *Id.* at 667 (Vinson, J., dissenting). Justices Frankfurter, Douglas, Jackson, and Burton wrote concurring opinions. *Id.* at 593-659. Justice Clark concurred only in the judgment. *Id.* at 660.

⁶² *Id.* at 585-89.

⁶³ *Id.* at 634 (Jackson, J., concurring); see *Dames & Moore v. Reagan*, 453 U.S. 654 (1981). In *Dames*, a case involving the attachment of Iranian assets and the suspension of claims against the Iranian Government, then-Justice Rehnquist cited Jackson's concurrence with approval. Justice Rehnquist stated that both parties agreed that Jackson's concurrence "brings together as much combination of analysis and common sense as there is in this area." *Id.* at 661; see also *DKT Memorial Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 281 (D.C. Cir. 1989) (utilizing Jackson's categories in foreign affairs case); *Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (same).

presidential acts against the will of Congress.⁶⁴

In *Youngstown* the President seized steel mills without complying with the statutory procedures established by Congress.⁶⁵ This unauthorized action placed the case in category three under Justice Jackson's analysis: a presidential act contrary to the will of Congress.⁶⁶ In this category, presidential powers must be scrutinized with caution.⁶⁷ Justice Jackson wrote that in category three, presidents can rely only upon their own constitutional powers reduced by any powers the Constitution delegates to Congress on the subject.⁶⁸

Justice Jackson then analyzed the specific constitutional powers implicated and found them to be insufficient to authorize the seizure.⁶⁹ Jackson subsequently refused to recognize any general foreign affairs power in the President.⁷⁰ Finding no constitutional basis for the President's assertion of authority, Justice Jackson found the seizure to be invalid.⁷¹

Curtiss-Wright and *Youngstown* thus do not establish any general presidential foreign affairs power. In *Curtiss-Wright* the Court

⁶⁴ *Youngstown*, 343 U.S. at 634, 635-38 (Jackson, J., concurring). In the first category, presidential authority is at its zenith; equal to the aggregate power of the Executive and "all that Congress can delegate." *Id.* at 635. The second category is a "zone of twilight" wherein Congress and the President may have concurrent power and the division of power may be uncertain. *Id.* at 637. In the third category, Presidential power is at its lowest ebb. *Id.*

⁶⁵ *Id.* at 585-86, 639.

⁶⁶ *Id.* at 639-40 (Jackson, J., concurring).

⁶⁷ *Id.* at 637-38. Jackson wrote: "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638.

⁶⁸ *Id.*

⁶⁹ *Id.* at 640-46. Justice Jackson analyzed the three constitutional provisions asserted by the Solicitor General on behalf of the President. Justice Jackson found that none of the provisions — the grant of executive power, the Commander in Chief clause, and the faithful execution clause — authorized the President to seize the steel mills within the rubric of category three. *Id.*

⁷⁰ *Id.* at 646-54. Justice Jackson refused to accept the Solicitor General's final argument which Jackson characterized as based on "nebulous, inherent powers." *Id.* at 646. Specifically, Justice Jackson refused to recognize any "inherent," "implied," "incidental," "plenary," "war," or "emergency" power in the President sufficient to authorize seizure within the rubric of category three. *Id.* at 647-54.

⁷¹ *Id.*

stated that presidential powers must be exercised in subordination to the applicable provisions of the Constitution.⁷² In *Youngstown* the Court held that presidential actions must be authorized by an act of Congress or the Constitution itself.⁷³

Following either of these approaches, a court reviewing the Iran-Contra affair would consider the specific constitutional power implicated by the President's circumvention of the Boland Amendment. The dispute involves executive branch expenditures in violation of a congressional spending prohibition. It is therefore necessary to examine the specific power implicated, Congress' power of appropriations.

B. Congress' Power of Appropriations

The Boland Amendment prohibited the CIA, the Department of Defense and all other United States agencies involved in intelligence activities from expending any funds to provide military aid to the Contras.⁷⁴ During the effective period of the Boland Amendment, the NSC and CIA provided military aid to the Contras.⁷⁵ The NSC obtained these funds from private contributions from American citizens, contributions from foreign governments, and profits made on sales of missiles to Iran.⁷⁶ Thus, this examination of Congress' power over appropriations must resolve not only the issue of congressional control over conventional government revenue but also congressional control over external sources of revenue.

The Constitution expressly places the power to tax and spend with the Legislature.⁷⁷ Records of the Constitutional Convention reveal that this placement of "the power of the purse" in the hands of Congress was of profound significance to the framers of

⁷² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); see also *supra* note 55 (discussing improper use of *Curtiss-Wright* to justify broad assertions of Presidential authority).

⁷³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

⁷⁴ IRAN-CONTRA REPORT, *supra* note 1, at 395-410; see also *supra* notes 8-11, 19 and accompanying text (describing Boland Amendment).

⁷⁵ IRAN-CONTRA REPORT, *supra* note 1, at 31-103.

⁷⁶ *Id.* See *supra* note 28-30 (describing NSC fund-raising activities).

