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# BOLAND IN THE WIND: The Iran-Contra Affair and the Invitation to Struggle

Bretton G. Sciaroni\*

## I. INTRODUCTION

On November 4, 1986, news stories made passing references to incredible allegations featured in an obscure Lebanese newspaper, *Al-Shiraa*, regarding the events surrounding the most recent release of an American hostage held by Hezbollah kidnappers. The previous weekend, the *Al-Shiraa* reported that the United States government had delivered military spare parts and ammunition to Iran shortly after a secret mission to Teheran by Robert McFarlane, the former National Security Adviser to President Ronald Reagan.<sup>1</sup> The military hardware allegedly had been delivered in a bid to win the freedom of American hostages.<sup>2</sup>

The proliferation of foreign press accounts and domestic news me-

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1. Hijazi, *Hostage's Release Is Linked to Shift in Iranian Policy*, N.Y. Times, Nov. 4, 1986, § A, at 1, col. 4. News of the Iranian initiative and the visit to Iran by McFarlane had previously been publicized by pamphlets distributed in Teheran. At a meeting held on October 29, 1986, in Mainz, Federal Republic of Germany, the Iranian delegation informed the United States participants that the pamphlets had been distributed in mid-October, and that a Hezbollah newspaper in Lebanon had later picked up the story. U.S. SENATE SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & U.S. HOUSE OF REPRESENTATIVES SELECT COMMITTEE TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS, S. REP. NO. 216 & H.R. REP. NO. 433, 100th Cong., 1st Sess. 259 (1987) [hereinafter IRAN-CONTRA REPORT]; REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD III-19 (Feb. 26, 1987) [hereinafter TOWER COMMISSION REPORT] (this report mistakenly places the U.S.-Iran meeting from October 26-28, 1986); see also M. LEDEEN, *PERILOUS STATECRAFT: AN INSIDER'S ACCOUNT OF THE IRAN-CONTRA AFFAIR* 238-41 (1988) (suggesting that the disclosure in Teheran was made by an Iranian faction which felt that it was being eliminated from the negotiation process.).

2. Hijazi, *supra* note 1.

dia speculation, fueled in part by Reagan Administration leaks,<sup>3</sup> caused rumors regarding U.S.-Iranian dealings to spread rapidly. Early efforts by the Reagan Administration to rebut these rumors failed,<sup>4</sup> and President Reagan eventually delivered an address to the nation confirming that the U.S. indeed had undertaken a diplomatic initiative toward Iran and conducted covert intelligence operations in support of that venture.<sup>5</sup> President Reagan's address, however, did not stem the ongoing controversy regarding what precisely was involved in the Iranian initiative. Finally, in the wake of conflicting accounts of the "opening to Iran" proffered by senior administration officials, President Reagan asked Attorney General Edwin Meese, III to conduct a formal inquiry to establish all of the pertinent facts regarding the Iranian initiative.<sup>6</sup> On November 25, 1986, in a hastily-called press conference,<sup>7</sup> Attorney General Meese dramatically revealed that some portion of the profits from the sale of arms to Iran had been diverted to support the Nicaraguan democratic resistance in its fight against the communist regime in Managua.<sup>8</sup>

The November 1986 revelations regarding the secret Iranian initiative and various forms of support rendered by the National Security Council (NSC) to the private supply network for the Nicaraguan freedom fighters had far-reaching consequences. Among them was a shake-up of the Reagan Administration national security apparatus that ultimately led to the resignation or firing of numerous officials at the White House, the NSC, and the Central Intelligence Agency (CIA). The revelations not only led to the creation of a "special review board" within the executive branch to review the role of the

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3. See, e.g., Gwertzman, *U.S. to Persevere with Iran Moves*, *Officials Report*, N.Y. Times, Nov. 12, 1986, § A, at 1, col. 6 (citing unnamed "White House officials" to the effect that the White House counsel had not been involved in the National Security Council operation); Gwertzman, *Dealing with Iran Said to Undercut Credibility of U.S.*, N.Y. Times, Nov. 9, 1986, § A, at 1, col. 6 (citing anonymous State Department official critical of the initiative); Engelberg, *Reagan Approved Iranian Contacts*, *Officials Report*, N.Y. Times, Nov. 8, 1986, § A, at 1, col. 6 (citing unnamed "Administration officials" who confirmed aspects of the story and stated that it had been a presidentially-approved program); Boyd, *Iran is Said to Get U.S. Weapons Aid in a Hostage Deal*, N.Y. Times, Nov. 7, 1986, § A, at 1, col. 6 (citing anonymous "American intelligence sources" who confirmed the story and stated that the U.S. also persuaded Israel to sell arms as well).

4. See, e.g., Remarks and an Informal Exchange with Reporters Prior to a Meeting, 22 WEEKLY COMP. PRES. DOC. 1545-46 (Nov. 7, 1986); see also Statement by the Principal Deputy Press Secretary to the President, 22 WEEKLY COMP. PRES. DOC. 1552-53 (Nov. 10, 1986).

5. 22 WEEKLY COMP. PRES. DOC. 1559-61 (Nov. 13, 1986).

6. *Id.* at 1604 (Nov. 25, 1986).

7. *Id.* at 1604-05.

8. Press Briefing by Attorney General Edwin Meese, III, Washington, D.C. (Nov. 25, 1986) [hereinafter Press Briefing] (available from the White House, Office of the Press Secretary).

NSC,<sup>9</sup> but also spurred calls for a congressional investigation<sup>10</sup> and, more ominously, for the creation of an independent counsel—calls that were ultimately heeded.<sup>11</sup>

When the Iran-Contra affair burst into public view in November 1986, it was immediately apparent that among the many tangled factual, political, and managerial questions that needed to be answered were some significant legal issues.<sup>12</sup> Admittedly, some of these legal issues were associated with the Iranian aspect of the affair,<sup>13</sup> and the initiative to Teheran was politically more troublesome.<sup>14</sup> However, it was the legal questions associated with the “diversion” of funds to the Nicaraguan Contras and the related matter of the NSC’s participation in the private and third-party efforts to aid the resistance that seemed to attract the most attention. Foremost among the legal issues involved was the question of whether the 1984 Boland Amendment, proscribing U.S. government assistance to the Nicaraguan

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9. President Reagan first mentioned the creation of a special review board during the November 25, 1986, press conference. Remarks Announcing a Review of the Council’s Role and Procedures, 22 WEEKLY COMP. PRES. DOC. 1604 (Nov. 25, 1986). Subsequently, the Tower Commission was created by Executive Order 12,575. Executive Order 12,575, 22 WEEKLY COMP. PRES. DOC. 1611-12 (Dec. 1, 1986).

10. Roberts, *The White House Crisis: Tension with Capitol Hill? Congress Leaders Seek Special Unit on Iran Arms Deal*, N.Y. Times, Dec. 1, 1986, § A, at 1, col. 6.

11. See Gwertzman, *2 U.S. Aids Stick to Contradictions in Iran Testimony*, N.Y. Times, Dec. 19, 1986, § A, at 1, col. 6.

12. Shortly after the Iran-Contra affair became public, there was speculation that the Reagan Administration had purposely framed the issues in a legal context because it had adopted a strategy of demonstrating that no laws had been broken. Thus, the week the Iran-Contra affair broke, political commentator, John McLaughlin, speculated that:

The central strategy of the White House is to convert this matter from a policy matter and problem to a legal problem, with the hope that because the law is so obscure in its application to these events, that the worst the White House would suffer would be a draw.

*McLaughlin Group* (NBC television broadcast, Nov. 28, 1986). In retrospect, it is clear that the Administration had no such strategy.

13. See, e.g., Scheffer, *U.S. Law and the Iran-Contra Affair*, 81 AM. J. INT’L L. 696, 698-713 (1987).

14. According to one assessment, “The Iran half of the operation is the one the American people dislike most . . .” *Memo to George Bush*, NAT’L REV., Feb. 19, 1988, at 17. The fact that the American public was more concerned with the sale of arms to Iran than with the Central American aspect of the Iran-Contra affair was evident even to Reagan Administration’s critics on the congressional investigating committees. For example, two senators known for their opposition to Reagan’s Contra policy noted that the public was divided over the Nicaragua activities, but that the American people were “truly angry” over the establishment of relations with Iran. W. COHEN & G. MITCHELL, *MEN OF ZEAL: A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS* 66 (1988).

rebels,<sup>15</sup> applied to the NSC. The matter was complicated by the fact that the Amendment did not stand alone; instead, it was one of a series of laws limiting or proscribing aid to the Nicaraguan resistance.<sup>16</sup> The entire subject was of paramount importance because, if the Amendment's jurisdictional ambit encompassed the NSC, the NSC's activities in support of the contras violated U.S. laws. This, in turn, was certain to have major consequences for the individuals involved, the fate of the Reagan Administration, and executive-congressional relations.

The conceptual basis of the U.S. government's support for the Nicaraguan democratic resistance was the Reagan Doctrine, a cornerstone of the administration's national security policy, which pledged U.S. assistance for movements fighting in regional conflicts against Soviet armed forces or their proxies.<sup>17</sup> In general, the Reagan Doctrine engendered considerable controversy, largely along partisan lines. However, of all of the regional conflicts, none was as controversial as the Reagan Administration's support for anti-communist

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15. Temporary Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-441, § 106(c), 98 Stat. 1699, 1700-01 (1984), and Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-36 (1984). For a list of laws limiting or proscribing aid to the Nicaraguan resistance, see *infra* note 16.

16. A number of Acts have come to be known as the Boland Amendments. The following is a chronological list of the Boland Amendments: Continuing Appropriations Act for Fiscal Year 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982) (the 1982 Boland Amendment) (effective Dec. 21, 1982, to Dec. 7, 1983) (prohibiting the expenditure of funds for the purpose of overthrowing the Government of Nicaragua); Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983), and Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452 (1983) (the 1983 Boland Amendment) (effective Dec. 8, 1983, to Oct. 21, 1984) (approving the expenditure of \$24 million for the Nicaraguan freedom fighters); Temporary Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-441, § 106(c), 98 Stat. 1699, 1700-01 (1984), and Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-36 (1984) (the 1984 Boland Amendment) (effective Oct. 3, 1984, to Sept. 30, 1985) (prohibiting the expenditure of funds by intelligence agencies to support the Nicaraguan resistance); International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 722(g), 99 Stat. 190, 254-55 (1985) (the 1985 Boland Amendment I) (effective Aug. 8, 1985, to Mar. 31, 1986) (appropriating \$27 million in humanitarian aid for the Contras to be administered by an agency designated by the President, other than the CIA or Department of Defense); Further Continuing Resolution Appropriations, 1985, Pub. L. No. 99-190, § 8050, 99 Stat. 1185, 1211 (1985) (the 1985 Boland Amendment II) (effective Dec. 4, 1985, to Oct. 17, 1986) (prohibiting the expenditure of funds for "materiel, or other assistance to the Nicaraguan democratic resistance"). For the purpose of this article, it is usually the 1984 Boland Amendment [hereinafter the Amendment] that is in question.

17. See, e.g., U.S. Interests in Central America, Address to the Nation by President Ronald Reagan (May 9, 1984), reprinted in U.S. DEP'T OF STATE, REALISM, STRENGTH, NEGOTIATION: KEY FOREIGN POLICY STATEMENTS OF THE REAGAN ADMINISTRATION 134-38 (1984); see also SCOUTING THE FUTURE: THE PUBLIC SPEECHES OF WILLIAM J. CASEY 177-89 (M. Liedl ed. 1989); Bode, *The Reagan Doctrine*, 14 STRATEGIC REV. 21-29 (1986). The origins of the Reagan Doctrine can be traced to policy papers circulated among senior Reagan advisers following the 1980 presidential campaign. See, e.g., C. MENGES, *THE TWILIGHT STRUGGLE* (forthcoming 1990).

forces in Central America. Furthermore, in the context of the wars in that region, covert aid to the Nicaraguan freedom fighters was the most hotly contested subject. In fact, the history of the various laws on the subject, enacted from 1982 through 1988, attests that the U.S. stance toward Nicaragua was one of the most contentious foreign policy issues during the Reagan Administration.<sup>18</sup>

Regrettably, instead of joining in a forthright debate regarding the merits of American foreign policy, the political struggle that ensued between President Reagan and the liberal Democrat congressional leadership took the form of a series of debates over appropriations measures. Every year brought a new set of appropriation spending measures affecting the fate of the Nicaraguan resistance. The Reagan Administration's foreign policy agenda itself was hostage to the events in Nicaragua. Thus, for example, when it was revealed in 1984 that the CIA had been mining the harbors of Nicaragua,<sup>19</sup> congressional critics of President Reagan's policies temporarily acquired enough political muscle to enact the most restrictive legislation curbing U.S. aid to the resistance—the 1984 Boland Amendment.

This Amendment, like all congressional acts pertaining to Nicaragua, was surrounded by considerable acrimony; thus, it was a typical compromise agreement and tended to employ general, if not purposefully vague, language.<sup>20</sup> However, as is often the case with Congress in such matters, numerous members resorted to extra-statutory embellishments. Thus, when the Amendment was passed by Congress in 1984, its author used sweeping language to describe its alleged impact. According to Representative Edward Boland (D-Mass.), the Amendment "clearly ends U.S. support for the war in Nicaragua."<sup>21</sup>

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18. See *supra* note 16 and accompanying text.

19. Rogers, *U.S. Role in Mining Nicaraguan Harbors Reportedly is Larger Than First Thought*, Wall St. J., Apr. 6, 1984, at 6, col. 1.

20. The lack of clarity in the Boland legislation was initiated with the first Boland Amendment in 1982, which prohibited aid "for the purpose of overthrowing the Government of Nicaragua." Continuing Appropriations Act for Fiscal Year 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982). This language begged the question of whose "purpose" was controlling—that of the Nicaraguan resistance or of the U.S. government. The Reagan Administration's position was that regardless of the intent of the Nicaraguan democratic resistance, the U.S. government did not advocate the overthrow of the communist regime in Managua. Hence, its activities were in compliance with the 1982 Boland Amendment. See, e.g., B. WOODWARD, VEIL: THE SECRET WARS OF THE CIA 1981-1987, at 225-28 (1987).

21. Representative Boland made that statement on October 10, 1984. 133 CONG. REC. H4830 (daily ed. June 15, 1987) (statement of Rep. Boland). The Congressional Research Service of the Library of Congress compiled a complete history of the Boland Amendments. The compilation was reprinted in its entirety in the Congressional Rec-

Yet, while Representative Boland's intention might well have been to abandon the democratic resistance to its fate, what was far less evident is whether the actual statutory text of the Amendment accomplished this objective.

Not surprisingly, for many observers, the issue of the Amendment's applicability to the NSC became the key legal question of the Iran-Contra affair.<sup>22</sup> Thus, when NSC operations in support of the Nicaraguan resistance were exposed in 1986, it was evident that a legal memorandum, which I had written and which was reviewed and issued by the President's Intelligence Oversight Board (PIOB)<sup>23</sup> in 1985, would quickly acquire considerable prominence. The Board's legal opinion had analyzed the strictures of the Amendment and concluded that it did not apply to the NSC staff.<sup>24</sup>

Ordinarily, this legal memorandum, like all other work products of the Board, would not have been made public because the Board re-

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ord on June 15, 1987, and all references to the legislative debate over the Boland Amendments will cite that compendium.

22. See, e.g., Riley, *A Legal Thicket That's Thicker than Watergate*, NAT'L L.J., May 11, 1987, at 29, col. 1 (Amendment is "key legal linchpin" in the Iran-Contra affair); Note, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534, 1534 (1988) [hereinafter Note, *The Boland Amendments*] (the "central legal issue raised by the congressional hearings on the Iran-Contra scandal involved the constraints imposed by the Boland Amendments"); Note, *The Iran-Contra Affair and the Boland Amendment: President Reagan Claims He Is Above the Law*, 12 SUFFOLK TRANSNAT'L L.J. 135, 141-42 (Fall 1988) [hereinafter Note, *The Iran-Contra Affair*] (whether the Amendment applied to the NSC and the President was "the critical legal issue surrounding the Iran-Contra affair"); Crovitz, *Congress Is Hoist by Its Boland Petard*, Wall St. J., July 7, 1987, at 28, col. 3 ("key question is which agencies were covered" by the Amendment); Kinsley, *In Defense of the Boland Amendment*, Wall St. J., June 18, 1987, at 31, col. 3 (the Amendment represents the "main law at issue").

