

Military Aid to Guatemala: The Failure of U.S. Human Rights Legislation

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In the wake of the war in Indochina, U.S. citizens began to reassess their country's role in world affairs. Troubled by their own government's violence,¹ they questioned its support of violent governments elsewhere.² Too frequently, the United States was providing aid to governments that violated fundamental human rights. In the 1970s, Congress enacted several statutes designed to curtail this practice; by 1980, a comprehensive scheme of human rights legislation was in force. This legislation prohibited military sales and assistance,³ development assistance,⁴ and favorable votes for certain multilateral loans⁵ to countries whose governments engage in a "consistent pattern of gross violations of internationally recognized human rights."⁶ In addition, Congress enacted human rights legislation directed at specific countries.

In 1977, Guatemala was the subject of country-specific human rights legislation that terminated one form of military assistance.⁷ The country also came within the purview of the general human rights statutes, as its record of human rights abuse was abysmal, among the worst in the hemisphere.⁸ Government-sponsored political murder, torture, disappearances, and other cruelties have plagued the lives of

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1. See P. SLATER, *THE PURSUIT OF LONELINESS: AMERICAN CULTURE AT THE BREAKING POINT* 29 (1970) ("The past few years in America have seen the gradual disintegration of the illusion that we are not a violent people.").

2. For a critical view of U.S. policy, see Chomsky & Herman, *The United States versus Human Rights in the Third World*, *MONTHLY REV.*, July-Aug. 1977, at 44 ("After the horrors of Indochina, some dramatic initiatives were needed to reconstruct the image of American benevolence.").

3. Foreign Assistance Act of 1961 § 502B, 22 U.S.C. § 2304 (1982 & Supp. III 1985).

4. *Id.* § 116, 22 U.S.C.A. § 2151n (West 1979 & Supp. 1987).

5. International Financial Institutions Act of 1977 § 701, 22 U.S.C. § 262d (1982 & Supp. III 1985).

6. *E.g.*, Foreign Assistance Act of 1961 § 502B, 22 U.S.C. § 2304(a)(2).

7. Section 503B of the Foreign Assistance and Related Programs Appropriations Act of 1978 prohibited the use of funds "to provide foreign military credit sales to the Governments of Argentina, Brazil, El Salvador, and Guatemala." Pub. L. No. 95-148, § 503B, 91 Stat. 1230, 1239 (1977). See *infra* note 117.

8. AMERICAS WATCH COMMITTEE, *CIVIL PATROLS IN GUATEMALA* 1 (1986) [hereinafter *CIVIL PATROLS IN GUATEMALA*]; see also Black, *Under the Gun*, *NACLA REPORT ON THE AMERICAS*, Nov.-Dec. 1985, at 11.

Guatemalans for over 30 years. During the early 1980s alone, an estimated 36,000 to 72,000 Guatemalan adults were killed.⁹ Few in this country of eight million have not lost a brother or sister, a parent or child.

The U.S. government bears much responsibility for these tragedies. In 1954, the United States directed the overthrow of the reformist government of President Jacobo Arbenz.¹⁰ Since then, the United States has supported, always with money¹¹ and often with guns,¹² a series of brutal military regimes.¹³ During the Reagan years, the Administration has frequently evaded Congress' human rights restrictions, and Guatemala has suffered no shortage of military materiel.

Thus it was with utmost interest that human rights advocates witnessed the inauguration of a civilian president, Vinicio Cerezo Arévalo, in January 1986. Five months earlier, encouraged by prospects of democratic reform and civilian rule,¹⁴ Congress had enacted new legislation on Guatemala—section 703 of the International Security and Development Cooperation Act (ISDCA)¹⁵—lifting the prohibition on military aid if

9. Black, *supra* note 8, at 11 (citing a Guatemalan government census). The figure was derived by counting orphans; the number of murdered children is unknown.

10. See generally S. SCHLESINGER & S. KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA (1983).

11. Even after Congress prohibited the extension of credit for military sales in 1977, see *supra* note 7, Guatemala continued to receive U.S. development assistance. GENERAL ACCOUNTING OFFICE, NAT'L SECURITY AND INT'L AFFAIRS DIV., MILITARY SALES: THE UNITED STATES CONTINUING MUNITION SUPPLY RELATIONSHIP WITH GUATEMALA 30 (1986) [hereinafter GAO REPORT]; see also T. BARRY, GUATEMALA: THE POLITICS OF COUNTERINSURGENCY 42 (1986).

12. See *infra* Parts II and III.

13. See generally 2 M. MCCLINTOCK, THE AMERICAN CONNECTION: STATE TERROR AND POPULAR RESISTANCE IN GUATEMALA (1985); J. HANDY, GIFT OF THE DEVIL: A HISTORY OF GUATEMALA (1984).