⁷⁷ U.S. CONST. art. I, § 8. Congress is vested with "[a]ll legislative Powers" including the power to tax and to spend. *Id.* art. I, § 8, cl. 1. Congress has the power "(t)o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." *Id.* art. I, § 8, cl. 18.

the Constitution.⁷⁸ The framers were familiar with the civil war and upheaval caused by the unrestrained war powers of English kings.⁷⁹ To prevent similar occurrences in the United States, the framers deliberately constructed a government in which no single branch could both make war and fund it.⁸⁰

The concerns of the framers were not limited to controlling wars funded by domestic revenue. Like President Reagan, English kings had sometimes used funds from extra-parliamentary sources, including foreign governments, to finance their military activities.⁸¹ In reaction, the framers delegated to Congress the power to control all government expenditure.⁸² The appropriations clause does not simply grant power to the Legislature to authorize expenditures, but it also mandates that no branch of the government shall expend funds unless those funds have been first appropriated by the Legislature.⁸³

⁷⁸ At the Constitutional Convention, Col. George Mason advised his colleagues that "the purse and sword ought never to get into the same hands." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144 (M. Farrand ed. 1911). James Madison wrote that the power of the purse represents the "most compleat(sic) and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST NO. 58, at 391 (J. Madison) (B. Wright ed. 1961).

Despite its significance in the constitutional framework, few scholars have addressed the scope of Congress' power of the purse. Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988) (noting L. FISHER, *supra* note 39, and L. WILMERDING, *THE SPENDING POWER* (1943) as exceptions). Constitutional law scholars have focused more on the taxation and appropriation powers than on Congress' power to control expenditures. Laurence Tribe has noted, "eventually, we will need a more complete theory of how constitutional law and political power have interacted, and should interact, in this vital terrain." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 257 (2d ed. 1988).

⁷⁹ P. EINZIG, *THE CONTROL OF THE PURSE* 57-64, 100-06 (1959).

⁸⁰ M. GLENNON, *supra* note 45, at 287 (describing historical background of appropriations clause).

⁸¹ See P. EINZIG, *supra* note 79, at 60-61, 100-06 (1959).

⁸² U.S. CONST. art. I, § 9, cl. 7. The clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

⁸³ Stith, *supra* note 78, at 1357. Interpreting the appropriations clause as a restriction on presidential power is consistent with the structure of the clause. Every clause of article I, section 9 of the Constitution prohibits a specific act of Congress (e.g., issuing bills of attainder or granting titles of nobility). See *Executive Impoundment of Appropriated Funds: Hearings Before the*

The framers intended that the public treasury, controlled by Congress, would include all funds raised by the government, whether by taxation or otherwise.⁸⁴ Subsequent practice and statutory law affirm the continued vitality of Congress' control of all funds raised by or for the government.⁸⁵ For example, Congress has required that revenues from any source, including external sources such as donations or proceeds from weapons sales,⁸⁶ must be placed in the Treasury Department and spent only as authorized by Congress.⁸⁷ The purpose of this statutory requirement is to ensure that the executive branch remains dependent upon the congressional appropriations process.⁸⁸

Subcomm. on Separation of Powers of the Senate Comm. of the Judiciary, 92d Cong., 1st Sess. 143 (1971) (statement of Professor Alexander Bickel) (asserting that phrase "Appropriations made by Law" of article I, section 9, cl. 7 relates to Congress' enumerated powers in article I, section 8 and thus empowers Congress "to make all the rules . . . to govern everyone else . . . including Presidents" with respect to government spending).

The placement of the appropriations requirement in section 9 is also consistent with the Framers' distrust of the executive branch and government in general. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 157 (1969).

⁸⁴ Stith, *supra* note 78, at 1356. As Alexander Hamilton stated, "no money can be expended, but for an object, to an *extent*, and *out of a fund*, which the laws have prescribed." "Explanation," Nov. 11, 1795, in 8 A. HAMILTON, *WORKS* 122, 128 (H.C. Lodge ed. 1885) (emphasis in original).

⁸⁵ See Stith, *supra* note 78, at 1360-64.

⁸⁶ 31 U.S.C. § 3302 (1988) (originally enacted as Act of Mar. 3, 1849, ch. 110, 9 Stat. 398). This statute, known as the Miscellaneous Receipts Statute, requires that any "official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury." *Id.* § 3302(b).

⁸⁷ 31 U.S.C. § 1341(a)(1)(A) (1988) (originally enacted as Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257-58).

⁸⁸ See Stith, *supra* note 78, at 1356-58. Stith articulates two fundamental principles of appropriations control: (1) the public fisc includes all monies received by the government; and (2) that all expenditures from the public fisc must be authorized by Congress. *Id.* Stith asserts that in principle all members of the U.S. Government acting in an official capacity are prohibited from spending even one minute on an activity explicitly denied appropriations funds by Congress. *Id.* at 1354, 1361.

This restriction on government expenditure represents a necessary component of the Framers' vision of a limited federal government. *Id.* at 1357-58. If the executive branch could avoid fiscal restraints imposed by Congress, the Executive could determine the scope of the national government. *Id.* at 1352-53.

In addition, if the executive branch could spend in violation of congressional spending prohibitions, the President would possess a veto

Consistent with the framers' intent, the Supreme Court has consistently affirmed the wide breadth of Congress' appropriations power. The Supreme Court has never held unconstitutional Congress' use of the appropriations power to limit the executive branch's exercise of power.⁸⁹ The Court has, however, invalidated an appropriations measure that violated an express constitutional provision.⁹⁰ In the case of executive branch assistance to the Contras, no constitutional provision prevents Congress from prohibiting executive expenditure.⁹¹ On the contrary, the text of the Constitution and the intent of the framers support the inherent authority of Congress to regulate all executive expenditures.⁹²

This examination of the constitutional system established by the framers and its subsequent judicial interpretation demonstrates Congress' plenary authority in the realm of appropria-

which no majority of Congress could override. See L. TRIBE, *supra* note 78, at 257. Tribe asserts that recognizing in the President a power to impound appropriated funds would be tantamount to a veto that Congress could never override. *Id.* at 258. Similarly, if the President were authorized to use government funds or facilities to support prohibited activities, no action of Congress short of impeachment could check the President's action. *Id.*

The framers never intended that such unrestrained veto power rest in the Executive Branch. The framers deliberately gave the President "a qualified negative" (subject to the power of Congress to override a President's veto) rather than "the absolute negative of the British sovereign." THE FEDERALIST NO. 69, at 445 (A. Hamilton) (B. Wright ed. 1961).