The application of the Amendment to the NSC also appeared to be an important legal question for the special prosecutor. The indictment alleged that the defendants conspired to defraud the U.S. Government

by impeding, impairing, defeating and obstructing the lawful governmental functions of the United States, including compliance with legal restrictions governing the conduct of military and covert action activities and congressional control of appropriations and exercise of oversight for such activities, by deceitfully and without legal authorization organizing, directing and concealing a program to continue the funding of the logistical and other support for military and paramilitary operations in Nicaragua by the Contras, at a time when the prohibitions of the Boland Amendment and other legal restrictions on the execution of covert actions were in effect.

Indictment at 8-9, *United States v. Poindexter*, No. 88-80 (D.D.C. filed Mar. 16, 1988) (Count 1).

23. The President's Intelligence Oversight Board (PIOB), created in the mid-1970s, was the highest executive branch entity to oversee the legality and propriety of intelligence activities. See Sciaroni, *The Theory and Practice of Executive Branch Intelligence Oversight*, 12 HARV. J.L. & PUB. POL'Y 397 (1989). For the complete text of the PIOB's legal memorandum, see 5 *Iran-Contra Investigation: Joint Hearing Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition & House Select Committee to Investigate Covert Arms Transactions with Iran*, 100th Cong., 1st Sess. 1158-71 [hereinafter *Iran-Contra Hearings*] (exhibit BGS-9).

24. See, e.g., *Iran-Contra Hearings*, *supra* note 23, at 1158-71.

ported on an exclusive and confidential basis to the President.<sup>25</sup> Accordingly, in the tradition of the attorney-client privilege, the Board's advice and counsel to the President would remain undisclosed.<sup>26</sup> Furthermore, it is a longstanding practice of the President to assert the venerable principle of executive privilege to deny congressional requests for information generated by the White House staff.<sup>27</sup> Yet, inexplicably, in an act of extraordinary deference to the congressional committees, the Chief Executive waived that privilege almost from the onset of the controversy, yielding in the process one of the most important defenses the President has in the face of an antagonistic Congress. Predictably, the release of the PIOB's opinion did not satisfy anyone. It became a focal point of the Iran-Contra controversy and, ultimately, led to my appearance before the joint congressional investigating committees.

The precipitous release of a PIOB opinion was unprecedented; the fact that a PIOB attorney was compelled to testify on an issue of this importance was even more unusual. To begin with, testifying on legal and constitutional issues is usually the province of the Department of Justice. Regrettably, the problem was that no other office or agency in the entire Administration had taken the initiative to analyze the most restrictive Boland Amendment, applicable from 1984 until 1986.<sup>28</sup> Among the number of legal entities which theoretically

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25. Investigations conducted in the wake of the Iran-Contra affair disclosed many internal White House documents, including the PIOB's legal opinion. The existence of the memorandum was first publicly revealed by the Tower Commission. See TOWER COMMISSION REPORT, *supra* note 1, at IV-6. However, much of the Tower Commission's account of the origins of the PIOB opinion is inaccurate. See Sciaroni, *supra* note 23, at 422.

26. Evidently in an attempt to impugn Lt. Col. Oliver North's character, many reports have alleged that he had the Board's opinion classified, presumably to prevent it from becoming known to Congress or the public. See, e.g., Blanton, *North File Fills Out a Record of Bad Faith*, Wall St. J., May 10, 1989, § 1, at 18, col. 3 (alleging that "North kept [the legal memorandum] secret"). This is entirely untrue. In fact, I testified that I classified the document as I did with most of the Board-generated documents. See 5 *Iran-Contra Hearings*, *supra* note 23, at 409 (testimony of Bretton G. Sciaroni).

27. See, e.g., Schmitt, *Executive Privilege: Presidential Power to Withhold Information from Congress*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 154-94 (J. Bessette & J. Tulis ed. 1981).

28. To be sure, there have been suggestions that others in the Reagan Administration examined the issue. For example, according to former National Security Adviser Robert McFarlane, the question of whether the NSC's activities violated the Amendment was raised with the White House Counsel in 1985. According to McFarlane, nothing was done at that time. 2 *Iran-Contra Hearings*, *supra* note 23, at 136-37 (testimony of Robert C. McFarlane). But, according to another account, "Former White House counsel Fred Fielding . . . says his office never was asked to analyze the [A]mendment,



had an interest in this important subject were the White House Counsel, the NSC's General Counsel, and the Justice Department. Not having bothered to do their homework in advance, none of these entities had much interest in doing it in the middle of congressional investigations. Furthermore, even though President Reagan later stated that it was his understanding in September 1985 that the Amendment did not apply to the NSC,<sup>29</sup> as the events from 1986 until 1987 unfolded, there was a demonstrable reluctance on the part of key administration figures even to take a clear position on the subject.<sup>30</sup> Nevertheless, the former National Security Adviser, Admiral John M. Poindexter, and his aide, Lt. Col. Oliver L. North, later would testify that in 1985 they had relied on the PIOB's legal opinion that the Amendment did not apply to the NSC.<sup>31</sup>

The history of the Amendment and the PIOB's review of the

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and administration officials say Attorney General Edwin Meese didn't undertake a *formal review* of the amendment until after the Iran-Contra scandal broke." Seib, *White House Case Against Boland Amendment Attempts End Run Around Charges of Violation*, Wall St. J., May 18, 1987, at 56, col. 1 (emphasis added). One other author claims that the White House Counsel and the Presidential counselor also examined the issue. See G. FOSSEDAL, *THE DEMOCRATIC IMPERATIVE: EXPORTING THE AMERICAN REVOLUTION 172* (1989). However, former Attorney General Meese has stated that he does not recall any request for advice regarding the Amendment while he was Counselor to the President. See *9 Iran-Contra Hearings*, *supra* note 23, at 265-66 (testimony of Edwin Meese, III). During all of the investigations of the Iran-Contra affair, no other legal memoranda were uncovered in the executive branch on the Amendment's applicability to the NSC. Interestingly enough, there were several executive branch legal opinions analyzing the original Boland Amendment. In addition to a PIOB opinion written in 1983, the Office of Legal Counsel of the Department of Justice issued a memorandum in 1984 analyzing the first Boland Amendment. IRAN-CONTRA REPORT, *supra* note 1, at 408 n.15 (Memorandum for the Attorney General from Theodore B. Olsen, Apr. 27, 1984). To the best of my knowledge, there was no effort to determine why the Justice Department issued an opinion on the earlier legislation but did not analyze the 1984 Amendment.

29. By the summer of 1988, President Reagan acknowledged that he agreed with the Board's opinion. In response to interrogatories submitted by Lt. Col. North's attorneys, President Reagan stated that the position outlined in the PIOB opinion on the Amendment "is consistent with [his] understanding at that time." See Letter from Lawrence Walsh to Barry S. Simon (July 28, 1988) [hereinafter Letter] (discussing *United States v. North*); see also Sciaroni, *Irangate Pardons Hinge on a State of Mind*, Wall St. J., May 5, 1988, at 32, col. 3. At a time more proximate to the congressional inquiries, there evidently were at least a few administration lawyers who agreed with the Board's analysis of the Amendment. See, e.g., G. FOSSEDAL, *supra* note 28, at 170-72 & n.77.

30. One would be hard-pressed to find a definitive statement by any administration official on the subject. One evidence of this unsettled state of affairs is that, despite the fact that the Amendment issue was the principal anticipated subject of my testimony, I received little, if any, guidance from the Administration lawyers. See *infra* note 194. One observer aptly noted that the Reagan "administration never advanced a coherent position on the [A]mendment." See Teti, *The Coup That Failed*, 42 POL'Y REV. 24, 28 (Fall 1987).

31. *7 Iran-Contra Hearings* (pt. 1), *supra* note 23, at 166 (testimony of Lt. Col. Oliver L. North); *8 Iran-Contra Hearings*, *supra* note 23, at 203 (testimony of Admiral John M. Poindexter). Although the memorandum was addressed to Robert C. McFarlane, the former Assistant to the President for National Security, he has testified that

Amendment's applicability provides both a revealing case study in executive branch oversight and an instructive example of the significance of proper legislative analysis. Contrary to oft-repeated assertions, it also demonstrates that the system of intelligence oversight in the executive branch worked. The Board recognized an important issue in the late summer of 1985, investigated the allegations, analyzed the law, wrote a memorandum to the Assistant to the President for National Security Affairs, and brought the issue to the President's attention by briefing him on the PIOB's memorandum. Thus, the interests of the President and intelligence oversight were well served.<sup>32</sup>

Moreover, from a vantage point of legislative analysis, the PIOB's legal opinion was unexceptional. Whether the NSC was subject to the constraints imposed by the Amendment was not an inherently complicated legal issue. In fact, the Board's legal opinion seemed reasonable on its face. Indeed, few would have predicted the firestorm of criticism this opinion received. This article will explicate the Board's opinion, place the Amendment in its proper historical and political context, and comment on what the Amendment and the Reagan Administration's reaction to it means for the future of congressional-executive relations in the area of intelligence.

## II. ORIGINS OF THE PIOB'S INQUIRY

In August 1985, numerous allegations surfaced in the U.S. press that a member of the NSC staff, Lt. Col. Oliver North, was involved in activities in support of the Nicaraguan democratic resistance which might run afoul of the Amendment's strictures. According to the original story, the NSC staff officer was exercising "tactical influence" over the rebels, as well as helping them raise money during the time when the U.S. government funding was prohibited.<sup>33</sup> For the next month, numerous newspaper commentaries publicized a number of additional allegations, all centering around Lt. Col. North's alleged pro-Contra activities and discussing how these activities might comport with the Amendment.

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he does not recall receiving it. 2 *Iran-Contra Hearings, supra* note 23, at 164 (testimony of Robert C. McFarlane).

32. A number of alternative legal offices were available for a second opinion if the President or his National Security Adviser had any questions about the correctness of the Board's position in the legal memorandum. See *supra* notes 28-30 and accompanying text.

33. Brinkley, *Nicaragua Rebels Getting Advice from White House on Operations*, N.Y. Times, Aug. 8, 1985, § A, at 1, col. 1.

Upon reading these press allegations in early August 1985, it was not immediately clear to me whether the PIOB should get involved in this issue. On the one hand, the NSC was not a member of the intelligence community, and, therefore, one could conclude that the Board had no authority over the NSC's staff or activities.<sup>34</sup> On the other hand, even though the NSC had no obligation to report to the PIOB, the Board arguably did have jurisdiction in this case because Executive Order 12,334 mandates that the Board investigate allegations of illegal intelligence activities.<sup>35</sup> Even more fundamentally, if the principle of presidential accountability suggested that the President would be held responsible for any intelligence failures, and if the Board was to play its role as guarantor that the President would know of all problematic intelligence activities, then the situation required that the PIOB examine this prominent issue.

The Board's concern about ensuring that intelligence operations were legal was further enhanced in this particular instance because the allegations concerned the Nicaraguan program. The U.S. government's effort to aid the Nicaraguan democratic resistance was perhaps the most controversial covert action program of the Reagan Administration. Furthermore, because this was a policy in which President Reagan had expressed a great personal interest and commitment, the congressional Democrat opposition could be expected to maximize any problems to their political advantage. Thus, in order to best serve the President's interests, it was incumbent upon the Board to devote more attention to the Central American programs.<sup>36</sup>

Finally, calls for investigations by oversight committees on Capitol Hill would have made it difficult for the PIOB to ignore this issue.<sup>37</sup> Accordingly, the Board approved my recommendation that we analyze the Amendment's application. At its next meeting on September

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34. See Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401 app. at 44-51 (1982); Exec. Order No. 12,334, 3 C.F.R. 216 (1981), *reprinted in* 50 U.S.C. § 401 app. at 51 (1982).

35. Exec. Order No. 12,334, *supra* note 34.

36. The PIOB had learned firsthand the previous year how controversial the Nicaraguan program had become. On October 15, 1984, U.S. intelligence officials revealed that the CIA had produced a manual on psychological operations for use by the Contras. *CIA Said to Produce Manual for Anti-Sandinistas*, N.Y. Times, Oct. 15, 1984, § A, at 7, col. 1. The officials alleged that the so-called "Tayacan Manual" advocated assassination and other improper activities. *Id.* Subsequently, President Reagan asked the CIA's Inspector General and the PIOB to conduct investigations. Statement by the Principal Deputy Press Secretary to the President, 20 WEEKLY COMP. PRES. DOC. 1568-69 (Oct. 18, 1984). Later, the Deputy Press Secretary to the President announced that these investigations revealed that "despite portions which could be misinterpreted, the manual had worthy purposes . . . Both reports [by the CIA's Inspector General and the PIOB] found that there had been no violations by CIA personnel or contract employees of the Constitution or laws of the United States, Executive orders, or Presidential directives." *Id.* at 1823 (Nov. 10, 1984).

37. See, e.g., 2 *Iran-Contra Hearings*, *supra* note 23, at 546-47 (exhibit 40A).

12, 1985, the Board reviewed, edited, approved my draft, and issued its legal memorandum.<sup>38</sup>

### III. LEGISLATIVE ANALYSIS: DID THE AMENDMENT COVER THE ACTIVITIES OF THE NSC?

Several arguments were raised in support of the position that the Amendment applied to the NSC. First, those advocating this position maintain that the Amendment's phrase "agency or entity of the United States involved in intelligence activities"<sup>39</sup> functionally defined the range of government agencies to which the legislation applied. Thus, "if an official of the United States is in fact engaged in intelligence activities, then that person is covered by the act regardless of which agency he happens to be working for or whose payroll he's on."<sup>40</sup>

Furthermore, citing the executive order on intelligence, advocates claimed that the NSC qualified as "an agency or entity of the United States involved in intelligence activities." Specifically, Executive Order 12,333 states that the NSC is the "highest Executive Branch entity that provides review of, guidance for and direction to" intelligence programs.<sup>41</sup> Based on this statement, advocates of the "broad" reading of the Amendment have maintained that the NSC

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38. Senator George Mitchell (D-Maine) and Senator William Cohen (R-Maine) erroneously asserted that I wrote the memo on my own, stating that "Sciaroni, *on his own initiative*, prepared a legal opinion concluding that the Boland Amendments [sic] did not apply to the NSC." W. COHEN & G. MITCHELL, *supra* note 14, at 122 (emphasis added). However, as I have testified, I was directed to write the Amendment memorandum. 5 *Iran-Contra Hearings*, *supra* note 23, at 393, 434 (testimony of Bretton G. Sciaroni); see also *Report of the Congressional Committees Investigating the Iran-Contra Affair, Appendix B: Volume 24, Depositions*, S. REP. NO. 216 & H.R. REP. NO. 433, 100th Cong., 1st Sess. 899 (1988) [hereinafter *Iran-Contra Depositions*] (deposition of Bretton G. Sciaroni). While it was my idea to examine the issue, I did not do so until I had authorization from the Chairman of the Board. Furthermore, as a staff employee, I had no authority to issue any legal opinion on my own; therefore, the Board exercised its discretion in deciding to issue the memorandum. In fact, the legal opinion was carefully reviewed, edited, and approved by the entire Board, including the late Charles J. Meyers, a Board member who was the former Dean of the Stanford Law School, the former President of the Association of American Law Schools, and a senior partner at the national law firm of Gibson, Dunn & Crutcher; W. Glenn Campbell, then Director of the Hoover Institution on War, Revolution and Peace at Stanford University; and Charles Tyroler, II, the Director of the Committee on the Present Danger in Washington, D.C.