14. Several parties had participated in the July 1, 1984 elections for a Constituent Assembly, which was responsible for drafting a constitution and habeas corpus laws. *Developments in Guatemala and U.S. Options: Hearing before the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 42, 43 (1985) (statement of Georges A. Fauriol, Senior Fellow, Caribbean Basin Program, Center for Strategic and International Studies, Georgetown University). Presidential elections were held on November 3, 1985. INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA, THE 1985 GUATEMALAN ELECTIONS: WILL THE MILITARY RELINQUISH POWER? (1985) [hereinafter GUATEMALAN ELECTIONS]. Cerezo was elected in a run-off election held on December 8, 1985. NETWORK IN SOLIDARITY WITH GUATEMALA, UNDERSTANDING TODAY'S GUATEMALA (1986) [hereinafter TODAY'S GUATEMALA].

15. Pub. L. No. 99-83, § 703, 99 Stat. 190, 239-41 (1985). Section 703(a) reads as follows:

(a) Conditions on Military Assistance and Sales. —For fiscal years 1986 and 1987, assistance may be provided for Guatemala under chapter 2 of part II of the Foreign Assistance Act of 1961 (relating to grant military assistance) and sales may be made and financing may be provided for Guatemala under the Arms Export Control Act (relating to foreign military sales) only if the President makes the following certifications to the Congress:

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certain conditions were met. Under the legislation, military assistance grants and military sales and credits would be provided to Guatemala in fiscal years 1986 and 1987 only if the President certified that “an elected civilian government is in power in Guatemala,” and that “the Government of Guatemala made demonstrated progress during the preceding year” in “achieving control over its military and security forces,” in eliminating human rights abuses, and in respecting the human rights of the indigenous Indian population.¹⁶

Sadly, the legislation has not served its purpose. In spite of the election and inauguration of a civilian president, grievous human rights violations, attributable to the army, continue to terrorize the Guatemalan people. At the same time, U.S. military aid has increased. In June 1986 Secretary of State George Shultz, on behalf of the President, certified to Congress that the conditions of section 703 had been met.¹⁷ That year, the United States delivered an estimated \$109.5 million in economic and military assistance to Guatemala.¹⁸ The Administration submitted a second certification in December 1986,¹⁹ and Congress allocated another \$117.6 million for fiscal year 1987.²⁰ The President has requested \$144.6 million for fiscal years 1988 and 1989.²¹

(1) For fiscal year 1986, an elected civilian government is in power in Guatemala and has submitted a formal written request to the United States for the assistance, sales, or financing to be provided.

(2) For both fiscal years 1986 and 1987, the Government of Guatemala made demonstrated progress during the preceding year—

(A) in achieving control over its military and security forces,

(B) toward eliminating kidnappings and disappearances, forced recruitment into the civil defense patrols, and other abuses by such forces of internationally recognized human rights, and

(C) in respecting the internationally recognized human rights of its indigenous Indian population.

16. *Id.* International Military and Education Training (IMET) is not covered by the section 703 restrictions. Section 703(b) requires that U.S.-provided construction equipment, mobile medical facilities and related training be limited to “programs that will directly assist the poor.” Subsection (c) prohibits the use of U.S. funds for “the procurement by Guatemala of any weapons or ammunition.” Subsection (e) prohibits the use of U.S. development assistance funds and economic support funds for Guatemala’s rural resettlement program. *See infra* note 164.

17. Certification to Authorize Military Assistance and Sales for Guatemala, 51 Fed. Reg. 24,467 (1986).

18. 1987 AGENCY FOR INT’L DEV., FISCAL YEAR SUMMARY TABLES 13.

19. Certification to Authorize Military Assistance and Sales for Guatemala, 51 Fed. Reg. 46,971 (1986).

20. Stix, *Reagan Requests Increased Aid for Guatemala*, REP. ON GUATEMALA, Mar.-Apr. 1987, at 15. Fiscal year 1987 runs from October 1, 1986 to September 30, 1987.

21. *Id.* However, in April, the House Foreign Affairs Committee recommended cutting this figure by \$23 million. Stix, *House Committee Requests 121.5 Million in Aid to Guatemala*, REP. ON GUATEMALA, May-June 1987, at 14. On December 10, 1987, the House passed a foreign aid authorization bill for fiscal years 1988 and 1989. H.R. 3100, 100th Cong., 1st Sess. (1987). The Senate version was referred to the full Senate by the Senate Committee on Foreign

The Reagan Administration thus continues to undermine prospects for an end to human rights abuses in Guatemala. But Congress must share responsibility with the Executive. By emphasizing mere progress in eliminating human rights abuses, section 703's certification provision weakens the blanket prohibition on military aid to human rights violators imposed by earlier statutes.²² Moreover, the certification process is easily manipulated by the Executive, and leaves Congress with few effective means of oversight. So long as the Executive complies with the procedural requirements of the statute, the authorization of military assistance for Guatemala is a *fait accompli*.²³ With these substantive and procedural innovations, Congress has forsaken the principles that inspired the early legislation, and has acquiesced in the demise of a serious human rights policy.