⁸⁹ CONGRESSIONAL RESEARCH SERVICE, U.S. LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess. 1597-1619 (1973) (listing all acts of Congress held unconstitutional in whole or in part by Supreme Court through June 26, 1972).

Declassified minutes of a National Security Planning Group Meeting on June 25, 1984, indicate that Chief of Staff James Baker, III and Secretary of State George Schultz took seriously the possibility that soliciting nonappropriated funds would be an impeachable offense. Schultz stated, "I would like to set money for the Contras also but another lawyer, Jim Baker, said that if we go out and try to get money from third countries, it is an impeachable offense." 135 CONG. REC. S8,028 (daily ed. July 17, 1989).

⁹⁰ *United States v. Lovett*, 328 U.S. 303, 315 (1946) (finding that statute constituted bill of attainder).

The Constitution imposes only one restriction on the use of the appropriations power to check the executive branch. Congress may not increase or diminish the compensation of the President during the President's term of office. U.S. CONST. art. I, and art. II, § 1, cl. 7.

⁹¹ See U.S. CONST. art. II.

⁹² See *supra* notes 74-84 and accompanying text.

tions. This power is not limited to conventional revenues but extends to funds raised by foreign missile sales and funds solicited from foreign and domestic sources.⁹³ Coupled with the President's lack of inherent foreign affairs power,⁹⁴ this analysis strongly supports the authority of Congress to legislate the prohibitions of the Boland Amendment. Yet the resolution of the Iran-Contra affair suggests that Congress nevertheless lacks the ability to control presidential spending of external revenues.⁹⁵ Judicial deference to Congress and the President has facilitated this rift between Congress' constitutional authority and its practical ability to control presidential spending.⁹⁶

III. JUDICIAL DEFERENCE IN FOREIGN AFFAIRS

When faced with alleged violations of statutes that implicate issues of foreign policy, the federal courts often defer to the political branches of government.⁹⁷ As a result of this deferential approach, courts often refuse to adjudicate foreign affairs cases on the merits. Some courts avoid adjudication by finding that foreign affairs cases present nonjusticiable political questions.⁹⁸

⁹³ See *supra* notes 81-84 and accompanying text.

⁹⁴ See *supra* notes 40-73 and accompanying text.

⁹⁵ See *supra* notes 28-38 and accompanying text.

⁹⁶ See generally Koh, *supra* note 39, at 1313-17 (describing judicial deference in cases challenging executive initiatives in foreign affairs).

⁹⁷ See, e.g., *Burke v. Barnes*, 479 U.S. 361 (1987) (dismissing claim as moot); *Goldwater v. Carter*, 444 U.S. 996, *vacating and remanding for dismissal* 617 F.2d 687, 997 (J. Powell concurring in dismissal on ripeness grounds), 1002 (J. Rehnquist, J. Stewart, and J. Stevens concurring in dismissal on political question grounds) (1979). Lower federal courts have refused to reach the merits in a large number of foreign relations cases particularly in cases that involved challenges to the Vietnam War and to U.S. support for the Contra War. See generally Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo China: A Bibliography of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470, 470 (1974) (noting that most courts found challenges to Vietnam War to be nonjusticiable); Note, *Covert Wars and Presidential Power: Judicial Complicity in a Realignment of Constitutional Power*, 14 HASTINGS CONST. L.Q. 683 (1987) (describing role of judicial deference in augmenting executive power.)

⁹⁸ See, e.g., *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (finding suit regarding U.S. military activities in El Salvador raised nonjusticiable political question); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (finding suit to compel presidential compliance with War Powers Resolution raised nonjusticiable political question); cf. Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 HARV. INT'L L.J. 155 (1985) (arguing courts should rigorously apply

Other courts invoke other justiciability doctrines such as ripeness to avoid deciding these cases.⁹⁹

A. Nonjusticiable Political Questions

The Supreme Court's decision in *Goldwater v. Carter*¹⁰⁰ demonstrates the difficulty of persuading courts to intervene in cases involving foreign affairs.¹⁰¹ In *Goldwater*, members of Congress brought suit to challenge President Carter's termination of a defense treaty with Taiwan.¹⁰² The plaintiffs sought to nullify the President's termination of the defense treaty because the President did not receive the approval of either a two-thirds vote of the Senate or a majority vote of both houses of Congress.¹⁰³ A divided Court remanded the case with directions to dismiss the complaint thus allowing President Carter's action to stand.¹⁰⁴

Of the six justices who found that the case should be dismissed, three joined Justice Rehnquist's opinion that the case presented a nonjusticiable political question.¹⁰⁵ Justice Rehnquist asserted

principles of international law to U.S. officials rather than allowing such issues to be resolved politically).

⁹⁹ See *infra* notes 129-38 and accompanying text.

¹⁰⁰ *Goldwater*, 444 U.S. at 996 (suit by members of Congress seeking declaratory and injunctive relief to prevent President from terminating defense treaty with Republic of China without congressional consent).

¹⁰¹ *Id.* Only three Justices were willing to decide the merits of the case. Justice White and Justice Blackmun would have given plenary consideration. *Id.* at 1006 (Blackmun, J., dissenting in part). Justice Brennan would have affirmed the judgment of the court of appeals which rested upon President's authority to recognize and derecognize foreign governments. *Id.* (Brennan, J., dissenting).