39. Temporary Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-441, § 106(c), 98 Stat. 1699, 1700-01 (1984), and Department of Defense Appropriations Act 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-36 (1984).

40. 9 *Iran-Contra Hearings*, *supra* note 23, at 431 (statement of Sen. Mitchell).

41. Exec. Order No. 12,333, *supra* note 34, § 1.2(a).

fell within the jurisdictional ambit of the Amendment.<sup>42</sup>

Those who maintain that the NSC fell within the Amendment's ambit also rely upon contemporaneous statements made by Representative Boland at the time of the legislation's passage. They claim that his intent was clear and unambiguous: the legislation effectively ended U.S. support for the Nicaraguan resistance.<sup>43</sup> Boland supporters also rely upon two legal opinions written in 1985, which claimed that the Amendment applied to the NSC.<sup>44</sup> Finally, my testimony is cited (incorrectly) to support the contention that the NSC was covered within the Amendment.<sup>45</sup>

On the other hand, the PIOB's conclusion, later adopted by the Administration and others, was that the NSC was not covered by the statutory language of the Amendment. In reaching this conclusion, the Amendment was analyzed in the context of the congressional legislation that contained the Amendment, other contemporaneous legislation, previous and subsequent intelligence statutes, and the executive branch order setting forth what constituted intelligence agencies or activities.

#### A. *The Legislation to Which the Amendment Was Attached Did Not Cover the NSC*

The Amendment was set out in the Department of Defense Appropriations Act,<sup>46</sup> which was a part of the Continuing Resolution adopted in the last days of the 98th Congress (the "Continuing Resolution").<sup>47</sup> Section 8066(a) of the Department of Defense Appropriations Act stated in relevant part:

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, mili-

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42. This claim was first raised in the initial letter of inquiry from Representative Michael Barnes to National Security Adviser Robert McFarlane regarding Lt. Col. North's activities. 2 *Iran-Contra Hearings*, *supra* note 23, at 546-47 (exhibit 40A). The Iran-Contra committees' majority report also indirectly relied upon this argument by citing a memorandum that, in part, used an analysis of the language of Executive Order 12,333 to conclude that the Amendment applied to the NSC. 5 *Iran-Contra Hearings*, *supra* note 23, at 1274-76 (exhibit BGS-26; Steven K. Berry Memorandum); see also IRAN-CONTRA REPORT, *supra* note 1, at 399-400. Yet, interestingly, the Iran-Contra majority report never directly articulates that argument. Rather, it states that "had the NSC staff remained true to the NSC's traditional statutory functions of coordination and oversight, [the Amendment] would not have applied to its activities." *Id.* at 399.

43. See *infra* notes 104-105 and accompanying text.

44. See *infra* notes 113, 115 and accompanying text.

45. See *infra* notes 118, 122 and accompanying text.

46. Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 101(h), 98 Stat. 1904 (1984).

47. Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

tary or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.<sup>48</sup>

The Amendment also was incorporated by reference in the Intelligence Authorization Act for Fiscal Year 1985.<sup>49</sup>

### 1. The Department of Defense Appropriations Act, 1985

Given the structure of the Continuing Resolution, it is clear that the NSC was not covered by the Amendment. Section 101 of the Continuing Resolution authorized funds with respect to nine separate appropriations acts that had not been acted upon by Congress.<sup>50</sup> Each of these appropriations bills was the subject of a separate subsection of section 101.<sup>51</sup>

As noted above, the Amendment<sup>52</sup> was part of the Department of Defense Appropriations Act, which was the subject of subsection (h) of section 101 of the Continuing Resolution.<sup>53</sup> On the other hand, continuing funding for the NSC was provided for in section 101(j), a separate subsection of the Continuing Resolution which dealt with the Treasury, Postal Service, and General Government Appropriations Act of 1985.<sup>54</sup> Nothing in subsection (j) referenced the Amendment. Similarly, none of the other subsections of section 101, containing the seven additional unenacted appropriations bills, referenced the Amendment provision that was found in only the Defense Department appropriations Act.<sup>55</sup> Thus, the Amendment, contained in the Continuing Resolution, pertained only to the Defense Department appropriations.

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48. Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1935 (1984).

49. Intelligence Authorization Act for Fiscal Year 1985, Pub. L. No. 98-618, § 801, 98 Stat. 3298, 3304 (1984).

50. Continuing Appropriation Act for Fiscal Year 1985, Pub. L. No. 98-473, § 101(c)-(k), 98 Stat. 1837-2199 (1984).

51. *Id.*

52. Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-36 (1984).

53. Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 101(h), 98 Stat. 1904 (1984).

54. Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473, § 101(j), 98 Stat. 1837, 1963 (1984); *see also* IRAN-CONTRA REPORT, *supra* note 1, at 492-93.

55. It is important to note that sections of the Continuing Resolution applied generally to all of the nine appropriations acts. The Amendment, however, was not one of these sections. Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473, § 101, 98 Stat. 1837, 1964 (1984).

## 2. The Intelligence Authorization Act for Fiscal Year 1985

Within hours of adopting the Continuing Resolution, Congress completed legislative action on the Intelligence Authorization Act for Fiscal Year 1985, which incorporated by reference the Amendment, thereby making it applicable to the funding of the intelligence community.<sup>56</sup> The Act specifically listed the ten separate entities of the U.S. government engaged in "intelligence and intelligence-related activities."<sup>57</sup> Congress, however, did not include the NSC in defining the universe of agencies and entities to which the Amendment applied.<sup>58</sup> Indeed, in the entire history of intelligence authorization legislation, the NSC never had been considered part of the intelligence community.<sup>59</sup>

### *B. Does the Language of Section 8066(a) of the Department of Defense Appropriations Act, 1985, Include the NSC?*

Beginning in 1987, Reagan Administration critics started to maintain that the Amendment applied to the NSC. They argued that the NSC constituted an "agency or entity of the United States involved in intelligence activities," which was prohibited by section 8066(a) from aiding the Nicaraguan democratic resistance.<sup>60</sup> These critics asserted that the definition of section 8066(a) was functional in nature because the section defined the agencies to which the Amendment proscriptions applied in terms of the agencies' functions or operations.

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56. The intelligence legislation specifically referenced House Joint Resolution 648, the original Continuing Resolution which included the Amendment. Intelligence Authorization Act for Fiscal Year 1985, Pub. L. No. 98-618, § 801, 98 Stat. 3298, 3304 (1984).

57. The agencies of the U.S. government that were involved in "intelligence and intelligence-related activities" as defined by Congress were:

- (1) The Central Intelligence Agency.
- (2) The Department of Defense.
- (3) The Defense Intelligence Agency.
- (4) The National Security Agency.
- (5) The Department of the Army, the Department of the Navy, and the Department of the Air Force.
- (6) The Department of State.
- (7) The Department of the Treasury.
- (8) The Department of Energy.
- (9) The Federal Bureau of Investigation.
- (10) The Drug Enforcement Administration.

Intelligence Authorization Act for Fiscal Year 1985, Pub. L. No. 98-618, § 101, 98 Stat. 3298, 3298 (1984).

58. *Id.*

59. IRAN-CONTRA REPORT, *supra* note 1, at 494; 5 *Iran-Contra Hearings*, *supra* note 23, at 400.

60. Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1935 (1984).

### 1. The Boland Phrase as a Functional Definition

The authors of the PIOB memorandum recognized and dealt with the contention that the Amendment defined the prohibition in terms of the type of activity being undertaken, rather than the type of organization involved. After citing Representative Barnes' letter to former National Security Adviser Robert C. McFarlane, the PIOB's legal opinion observed:

Whether the Boland Amendment applies to the NSC turns on the clarification of the NSC as an "agency or entity of the United States involved in intelligence activities" prohibited from supporting the Nicaraguan democratic resistance. On the face of it the NSC would appear to be an agency or entity of the United States covered by the [A]mendment.<sup>61</sup>

In essence, the argument that the NSC was subject to the Amendment's strictures is founded on the notion that once the NSC, or any other agency of the U.S. government, became involved in intelligence operations, that agency was thereby turned into a member of the U.S. intelligence community for purposes of the Amendment. Thus, the Iran-Contra committees' majority report held that "if an agency is 'involved in intelligence activities,' then it cannot engage in the proscribed conduct of assisting the Contras . . . [T]he phrase used by Congress—'any other agency or entity . . . involved in intelligence activities'—is descriptive."<sup>62</sup>

### 2. Boland Phrase as Defining a Category of Agencies

An alternative view is that the Amendment was not meant to regulate the activities of the NSC. Rather, the key statutory phrase regarding agencies "involved in intelligence activities" is read to pertain only to the members of the intelligence community. This proposition appears almost self-evident. Indeed, had a total ban on all U.S. government support for the Nicaraguan freedom fighters been intended, the phrase "involved in intelligence activities" would not have been necessary. Instead, that result could have been achieved simply by prohibiting any expenditures of U.S. funds, derived from any source, that would have the effect of aiding the Nicaraguan rebels.<sup>63</sup> Thus,

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61. 5 *Iran-Contra Hearings*, *supra* note 23, at 1158-59 (exhibit BGS-9) (emphasis added).

62. IRAN-CONTRA REPORT, *supra* note 1, at 399.

63. Congress could have used language which announced its intention for the legislative prohibition to cover all U.S. governmental agencies and departments. As a Library of Congress study noted, "Unlike some other appropriations statutes, there is no express bar [in Boland] to the use of funds for activities for which Congress had denied assistance." 133 CONG. REC. H4794 (daily ed. June 15, 1987). Yet, the use of compre-



the Amendment's language was meant to describe a category of agencies—the members of the intelligence community—to which it applied, and could not have been intended to be a functionally descriptive definition.

### 3. Legislative Analysis Supports the Contention that the Amendment Defined a Category of Agencies.

Because the language of the Amendment is ambiguous,<sup>64</sup> under the accepted rules of statutory construction, it is appropriate to use extrinsic aids to clarify the law's intent and to discern its meaning.<sup>65</sup>

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hensive bans on such assistance have been used in similar legislation. For example, the law that terminated U.S. aid to the Angolan freedom fighters stated the following: "*Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose, or which would have the effect, of promoting or augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola . . .*" International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 118(a), 94 Stat. 3131, 3141 (1980) (emphasis added).

64. There should be little dispute that the Amendment was ambiguous. Nevertheless, some commentaries contend that the law clearly applied to the NSC. For example, the Iran-Contra committees' majority report contended that "[t]he statutory language is clear on its face . . ." IRAN-CONTRA REPORT, *supra* note 1, at 399. Another account, while admitting that the NSC was not specifically included in the Amendment, contends that the series of Boland Amendments did not indicate a vague or vacillating policy: "[T]he Amendments do show a clear pattern of steadily greater restrictions . . . and then a steady increase in aid. Congress may have frequently changed its mind, but that does not make the individual statutes vague: Congress knew exactly what it wanted each time" it passed an amendment. Note, *The Boland Amendments*, *supra* note 22, at 1571 n.271. These views, however, are specious. First, even some commentators who believe that the Amendment applied to the NSC do not see a clear pattern in the legislation involving the Contras. See, e.g., Note, *The Iran-Contra Affair*, *supra* note 22, at 136-37 (distinguishing the first, second, and fifth Boland Amendments from the third and fourth). Moreover, the clarity of purpose attributed to Congress is clearly at a variance with the experience of those who were involved with the issue at the time and is especially untenable, given the context of acute executive-congressional battles in which the Amendment was adopted. See *infra* note 180 and accompanying text. For other views, see TOWER COMMISSION REPORT, *supra* note 1, at III-21 (congressional efforts to restrict Contra funding led to a "highly ambiguous legal environment"); Riesenfeld, *The Powers of Congress and the President in International Relations: Revisited*, 75 CALIF. L. REV. 405, 410 (1987) (Amendment "not free from ambiguity"); Toensing, *Congressional Oversight: Impeding the Executive Branch and Abusing the Individual*, 11 HOUS. J. INT'L L. 169, 173 (1988) (the Amendment's language contains "murkiness and obfuscation"); Rivkin, *Boland Amendment Didn't Apply to NSC*, Legal Times, July 20, 1987, at 14, col. 1 ("given all the congressional flip-flops on Contra aid reflected in contradictory Boland Amendments, one would have to be a psychiatrist to fathom the spirit of this particular version"); Engelberg, *Contra Aid: Loose Law?*, N.Y. Times, Jan. 15, 1987, § A, at 12, col. 1 (Congressional Democrats and Republicans acknowledge that the Boland Amendments were loosely written and offered the Reagan Administration loopholes).

65. 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.01 (4th ed. 1984).

a. *The Legislative History Does Not Support the Argument that the NSC was Covered by the Amendment*

The Amendment's legislative history does not contain the slightest indication that the Amendment was intended to include the NSC. In fact, one will look in vain in that considerable record to find any mention of the NSC. It seems unlikely that Congress would break a nearly forty-year precedent by enacting an amendment that would apply to an element of the White House, like the NSC, without making even a passing reference to it.<sup>66</sup>

Nor is there any evidence in the record after passage of the Amendment indicating that the NSC was intended to be covered.<sup>67</sup> Indeed, the next congressional action on the issue of Contra aid strongly suggests that the NSC was not included within the Amendment's strictures. In 1985, while the Amendment prohibition was still in effect, Congress approved \$27 million in humanitarian assistance for the Nicaraguan resistance.<sup>68</sup> The critical question debated in Congress at the time was which agency would administer the aid. The House Democratic leadership was determined to ensure that members of the intelligence community would not manage the program. Representative Boland himself stated that the funds could not be channelled through an intelligence agency.<sup>69</sup> Yet, at the same time, the NSC was under active consideration to be the entity designated to administer the humanitarian aid program.<sup>70</sup> Although a unit was ultimately created in the State Department to administer those funds, the fact that the House Democrats did not consider the NSC an intelligence agency was clear.<sup>71</sup>

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66. See IRAN-CONTRA REPORT, *supra* note 1, at 494.

67. To be sure, statements made subsequent to the passage of legislation cannot be used to redefine its effect. Generally, principles of statutory construction do not permit examination of the post-enactment history. 2A N. SINGER, *supra* note 65, § 48.20. Nevertheless, the subsequent public record is useful in clarifying at least how certain members of Congress construed their legislative handiwork.

68. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 722(g), 99 Stat. 190, 254-55 (1985).

69. Representative Boland specifically mentioned the CIA and the Defense Department as being prohibited from administering the humanitarian aid, thus reinforcing the notion that the 1984 Boland Amendment was aimed primarily at those organizations. 133 CONG. REC. H4909 (daily ed. June 15, 1987). Representative Boland stated that the language of the 1984 Amendment had been adopted four times, and by including it in the current Amendment, the House of Representatives "take the intelligence agencies out of this matter entirely." *Id.* (emphasis added).

70. Crovitz, *supra* note 22.

71. See Crovitz, *Crime, the Constitution, and the Iran-Contra Affair*, 84 COMMENTARY 23, 25 (Oct. 1987).

b. *Boland Phrase a Term of Art*

The PIOB concluded that the Boland phrase "agency or entity of the United States involved in intelligence activities" was a term of art which had been consistently understood to define, by both legislation and executive orders, a finite and specific number of agencies and departments of the U.S. government.<sup>72</sup> The Board's conclusion was further supported by contemporaneous statements regarding the reach of the Intelligence Authorization Act for Fiscal Year 1985, which included the 1984 Amendment.<sup>73</sup> Thus, for example, in the authorization act, the agencies comprising the intelligence community were described in terms very similar to the Boland language. Specifically, the Act allocated funds "for the conduct of the *intelligence and intelligence-related activities of the following elements of the United States Government.*"<sup>74</sup> This phrase, or similar variations, has consistently been used in the intelligence authorization acts since 1978, all of which defined the intelligence community as the same set of agencies and departments, but none of which included the NSC.<sup>75</sup> In fact, prior to 1981, the intelligence authorization acts were entitled "Intelligence and Intelligence-Related Activities Authorization Act."<sup>76</sup> In short, Congress did not define the organizations, to which the intelligence authorization acts applied, based upon whether they were engaged in a particular course of conduct. Rather, Congress used the words "intelligence activities" in successive laws as a term of art, defining the enumerated members of the intelligence community. The

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72. "In the absence of legislative intent to the contrary, or other overriding evidence of a different meaning, technical terms or terms of art used in a statute are presumed to have their technical meaning." 2A N. SINGER, *supra* note 65, § 47.29, at 234. As has been demonstrated, there is an absence of legislative intent to the contrary or of overriding evidence of a different meaning.