Using Guatemala as a case study, this Comment explores the interaction of the Executive and Congress in implementing human rights legislation. Part I assesses the constitutionality of human rights legislation as a legitimate constraint on executive power in foreign affairs. Part II analyzes section 502B of the Foreign Assistance Act of 1961, the statute prohibiting military aid to human rights violators, and offers evidence of the Reagan Administration's evasions of the provision as applied to Guatemala. Part III focuses on the 1985 legislation and the State Department's subsequent certification. By contrasting the certification's language with current conditions in Guatemala, Part III demonstrates that the Executive has continued to undermine congressional intent. Finally, the Conclusion offers suggestions as to how Congress can and must, if it takes seriously its commitment to human rights, regain its control.

I. The Constitutionality of Human Rights Legislation

In conditioning military aid to foreign countries on their respect for human rights, Congress treads in an area of constitutional uncertainty.

Relations in April 1987. S. 1274, 100th Cong., 1st Sess. (1987). At this writing, no action has been taken on this bill.

22. 22 U.S.C. § 2304(a)(2). In contrast, *development* and *economic* assistance may be furnished "to any country with respect to which the President finds that such a significant improvement in its human rights record has occurred as to warrant lifting the prohibition on furnishing such assistance in the national interest of the United States." 22 U.S.C. § 2304(e). Under the terms of this provision, *non-military* aid arguably may be furnished to a country whose government continues to engage in gross violations of human rights.

23. After authorizing funds for foreign assistance, however, Congress must still pass an appropriations bill before the Executive may use the funds. At the appropriations stage, Congress has the power to add a provision prohibiting military assistance to Guatemala, but implementing this power would be difficult. See *infra* text following note 128.

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The U.S. Constitution leaves open to dispute which branch of the government is to direct the course of foreign policy.²⁴ The enumerated powers of the President in this area are few: the commander in chief power,²⁵ the power to receive ambassadors,²⁶ and (with the advice and consent of the Senate) the power to make treaties and appoint ambassadors and other officers of the United States.²⁷ The President also is charged with exercising the "executive Power"²⁸ and is required to "take Care that the Laws be faithfully executed."²⁹ Case law and executive practice have added an unenumerated "foreign affairs" or "sole organ"³⁰ power as well, although its content is far from clear.³¹

The enumerated powers of Congress relating to foreign affairs include the power to declare war,³² to establish, support and regulate the armed forces,³³ to define and punish offenses against the law of nations,³⁴ and to regulate foreign commerce.³⁵ More generally, the Constitution vests in Congress the authority to provide "for the common Defense and general Welfare of the United States."³⁶ In addition, Congress derives implied

24. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 32 (1972):

As they have evolved, the foreign relations powers appear not so much "separated" as fissured, along jagged lines indifferent to classical categories of governmental power: some powers and functions belong to the President, some to Congress, some to the President-and-Senate; some can be exercised by either the President or the Congress, some require the joint authority of both. Irregular, uncertain division renders claims of usurpation more difficult to establish and the courts have not been available to adjudicate them.

25. U.S. CONST. art. II, § 2, cl. 1.

26. *Id.* § 3.

27. *Id.* § 2, cl. 2.

28. *Id.* § 1, cl. 1.

29. *Id.* § 3.

30. The phrase is from John Marshall, speaking in the House of Representatives in 1799 in favor of President John Adams's decision, pursuant to a treaty, to extradite without judicial process a person charged with murder by Great Britain. 10 ANNALS OF CONGRESS 613 (1800), discussed in Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 15-17 (1972). The "sole organ" language, with a gloss unintended by Marshall, has been oft repeated, most notably in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

31. See L. HENKIN, *supra* note 24, at 45-50.

32. U.S. CONST. art. I, § 8, cl. 11.

33. *Id.* cl. 12-14.

34. *Id.* cl. 10.

35. *Id.* cl. 3.

36. *Id.* cl. 1. In addition, Article I, Section 9, Clause 7 establishes that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Thus the Constitution both grants a "spending power" to Congress and denies this power to the Executive absent congressional authorization.

powers from the "necessary and proper" clause,³⁷ as well as from an unenumerated congressional "foreign affairs" power.³⁸

Undoubtedly Congress has the authority, under the foreign commerce power, to regulate sales of weapons and technology to foreign countries. Equally clear, the disbursement of foreign aid is a function of the spending power of Congress.³⁹ It does not follow, however, that Congress may exercise these powers in any way it chooses. The powers are exclusive, in that no other branch on its own authority may spend for the general welfare or regulate foreign commerce, and they are unquestionably broad, but they are not without limits.