¹⁰² *Goldwater v. Carter*, 617 F.2d 697, 701 (D.C. Cir.), *vacated and remanded for dismissal*, 444 U.S. 996 (1979).

¹⁰³ *Id.* at 701-02.

¹⁰⁴ *Goldwater*, 444 U.S. at 996.

¹⁰⁵ *Id.* at 1002 (Rehnquist, J., concurring in judgment). Chief Justice Burger, Justice Stewart, and Justice Stevens joined Rehnquist's opinion. *Id.* Justice Marshall concurred in the result. *Id.* at 996. Justice Powell concurred in the judgment and filed a statement. *Id.* at 997 (Powell, J., concurring in judgment); see *infra* notes 129-35 and accompanying text (discussing Powell's opinion). Justice White and Justice Blackmun would have set the case for argument. Justice Blackmun filed a statement which Justice White joined. *Id.* at 1006 (Blackmun, J., dissenting in part). In his single paragraph statement, Justice Blackmun asserted that the court needed time to study the issues of justiciability and the merits of the case. *Id.*

Justice Brennan dissented from the order directing the district court to

that *Goldwater* presented a political question because the Constitution does not expressly delegate the power of treaty termination implicated by the case.¹⁰⁶ Because the Constitution does not delegate power to terminate a treaty, Justice Rehnquist asserted that the Court lacked judicially discoverable and manageable standards for resolving the controversy.¹⁰⁷

The *Goldwater* Court addressed a conflict between the executive and legislative branches where neither branch has constitutional authority over the power implicated in the conflict.¹⁰⁸ In contrast, executive branch violations of congressional spending prohibitions implicate the power of appropriations that the Constitution clearly delegates to Congress.¹⁰⁹ Judicially discoverable and manageable standards, found lacking in *Goldwater*, would thus exist in a controversy involving appropriations powers. Therefore, fund diversion cases such as Iran-Contra do not present the same grounds for invoking the political question doctrine as the *Goldwater* case presented.

Nonetheless, one district court opinion suggests that federal courts would dismiss fund diversion cases under the political question doctrine. In *Sanchez-Espinoza v. Reagan*,¹¹⁰ twelve members of the House of Representatives brought suit claiming that CIA activities in Nicaragua orchestrated by the President and his

dismiss the case and would have affirmed the judgment of the court of appeals. *Id.* at 1006 (Brennan, J., dissenting). The court of appeals held that the President was empowered to terminate the Treaty in accord with its terms and based its decision in part on the President's authority to withdraw recognition from foreign governments. *Goldwater*, 617 F.2d at 699, 707-08. Justice Brennan asserted that Justice Rehnquist "profoundly misapprehends" the political question doctrine as it relates to foreign affairs cases. *Goldwater*, 444 U.S. at 1006. Justice Brennan asserted that the Court has the responsibility to determine whether the President has the authority he claims. *Id.* at 1007. Prior case law established that in the case of recognition, the President has this authority. *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *Baker v. Carr*, 369 U.S. 186, 212 (1962); *United States v. Pink*, 315 U.S. 203, 228-30 (1942)).

¹⁰⁶ *Goldwater*, 444 U.S. at 1003 (Rehnquist, J., concurring in judgment).

¹⁰⁷ *Id.* Lacking judicially discoverable and manageable standards to resolve the controversy, Justice Rehnquist concluded that the issue "must surely be controlled by political standards." *Id.* (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

¹⁰⁸ *Id.* at 996.

¹⁰⁹ See *supra* notes 77-96 and accompanying text.

¹¹⁰ 568 F. Supp. 596 (D.D.C. 1983), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985).

officers violated the Boland Amendment.¹¹¹ The District Court for the District of Columbia found that the court lacked judicially discoverable and manageable standards for resolving the controversy.¹¹² In addition, the court stated that resolving the case would require inquiry into sensitive military matters that were not judicially discoverable.¹¹³ The court also asserted that it could not resolve the case without expressing a lack of respect for the President.¹¹⁴ Accordingly, the court found that the case presented a nonjusticiable political question and dismissed the case.¹¹⁵ The court thus did not even reach the issue of Congress' authority to legislate the restrictions of the Boland Amendment.¹¹⁶

¹¹¹ *Id.* at 597, 600. The alleged violation would have been of Boland I. Defense Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982) (prohibiting use of U.S. Government funds to overthrow Government of Nicaragua). The congressional plaintiffs also alleged that the President was in violation of the neutrality laws, the War Powers Resolution, and the National Security Act of 1947. *Sanchez-Espinoza*, 568 F. Supp. at 600.

¹¹² *Id.* at 597-98, 600.

¹¹³ *Id.* at 600.

¹¹⁴ *Id.* The court based this finding on the fact that President Reagan had publicly asserted that he was not violating the Boland Amendment. *Id.* Resolving the case on the merits would force the court to decide whether the President was misinterpreting the Boland Amendment or "shielding the truth" from the American people about CIA activities in Nicaragua. *Id.*

¹¹⁵ *Id.* at 602. The Court of Appeals of the District of Columbia Circuit affirmed the district court's judgment on the same grounds with respect to two of the seven causes of action before it. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (affirming *Sanchez-Espinoza*, 568, F. Supp. 596 on other grounds). Writing for the court, Justice (then Judge) Scalia affirmed dismissal of the congressional appellants' claim that the President was in violation of the war powers clause on the grounds of nonjusticiable political question. *Id.* The court also affirmed dismissal of the Florida resident's nuisance law claim for lack of pendent jurisdiction. *Id.* Justice Scalia noted that the court did not necessarily disapprove of the district court's invocation of the political question doctrine as grounds for dismissing the five other causes of action but preferred to dismiss them on other grounds rather than resort to that doctrine. *Id.* at 206. The court dismissed as moot the congressional appellants' second of two causes of action, violation of the Boland Amendment. *Id.* at 210. The court dismissed the Nicaraguan appellants' four causes of actions (three tort claims, one constitutional claim) on various grounds — none involving justiciability issues.