73. 133 CONG. REC. H4833 (daily ed. June 15, 1987).

74. Intelligence Authorization Act for Fiscal Year 1985, Pub. L. No. 98-618, § 101, 98 Stat. 3298, 3298 (1984) (emphasis added).

75. For example, the intelligence authorization acts for fiscal years 1983, 1984, and 1985 authorized funds for the "conduct of intelligence and intelligence-related activities" of the "elements of the United States Government" which comprised the intelligence community. The intelligence authorization acts for fiscal years 1981 and 1982 made reference to the "agencies of the United States Government" whose intelligence and intelligence-related activities were being funded. In fiscal years 1979 and 1980, the intelligence community whose appropriations were being authorized were described as the "departments, agencies, and other elements of the United States government." Thus, the intelligence legislation typically described the elements of the intelligence community in terms of intelligence agencies and did not contain descriptive definitions dependent upon the actual activities of the organizations involved. For the texts of intelligence authorization acts 1979 through 1985, see PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE HOUSE OF REPRESENTATIVES, COMPILATION OF INTELLIGENCE LAWS AND RELATED LAWS AND EXECUTIVE ORDERS OF INTEREST TO THE NATIONAL INTELLIGENCE COMMUNITY, AS AMENDED THROUGH MARCH 1, 1985, at 113-54 (July 1985) [hereinafter COMPILATION OF INTELLIGENCE LAWS].

76. *Id.* at 149-54.

NSC was never included in any intelligence authorization act.<sup>77</sup>

The origins of the Amendment's phrase "agency or entity . . . involved in intelligence activities" also supports the PIOB's analysis. This phrase originally appeared in the Intelligence Oversight Act of 1980.<sup>78</sup> The minority report of the Iran-Contra committee recounts the various attempts during the 1970s to pass legislation creating a comprehensive charter for the intelligence community.<sup>79</sup> The record indicates that, at the time, explicit attempts to have the NSC covered by the legislation were rejected by both the Carter Administration and the Democrat majority in the Senate.<sup>80</sup> The ultimate legislative enactment that initially attempted to create a charter—the Intelligence Oversight Act of 1980—*did not* list the members of the intelligence community to which it applied, but, in using Boland-like language, limited its scope to the intelligence community, excluding the NSC from its ambit.<sup>81</sup>

The minority report of the Iran-Contra committee also quoted William Harris, a consultant to the Senate Select Committee on Intelligence, who advised the Committee that Congress made a clear decision to exclude the NSC from the coverage of the intelligence oversight legislation. He stated:

Commencing in 1978, the intelligence oversight committees adopted the procedure of enacting separate intelligence authorization acts for all entities of the "intelligence community" engaged in national intelligence . . . . Proposals in 1980 to extend the scope of "entities" to include the National Security Council and its staff were *expressly* rejected in the course of streamlining what became the Intelligence Oversight Act of 1980.<sup>82</sup>

Harris made the following comment concerning the Amendment's phrase defining the agencies covered:

Notwithstanding efforts in 1980 to broaden its scope of coverage, what became Section 501(a)(1) of the *Intelligence Oversight Act of 1980* did not represent a legislative effort to include operations of the National Security Council or its staff within the mandatory reporting duties of this subsection. . . . [T]he linked reference to "department, agency, or entity" engaged in intelligence activities developed a meaning widely understood in the executive and legislative branches. *This phrase of legislative art applied exclusively to the intelligence agencies or specialized intelligence collection components of the U.S. intelligence community. This definition did not include within its scope*

77. See, e.g., 5 *Iran-Contra Hearings*, *supra* note 23, at 1168 (exhibit BGS-9).

78. Pub. L. No. 96-450, § 407(b), 94 Stat. 1975, 1981 (1980) (codified at 50 U.S.C. § 413 (1982)).

79. IRAN-CONTRA REPORT, *supra* note 1, at 493.

80. *Id.* at 594-607.

81. *Id.* at 494. It is worth noting that Representative Boland was a co-sponsor, floor manager, and conferee of the 1980 act.

82. *Id.* (emphasis added).

*other entities of government that supervised the intelligence "entities" or summarized and disseminated their products.*<sup>83</sup>

An additional reason to conclude that the Amendment's language was used as a term of art, meant to describe only the members of the intelligence community and especially those traditional operational entities in that community, is the fact that the precise language of the 1984 Amendment can be traced to the intelligence act for the previous year. The version of the Amendment in force just prior to the 1984 enactment was a funding measure that provided \$24 million for the Contras. That legislation provided as follows:

*During fiscal year 1984, not more than \$24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.*<sup>84</sup>

The language of section 8066(a),<sup>85</sup> except for the year and the appropriations amount, was copied in its entirety from the 1983 legislation. There is no indication that the 1983 Boland Amendment was intended to pertain to the NSC's activities. Therefore, it is difficult to believe that one year later, the 1984 Amendment, which used the exact same language as the 1983 legislation, did include, or was intended to include, the NSC.

*c. Subsequent Statements by Members of Congress, Intelligence Experts, and Others Do Not Support the Contention that the Amendment Applied to the NSC*

Further understanding about the intended reach of the Amendment can be gained by reviewing the responses of congressional members and others to the first rumors linking the NSC staff to support for the Contras. While the Iran-Contra committees' report is silent on this issue, even a cursory review of the press in August and September of 1985 demonstrates the widespread view that the Amendment did not apply to the NSC.<sup>86</sup> In fact, this opinion was held even by members of Congress and pundits, who were critical of President Reagan's Nicaraguan policy. For example, on August 8, 1985, the *New York Times*, which broke the front-page story on White House involvement in aid to the Nicaraguan resistance, reported that an NSC aide was allegedly giving advice and exerting "tactical influence" over the freedom fighters.<sup>87</sup> Yet, the article

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83. *Id.* at 603-04 (emphasis added).

84. Intelligence Authorization Act for Fiscal Year 1984, § 108, *reprinted in* COMPILATION OF INTELLIGENCE LAWS, *supra* note 75, at 121 (emphasis added). For a comparison of this act to the Amendment, see *supra* note 48 and accompanying text.

85. See *supra* note 48 and accompanying text.

86. See, e.g., *infra* notes 87-96 and accompanying text.

87. Brinkley, *supra* note 33, at 1.

stated:

Although some members of Congress say they believe the National Security Council operation has flouted the intent of legislation banning direct aid to the rebels, they add that *they do not believe it violates United States laws*. "If the President wants to use the N.S.C. to operate a war in Nicaragua, I don't think there's any way we can control it," said Representative George E. Brown Jr., Democrat of California and a member of the House Select Committee on Intelligence.<sup>88</sup>

Two years later, many of Representative Brown's colleagues railed with righteous indignation against Reagan Administration witnesses who had the temerity to suggest that the Amendment ban did not apply to the NSC. Yet, at the time when the initial allegations arose regarding the NSC's involvement with the Contras, Representative Brown had plenty of company in his belief that the Amendment did not apply to the NSC, or, at least, that the issue was unclear. My file from that period contains accounts of the following widely shared views on this subject:

- Former Director of Central Intelligence Stansfield Turner stated, "It may not break the law, but it's ridiculous when the C.I.A. had to be kept at arm's length from the contras to have another arm of the Government doing exactly the same thing."<sup>89</sup> Subsequently, Turner asserted that the NSC's activities were " 'a devious and disingenuous technique' to skirt the law."<sup>90</sup>
- President Carter's NSC adviser, Zbigniew Brzezinski, stated, "The NSC is an instrument for enforcing the President's will. I don't have any objections to this."<sup>91</sup>
- The *New York Times* editorialized that "the President insists that no laws have been broken. That's true, but only in the most technical sense. Congress said no to the secret war. To shift conduct of these activities to the National Security Council is a sly, even a cynical

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88. *Id.* (emphasis added). Subsequently, Representative Brown stated that "he and other [House Intelligence Committee] members had discussed the National Security Council activities, but had concluded they could do little about them." Brinkley, *White House Aid to Nicaraguan Rebels Reportedly Worried C.I.A.*, N.Y. Times, Aug. 10, 1985, § A, at 3, col. 1.

89. Boyd, *Role in Nicaragua Described by U.S.*, N.Y. Times, Aug. 9, 1985, § A, at 4, col. 1 (emphasis added).

90. Brinkley, *supra* note 88, at 3. Although Stansfield Turner clearly disapproved of the alleged use of the NSC in this particular manner, he did not say it was against the law for the NSC to be involved in supporting the Nicaraguan resistance. Yet, Representative Boland cited Turner as indicating that the Amendment applied to the NSC. 9 *Iran-Contra Hearings*, *supra* note 23, at 433 (statement by Rep. Boland).

91. Brinkley, *supra* note 88, at 3 (emphasis added).

evasion.”<sup>92</sup>

- According to Joseph C. Harsch of the *Christian Science Monitor*, “Technically the President is not violating the congressional ban by running the U.S. side of the operations against Nicaragua out of the White House itself, instead of through the CIA and Pentagon.”<sup>93</sup>

- Columnist Joseph Kraft, after recounting the allegations against the NSC aide, stated that “[t]he White House has said—*not wrongly*—that North did not break any laws.”<sup>94</sup>

The issue regarding whether the Amendment applied to the NSC was also unclear to the liberal lobbying group, Common Cause. In a letter to the chairmen of the Senate and House intelligence committees, the president of Common Cause stated that the NSC’s “involvement with the rebels ‘during the period the Boland Amendment has been in effect raises major questions of whether this broad congressional prohibition has been violated and, if not, whether the N.S.C.’s activities violate the spirit and intent of Congress in enacting the amendment.’”<sup>95</sup>

Overall, at the time that the original allegations were raised, there were no unqualified statements by any individual or group which clearly stated that if Lt. Col. North was indeed involved in the alleged activities, the Amendment was thereby violated. The alleged illegality of the NSC’s actions was not evident even to congressional critics of the Reagan Administration.<sup>96</sup> In fact, most seemed to think that the 1984 Amendment did not apply to the NSC.

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92. *Hiding the War in the White House*, N.Y. Times, Aug. 11, 1985, § 4, at 22, col. 1 (emphasis added).

93. Harsch, *U.S. and Nicaraguan ‘Contras’: How Legal?*, *Christian Sci. Monitor*, Aug. 15, 1985, at 13.

94. Kraft, *An Orgy of Foreign Policy Sniping*, *Wash. Post*, Aug. 15, 1985, § A, at 21, col. 1 (emphasis added).

95. Brinkley, *Inquiry Sought on Aid to Rebels*, N.Y. Times, Aug. 15, 1985, § A, at 4, col. 3.

96. For example, the initial letter of inquiry from Representative Michael Barnes, Chairman of the Western Hemisphere Subcommittee of the House Foreign Affairs Committee, did not explicitly state that there would be a violation of law if Lt. Col. North was involved in the alleged pro-Contra activities. Rather, Barnes stated, “It would be stretching the integrity of the law to suggest that this prohibition was not intended to cover the NSC. . . . Congressional intent in passing the Boland Amendment was to distance the United States from the Nicaraguan rebel movement . . .” 2 *Iran-Contra Hearings*, *supra* note 23, at 546-47 (exhibit 40A, letter of Aug. 16, 1985). This is the sort of verbal sleight-of-hand that characterized much of the debate over the Nicaraguan program. Similarly, the initial inquiry from the Chairman of the House Intelligence Committee, Representative Lee Hamilton (D-Ind.), only asked for a report regarding the alleged NSC activities and a legal justification for them. 2 *Iran-Contra Hearings*, *supra* note 23, at 756 (letter of Aug. 20, 1985); *see also* Fuerbringer, *U.S. Aide’s Ties to Contras Challenged*, N.Y. Times, Sept. 5, 1985, § A, at 3, col. 4 (more qualified statements by Hamilton regarding whether the NSC activities would be legal).

*d. Executive Order 12,333 Also Supports the Contention that the NSC Was Not Within the Amendment's Ambit*

In its memorandum, the PIOB recognized that, other than the literal interpretation given by Representative Barnes to the Amendment's text,<sup>97</sup> Executive Order 12,333 was the only evidence cited to support the contention that the Amendment might apply to the NSC. According to the Board's legal opinion, "[t]he executive order cited by Congressman Barnes does refer to the NSC as 'the *highest Executive Branch entity* that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence, and special activities, and attendant policies programs.'<sup>98</sup> However, the NSC's guidance on matters of intelligence does not an intelligence entity make, just like the NSC's direction on matters of foreign policy does not make it an element of the State Department. Furthermore, the executive order supports the contention that the Amendment's phrase referring to U.S. agencies "involved in intelligence activities" is a term of art describing the members of the intelligence community.

Executive Order 12,333 defined "intelligence activities," a key phrase in the Amendment, as "all activities that agencies within the Intelligence Community are authorized to conduct pursuant to this [o]rder."<sup>99</sup> The order, however, goes on to define "Intelligence Community" as referring to a list of agencies or organizations which were nearly identical to those listed by Congress in successive intelligence authorization acts.<sup>100</sup> Of course, the NSC does not appear on that list. In fact, the NSC has never been described by any executive order on intelligence as being a member of the intelligence community.<sup>101</sup>

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97. See *supra* note 42 and accompanying text.

98. 5 *Iran-Contra Hearings*, *supra* note 23, at 1159 (exhibit BGS-9) (emphasis added).

99. Exec. Order No. 12,333, *supra* note 34, § 3.4(e).

100. *Id.* § 3.4(f). The only agency that is considered part of the intelligence community by Congress but not by the executive branch is the Drug Enforcement Administration.

101. This understanding should not have been a surprise to those on Capitol Hill involved in intelligence matters, since they had been consulted on the creation of the Reagan executive order. This is particularly true of Representative Boland, who was the Chairman of the House Intelligence Committee and who was specifically consulted on the new order. See Remarks of Deputy Director of Central Intelligence Bobby K. Inman on the New Executive Order on United States Intelligence Activities (Dec. 4, 1981) (available from the White House, Office of the Press Secretary).



### C. *The Iran-Contra Majority's Boland Amendment*

Notwithstanding the Amendment's text, legislative history, and other above-referenced relevant considerations, the majority of the select committees on the Iran-Contra affair held that the Amendment applied to the NSC. Boldly extending the already considerable reach of Congress right into the foreign policy-making process of the White House, the majority concluded that, once the NSC became involved in intelligence operations and aided the Contras, "both the letter and the spirit of [the Amendment] were violated."<sup>102</sup> Unfortunately, the Iran-Contra majority offered little analysis to support its position. Its primary argument, based on a faulty statutory interpretation of the language of the Amendment already has been discussed and rebutted.<sup>103</sup> The majority's remaining arguments and supporting evidence are discussed below.

#### 1. A Question of Intent

Some argue that the Amendment clearly reflects Congress's intent to end *all* U.S. government aid to the Nicaraguan rebels. Proponents of this view often cite language from the House's floor debate on the Amendment. Specifically, they rely on Representative Boland's statements in introducing his legislation:

Let me make very clear that this prohibition applies to all funds available in fiscal year 1985 regardless of any accounting procedure at any agency. It clearly prohibits any expenditure, including those from accounts for salaries and all support costs. . . . To repeat, the compromise provision clearly ends U.S. support for the war in Nicaragua.<sup>104</sup>

Allegedly, this sweeping language, as well as similar colloquies authored by other members, supports the view that at least the "spirit" of the Amendment was a government-wide prohibition on aid to the Contras, and that the prohibition included the NSC. For example, the Iran-Contra committees' majority report stated that "Representative Boland plainly viewed the conference compromise as terminating all U.S. Government assistance of any kind until Congress revisited the issue."<sup>105</sup>

There are two fundamental flaws with the majority's assertion that Representative Boland's commentary defined the meaning of the legislation. First, it is unclear how much weight should be given to his words. Second, even assuming *arguendo* that the intent of Congress as a whole in enacting the legislation was to end the secret war in

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

103. See *supra* notes 39-101 and accompanying text.

104. 133 CONG. REC. H4830 (daily ed. June 15, 1987). In response to an inquiry from a colleague, Boland stated that "[t]here are no exceptions to the prohibition." *Id.* at H4831.