Even in the exercise of its exclusive powers, Congress is bound by the Constitution, and it cannot violate constitutional constraints on federal authority. Congress could not, for example, appropriate funds to establish an official religion. It could not pay government employees disparately according to their race. Nor could it withhold salaries to certain federal employees because it believes they are "subversives."⁴⁰

Other limits on Congress, less clear perhaps, derive from the separation of federal powers,⁴¹ and it is these limits that may be implicated in Congress' control over foreign aid and arms sales. To what extent do the powers vested by the Constitution in the Executive Branch constrain Congress' discretion to spend for the general welfare and to regulate commerce among foreign nations? While the Supreme Court has never

37. *Id.* cl. 18 (authorizing Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .").

38. *See* *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 603 (1889) (holding that Congress could invoke powers "incident of every independent nation" to exclude aliens).

39. Congress' article I power to spend for the general welfare has been interpreted broadly. *See* *United States v. Butler*, 297 U.S. 1, 66 (1936) (the spending power is "not limited by the direct grants of legislative power found in the Constitution"); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950) (the spending power is limited only in that Congress must act for the common benefit).

40. In *United States v. Lovett*, 328 U.S. 303, 315 (1946), the Supreme Court held invalid, under Article III, a provision in an appropriations act that forbade the payment of federal salaries to three named government employees. The provision fell "precisely within the category of congressional action which the Constitution barred by providing that 'No Bill of Attainder or ex post facto Law shall be passed'." *Id.*

41. Congress cannot legislate so as to direct the judiciary to reach a particular outcome in a case. *See* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

The separation-of-powers doctrine also limits the range of procedural devices available to Congress. For example, most assistance to countries provided under the Foreign Assistance Act of 1961 is subject to termination by concurrent resolution. 22 U.S.C. § 2367 (1982). This procedure would allow majorities of the two Houses of Congress to override an executive decision, and is therefore a form of legislative veto. In *I.N.S. v. Chadha*, 462 U.S. 919 (1983), the Supreme Court held unconstitutional another type of legislative veto, the one-House veto. The Court's rationale was broad—the legislative veto provision in the challenged statute was held to violate, *inter alia*, the presentment clause of article I, Section 7—and likely invalidates the two-House vetoes contained in the Foreign Assistance Act.

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struck down any use of the spending power as an infringement upon executive authority,⁴² certain limits must exist. For example, in exercising its spending power, Congress cannot nullify a power that belongs exclusively to the Executive. In particular, it is unlikely that Congress could refuse to appropriate money for the salary of an ambassador or for the maintenance of an embassy. Congressional action of this sort would unabashedly intrude on the President's exclusive appointment and recognition powers.⁴³

Human rights restrictions on foreign aid and trade do conflict with the President's recognition power and its emanations. Directing the President to declare a country a gross violator of human rights⁴⁴ would certainly affect, and might well jeopardize, U.S. relations with that country. To put this argument at its strongest, a congressional human rights policy could result in a severance of diplomatic relations. But this situation is different from a decision by Congress to cut off all funds for an embassy. The latter is a direct nullification of the President's power to establish diplomatic relations; the former is a legitimate legislative policy—to avoid funding governments that deny their citizens fundamental human rights—that might result in the deterioration of diplomatic relations.⁴⁵ As Louis Henkin has written:

It has been argued that increasingly foreign policy takes the form of spending programs; that [aid programs] in particular are . . . essential indicia of friendly relations with many countries; that decisions as to aid are therefore properly the President's responsibility and Congress can no more refuse the President appropriations for foreign assistance than for maintaining an embassy.

Here the argument for Congressional independence is surely stronger. Foreign assistance seems not merely an appropriation of funds to implement policies which are primarily the President's responsibility but a form of spending for the general welfare of the United States, and it is difficult to

42. Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912, 944 (1985).

43. That exclusive executive control over embassies derives from these powers is not obvious from the constitutional text. The power has become well established over time, however. "It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize foreign governments and whether to maintain or terminate relations with them." L. HENKIN, *supra* note 24, at 47.

44. None of the human rights statutes requires such a declaration, and presidents have complied with the statutory requirements without making formal declarations. Whether or not the Executive makes a formal declaration, however, countries may indeed take offense, as did Guatemala in 1977. See *infra* note 117.

45. Admittedly, the effect on the recognition power is a matter of degree. But in this area constitutional rules turn on matters of degree: How directly and pervasively does a congressional act interfere with an exclusive power of the President?

accept that the President should command a power expressly conferred upon Congress.⁴⁶

Champions of executive autonomy may also argue that human rights restrictions interfere with the "sole organ" power of the President, or, as Justice Sutherland wrote in *Curtiss-Wright*, the power of "the President alone . . . to speak or listen as a representative of the nation."⁴⁷ This doctrine has doubtful merit as a statement of constitutional principle.⁴⁸ However, even if the President does possess a "sole organ" power requiring "one voice" in foreign affairs, it does not follow that Congress should be denied a role in shaping the content of that voice.⁴⁹ In the case of

46. L. HENKIN, *supra* note 24, at 108.

47. 299 U.S. at 319. Justice Sutherland wrote broadly, seeming to confer unconstrained, even extra-constitutional, power on the President. The actual holding of the case was narrower, validating President Franklin Roosevelt's decision, *pursuant to an explicit delegation of power from Congress*, to ban arms sales to Bolivia and Paraguay. The question for decision concerned only the power of Congress to delegate to the President its authority over foreign arms sales.