¹¹⁶ *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600-01 (D.D.C. 1983). Nor did the court of appeals reach the issue of congressional

B. Compelling Justiciability

Despite the decisions in *Goldwater* and *Sanchez-Espinoza*, Congress may have an opportunity to overcome the political question doctrine in fund diversion cases. Congress' experience with another doctrine of judicial deference, the act of state doctrine, establishes that Congress can sometimes compel justiciability.¹¹⁷

The act of state doctrine holds that the U.S. judiciary shall not judge the acts of a foreign government carried out within the foreign country's own borders.¹¹⁸ The federal courts' invocation of this doctrine to dismiss cases involving the expropriation of American assets by foreign governments frustrated members of Congress.¹¹⁹ These members drafted the Hickenlooper Amendment to Foreign Assistance Act of 1964¹²⁰ specifically to require that the federal courts decide suits concerning foreign expropriation of American assets on the merits, applying the principles of international law.¹²¹ Since the passage of this statute, the federal courts have been willing to adjudicate cases involving foreign expropriation of American assets.¹²²

authority to legislate restrictions such as Boland I. The court of appeals dismissed this particular cause of action as moot because the appropriations of Boland I had expired and Congress sought only prospective relief. *Sanchez-Espinoza*, 770 F.2d at 210.

¹¹⁷ Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912, 957-59 (1985).

¹¹⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987). The Supreme Court stated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), that the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers." *Id.* at 423. The Court stated that while the doctrine is not constitutionally compelled, it "does have constitutional underpinnings." *Id.* The Court stated that the doctrine "concerns the competency of dissimilar institutions [such as the different branches of government] to make and implement particular kinds of decisions in the area of international relations" and that judicial deference avoids embarrassing the political branches in the conduct of foreign policy. *Id.* at 423, 431-32.

¹¹⁹ See, e.g., *Sabbatino*, 376 U.S. at 398; see also Franck & Bob, *supra* note 117, at 957-59.

¹²⁰ 22 U.S.C. § 2370(e)(2)(1988) (originally enacted as Foreign Assistance Act of 1964, Pub. L. No. 88-633, pt. III, § 301(d)(4), 78 Stat. 1009, 1013).

¹²¹ *Id.*

¹²² *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 180-83 (2d Cir. 1967), *aff'g* 243 F. Supp. 957 (S.D.N.Y. 1965) *cert. denied*, 390 U.S. 956, *reh'g denied*, 390 U.S. 1037 (1968). The Supreme Court has had two opportunities to

Strong similarities exist between the act of state doctrine and the political question doctrine. Both doctrines have constitutional underpinnings,¹²³ involve decisions in the area of foreign affairs,¹²⁴ and are designed to avoid embarrassing the political branches in the conduct of foreign policy.¹²⁵ These similarities suggest that the courts might adhere to directives from the political branches compelling justiciability in political question cases.¹²⁶ Congress, however, has not passed a political question statute comparable to the Hickenlooper Amendment.¹²⁷ Therefore, the federal courts have not yet resolved the efficacy of this approach in political question cases.¹²⁸

C. Ripeness

The doctrine of ripeness provides an alternative basis for judicial deference in fund diversion cases. Justice Powell in *Goldwater* justified dismissal of the complaint on the grounds that it was not ripe for adjudication.¹²⁹ Justice Powell asserted that the judiciary

reverse the Second Circuit's interpretation but has declined to do so. *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 882 n.10 (2d Cir. 1981) (referring to *First National City Bank v. Banco Nacional de Cuba*, 400 U.S. 1019 (1971) (*vacated and remanded*, 406 U.S. 759 (1972) (reversed on other grounds)).

¹²³ *Franck & Bob*, *supra* note 117, at 958; *see also Sabbatino*, 376 U.S. at 423.

¹²⁴ *Franck & Bob*, *supra* note 117, at 958; *see also Sabbatino*, 376 U.S. at 423.

¹²⁵ *Franck & Bob*, *supra* note 117, at 958; *see also Sabbatino*, 376 U.S. at 431-32.

¹²⁶ *Franck & Bob*, *supra* note 117, at 958-59.

¹²⁷ *Id.* at 957-58.

¹²⁸ *Id.* at 958. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *aff'g* 243 F. Supp. 957 (S.D.N.Y. 1965), *cert. denied*, 390 U.S. 956, *reh'g denied*, 390 U.S. 1037 (1968). The Court of Appeals for the Second Circuit affirmed the constitutionality of the Hickenlooper Amendment without addressing whether the courts could be compelled to accept congressional directives to adjudicate issues previously held to be nonjusticiable as political questions. *Id.* at 181 n.18.