105. IRAN-CONTRA REPORT, *supra* note 1, at 398.

Nicaragua, the question remains as to whether that objective was realized. In other words, did the legislation, as written, accomplish the objective?

According to the rules of statutory construction, although it is appropriate to consider extrinsic aids when a statute is ambiguous and unclear,<sup>106</sup> the words of the statute's author are a special category of extrinsic evidence. Specifically, the rules of statutory interpretation caution against using the author's explanation of the legislation because the author often will tend to insinuate his own specific intent to the entire legislature.<sup>107</sup> Furthermore, the Amendment, like the other legislation concerning Nicaragua, represented a series of compromises among the various legislators, as well as with the executive branch.<sup>108</sup> Thus, Representative Boland cannot ascribe his intent in proposing the specific legislation to the entire legislative body which voted for the compromise, and he cannot broaden the scope of legislation after it is enacted through statements on the House floor.<sup>109</sup>

Second, even if it could be demonstrated that Congress collectively intended the Amendment to end all U.S. involvement in Nicaragua, the Amendment as written did not accomplish that end. This shortfall between the intent and the result is not particularly surprising. Congress frequently enacts legislation that fails to achieve the intended objective. Significantly, it is the specific language of the

106. 2A N. SINGER, *supra* note 65, § 48.01, at 277-78.

107. The reasons for the rule of excluding an author's explanation as an extrinsic aid was explained by the Earl of Halsburg:

[I]n construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done.

*Id.* § 48.12, at 326-27.

108. For example, in 1984, the Senate initially rejected restrictions on Contra aid and voted for \$28 million for the resistance. S. 2713, 98th Cong., 2d Sess. (1984). This forced the issue into conference where, ultimately, the Amendment was approved.

109. Unfortunately, the misuse of legislative history is widespread. One judicial observer has lamented that the statutory language is no longer "the sole, or even the most significant, index of legislative will. Instead, attorneys and courts often engage in a kind of scavenger hunt through the contradictory documents that comprise a statute's legislative history, in the hope of discovering the law's 'true' meaning." Kozinski, *Hunt for Laws' 'True' Meaning Subverts Justice*, Wall St. J., Jan. 31, 1989, § A, at 18, col. 3. The author points out the inherent difficulty in relying on legislative history: "Figuring out what 535 legislators, organized in two houses and a variety of committees, plus the president, may have meant in passing a statute is a cumbersome and inexact exercise, even if one is able to accept the idea of a collective intent." *Id.*

statute that governs, not the intent of its authors, or even of the entire legislative body that passed it. The U.S. Supreme Court has stated that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . ."<sup>110</sup> Thus, Representative Boland's subsequent comments, which purported to broaden the potential application of the Amendment, cannot override the words used in the statute.<sup>111</sup>

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110. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The Iran-Contra Committees' majority argued that, according to the principles of statutory construction, an interpretation of legislation that renders a law meaningless will not be honored by a court. See, e.g., 9 *Iran-Contra Hearings*, *supra* note 23, at 431 (statement of Sen. George Mitchell). Of course, that presupposes a great deal. First, it assumes clarity in the law. More important, however, is the fact that the Amendment achieved its aim: it precluded the CIA and the Defense Department, the two principal agencies of the U.S. government capable of aiding covert paramilitary organizations, from supporting the Nicaraguan resistance. Thus, the legislation was not "rendered meaningless." It achieved its objective as written.

111. Unfortunately, the history of legislation on Nicaragua is replete with examples of supporters using over broad language describing the reach of a law after its enactment. Just as particular members of Congress attempted to give further definition to the 1984 Amendment two years after its enactment by asserting that it applied to the NSC, some members of Congress had previously attempted to redefine the meaning of the 1982 Boland Amendment by issuing *ex post facto* comments after it was enacted.

The 1982 Boland Amendment prohibited the Defense Department and the CIA from giving aid to the Contras "for the purpose of overthrowing the government of Nicaragua." See *supra* note 16. In the process of passing the 1982 Boland Amendment, the House had voted against proposed legislation that would have imposed even greater restrictions on aid. Representative Tom Harkin (D-Iowa) proposed legislation that would have prohibited aid to assist any group or individual "in carrying out military activities in or against Nicaragua." 133 CONG. REC. H4585-86 (daily ed. June 15, 1987). In introducing legislation similar to Representative Harkin's bill, Senator Christopher Dodd (D-Conn.) explained that "[t]here are any number of ways of circumventing" the 1982 Boland Amendment, which he characterized as a "green light" for continued covert action in Nicaragua. *Id.* at H4597. Thus, according to the 1987 Congressional Research Service study, Congress, in voting for the 1982 Boland Amendment as opposed to the more restrictive legislation, "clearly understood at the time of enactment that the [Boland] compromise would not cut off all direct or indirect assistance to the contras." *Id.* at H4585.

Yet, a year after its passage, congressional critics asserted that the 1982 Boland Amendment accomplished the objective of ending all assistance. According to Representative Lee Hamilton (D-Ind.), "covert action against Nicaragua is against our laws. The first law in question is the Boland amendment, passed last year [in 1982]." *Id.* at H4625.

Assertions such as these led the ranking minority member on the House Intelligence Committee, Representative Kenneth Robinson (R-Va.), to make the following response:

The House voted down a legislative amendment [Harkin] which would have denied funds for the purpose of carrying out covert activity . . . . The House, however, adopted the [1982] Boland amendment by a vote of 411 to 0. In so doing, the House approved the concept . . . that a covert paramilitary operation in Nicaragua was acceptable.

*Id.* at H4623. Representative Robinson also categorically denied that the Boland amendment had been violated. *Id.* at H4651.

## 2. The Dog that Did Not Bark: Contemporaneous Legal Opinions on the Amendment

One of the most surprising things about the Iran-Contra majority's report is that it offers no contemporaneous legal opinions which support its contention regarding the Amendment's jurisdictional ambit. Even a casual review of the press accounts indicates that there was a great deal of speculation in 1985 about the NSC's activities. Given the earlier recitation of a number of members of Congress, news commentators, and intelligence experts, who noted that the application of Boland to the NSC was questionable at best,<sup>112</sup> it is highly probative that no legal memoranda by President Reagan's opponents emerged analyzing the reach of the law.

In fact, aside from the PIOB's legal memorandum, the Iran-Contra majority report makes references to only two contemporaneous opinions. One opinion is an undated memorandum prepared by the Congressional Research Service of the Library of Congress sometime after August 13, 1985.<sup>113</sup> According to the Iran-Contra majority report, the undated memorandum found "strong, if not conclusive evidence that the [language] was intended to apply to the National Security Council."<sup>114</sup> However, it is difficult to evaluate this legal memorandum because the committees did not see fit to reproduce it in the over fifty volumes of material that they published.

The other memorandum cited by the majority report to support the contention that the Amendment applied to the NSC was a staff memorandum prepared on August 8, 1985, for Representative Henry J. Hyde (R-Ill.), a supporter of Contra aid.<sup>115</sup> This cursory and conclusory memorandum recited the same arguments addressed by others.<sup>116</sup> In fact, Representative Hyde later wrote:

I was never convinced that the analysis in that memorandum about the applicability of the Boland Amendments to the NSC was correct. . . . As I studied those matters more deeply during the Iran-Contra proceedings, I decided that the stronger arguments pointed to the conclusion that the Boland Amendments did not apply to the NSC.<sup>117</sup>

In fact, it was the lack of significant contemporaneous legal opin-

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112. See *supra* notes 87-96 and accompanying text.

113. IRAN-CONTRA REPORT, *supra* note 1, at 400.

114. *Id.*

115. *Id.*

116. See *supra* notes 39-42 and accompanying text; see also 5 *Iran-Contra Hearings*, *supra* note 23, at 1273-76 (exhibit BGS-26; Stephen K. Berry Memorandum).

117. Hyde, *Boland Rules Did Not Cover NSC*, Wall St. J., June 12, 1989, § A, at 15, col. 1 (letter to the editor).

ions that may have led the Iran-Contra majority to misrepresent both the PIOB's memorandum and my testimony in order to bolster its position that the Amendment applied to the NSC. The record clearly indicates that neither the memorandum nor my testimony supported the proposition that the law applied to the NSC. Yet, the Iran-Contra committees' majority report distorted this record to fit its partisan predilections.<sup>118</sup>

For example, the majority report states that "Sciaroni based his opinion on certain key factual premises that turned out to be incorrect."<sup>119</sup> However, while some of the facts recited in the PIOB factual inquiry turned out to be incorrect,<sup>120</sup> no connection existed between the factual inquiry and the legal analysis in the Board memorandum. In fact, the legal analysis was done before the factual inquiry and different facts would not have changed the Board's legal conclusion that the Amendment did not apply to the NSC.<sup>121</sup>

Even so, despite my repeated testimony to the contrary, this position continued to be misrepresented. For example, Senator William Cohen (R-Me.) said that "we have a situation in which incomplete, misleading information is given to counsel such as Mr. Sciaroni, leading him to a conclusion."<sup>122</sup> Yet, just minutes prior to that assertion, I gave testimony contrary to Senator Cohen's statement, stating that the legal conclusion stood regardless of the factual circumstances concerning North's activities.<sup>123</sup>

The Committee's majority report does state that "[Sciaroni] concluded that the NSC was not an agency or entity 'involved' in intelli-

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118. The final report of the Iran-Contra Committee's majority was so full of errors that it led one of the minority members, in describing a book written by one of the figures in the Iran-Contra affair, to quip that the book had "more truth on almost any page than in the entire Iran-Contra Committee official report." Wash. Post, Nov. 6, 1988, (Book World), at 12, col. 3 (Representative James Courter [R-N.J.] regarding M. LEDEEN, *supra* note 1).

119. IRAN-CONTRA REPORT, *supra* note 1, at 400. Ironically, the results of subsequent factual inquiries by the PIOB regarding the NSC's activities proved to be of no interest to the Iran-Contra committees. See, e.g., 5 *Iran-Contra Hearings*, *supra* note 23, at 443 (colloquy between Bretton G. Sciaroni and Sen. Warren Rudman).

120. The memorandum faithfully recited the facts as presented to me. Unfortunately, they did not accurately reflect the activities of the NSC. In explaining why the correct facts were not given to me, Lt. Col. North testified that "[w]e viewed this to be a covert operation and [Sciaroni] had absolutely no need to know the details of what I was doing." 7 *Iran-Contra Hearings* (pt. 1), *supra* note 23, at 171 (testimony of Lt. Col. Oliver L. North).

121. See, e.g., 5 *Iran-Contra Hearings*, *supra* note 23, at 400, 417, 445; 24 *Iran-Contra Depositions*, *supra* note 38, at 925, 954-55 (testimony of Bretton G. Sciaroni).

122. 5 *Iran-Contra Hearings*, *supra* note 23, at 447 (statement by Sen. William Cohen).

123. *Id.* at 445 (testimony of Bretton G. Sciaroni). The committees' misrepresentation continues to find its way into print. See, e.g., Blanton, *supra* note 26, at 118. Blanton twice repeats the Iran-Contra majority's assertion that the Board's legal conclusion was based on false representations by North. *Id.*

gence activities from the factual premise that 'it is a coordinating body with no operational role,' so that the NSC 'does not function as an operational unit.'"<sup>124</sup> Presumably, since the NSC did turn out to have an operational role in the Iran-Contra affair, this undermined the validity of my conclusion.

No doubt, the traditional role of the NSC as primarily a coordinating body explains, in part, why it was not considered a member of the intelligence community. But it was never even implied that the NSC was precluded by law or custom from assuming an operational role regarding intelligence activities in accordance with the President's constitutional prerogatives. Indeed, according to the Tower Commission report, the National Security Council, the National Security Adviser, and the NSC staff "are the means through which the creative impulses of the President are brought to bear on the permanent government."<sup>125</sup> Furthermore, the National Security Act<sup>126</sup> "rightly give[s] the President wide latitude in fashioning exactly how these means are used."<sup>127</sup> Thus, the NSC's flexibility to assume an operational role did not in any way alter the legal determination that the Amendment did not apply to the NSC.<sup>128</sup>

### 3. Conclusion

The Iran-Contra committees' majority report asserts that the Amendment clearly applied to the NSC. Yet, the minimal legal analysis offered in their report is unpersuasive. Neither the words of the Amendment nor Representative Boland's subsequent explanations demonstrate that the NSC was meant to be covered.<sup>129</sup> Moreover, even if Representative Boland and Congress as a whole intended for the NSC to be included, the statute, as enacted, failed to accomplish this objective. Also, the Iran-Contra majority, which maintained in 1987 that the law's meaning was clear, could offer no authoritative contemporaneous legal opinions supporting its contention.

Furthermore, if Representative Boland or any other member of

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124. IRAN-CONTRA REPORT, *supra* note 1, at 400.

125. TOWER COMMISSION REPORT, *supra* note 1, at V-1.

126. 50 U.S.C. § 402 (1982).

127. TOWER COMMISSION REPORT, *supra* note 1, at V-1.

128. 5 *Iran-Contra Hearings*, *supra* note 23, at 404; 24 *Iran-Contra Depositions*, *supra* note 38, at 925-26, 947-48, 956 (testimony of Bretton G. Sciaroni).

129. Thus, former Watergate prosecutor Philip Lacovara stated "that if Congress intended the [A]mendment to apply to 'others than those persons connected with official intelligence agencies, it could and should have said so.'" Church, *But What Laws Were Broken?*, TIME, June 1, 1987, at 25.

Congress strongly felt that there was a “loophole” in the law and that the NSC should be covered, then subsequent legislation could have been introduced to close such loopholes and include the NSC. The issue concerning the NSC’s activities was of considerable concern over many months and was the subject of intense congressional scrutiny in 1985 and 1986. Yet, Representative Boland did not attempt to muster a majority of his colleagues to regulate the activities of the President and his staff.

#### IV. DID THE AMENDMENT AMEND THE SEPARATION OF POWERS DOCTRINE?<sup>130</sup>

An additional argument against a “broad” reading of the Amendment is that, so construed, it would have become an unconstitutional congressional effort to control the exercise of core functions of the coordinate political branch—an action which runs afoul of the separation of powers principle.<sup>131</sup> The separation of powers doctrine is a key principle underlying the U.S. constitutional framework. The division of the federal government into the three separate and coordinate branches—legislative, executive, and judicial—and the assignment to them of their respective powers, provides the basis for the doctrine. The Founding Fathers opined that the separation of powers was a fundamental principle, a “sacred maxim,” of the Constitution.<sup>132</sup> Writing in *The Federalist No. 47*, for example, James Madison stated that “the preservation of liberty requires that the three great departments of power should be separate and distinct.”<sup>133</sup> Therefore, although the text of the Constitution does not explicitly refer to the separation of powers doctrine, the Founders clearly embraced this doctrine as implicit in the new government’s design. Moreover, the separation doctrine has been endorsed by subsequent Supreme Court cases as an operative principle of the U.S. government.<sup>134</sup>

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130. Representative Henry Hyde (R-Ill.) stated: “There is a doctrine called separation of powers that has not been amended by the Boland act, I am sure.” 5 *Iran-Contra Hearings*, *supra* note 23, at 428 (statement by Rep. Henry Hyde).