Justice Sutherland argued that

since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source [than the Constitution]. . . . It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.

Id. at 316. The historical premise upon which Justice Sutherland built his theory has been much criticized. See L. HENKIN, *supra* note 24, at 289 & n.10; Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Berger, *supra* note 30, at 26-33 and sources cited therein.

In any event, the "extra-constitutional" theory of *Curtiss-Wright* seems to have been cast aside by *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579 (1952). Justice Black, writing for the majority, made no reference to *Curtiss-Wright*, and wrote simply: "The President's power, if any, to issue the order [directing the Secretary of Commerce to take possession of the steel mills] must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. In his famous concurrence in *Youngstown*, Justice Jackson discussed *Curtiss-Wright* in a footnote, stating that it "recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs did not apply with respect to delegations of power in external affairs." *Id.* at 635 n.2 (Jackson, J., concurring). Despite Sutherland's wandering dicta, *Curtiss-Wright* was really about congressional power. To cite *Curtiss-Wright* as authority for limiting congressional power in foreign affairs is to stand the case on its head.

48. Undoubtedly the President speaking alone makes for efficient practice, but, as the Court wrote in another context, "[T]he Framers ranked other values higher than efficiency." *I.N.S. v. Chadha*, 462 U.S. at 959.

49. Reacting to the exclusion of Congress by the Executive in its Iran-Contra affair, the congressional committees investigating the affair wrote:

The Constitution of the United States gives important powers to both the President and the Congress in the making of foreign policy. The President is the principal architect of foreign policy in consultation with the Congress. The policies of the United States cannot succeed unless the President and the Congress work together.

HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN & SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 19 (1987).

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Guatemala, for instance, direct communication by Congress with the Guatemalan government might unconstitutionally infringe on the President's "sole organ" power.⁵⁰ But Congress is not forbidden from directing the President to refuse, in his single voice, aid to Guatemala. If any content can be imputed to the "sole organ" power of the President, it cannot utterly disempower Congress from acting under its express constitutional authority to regulate foreign commerce and provide for the common defense and general welfare.⁵¹

Congress and the President are partners in the making of foreign policy, and while each has exclusive powers, they frequently occupy the same terrain. The actions of one affect the actions of the other, and human rights legislation is no exception. It could not be otherwise, without sacrificing the principles of a constitutional scheme that places great value on a system of checks and balances.

Congress, therefore, has the constitutional power to enact human rights restrictions on foreign aid and trade. Because, under Article II, the President "shall take Care that the Laws be faithfully executed,"⁵² it is unconstitutional for the President not to enforce human rights legislation. However, the courts are loath to adjudicate foreign policy disputes between Congress and the President, labeling such disputes nonjusticiable political questions⁵³ or denying standing to the litigants.⁵⁴ In the

50. This possibility is not far-fetched. At this writing, controversy builds over House Speaker Jim Wright's private meeting with Nicaraguan President Daniel Ortega. See *New Haven Register*, Nov. 17, 1987, at A1, col. 2 (noting "[a]ngry charges . . . over whether Wright overstepped his bounds and usurped the president's foreign policy role").

51. See L. HENKIN, *supra* note 24, at 65 ("Even the broadest theories [of the President's powers in foreign affairs] . . . accept that there are major limitations on the President implied in or flowing from grants of power to Congress . . .").

52. U.S. CONST. art. II, § 3.

53. The contour of the political question doctrine in the foreign affairs context is unsettled in Supreme Court jurisprudence. In *Goldwater v. Carter*, 444 U.S. 996 (1979), a plurality of four justices relied on the doctrine to decline review of President Carter's termination of a treaty with Taiwan. Justice Rehnquist, writing for the plurality, broadly declared that "this case is 'political' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." *Id.* at 1002 (plurality opinion).

Justice Powell, while concurring in the dismissal of the case, strongly disagreed with the plurality's analysis. Even on Powell's narrower understanding of the political question doctrine, however, a challenge to an executive certification of human rights conditions would likely fail because "resolution of the question [would] demand that a court move beyond areas of judicial expertise," or because "prudent considerations counsel against judicial intervention." *Id.* at 998 (Powell, J., concurring).

The doctrine has been more visible in the lower federal courts. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311 (2d Cir. 1973) (whether President's expansion of Indochina War into Cambodia was "basic change in the war," thereby requiring congressional approval, was beyond judicial competence). Recent cases, however, cast doubt on the doctrine's vitality. See, e.g., *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860 (1986) (challenge to Secretary of Commerce's decision not to certify that Japan's whaling practices diminished

political arena, a successful challenge to executive action is also difficult, and may require the two-thirds vote necessary to override the President's veto. Thus, while the Administration has no *constitutional* authority to avoid executing human rights statutes, it may often find the *political* power to evade their provisions.