¹²⁹ *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring in judgment). A recent foreign affairs opinion that followed Justice Powell's ripeness analysis addressed a challenge to President Bush's authority to use offensive force against Iraq. *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (finding controversy not ripe because (1) Congress had not yet challenged President Bush's actions and (2) President Bush had not yet clearly committed troops to "war"). A significant number of courts addressing challenges to presidential actions in foreign affairs have adopted

should not act until each political branch has taken action asserting its constitutional authority.¹³⁰ Justice Powell's concurrence did state, however, that the judiciary must intervene if the executive and legislative branches, both having acted to the full extent of their constitutional authority, "reach[] irreconcilable positions" thereby creating a constitutional impasse.¹³¹ The possibility that the federal government would be brought to a halt by a clash between the President and Congress would require the federal courts to fulfill their constitutional duty to interpret the law.¹³² Justice Powell, however, argued that until this impasse is reached courts should decline to intervene.¹³³ Justice Powell found no constitutional impasse in *Goldwater* because Congress had taken no official action to oppose President Carter's termination of the treaty with Taiwan.¹³⁴ Justice Powell thus concurred in dismissing the complaint.¹³⁵

Under this approach to ripeness, fund diversion cases would not constitute a constitutional impasse because the two branches would not have yet fully asserted their constitutional authority. To create a constitutional impasse, Congress would have to pass a second statute finding that presidential expenditures violated the initial spending prohibition.¹³⁶ Garnering sufficient votes to pass a statute declaring that the President had violated an earlier statute would pose serious practical problems.¹³⁷ Without such a statute, however, a court could find that Congress had not sufficiently exercised its authority to make the controversy ripe for

Justice Powell's approach. See, e.g., *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Ginsburg, J., concurring); *Lowry v. Reagan*, 676 F. Supp. 333, 339 (D.D.C. 1987), *aff'd* No. 87-5426 (D.C. Cir. Oct. 17, 1988); *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam).

¹³⁰ *Goldwater*, 444 U.S. at 997 (Powell, J., concurring in the judgment).

¹³¹ *Id.* at 957, 1001.

¹³² *Id.*

¹³³ *Id.* at 997.

¹³⁴ *Id.* at 997-98.

¹³⁵ *Id.* at 997-1002.

¹³⁶ See *id.* at 998. Justice Powell stated that, until "Congress chooses . . . to confront the President, it is not [the Court's] task to do so." *Id.* In *Goldwater*, Congress had merely considered a resolution declaring the need for Senate approval to terminate a mutual defense treaty. *Id.*

¹³⁷ See IRAN-CONTRA REPORT, *supra* note 1, at 395-99 (describing difficulties of garnering sufficient votes to pass Boland Amendment).

adjudication.¹³⁸

Alternatively, Congress could enact a general antidiversion statute establishing Congress' intent to prohibit certain future fund diversions. This statute would then prohibit fund diversions in all future instances where Congress passed a specific spending prohibition incorporating the general antidiversion statute. The enactment of the specific spending prohibition would thus serve as the definitive and final congressional action Justice Powell required in *Goldwater*.

This discussion of the political question and ripeness doctrines establishes that although Congress has the authority under its appropriations power to control presidential spending, judicial deference has enabled an active executive branch to erode Congress' control of foreign affairs spending.¹³⁹ To reverse this trend and avoid episodes like the Iran-Contra affair, Congress must overcome the doctrines of judicial deference.

IV. PROPOSED STATUTE

Despite the trend toward executive power in foreign affairs, Congress may be able to re-establish its constitutional role through a reassertion of its appropriations power. Effective congressional action must overcome judicial deference so that the courts will be forced to fulfill their duty to interpret the Constitution. Congress' best chance of success in court lies in a statute that does not exceed Congress' plenary power of appropriations. To deter executive expenditure effectively, Congress should pass a statute that overcomes the doctrines of judicial deference and provides mandatory penalties for every executive expenditure that violates a congressional spending prohibition.

A. *Essential Components of the Statute*

As a preliminary matter, the statute must overcome the doctrines of judicial deference. With a less deferential federal court system, a statute requiring the executive branch to comply with statutory spending prohibitions would not be necessary.¹⁴⁰ Case law demonstrates, however, that the federal courts will frequently

¹³⁸ See *supra* note 136 and accompanying text (discussing Justice Powell's confrontation requirements).

¹³⁹ See *supra* notes 97-138 and accompanying text.

¹⁴⁰ See Koh, *supra* note 39, at 1305.

avoid adjudication of foreign affairs cases.¹⁴¹ Thus, the statute should minimize the opportunities for a court to dismiss a case without ever reaching the merits.

The first doctrine of judicial deference that the statute must overcome is the political question doctrine. The drafters of the Hickenlooper Amendment to the Foreign Assistance Act of 1964¹⁴² faced a similar problem prompting the drafting of that statute.¹⁴³ The drafters of the Hickenlooper Amendment successfully overcame the act of state doctrine by compelling justiciability in cases involving the expropriation of United States assets.¹⁴⁴ The fund diversion statute should similarly require that the federal courts adjudicate fund diversion cases on the merits.¹⁴⁵

The statute must also preclude the courts from dismissing the case on ripeness grounds. Presently in fund diversion cases the executive branch can assert that Congress has not taken final action.¹⁴⁶ The executive can also assert that Congress has not expressly granted nor denied the President the authority to raise money independently.¹⁴⁷ The statute must unambiguously establish congressional intent to prohibit fund diversions in all instances where the statute applies. This would create a constitutional impasse in all cases where the spending prohibition incorporates the antidiversion statute. Such an impasse would necessitate intervention by the federal courts.¹⁴⁸

The statute must control only those activities falling within the scope of Congress' appropriations power, which extends to all United States Government expenditures.¹⁴⁹ Thus, the statute may regulate United States Government funds, facilities, and per-

¹⁴¹ See *supra* note 98.

¹⁴² Pub. L. No. 88-663, pt. III, § 301(d)(4), 78 Stat. 1009, 1013 (1964) (codified at 22 U.S.C. § 2370(e)(2) (1982)).