131. It is this author’s position that the Amendment was constitutionally suspect. See 5 *Iran-Contra Hearings*, *supra* note 23, at 419, 449, 457, 458; 24 *Iran-Contra Depositions*, *supra* note 38, at 968-69 (testimony of Bretton G. Sciaroni).

132. THE FEDERALIST NO. 47, at 331 (J. Madison) (J. Cook ed. 1961).

133. *Id.* at 324 (J. Madison). Madison commented during the Constitutional Convention: “If it be a fundamental principle of free Gov[ernment] . . . that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised.” 2 THE RECORDS OF THE FEDERAL CONVENTION 56 (M. Farrand ed. 1937).

134. For example, the U.S. Supreme Court has stated, “The Constitution, in distributing the powers of government, creates three distinct and separate departments . . . . This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital . . . namely, to preclude a commingling of these essentially

Thus, the Constitution was designed to establish the structure of government that would prevent undue concentrations of power—an arrangement which, among other things, serves to protect individual liberties—and to set up a system of checks and balances to guard against the legislative tendencies to aggrandize power. The key to this scheme was the creation of a strong, energetic, and independent executive. According to *The Federalist No. 70*, “[e]nergy in the executive is a leading character in the definition of good government.”<sup>135</sup> In the new Constitution, energy led to virtue reposed in the Executive because of its “ingredients” of unity of office, duration, and accountability. The clear expectation of the Framers was that the President, armed with a full panoply of his constitutional prerogatives, would vigorously resist legislative encroachments, and thus preserve the separation of powers. One scholar stated:

Personal firmness [by the executive] is needed in standing up to the legislature, which is most likely to reflect popular delusions and in republican governments tends to absorb the executive and the judiciary. Separation of powers requires independence in the powers, and above all, in practice, firmness in the executive, since the usual danger in republics is legislative domination and usurpation of the executive and judicial powers. Publius makes the executive the guarantor of separation of powers as well as the defender of the republican principle.<sup>136</sup>

What was true for executive power in general was especially true regarding the President's conduct of foreign policy. The energy that was a general virtue of the Executive was a particular virtue when the conduct of foreign relations was involved: “Energy in Government is essential to that security against external and internal danger . . . .”<sup>137</sup> The Executive will be able to act where the legislature cannot because his actions will be characterized by “[d]ecision, activity,

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different powers of government in the same hands.” *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933). In discussing the potential conflict between the separate powers of Congress and officers of the executive branch, the Supreme Court more recently opined that “[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.” *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). The Court also has stated that Congress may not grant itself executive functions in order “to increase its own powers at the expense of the Executive Branch.” *Morrison v. Olsen*, 108 S. Ct. 2597, 2620 (1988).

135. THE FEDERALIST NO. 70, at 471 (A. Hamilton) (J. Cooke ed. 1961).

136. Mansfield, *Republicanizing the Executive*, in *SAVING THE REVOLUTION* 162, 180 (C. Kesler ed. 1987).

137. THE FEDERALIST NO. 37, at 233 (J. Madison) (J. Cooke ed. 1961). One constitutional expert described the importance of foreign affairs to the Founding Fathers as follows: “Problems of security and diplomacy were among the dominant preoccupations of the men who met at Philadelphia, and first among their arguments for Union.” Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 845 (1972).



secrecy, and dispatch.”<sup>138</sup> An executive energy with these characteristics “is essential to the protection of the community against foreign attacks.”<sup>139</sup> In addition, foreign policy was clearly viewed as primarily the province of the Executive: “The actual conduct of foreign negotiations . . . the arrangement of the army and navy, the direction of the operations of war; these and other matters of a like nature constitute what seems to be most properly understood by the administration of government.”<sup>140</sup>

The Constitution vests in the President certain plenary powers in the field of foreign relations.<sup>141</sup> Both historical and judicial precedent confirm the President’s broad mandate in foreign affairs. In the seminal case of *United States v. Curtis-Wright Export Corp.*,<sup>142</sup> the Supreme Court stated:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . .<sup>143</sup>

In those areas in which both the Executive and Congress have constitutional powers bearing on foreign relations, political strife between the two branches is perhaps inevitable.<sup>144</sup> Nevertheless, while Congress itself has certain foreign affairs powers, this does not imply that the Executive and Congress are constitutional equals in the foreign affairs domain. While the President possesses all of the executive power, which encompasses the sum of all powers appertaining to the external sovereignty of the U.S., Congress has only limited and specifically enumerated powers. Moreover, Congressional powers are to be strictly construed.<sup>145</sup>

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138. THE FEDERALIST NO. 70, at 472 (A. Hamilton) (J. Cooke ed. 1961).

139. *Id.* at 471.

140. THE FEDERALIST NO. 72, at 486-87 (A. Hamilton) (J. Cooke ed. 1961).

141. The main textual basis for this authority is *not* found within the few explicitly enumerated presidential powers or extrapolations from them; rather, it is the grant of the “executive power” to the President. For a discussion of this issue, see Block & Rivkin, *The Battle to Control the Conduct of Foreign Intelligence and Covert Operations: The Ultra-Whig Counterrevolution Revisited*, 12 HARV. J.L. & PUB. POL’Y 303, 307-20 (1989).

142. 299 U.S. 304 (1936).

143. *Id.* at 319-20. Justice Sutherland’s formulation closely resembled that of Chief Justice John Marshall, who stated in 1799, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 177 (4th ed. 5th printing 1968).

144. Thus, in Corwin’s formulation, the Constitution constituted “an invitation to struggle for the privilege of directing American foreign policy.” E. CORWIN, *supra* note 143, at 171.

145. Even Thomas Jefferson, who did not generally favor constitutional interpretations which supported implied presidential powers, stated that “[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the sen-

Limitations on Congressional foreign affairs powers by the Framers of the Constitution reflect both their wariness of the legislative branch with its propensity for self-aggrandizement, and their endorsement of the Executive as the dominant foreign policy decision-maker. The call for a Constitutional Convention arose largely because the Articles of Confederation had proved deficient, especially with regard to establishing a responsible and responsive Executive. In *The Federalist No. 51*, Publius observed that "[i]n republican government the legislative authority, necessarily, predominates."<sup>146</sup> Indeed, the Framers warned against the "propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments . . . ."<sup>147</sup>

Despite its considerable breadth, the presidential foreign affairs authority is neither unlimited nor exclusive. After all, the Court in *Curtis-Wright* noted that the President's plenary and exclusive power in foreign affairs is conditioned by other "applicable provisions of the Constitution."<sup>148</sup> The Senate, for example, must give its advice and consent to treaties and ambassadorial appointments.<sup>149</sup> Congress has the power to declare war.<sup>150</sup> It also has the power to regulate foreign commerce,<sup>151</sup> to define offenses against the law of nations,<sup>152</sup> and to set rules for governmental operations.<sup>153</sup> Lastly, Congress has the power to appropriate money for the federal government, perhaps

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ate. Exceptions are to be construed strictly . . . ." 5 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 161 (Apr. 24, 1790) (P. Ford ed. 1895). For more information regarding Jefferson's view about presidential power, see Schmitt, *Jefferson and Executive Power: Revisionism and the "Revolution of 1800,"* 17 PUBLIUS 7-25 (Spring 1987).

146. THE FEDERALIST No. 51, at 350 (A. Hamilton or J. Madison) (J. Cooke ed. 1961).

147. THE FEDERALIST No. 73, at 494 (A. Hamilton) (J. Cooke ed. 1961). This point seemed totally lost on the majority of the Iran-Contra committee, which asserted:

The Framers were determined not to combine the power of the purse and the power of the sword in the same branch of government. They were concerned that if the executive branch had both the power to raise and spend money, and control over the armed forces, it could unilaterally embroil the country in war without consent of Congress, notwithstanding Congress' exclusive power to declare war.

IRAN-CONTRA REPORT, *supra* note 1, at 411-12.

148. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

149. U.S. CONST. art. II, § 2, cl. 2. For a discussion of the decision by the framers to divide responsibilities for treaties between the President and the Senate, see Erler, *The Constitution and the Separation of Powers*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 151, 160-61 (L. Levy & D. Mahoney ed. 1987).

150. U.S. CONST. art. I, § 8, cl. 11.

151. *Id.* § 8, cl. 3.

152. *Id.* § 8, cl. 10.

153. *Id.* § 8, cl. 14.

the most formidable of its powers: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."<sup>154</sup>

However, both practical and constitutional limitations affect Congress's appropriation power. In the field of foreign relations, the initiative still lies with the Executive. Thus, when Theodore Roosevelt sent the U.S. Navy on a world-wide tour in 1908,<sup>155</sup> and, more recently, when, in spite of widespread criticisms of the policy involved, Presidents Johnson and Nixon committed U.S. troops to Vietnam, Congress was loath to vote to cut off funds. In a practical sense, once the Executive has committed U.S. forces to a course of action, it has proven to be politically difficult for Congress to alter that commitment simply through the use of its appropriation power.

Even more importantly, there are constitutional limitations on the exercise of Congressional appropriations power in the field of foreign relations.<sup>156</sup> According to one constitutional scholar, "[i]f Congress cannot properly withhold appropriations for the President's activities, it ought not be able to impose conditions on such appropriations."<sup>157</sup> In other words, Congress cannot regulate indirectly through appropriations that which, because of specific constitutional restrictions, it could not control directly.<sup>158</sup> For example, "should Congress provide that appropriated funds shall not be used to pay the salaries of State Department officials who promote a particular policy or treaty, the President would no doubt feel free to disregard the limitation . . . ."<sup>159</sup>

The conflict between the respective powers of the Executive and Legislative Branches in the domain of foreign affairs raises the issue of the expansive reading of the Amendment—whether Congress can control the foreign policy activities of the President and his assistants through an appropriations measure. As discussed, there is considerable weight of constitutional authority to support the proposition that Congress does not have the right to condition any salaries in the executive branch.<sup>160</sup> For example, one commentator, L. Gordon

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154. *Id.* § 9, cl. 7.

155. S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 824 (1965).

156. Certain actions of the President cannot be directly controlled by Congress. In the earliest days of the republic, Chief Justice Marshall wrote that "by the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

157. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 113 (1972).

158. *See, e.g., Fairbank v. United States*, 181 U.S. 283, 294 (1901).

159. L. HENKIN, *supra* note 157, at 113.

160. The proponents of a broad reading of the Amendment suggest that Congress can control the conduct of the President and his aides by imposing restrictions on the funds from which their salaries are drawn. This contention, however, clearly leads to absurd results. For example, one newspaper account reported the following: "Some

Grovitz, has asserted that, "if, instead of simply withholding appropriations, Congress tries to attach conditions to the spending of authorized funds, such conditions cannot be used to usurp the constitutional authority of the executive branch."<sup>161</sup> To support this assertion, Crovitz cited to a leading U.S. Supreme Court case, *United States v. Lovett*:<sup>162</sup>

The Lovett case bears directly on Representative Boland's claim that his amendment prohibited executive-branch officials from helping the contras by reason of their receiving federal salaries appropriated by Congress. If Congress could limit the normal activities of any executive-branch official by conditioning his salary, it could make executive policy by using the power of the purse. For example, Congress could use the fact that it appropriates the President's salary to deny him the power to veto its bills.<sup>163</sup>

When this issue was fully joined before the select committee, a number of commentators objected to this interpretation of Boland as being unconstitutional. For example, two law professors wrote that "the president might, quite reasonably, never have interpreted the statute as applying to him or his men."<sup>164</sup> They asserted that various Supreme Court and federal court decisions

suggest that whereas Congress has the power to 'withhold' or not appropriate funds, once funds have been appropriated it does not have the power to 'condition' how they will be spent if the effect is to emasculate constitutionally protected powers [of the Executive]. For example, Congress does not have the power to impinge on the conduct of other executive officials—say, the solicitor general, by linking appropriations to him to the positions he is to take in arguments before the U.S. Supreme Court.<sup>165</sup>

Others have also argued on behalf of the powers of the presidency. One political scientist argued that laws like the Amendment are "unconstitutional in intent":

The logic of congressional supremacists leads to ludicrousness: because Congress appropriates all funds, including all executive-branch salaries, and pays

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legal experts argue that, because the president is involved in intelligence work and his salary and phone bills are paid from government funds, he was covered by the Boland amendment. By this reasoning, Mr. Reagan's telephone call constituted use of government resources to provide prohibited 'indirect' military aid." Seib, *supra* note 28, at 56.

161. Crovitz, *supra* note 71, at 28.

162. 328 U.S. 303 (1946).

163. Crovitz, *supra* note 71, at 28; see also Crovitz, *The Criminalization of Politics*, in *THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS* 239 (G. Jones & J. Marini ed. 1988); Balmer, *The Use of Conditions in Foreign Relations Legislation*, 7 *DEN. J. INT'L L. & POL'Y* 197 (1978); Note, *Limiting the Use of Funds Appropriated for Executive Functions: Is the 1984 Boland Amendment Constitutional?*, 13 *OKLA. CITY U.L. REV.* 569 (1988).

164. Wallace & Gerson, *The Dubious Boland Amendments*, *Wash. Post*, June 5, 1987, § A, at 27, col. 2. President Reagan did belatedly interpret the statute as not applying to him or his staff. See *supra* note 29.

165. Wallace & Gerson, *supra* note 164, at 27.

White House telephone and heating bills, Congress can forbid even any "indirect" use of funds that might aid the [contras, such] as Reagan's speaking in the White House with the Saudi king concerning Saudi aid to the contras, or using the telephone to call the leader of Honduras to urge cooperation with the contras. This argument annihilates the doctrine of separation of powers, and the presidency.<sup>166</sup>

The same argument properly applies to the President's staff. Although one may sympathize with those who find it difficult to know "where one draws the line between the president's men and those officials more directly subject to congressional controls,"<sup>167</sup> the case at hand is not a difficult one. The reinterpretation of the Amendment by the Iran-Contra majority amounts to an effort to control the activities of the President's staff. As noted by George Will, "[e]ither the president has powers or he does not. If his actions in foreign policy can be micro-managed by Congress, then he does not have significant power regarding foreign policy. But the language and structure of the Constitution say he has those powers. History says so too."<sup>168</sup>

To summarize, if the broad interpretation of the Amendment espoused by the majority of the Iran-Contra committee indeed reflected the legislative intent, then it amounted to an unconstitutional congressional effort to condition the salary of the President. It is worth repeating that this Amendment went beyond the mere control over the activities of the executive branch agencies involved in intelligence operations, but, according to members of Congress in the wake of the Iran-Contra revelations, was intended to reach into the White House itself and control the activities of the President and his staff.<sup>169</sup>

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166. Will, *The 'Spirit' of Boland, A Pseudo-Law*, Wash. Post, May 24, 1987, § D, at 7, col. 5.

167. Wallace & Gerson, *supra* note 164, at 27.

168. Will, *supra* note 166, at 7. In fact, history not only establishes the President's ability to act in the realm of foreign relations, but also indicates that the NSC staff can be used by the President unfettered by congressional conditions. When the NSC was created by statute in 1947, Congress did not attempt to control its activities. Indeed, Congress gave it broad discretion by authorizing it to perform "such . . . functions as the President may direct . . ." 50 U.S.C. § 402(b) (1982). In the entire history of the NSC, Congress made no attempt to condition, restrict, or otherwise define how the President might choose to use the staff.

169. The issue as to whether the activities of Lt. Col. North were covered by the Amendment was not fully covered in the PIOB's legal memorandum. The Board's understanding at that time was that he was not engaged in the alleged activities; thus, the memorandum merely stated in a footnote that "[a]lthough the NSC is not subject to the Boland Amendment prohibitions, nevertheless LtCol North might be, as he evidently is on a non-reimbursed detail from the Marine Corps." *5 Iran-Contra Hearings, supra* note 23, at 1160 (exhibit BGS-9).