II. The General Prohibition on Security Assistance: Congressional Intent and Executive Practice

A. *The Evolution of Section 502B*

The early human rights statutes,⁵⁵ enacted in the mid-1970s, articulated a new ideal in U.S. foreign policy: The United States would not

effectiveness of international convention held not political question, but rejected on merits); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514-15 (D.C. Cir. 1984) (noting the doctrine's difficulties), *vacated*, 471 U.S. 1113 (1985), *aff'd on other grounds*, 788 F.2d 762 (D.C. Cir. 1986). *See generally* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

54. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982) (private litigants must show that they "suffered some actual or threatened injury" that "fairly can be traced to the challenged action"); *Clark v. United States*, 609 F. Supp. 1249 (D. Md. 1985) (taxpayers have no standing to challenge U.S. policy toward El Salvador and Nicaragua).

Members of Congress obtain standing to sue the Executive only if the executive action in question nullified their vote. *See Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) ("the alleged diminution in congressional influence must amount to a disenfranchisement"), *vacated on other grounds*, 444 U.S. 996 (1979); *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974) (Senator had standing to sue on pocket veto issue "to protect the effectiveness of his vote"); *accord Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated on other grounds sub nom. Burke v. Barnes*, 106 S. Ct. 1258 (1986). The D.C. Circuit panel in *Goldwater* drew a distinction

between (1) a diminution in congressional influence resulting from an Executive action that nullifies a specific congressional vote or opportunity to vote, in an objectively verifiable manner . . . and (2) a diminution in a legislator's effectiveness, subjectively judged by him or her, resulting from Executive action withholding information or failing to obey a statute enacted through the legislator's vote, where the plaintiff-legislator still has power to act through the legislative process to remedy the alleged abuses

617 F.2d at 702. Only the former affords a basis for standing. A congressional suit alleging failure adequately to enforce the human rights statutes would clearly fall within the latter category.

But see Riegle v. Federal Open Market Comm., 656 F.2d 873, 881 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981) (court re-assessing use of congressional standing doctrine, but nonetheless invoking its "equitable discretion" to deny relief); *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (under court's equitable discretion, relief denied to members of Congress alleging that military aid to El Salvador violated section 502B of Foreign Assistance Act). *See generally* Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982).

55. The evolution of these statutes is traced in some detail in Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 249-56 (1982). *See also* Albert, *The Undermining of the Legal Standards for Human Rights Violations in United States Foreign Policy: The Case of "Improvement" in Guatemala*, 14 COLUM. HUM. RTS. L. REV. 231, 241-44 (1982-83); Nash, *Certifying Human Rights: Military Assistance to El Salvador and the International Security and Development Cooperation Act of 1981*, 14 COLUM.

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support countries, of whatever political and strategic value, that denied their citizens fundamental human rights. The language of the early legislation, however, was weak. The first statutes to link foreign aid to human rights standards were advisory only, expressing merely the "sense of Congress."⁵⁶ Since resistance within the executive branch was high, the first human rights statutes were "openly disregarded by the Nixon and Ford administrations."⁵⁷ Congress was giving advice, not instruction, and the Executive refused to follow it.

Executive recalcitrance came at a price, and in subsequent years Congress was more thorough in transforming its concerns into policy. Section 502B of the Foreign Assistance Act of 1961,⁵⁸ the key statute that links military assistance and sales of military and police equipment to human rights practices in recipient countries,⁵⁹ was made mandatory by amendments in 1976 and 1978. The 1976 amendment removed the "sense of Congress" language and amended the core of the statute (now section 502B(a)(2)) to read, "It is further the policy of the United States that, except under circumstances specified in this section, no security

HUM. RTS. L. REV. 275, 277-84 (1982-83); Comment, *Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador*, 33 AM. U.L. REV. 163, 167-76 (1983).

56. Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 32, 87 Stat. 714, 733 (1973), reprinted in 22 U.S.C. § 2151 note (1982). This first attempt to link aid to human rights concerns stated: "It is the sense of Congress that the President should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes." *Id.* While still not mandatory, legislation enacted the following year broadened the scope "to any government which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman or degrading treatment or punishment; prolonged detention without charges; or other flagrant denials of the right to life, liberty, and the security of the person." Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815 (1975) (current version at 22 U.S.C. § 2304). This legislation was the initial version of section 502B of the Foreign Assistance Act of 1961, and is still the core of that celebrated section. *See infra* notes 64-66 and accompanying text.