¹⁴³ Franck & Bob, *supra* note 117, at 957-59.

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 958-59 (suggesting political question doctrine might be overcome by compelling justiciability).

¹⁴⁶ See *supra* note 136 and accompanying text (discussing Justice Powell's confrontation requirement).

¹⁴⁷ Koh, *supra* note 39, at 1302 (describing Reagan Administration's inventiveness in finding loopholes in Boland Amendment).

¹⁴⁸ See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1001 (1979) (Powell, J., concurring in judgment).

¹⁴⁹ See *supra* notes 74-96 and accompanying text (discussing congressional power of appropriations).

sonnel.¹⁵⁰ The statute must prohibit all expenditures that would provide assistance to the individual, group, or country that has been denied funding by Congress. Thus, the statute must prohibit United States Government personnel from serving as liaison on behalf of the prohibited entity. It must prohibit the use of U.S. Government funds and facilities on behalf of the prohibited entity. The statute must also prohibit the provision of assistance to third parties if the purpose is to provide assistance to the prohibited entity.

B. Text of Proposed Statute

The essential text of such a measure would consist of the following:¹⁵¹

ANTI-DIVERSION STATUTE OF 1991

Preamble — This statute prohibits all officers and employees of the United States Government from channeling or diverting funds to entities that have been expressly prohibited funding by statute. This statute establishes the intent of Congress to retain

¹⁵⁰ See *supra* notes 77-78.

¹⁵¹ During 1989, both houses of Congress passed a measure, known as the Moynihan Amendment, similar to the one proposed here. S. 1160, 101st Cong., 1st Sess. § 111 (1989), *reprinted in* 135 CONG. REC. S8,023, S8,027 (daily ed. July 17, 1989), *and in* 135 CONG. REC. S8,107, S8,109 (daily ed. July 18, 1989) (passing Moynihan Amendment to S. 1160); H.R. 1487, 101st Cong., 1st Sess. § 109 (1989), *reprinted in* 135 CONG. REC. H8,311, H8,313 (daily ed. Nov. 9, 1989), *and in* 135 CONG. REC. H8,698, H8,703 (daily ed. Nov. 15, 1989 accepting Moynihan Amendment). The Moynihan Amendment prohibited the President from channeling or diverting funds. The measure also regulated presidential solicitations that did not involve United States personnel, funds, or facilities. The Moynihan Amendment did not expressly compel justiciability. See H.R. 1487, 101st Cong., 1st Sess. § 109 (1989); see also *Defense & Foreign Policy - Iran-Contra Amendment*, 47 CONG. Q. 3084-85 (1989) (describing goals of Moynihan Amendment). President Bush vetoed the measure on November 21, 1989. *President's Message to the House of Representatives Returning Without Approval of Foreign Relations Authorization Act, Fiscal Years 1990 and 1991*, 25 WEEKLY COMP. PRES. DOC. 1806 (Nov. 21, 1989). On November 19, 1989, President Bush vetoed a similar bill, H.R. 2939, 101st Cong., 2d Sess. (1989). Morgan, *Bush Vetoes Foreign Aid Package*, Washington Post, Nov. 20, 1989, at A1, col. 5. This bill was intended to bar the administration from using the prospect of U.S. aid to induce foreign countries to aid activities the administration was prohibited from aiding directly. Morgan, *supra*; *Defense & Foreign Policy - Iran-Contra Amendment*, *supra*, at 3085.

control over foreign affairs appropriations to the full extent authorized by the United States Constitution.

(a) This statute shall apply whenever:

(1) Congress has enacted a statute expressly prohibiting assistance to a foreign individual, group, or country; *and*

(2) The statute prohibiting such assistance incorporates the Anti-Diversion Statute of 1991 by reference and states that this statute shall apply.

(b) Whenever the requirements of (a) are met, no officer or employee of the United States Government or military shall assist the foreign country, group, or individual

(1) by receiving or channeling money from a foreign government, a foreign citizen or resident, a citizen or resident of the United States, or a foreign or domestic entity;

(2) by providing U.S. funds, assistance, or facilities; or

(3) by providing U.S. assistance to any third party if the purpose is to provide assistance indirectly to the prohibited foreign country, group, or individual.

c. JUSTICIABILITY — Any citizen of the United States shall have standing to sue for enforcement of this statute. Courts interpreting this statute shall find that any violation of this statute triggers a constitutional impasse requiring adjudication on the merits of the issues raised. It shall not be necessary for Congress to pass additional legislation to enforce this statute. The congressional decision to prohibit funding to a foreign country, group, or individual shall be conclusive evidence of congressional will to prohibit the channeling or diverting of funds to that foreign country, group, or individual.

d. PENALTY — Whoever knowingly and willfully, or with reckless disregard for facts, violates this statute shall be punished by not less than 30 days and not more than 5 years in a federal prison. It shall not be a defense to prosecution that an individual was acting at the behest of or under orders from another individual although this factor may be considered in sentencing.

For purposes of this statute, “reckless disregard for facts” shall be interpreted based on an objective standard of what a person in the position of authority held by the defendant would reasonably be expected to know.

C. Enforceability of Proposed Statute

Several sections of the proposed Anti-Diversion Statute specifically compel adjudication.¹⁵² Assuming that these measures are successful, a court would adjudicate violations of the statute on

¹⁵² See *supra* text accompanying note 151.

the merits. To evaluate the statute's effectiveness in re-establishing Congress' power of appropriations, the likely outcome of an adjudication must be considered.

Once in court, the executive branch would probably assert that the Anti-Diversion Statute unconstitutionally interferes with the President's foreign affairs power.¹⁵³ A court faced with this issue would analyze the statute in relation to the two seminal foreign affairs cases, *Curtiss-Wright* and *Youngstown*.