The concern as to whether Lt. Col. North's activities constituted a technical violation of the law arose because of the language Representative Boland used in describing the Amendment's application. Rep. Boland stated that the Amendment "clearly prohibits

## V. CONCLUSION

The 1984 Amendment did not apply to the NSC. This fact clearly emerges from an analysis of the statutory text and the legislative history. Of the two possible interpretations of the Amendment's jurisdictional ambit, the narrower interpretation, developed by the President's Intelligence Oversight Board, was supported by the Amendment's text, its legislative history and the circumstances surrounding its passage. The arguments advanced to support the "broad" reading of the Amendment are ultimately unpersuasive. Significantly, the majority report of the Iran-Contra committees added little to this debate other than to proffer discredited arguments that already had been adduced in the PIOB memorandum of September 12, 1985.<sup>170</sup> Ultimately, however, the reason that the Amendment could not have applied to the NSC was that such an interpretation would have made it unconstitutional. The courts have ruled that Congress cannot infringe on the core functions of the coordinate branches by attaching conditions to appropriations.

Unfortunately, despite the analytical flaws of the broad reading of

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any expenditure, including those from accounts for *salaries . . .*" 133 CONG. REC. H4830 (daily ed. June 15, 1987) (emphasis added).

The origins of this explanation evidently sprung from the contentious legislative history of funding for the Nicaraguan resistance. Prior to the passage of the 1984 Amendment, Democrat opponents alleged that the CIA had exceeded the congressionally imposed spending limits for the Nicaraguan program. The opponents alleged improper accounting procedures because the CIA lacked accountings for "fixed" costs, including ordinary costs of operations such as overhead, rent, salaries—costs that are totally separate from funds used for material support for the Contras. Thus, Democrats charged that previous funding restrictions had been circumvented by not taking into account these fixed costs, including the salaries of intelligence officers who worked on the Nicaraguan program. The congressional criticism had been so severe that the CIA would not even transfer items to the Contras that were purchased within the previous budget ceiling and before the Boland prohibition. *See, e.g., 5 Iran-Contra Hearings, supra* note 23, at 1234 (exhibit BGS-19).

In any case, Representative Boland was most likely addressing the issue of CIA's accounting procedures on October 11, 1984, and not whether the Amendment applied to the NSC staff. Nevertheless, had the matter of Lt. Col. North's salary been handled differently, the White House would have been able to mitigate some of the subsequent political difficulties. For example, it would have been prudent to have paid his salary out of the NSC account, funds which were not impacted by the Amendment.

Furthermore, if the range of Lt. Col. North's activities had been known, as well as whether he was on a non-reimbursed detail, *i.e.*, that he was being paid out of Defense Department funds, an elaboration of the constitutional issues addressed herein would have been necessary in the PIOB memo. Whether Lt. Col. North was on a reimbursed detail, the principle remains that Congress cannot control the activities of the President or his White House advisers through appropriations.

170. In fact, the majority report's contribution to the debate become especially thin when its misrepresentations of the Board's position are deleted.

the Amendment, the debate over it, and the related events of the Iran-Contra affair, is unlikely to be definitively resolved. Despite bold assertions by grandstanding Iran-Contra committee members,<sup>171</sup> the Amendment will likely never be litigated on its merits. Although the alleged violation of the Amendment appeared to be an important part of the indictment against Rear Admiral John Poindexter and Lt. Col. Oliver North,<sup>172</sup> the history of both cases indicates a retreat from this contention. For example, in response to motions filed by Lt. Col. North's attorney to dismiss charges, the special prosecutor denied that the Amendment violations were central to the case: "The essence of the crime is not the provision of support for the Contras *per se*; the defendants are not charged simply with conspiring to violate the Boland Amendment as such."<sup>173</sup> Rather, the "essence of the crime" was deceiving Congress about the support rendered to the Nicaraguan resistance.<sup>174</sup>

Subsequently, the rather circuitous charges related to Contra aid were dropped. Prior to the commencement of the trial, the special prosecutor dropped the main charges of conspiracy to defraud the U.S. government by allegedly violating the Amendment and "stealing" the funds generated by the Iranian arms sales.<sup>175</sup> Furthermore,

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171. Thus, according to Senator Warren Rudman (R-N.H.), "[t]his Congress assumes . . . that when it passes a law, that an outrageous, blatant attempt to subvert the law will be recognized by the courts for what it is, because courts always recognize attempts to subvert the law." 5 *Iran-Contra Hearings*, *supra* note 23, at 444 (Mr. Bumble colloquy). This statement was representative of the numerous commentaries made during the course of the hearings which attempted to criminalize executive-congressional policy differences. However, given the congressional presentation of the Iran-Contra affair as the crime of the century, the ultimate conviction of Lt. Col. North for the most minor of charges must have been anticlimactic for the former New Hampshire prosecutor.

172. For the language of the indictment, see *supra* note 22.

173. Memorandum of Points and Authorities in Opposition to Defendant's Motions to Dismiss or Limit Count One at 18, *United States v. North*, 716 F. Supp. 644 (D.D.C. 1989) (No. 88-0080-02); see also *id.* at 28 ("Whether or not an agreement openly to violate the Boland Amendment . . . would, without more, constitute a conspiracy to defraud the United States, the indictment here alleges far more."); *id.* at 33 ("Thus, even if it were the case that the activities of North and his co-conspirators had fallen within some sort of loophole in the Boland Amendment . . . the broader problem with their deceitful activities would remain: the defendants, aware of a clearly expressed congressional statutory effort to limit and closely monitor funding for the . . . Contras, chose to hide their activities from Congress to ensure that Congress would not have the opportunity to consider whether to close any such loophole."). One commentator aptly characterized the essence of the special prosecutor's charge: "[I]t's a crime to 'conspire' to commit a non-violation [of law] if that non-violation is something Congress might later outlaw." Crovitz, *The U.S. vs. U.S. v. North*, Wall St. J., Nov. 16, 1988, § A, at 18, col. 3. Thus, the commentator concluded, "This is a mind-boggling theory of criminalization. Under the Anglo-American system, crimes are supposed to be defined with precision, not by what Congress might do." *Id.*

174. Memorandum of Points and Authorities in Opposition to Defendant's Motions to Dismiss or Limit Count One at 18, *North* (No. 88-0080-02).

175. *Walsh Calls on Court to Drop Main Charges Against North; Disclosure of Secrets Feared*, N.Y. Times, Jan. 6, 1989, § A, at 1, col. 3. The only counts remaining in

the proceedings against former National Security Adviser John Poindexter evidently have encountered the same difficulties; the conspiracy counts concerning the diversion of funds to the Nicaraguan resistance have been dropped.<sup>176</sup>

Regardless of whether the issue of the Amendment's reach is ever adjudicated, there are lessons to be learned from this controversy. The debate over the Amendment and the actions of both Congress and the Executive are symptomatic of significant failings on the part of both branches of government.

The origins of the controversy are rooted in a policy dispute between the Executive and Congress, and the series of the Boland Amendments constituted an improper attempt by Congress not only to set the foreign policy of the United States, but also to micro-manage its implementation. More specifically, the various inter-branch negotiations and congressional enactments over a multi-year period led to the phenomenon of various congressional members actually legislating the most minute details of how the Nicaraguan program was to be run. Although the general concept of congressional micro-management is perhaps not a new one, Capitol Hill's involvement in determining the Nicaraguan policy represented one of its most extreme applications in recent years. The congressional hearings revealed only some of the finite, detailed requirements imposed on those charged with managing the program.

There were a number of reasons why Congress engaged in micro-management of U.S. foreign policy. Some in Congress have confused the legislative role with the administrative or even operational role that is properly the domain of the executive branch. Others, no doubt, used the infinite variety of conditions and restrictions as a way of impeding a policy that they could not directly end, hoping instead to so encumber the program with legal requirements so as to frus-

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the trial concerned obstruction of justice and accepting a gift of a security fence. Although the main charges were dropped because of the concern surrounding the disclosure of classified material during the trial, the question regarding whether the special prosecutor could have successfully prosecuted Lt. Col. North for violations of the Amendment remains unanswered. Lt. Col. North was aware of, and evidently even possessed a copy of, the PIOB opinion regarding the Amendment. Thus, it would have been difficult to prove that Lt. Col. North had the requisite *mens rea*, regardless of whether the Amendment applied to the NSC. See Crovitz, *supra* note 173 ("Lt. Col. North relied on [the conclusion of the PIOB's opinion], which would make it hard to prove he intended to violate the law."); see also Sciaroni, *supra* note 29.

176. See, e.g., Johnston, *U.S. Drops Part of Its Case Against Iran-Contra Figures*, N.Y. Times, June 17, 1989, § A, at 7, col. 4 (special prosecutor to drop charges including the illegality of the Contra aid).



trate its implementation and indirectly defeat its purpose. Still others insisted on provisions concerning particular matters of personal concern in exchange for their vote for a Contra aid package.

The mustering of a majority vote for either side was always problematic, because of the highly charged political environment in which the Nicaraguan aid proposals were considered. Vague and even contradictory language was frequently and intentionally employed to assemble the requisite number of votes for legislation. This activity was practically admitted to by Contra aid opponents. For example, Representative Sam Gejdenson (D-Conn.) commented on the Amendment: "We were trying to put together a package that could withstand a very popular President, and some of us said when they were written that they weren't tight enough."<sup>177</sup> Alluding to the inconsistencies contained in the legislation, he stated, "We had to give people some protection. They couldn't go back to their district and just say, 'I want to cut off aid because it's dumb policy.'"<sup>178</sup> In short, the number of different and even contradictory conditions required for the passage of the various Boland Amendments led to an ambiguous legal atmosphere surrounding the Nicaraguan program.<sup>179</sup>

Not only were there great differences among consecutive enactments dealing with the Contras, but, to ensure their passage, the individual amendments themselves frequently contained intentional ambiguity. Thus, the 1982 Boland Amendment's language was termed "delphic."<sup>180</sup> The 1984 Amendment was ambiguous as well. Indeed, to deny that the Boland phrase "agency or entity involved in intelligence activities" constituted a term of art is to admit the phrase's ambiguity. Furthermore, the phrase's ambiguity allowed the proponents of the "broad" interpretation to claim subsequently that the Amendment encompassed the NSC. As noted, congressional opponents of the Contra program were not loath to offer *ex post facto* rationales for ambiguous legislation enacted at a point in time distant from the explanation. This general phenomenon has been commented upon:

By using vague language, legislators can avoid making the difficult political choices that they have to confront when drafting a statute precisely. When statutory language is subject to varying interpretations, all sides can claim victory . . . . Legislators agree to disagree, and then try to influence future judicial interpretation by sprinkling the record with contradictory snippets of

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177. Engleberg, *supra* note 64, at 12.

178. *Id.*

179. Among the ambiguities and confusion created by the congressional micromanagement through the Boland Amendments were provisions for sharing intelligence, information, and logistical advice. For a succinct discussion of these issues, see IRAN-CONTRA REPORT, *supra* note 1, at 497-99 (Iran-Contra Committees' Minority Report).

180. ALMANAC OF AMERICAN POLITICS 1984, at 542 (M. Barone & G. Ujifusa ed. 1983).

legislative history.<sup>181</sup>

However, even though Congress passed ambiguous legislation and subsequently proclaimed that all was clear in 1984 and that disagreement with them constituted criminal conduct, the executive branch was not blameless. At a minimum, the Executive lacked courage. This failing was manifested at two key points: an initial lack of courage in 1984, when the Amendment was first enacted, and a subsequent failure of nerve once the crisis broke in the fall of 1986.

First, the Reagan Administration should have objected in the strongest terms possible to the Amendment at the time the Continuing Resolution was enacted.<sup>182</sup> The executive branch had two options. The first was to veto the resolution containing the Boland measure.<sup>183</sup> The problem, of course, was that the resolution included nine separate appropriations bills and its enactment was believed to be necessary to keep the federal government functioning. However, even if President Reagan felt compelled to sign, he should have made it clear at the time that the Amendment was of limited application and constitutionally suspect. The honest approach would have put Congress on notice that the Administration would not accept subsequent congressional explanations of what this ambiguous legislation meant. This approach would have strengthened the subsequent assertion of the President's constitutional prerogatives, as well as the definition of the Boland phrase as a statutory term of art.

The Administration's mistake in not announcing its reservations about the Amendment at the time of its enactment was not its worst mistake. After all, if Congress has left loopholes in legislation that benefit the Executive, the Administration is under no affirmative

181. Kozinski, *supra* note 109, at 18.

182. See *supra* note 47 and accompanying text.

183. One chronicler of the Iran-Contra affair noted the previous history of Boland Amendments:

The last time the White House stood its ground was in 1983, when an early version of the most restrictive Boland amendment was introduced into the Continuing Resolution. If passed, it would have prohibited the administration from providing assistance to the *contras*. Sen. Ted Stevens, the Republican floor leader, asked Judge Clark [the NSC adviser] what he should do about the amendment, and Clark told him that if it was not removed, Stevens should kill the entire bill. Reagan would not sign it. Stevens conveyed the message, and the amendment was defeated, but that was the last time the White House took such a stand.

M. LEDEEN, *supra* note 1, at 66; see also Crovitz, *Boland Laws May Be the Real 'Crime'*, Wall St. J., June 4, 1987, § A, at 30, col. 3 (White House threat to veto legislation constituting a total ban on aid to the Contras led to adoption of the vague language of the 1982 Boland Amendment).

duty to inform Congress about the loopholes' existence and when and under what circumstances it intends to utilize them. A mistake worse than failing to warn Congress of the Executive's interpretation of the Amendment was how the Iran-Contra affair was handled once it became public in 1986. Specifically, the Executive did not assert a coherent view of the jurisdictional ambit of the Amendment, nor did it defend its constitutional prerogatives. Thus, its earlier error of not expressing objections or reservations concerning the Amendment was compounded.

When the "diversion" memorandum was discovered in late November 1986, and the Reagan White House opted to make an immediate public announcement revealing its contents, the decision was made to frame the issue primarily in terms of the legality, or even the criminality, of the NSC staff activities.<sup>184</sup> Instead of staking out a forward position and aggressively asserting the general constitutional prerogatives of the President, the Administration let others define the legality of the policies and activities conducted by the executive branch. Thus, rather than determining whether good political judgment was exercised at the White House or whether the NSC had been administered according to sound management technique, the issue was quickly converted into a legal question. This inevitably led to the creation of an independent counsel and helped set the stage for the prosecutorial tone of the congressional hearings.

According to Gordon Crovitz, this strategy constituted a major blunder:

In November 1986, Reagan permitted Attorney General Meese, in announcing that funds from the sale of arms to Iran had been diverted to the *contras*, to treat the matter as a possible crime. What Reagan could and should have done was to go before the American people and say that while the diversion itself had not been authorized, it was consistent with his policy of doing everything within the power of the executive branch unilaterally to help the *contras*.<sup>185</sup>

This assessment has received support from a surprising source. The former chief counsel to the Senate's Iran-Contra Committee, Arthur Liman, observed:

The reality of it is that you had a catastrophe in national policy that the President could have ended before it got off the ground by saying, "Yes, it was a mistake. I authorized it." He even could have dealt with the diversion and he

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184. Interestingly, President Reagan, in his portion of the press conference, did not refer to questions of *legality*, but rather of *propriety*. See Remarks Announcing a Review of the Council's Role and Procedures, 22 WEEKLY COMP. PRES. DOC. 1604 (Nov. 25, 1986). However, the matter of legality was raised repeatedly during Attorney General Meese's press briefing. Although he would not comment on the legality of the activities, it was acknowledged that crimes may have been committed and an independent counsel might be named. See Press Briefing, *supra* note 8, at 5-6, 9, 13, 19.