57. Cohen, *supra* note 55, at 249. Executive resistance ran deeper than the presidency. The bulk of Professor Cohen's article details resistance within the executive branch of the Carter Administration, particularly within the career foreign service, to implementation of the human rights statutes, despite "the former President's aggressive public embrace of a human rights oriented foreign policy." *Id.*

58. 22 U.S.C. § 2304 (1982 & Supp. III 1985).

59. A related statute, section 660 of the same act, prohibits the use of funds "to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government . . ." 22 U.S.C. § 2420 (1982 & Supp. III 1985). Section 660 has been undermined in recent years as the Reagan Administration has evaded the prohibition by providing police training under the label "antiterrorism assistance," pursuant to the Anti-Terrorism Assistance Act, 22 U.S.C.A. § 2349aa-2(d) (West Supp. 1987). This training, however, contradicts the intent of the Anti-Terrorism Assistance Act, which is to "provide only *specialized* training (such as bomb disposal and hostage rescue) to combat *international* terrorism . . ." ARMS CONTROL AND FOREIGN POLICY CAUCUS, POLICE AID TO CENTRAL AMERICA 13 (1986) (emphasis in original).

assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”⁶⁰ While Congress clearly expected the prohibition to be implemented,⁶¹ the prefatory words, “policy of the United States,” still permitted the Executive to construe the statute as non-binding. Thus, in 1978, this language too was deleted to remove any doubts as to Congress’ intent.⁶²

Section 502B(a)(2) now reads, in part: “Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”⁶³ The act states that it shall be “a principal goal of the foreign policy of the United States . . . to promote the increased observance of internationally recognized human rights by all countries,”⁶⁴ and directs the President “to formulate and conduct international security assistance programs . . . in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights”⁶⁵

The legislation includes a panoply of procedural requirements. The Secretary of State is required to “transmit to the Congress, as part of the

60. International Security Assistance and Arms Export Act of 1976, Pub. L. No. 94-329, § 301, 90 Stat. 729, 748 (current version at 22 U.S.C. § 2304).

61. See Cohen, *supra* note 55, at 253.

62. International Security Assistance Act of 1978, Pub. L. No. 95-384, §§ 6(a)-(d)(1), (e), 10(b)(1), 12(b), 92 Stat. 730, 731, 732, 735, 737 (1978); see also H.R. CONF. REP. NO. 1546, 95th Cong., 2d Sess. 27, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 1833, 1874 (“the intended effect of this amendment is to substitute for the current policy statement a legal requirement . . .”).

63. 22 U.S.C. § 2304(a)(2). In spite of the opening phrase, no exceptions are actually specified, except that subsections (a)(2) and (c)(1)(C) provide for a waiver of the general prohibition under “extraordinary circumstances.” *Id.* §§ 2304(a)(2), (c)(1)(C).

The act defines “security assistance” broadly, to include:

(A) assistance under part II (military assistance) or part IV (economic support fund) or part V (military education and training) or part VI (peacekeeping operations) or part VIII (antiterrorism assistance) of this subchapter[;] (B) sales of defense articles or services, extensions of credits (including participations in credits), and guaranties of loans under the Arms Export Control Act; or (C) any license in effect with respect to the export of defense articles or defense services to or for the armed forces, police, intelligence, or other internal security forces of a foreign country under section 38 of the Arms Export Control Act.

Id. § 2304(d)(2).

The act defines “gross violations of internationally recognized human rights” to include “torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person” *Id.* § 2304(d)(1).

64. *Id.* § 2304(a)(1).

65. *Id.* § 2304(a)(3).

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presentation materials for security assistance programs proposed for each fiscal year, a full and complete report” on the human rights practices in prospective recipient countries.⁶⁶ The statute also establishes procedures for Congress to request from the Executive additional information on the human rights practices in any country.⁶⁷ If the Executive does not comply with the request within thirty days, security assistance to the designated country is automatically terminated.⁶⁸ Finally, at any time after receiving the State Department Country Reports, Congress may “adopt a joint resolution terminating, restricting, or continuing security assistance for such country.”⁶⁹ Unfortunately, these congressional control devices have not been entirely successful in promoting the goals of the legislation.

B. *The Circumvention of Section 502B*

Guatemala never formally came under the purview of section 502B, since neither Congress nor the Executive officially labeled the country a

66. *Id.* § 2304(b). Section 116 of the Foreign Assistance Act of 1961 (prohibiting development assistance to countries whose governments engage in a consistent pattern of gross violations of internationally recognized human rights) also requires the State Department to file annual “Country Reports.” *Id.* § 2151n(d).