The Court in *Curtiss-Wright* dealt with an express delegation of authority from Congress to the President.¹⁵⁴ In situations where the Anti-Diversion Statute would apply, no such delegation would exist. The Anti-Diversion Statute would apply only when Congress has enacted a law that (1) prohibits all aid to a particular foreign individual, group, or country, and (2) specifically states that the restrictions of the Anti-Diversion Statute apply.¹⁵⁵ Thus the Statute would apply only when Congress has expressly denied power to the President. *Curtiss-Wright* did not resolve the issue of express congressional denial of power to the President in a foreign affairs conflict between the branches and therefore would not control.¹⁵⁶

The *Youngstown* Court did address a situation where the President acted in violation of an established congressional procedure.¹⁵⁷ Writing for the Court, Justice Black emphasized that presidential authority must derive from an act of Congress or from the Constitution.¹⁵⁸ In an Anti-Diversion Statute case, rather than providing statutory authorization, Congress will have expressly denied authorization to the President. Therefore, under Justice Black's approach, the Constitution provides the only remaining source of presidential power. In both *Curtiss-Wright* and *Youngstown*, the Court refused to recognize any general

¹⁵³ See, e.g., 135 CONG. REC. S8,034 (daily ed. July 17, 1989) (letter from Ass't Attny. Gen. C. Crawford) (asserting Moynihan Amendment interferes with President's foreign affairs power).

¹⁵⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); see *supra* notes 47-58, 72 and accompanying text (discussing *Curtiss-Wright*).

¹⁵⁵ See *supra* text accompanying note 151 (providing text of proposed statute).

¹⁵⁶ *Curtiss-Wright*, 299 U.S. at 321-22 (noting presidential authority expressly granted by Congress).

¹⁵⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see *supra* notes 59-71, 73 and accompanying text (discussing *Youngstown*).

¹⁵⁸ *Youngstown*, 343 U.S. at 585.

presidential foreign affairs power.¹⁵⁹ Thus, the President lacks any authority to challenge congressional control over appropriations, even in the foreign affairs realm.

Justice Jackson in his concurring opinion in *Youngstown* utilized an analytical framework that many subsequent courts have since adopted.¹⁶⁰ According to Justice Jackson's analysis, presidential assertions of authority are "scrutinized with caution" when the President acts against the will of Congress.¹⁶¹ In *Youngstown*, the President placed the case in category three by failing to follow congressional procedures for seizing the steel mills.¹⁶² In an Anti-Diversion Statute case, the President would be directly violating a congressional statute by providing assistance to the prohibited entity.¹⁶³ A specific statutory prohibition provides stronger evidence of congressional will than does a general procedural requirement.¹⁶⁴ Thus, a fortiori, an Anti-Diversion Statute case would always fall into Justice Jackson's third category. In this category, presidential assertions of power are "scrutinized with caution."¹⁶⁵ Given the lack of presidential power over appropriations, executive expenditures in violation of congressional prohibitions would not withstand this level of scrutiny.

The Anti-Diversion Statute would be significant for a court utilizing Justice Jackson's analysis in *Youngstown* for an additional reason. Without the statute, a court might find no express act of Congress. The case would remain in Justice Jackson's category two. Justice Jackson described category two as a "zone of twilight" where the President and Congress may have concurrent

¹⁵⁹ *Id.*; *Curtiss-Wright*, 299 U.S. at 304.

¹⁶⁰ *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring); see also *supra* notes 63-64 and accompanying text.

¹⁶¹ *Youngstown*, 343 U.S. at 637-38.

¹⁶² *Id.* at 639-40.

¹⁶³ See *supra* text accompanying note 151 (providing text of proposed statute).

¹⁶⁴ See *Youngstown*, 343 U.S. at 639-40. Justice Jackson examined whether Congress had left seizure of private property an open field. *Id.* at 639. He found that Congress had not left it open but had established procedural requirements, for such seizures. *Id.* Justice Jackson's analysis would have been simplified had Congress statutorily prohibited seizing the steel mill subsequently seized by the President. Such a statutory prohibition would have been analogous to a situation where the proposed Anti-Diversion Statute would apply. See *supra* text accompanying notes 154-56 (describing when proposed statute would apply).

¹⁶⁵ *Id.* at 638.

powers and the diversion is uncertain.¹⁶⁶ Passage of the Anti-Diversion Statute would express Congress' will to prohibit unauthorized executive assistance. By attempting to exercise power expressly denied to him by Congress, the President would place the issue in Jackson's category of highest scrutiny, category three.¹⁶⁷

CONCLUSION

The covert funding of the Contras in violation of the Boland Amendment raises the issue of inherent presidential authority in the foreign affairs realm. The Constitution delegates no such general authority to the President. Instead, the Constitution delegates specific powers to Congress and the President. The Constitution delegates the power implicated by the Boland Amendment, appropriations, to Congress. This power extends to all funds used by the United States Government including donations and profits from weapons sales. Therefore, the Boland Amendment represented a legitimate exercise of Congress' constitutional authority.

Despite the constitutionality of such measures, judicial deference has undermined the measures' effectiveness. The passage of an Anti-Diversion Statute offers Congress an opportunity to overcome the doctrines of judicial deference. Once in court, Congress would succeed on the merits because of Congress' plenary power over appropriations. By forcing an adjudication, Congress could regain its control of foreign affairs spending.

J. Graham Noyes

¹⁶⁶ *Id.* at 637.

¹⁶⁷ *Id.* at 638.