185. Crovitz, *How Ronald Reagan Weakened the Presidency*, 86 COMMENTARY 25, 27 (Sept. 1988).

would not have been impeached.<sup>186</sup>

In the intervening months between the disclosure of the secret support given to the Contras and the congressional hearings, many additional mistakes were made which resulted in the surrendering of constitutional ground and the creation of unfortunate precedents.<sup>187</sup> Yet, all of these errors flowed from the original strategy adopted by the Reagan Administration. That strategy, according to Crovitz, was for President Reagan "to invoke the ignorance defense, claiming that he had no idea that any of his staff had been helping the *contras* or where the necessary funds had come from."<sup>188</sup> For example, President Reagan told the Tower Commission on January 26, 1987, that he "did not know that the NSC staff was engaged in helping the *Contras*."<sup>189</sup> Thus, others were left to defend the President's constitutional powers. Of course, the Chief Executive is the best person to protect his office and, ultimately, is the only person who can effectively defend his presidential prerogatives. Most presidents instinctively understand the need to protect the institution of the presidency. Yet, in the Iran-Contra affair, this reaction was lacking.

What makes the "ignorance defense" and the President's abandonment of his defense of the office even more incomprehensible is that, despite their protestations to the contrary, President Reagan and other senior administration officials were subsequently shown to be much more involved in the decision-making process regarding aid to Contras during the period of the Amendment's prohibition than was originally acknowledged. The first crack in the "ignorance defense" came with the commencement of the Iran-Contra congressional hearings. The second committee witness, former National Security Adviser Robert C. McFarlane, stated that President Reagan knew and approved of McFarlane's solicitation of Saudi funds for the Con-

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186. *Id.* at 28.

187. One significant concession, already alluded to, concerned the waiving of executive privilege. According to the former White House Chief of Staff, it was among the first decisions made in wake of the scandal. D. REGAN, FOR THE RECORD 60-61 (1988). Not only was executive privilege waived for the purpose of giving oral testimony, but also for the wholesale production of privileged documents. This led to the inevitable hemorrhage of national security information. Unfortunately, once this privilege was waived for the Tower Commission, it would have been difficult to reassert the privilege vis-a-vis Congress even if the political will was there. *See, e.g.*, M. LEDEEN, *supra* note 1, at 279.

188. Crovitz, *supra* note 185, at 28.

189. TOWER COMMISSION REPORT, *supra* note 1, at III-24.

tras.<sup>190</sup> Furthermore, the former Reagan aide testified about the presidential intervention with the Government of Honduras to release arms to the Contras.<sup>191</sup>

The subsequent admission by President Reagan that he had indeed discussed the Contra contributions with King Fahd of Saudi Arabia in February 1985<sup>192</sup> led the White House to modify its strategy. In the wake of the McFarlane revelations, it was “rediscovered” that the Amendment did not apply to the President’s activities. Thus, Chief of Staff Howard Baker stated that the Amendment “never mentioned the President.”<sup>193</sup> However, the Reagan Administration never adopted a clear and coherent view of the Amendment’s application to the White House or to the NSC during the congressional inquiry.<sup>194</sup> Of course, this lack of a principled position is even more inexplicable when one considers President Reagan’s subsequent statement that it was his understanding *at the time* the Amendment was in effect that the Amendment did not apply to the NSC.<sup>195</sup>

The “ignorance defense” became even more suspect after the trial of Lt. Col. North in 1989. In a forty-two page document submitted by the U.S. Government, a number of admissions were made detailing government-wide efforts to aid the Contras during the time that the Amendment was in effect.<sup>196</sup> These efforts included activities by

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190. 2 *Iran-Contra Hearings*, *supra* note 23, at 17-18, 22-24 (testimony of Robert C. McFarlane).

191. *Id.* at 28.

192. President Reagan denied, however, that he had solicited funds. See Boyd, *Reagan Denies Asking Saudis for Contra Aid*, N.Y. Times, May 13, 1987, § A, at 1, col. 2.

193. Church, *supra* note 129, at 24.

194. Although the Reagan White House was forced to adopt a position that the President was not covered by the Amendment prior to my testimony before the Iran-Contra committees in early June 1987, and indeed was busy placing stories to that effect in the press, I never received guidance regarding any prospective testimony. The later public position taken by White House spokesmen was that the Amendment did not apply to the President even if he was engaged in the alleged activities, which they also denied. The only legal memorandum given to me by the White House Counsel’s Office prior to my testimony was a disjointed and rambling legislative history of the various Boland Amendments. At the same time, journalists evidently were provided with “internal briefing papers” written by “White House attorneys” which outlined the new position being adopted by the White House and which discussed the constitutional and legislative aspects of the Amendment. See Seib, *supra* note 28. These memoranda were not made available to me. Moreover, for months after my testimony, the Reagan Administration could not make a definitive statement about the Amendment. See, e.g., 9 *Iran-Contra Hearings*, *supra* note 23, at 434 (testimony of Edwin Meese, III). Furthermore, when the Attorney General testified before the Iran-Contra committees in late July 1987, some eight months after the affair had become publicly exposed, he stated that, even at that late date, he had never been asked to render an opinion about the Amendment. *Id.* at 433. *But see supra* note 28 and accompanying text.

195. See Letter, *supra* note 29. Ironically, the strongest case in favor of presidential prerogatives was made by an element of Congress—the minority report of the Iran-Contra committees. See IRAN-CONTRA REPORT, *supra* note 1, at 457-78.

196. See Engelberg, *North Trial Casts Light on Reagan and Raises New Shadow for Bush*, N.Y. Times, Apr. 9, 1989, § 1, Part 1, at 1, col. 1; *What Government Admits Secret*

then Vice President George Bush, Secretary of State George P. Shultz, and interagency groups as well as departments.<sup>197</sup> Specifically, the admissions included plans, drawn up by senior administration officials and personally approved by President Reagan, for the U.S. President to send a letter to the President of Honduras offering a quid pro quo for increased U.S. aid in exchange for support for the Nicaraguan resistance.<sup>198</sup> Similar arrangements involving the former President with other countries also were outlined.<sup>199</sup> Furthermore, despite President Reagan's repeated assertions in 1987 that he did not solicit funds from the king of Saudi Arabia,<sup>200</sup> the government admitted in 1989 that President Reagan "urged" King Fahd to give more money to the Nicaraguan resistance.<sup>201</sup> Finally, evidence was introduced at the *North* trial that President Reagan apparently approved an operation to airdrop special intelligence and weapons to Contra units inside Nicaragua to attack ships carrying materiel to Sandinista soldiers.<sup>202</sup>

The subsequent revelations about the systematic, government-wide efforts, many involving President Reagan, to secure aid for the Contras, during the period when the Amendment was in effect, makes suspect both the decision to prematurely expose the diversion of Iranian arms sales profits and to adopt the "ignorance defense." Regardless of whether Admiral Poindexter told President Reagan about the diversion of funds, basic fact-finding and a review of U.S. policy regarding Contra aid prior to going public would have seemed in order. If, at the conclusion of such a review, it was determined that unauthorized or imprudent actions had been taken by his staff,

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*Documents Say*, N.Y. Times, Apr. 7, 1989, § A, at 11, col. 1 [hereinafter *Government Admits*].

197. See Engelberg, *supra* note 196; *Government Admits*, *supra* note 196.

198. In addition, it was admitted that there was direct intervention by President Reagan with the president of Honduras in order to have the Honduran military release arms intended for the Contras. See Engelberg, *supra* note 196; *Government Admits*, *supra* note 196.

199. See Engelberg, *supra* note 196; *Government Admits*, *supra* note 196.

200. On May 12, 1987, President Reagan denied that, in meeting with King Fahd, he had "solicited" money for the Contras. See *supra* note 192 and accompanying text. Subsequently, he told foreign journalists, "I never solicited any country and ask that it [contribute funds to the Contras] . . ." *Excerpts From Reagan Session with Foreigners*, N.Y. Times, May 28, 1987, § A, at 13, col. 1.

201. Trial Transcript, *United States v. North*, 716 F. Supp. 644 (D.D.C. 1989) (No. 88-80) (Vol. 37, at 6712, Apr. 6, 1989); see also Pichirallo, *Bush Joined Efforts by Reagan, Aides to Solicit Arms for Contras During Ban*, Wash. Post, Apr. 7, 1989, § A, at 3.

202. Johnston, *North Trial Challenges Image of Aloof Reagan*, N.Y. Times, Mar. 20, 1989, § A, at 15, col. 1; Lardner, *Reagan Apparently Approved North Plan for Airdrop*, *Trial Told*, Wash. Post, Mar. 17, 1989, § A, at 26, col. 2.

President Reagan had ample authority to make the necessary personnel or institutional changes. But the President should have made those changes in the context of a forthright defense of his constitutional powers. If President Reagan did not believe that the Amendment applied to the NSC, as he later admitted, he should have taken an early and strong stand in favor of the President's constitutional authority to conduct foreign policy.

The alternative to this course of action, which was taken by the White House, was to adopt a strategy that was fundamentally dishonest and could not be sustained. Subsequent revelations about the extent of U.S. government support to the Contras and the direct involvement of the President, although arguably not in contravention of the Amendment, stood in stark contrast to the early assertions of presidential ignorance. The discrepancy between the earliest contentions of the White House that President Reagan did not know about NSC support for the Contras<sup>203</sup> and the revelations over the next two years meant that the former President not only damaged the institution of the presidency, but looked disingenuous doing it.<sup>204</sup>

In the two years since the Iran-Contra affair, little evidence exists that either Congress or the Executive has learned from its mistakes. For example, Congress should have examined the Iran-Contra affair in its proper perspective, such as, how the executive branch process broke down and what, if any, changes might be adopted to make the administration of U.S. foreign policy more orderly and accountable. Instead, a majority of the legislators appeared to see the affair largely as a way of gaining partisan advantage over the Executive.

After stating that the Iran-Contra affair was primarily a failure of individuals, not of institutions, Congress proposed a series of measures designed to gain even more control over the executive branch than had previously existed. The legislative initiatives, which were for the most part of dubious constitutionality, were aimed at the intelligence community and at the President's foreign policy powers. Included among the intrusive proposals were bills to require mandatory notification of covert action within forty-eight hours of its

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203. TOWER COMMISSION REPORT, *supra* note 1, at III-24.

204. Newspaper accounts of the North trial noted the contradictory nature of the shifting position of former President Reagan over a two-year period. *See, e.g.*, Johnston, *supra* note 202; Atkinson & Morgan, *Reagan Assertion, Trial Data Conflict*, Wash. Post, Mar. 17, 1989, § A, at 2. Similar discrepancy is evident between former Secretary of State George P. Shultz's testimony before the Iran-Contra committees and subsequent revelations regarding his activities in support of the Contras. *See* Pichirallo, *supra* note 201 (Shultz's testimony opposing soliciting third country aid for the Contras versus his idea of using El Salvador as a conduit of aid to the resistance, and other State Department activities to arrange Contra aid); *see also* Pichirallo, *Schultz Backed Honduras Aid When Contra Support Slipped*, Wash. Post, Dec. 16, 1989, § A, at 1, col. 5.

initiation,<sup>205</sup> to infringe on the President's ability to negotiate with foreign countries,<sup>206</sup> and to create a statutory inspector general at the CIA.<sup>207</sup>

The unpleasant experience with the Contra program should have taught Congress the impracticality, if not impossibility, of successfully micro-managing executive branch programs. Congress argues that the NSC should not be operational, but attempts to get involved in operations to a far greater extent than Lt. Col. North ever imagined. This inevitably leads to feeble government, with built-in tendencies to avoid any risk taking—the very antithesis of the energetic executive envisioned by the Framers. It is fair to state that acting within the general authority of the law is no longer sufficient. Intelligence operatives and other personnel in the national security apparatus now will not act without specific legal guidance, which errs heavily on the side of inaction for fear of courting congressional disfavor.

How has the executive "leviathan" responded to the thousands of strands being imposed? In the wake of Iran-Contra, the Executive has engaged in continuous negotiations with Congress, doing little but whetting its appetite for further Boland-type legislation. Examples of the executive branch's lack of courage abound. For instance, although the Panamanian debacle of October 1989 was primarily a failure of presidential leadership, there were underlying reasons why options for intervention, covert or otherwise, were not presented and why there was a dearth of advocates for an activist foreign policy. Certainly, the detailed negotiations regarding intelligence activities between the two branches of government in the post-Iran-Contra era contributed to paralysis once events began moving in Panama.<sup>208</sup>

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205. See S. 1721, 99th. Cong., 2d Sess. § 501(a), 134 CONG. REC. S2249 (daily ed. Mar. 15, 1988).

206. In 1989, legislation was submitted to prohibit administration officials from directing money from third parties to any foreigner who is legally barred from receiving official United States aid. See, e.g., *Congress Slow to Alter Laws Over Iran-Contra Abuses*, CONG. Q., Dec. 2, 1989, at 3317, 3318-20.

207. Title VIII of the Intelligence Authorization Act, Fiscal Year 1990 created a statutory inspector general at the CIA. President George Bush signed the legislation, but in so doing noted his objections to the creation of the office. See Statement by the President, Washington D.C. (Nov. 30, 1989) (available from the White House, Office of the Press Secretary). His objections were on the grounds of safeguarding U.S. national security interests and providing efficient and accountable management at the CIA. *Id.* Finally, President Bush reserved his constitutional rights. *Id.*

208. See, e.g., Gigot, *Covert Action by Committee Means Inaction*, Wall St. J., Oct. 27, 1989, § A, at 16, col. 3; *Pitiful, Helpless Presidency?*, Wall St. J., Oct. 12, 1989, § A, at 16, col. 1; Evans & Novak, *Who Lost Noriega?*, Wash. Post, Oct. 9, 1989, § A, at 21,



The palpable lack of willingness, demonstrated during the Iran-Contra affairs, by senior officials to defend junior officials when they recommend or implement perfectly legal courses of action, which either go awry or are politically controversial, causes advice and internal debate in the executive branch to be skewed toward bureaucratically safe options: do as little as possible, preferably nothing, and never put anything on paper. The prospect of making an involuntary appearance in front of a congressional investigatory committee looking for publicity, or facing a head-hunting prosecutor, has proven sufficient to discipline even the highest government officials. The shrill controversy about the Amendment has even bureaucratized the heretofore sacrosanct advice that an attorney gives a client. At the time of the Iran-Contra hearings, one commentator noted the effect on the internal processes of government:

Even now, sources at the White House are reluctant to talk on the record about how they viewed the Boland amendments when they were passed. They fear the legal repercussion that anything they say could lead to a subpoena by Mr. Walsh. Indeed, this chill is one of the big effects of turning what is essentially a policy dispute into possible criminal cases; not since the McCarthy era have internal communications been so stifled.<sup>209</sup>

Furthermore, the ongoing trials of the Iran-Contra figures also have reminded those in government of the danger of advocating or implementing activities that Congress may choose to criminalize through the inevitable call for special prosecutors.

The fight over the key legal issue in the Iran-Contra affair—the jurisdictional ambit of the Amendment—laid bare a seriously impaired presidential will and a boundless congressional desire for more foreign policy power. The manner in which this question was dealt with by both Congress and the Executive has not contributed to good government. The Founding Fathers anticipated strife between the two branches of government, but it is difficult to believe that they could have endorsed the current situation. To use Edwin Corwin's famous phrase, the Constitution provided "an invitation to struggle for the privilege of directing American foreign policy."<sup>210</sup> Yet, in its response to the Amendment issue and subsequent actions taken in the

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col. 1. The subsequent U.S. intervention in Panama does not detract from the Bush Administration's initial inaction. In fact, the invasion reinforces this aspect: the Bush Administration's decision to intervene was, in part, a response to the U.S. failure to act during earlier coup attempts in Panama. See, e.g., Dowd, *Doing the Inevitable*, N.Y. Times, Dec. 24, 1989, § 1 (International), at 9, col. 1 (Presidential advisers stated that the invasion was inevitable after the Bush Administration "had been criticized for an ineffectual response to the failed Panamanian coup attempt on Oct. 3."); Gordon, *U.S. Drafted Invasion Plan Weeks Ago*, N.Y. Times, Dec. 24, 1989, § A, at 1, col. 1 (Presidential aides "conceded that the President felt pressure of congressional criticism over his dealings with General Noriega.").

209. Crovitz, *supra* note 183, at 30.

210. E. CORWIN, *supra* note 143, at 171.

wake of Iran-Contra revelations, the Executive has declined the invitation.