67. *Id.* § 2304(c). Either the Senate or the House of Representatives, by simple resolution, or the Senate Committee on Foreign Relations or the House Committee on Foreign Affairs, may make such a request. Within thirty days, the Secretary of State must issue a statement setting forth

(A) all the available information about observance of and respect for human rights and fundamental freedom in that country, and a detailed description of practices by the recipient government with respect thereto;

(B) the steps the United States has taken to—

(i) promote respect for and observance of human rights in that country and discourage any practices which are inimical to internationally recognized human rights, and

(ii) publicly or privately call attention to, and disassociate the United States and any security assistance provided for such country from, such practices;

(C) whether, in the opinion of the Secretary of State, notwithstanding any such practices—

(i) extraordinary circumstances exist which necessitate a continuation of security assistance for such country, and, if so, a description of such circumstances and the extent to which such assistance should be continued (subject to such conditions as Congress may impose under this section), and

(ii) on all the facts it is in the national interest of the United States to provide such assistance; and

(D) such other information as such committee or such House may request.

Id. § 2304(c)(1).

68. *Id.* § 2304(c)(3).

69. *Id.* § 2304(c)(4)(A). Of course, Congress could pass a joint resolution absent this provision; however, the statute provides that the resolution be considered in accordance with the expedited procedures specified in the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 601(b), 90 Stat. 729, 765-66 (1976). 22 U.S.C. § 2304(c)(4)(B).

gross human rights violator.⁷⁰ The onus was on the Executive, in the Country Reports required under section 502B,⁷¹ to characterize accurately the human rights record of each country, and to determine whether a country met the standard imposed by the statute. But the Executive was anxious not to antagonize "friendly" foreign governments. As a General Accounting Office (GAO) study prepared for the House Subcommittee on Western Hemisphere Affairs stated: "According to several State Department officials and documents, neither the Carter nor Reagan Administrations wished to publicly label any country as a consistent and gross violator of human rights because it would be too difficult to clear a country of such a label once given."⁷² Nevertheless, officials in the Carter Administration included Guatemala among the countries that were "considered to be engaged in gross violations under the statute . . . [as] could easily have been inferred from the pattern of decisions on specific security assistance issues raised in action memorandums."⁷³ According to the GAO report, "direct U.S. military assistance ([Foreign Military Sales] credits, Military Assistance Program, and International Military Education and Training funding) was discontinued between fiscal years 1978 and 1984, and commercial [arms] sales dropped significantly in the late 1970's and early 1980's because of cited human rights violations."⁷⁴ With respect to Guatemala, the Carter Administration's foreign aid practice was largely consistent with both congressional intent and the President's stated human rights policy.

While the Carter Administration at least implicitly recognized that Guatemala was a gross human rights violator, the admission was not long sustained under the next administration. President Reagan's desire to supply the Guatemalan military was incompatible with the goals of section 502B. By urging that improvements in human rights conditions were sufficient to justify military assistance under the statute, by issuing

70. Indeed, no countries were so designated. See Cohen, *supra* note 55, at 264; Albert, *supra* note 55, at 249 n.120.

71. 22 U.S.C. § 2304(b).

72. GAO REPORT, *supra* note 11, at 3, 4. The GAO Report incorrectly infers from this fact that therefore "the U.S. government has not been under any legal requirement to cut off U.S. arms transfers to [Guatemala]." *Id.* at 8. The legal requirement, however, stems from the fact that gross violations of human rights persisted in Guatemala, not from the fact that the State Department refused to issue a public condemnation. In this regard we agree with Elliott Abrams, Assistant Secretary of State for Inter-American Affairs: "[A]s now drafted the [GAO] report may be read to give the misleading impression that section 502B applies only in cases where a formal determination has been made that a country is engaged in a 'consistent pattern of gross violations of internationally recognized human rights'." *Id.*, Appendix XI: *Advance Comments from the Department of State*, at 36.

73. Cohen, *supra* note 55, at 269.

74. GAO REPORT, *supra* note 11, at 8.

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inaccurate and biased reports, and by evading section 502B's proscription of military sales, the President succeeded in undermining congressional intent.

1. "Improvement" as a Predicate for Aid

In July 1982, the Reagan Administration justified a proposed loan to Guatemala for the installation of a rural telephone system on the grounds that conditions had so improved in Guatemala that the country no longer fell within the prohibitions of the human rights statutes.⁷⁵ While the loan itself was not security assistance—it came instead under the domain of legislation prohibiting U.S. participation in multilateral development bank loans to human rights violators⁷⁶—the Executive's rationale for supporting the loan was broad enough to cut inroads into all the human rights statutes, including section 502B.⁷⁷

In effect, the President was reinterpreting section 502B; mere improvements in a country's human rights practices were tendered as a justification for U.S. military assistance. In fact, Guatemala did *not* qualify for assistance under the human rights statutes, except where the assistance clearly fell within one of the statutory exceptions.⁷⁸ There is abundant

75. See Letter of Stephen W. Bosworth, Deputy Assistant Secretary of State for Inter-American Affairs, Dept. of State (July 15, 1982), reprinted in *Inter-American Development Bank Loan to Guatemala: Hearing Before the Subcomm. on Int'l Development Institutions and Finance of the House Comm. on Banking, Finance and Urban Affairs*, 97th Cong., 2d Sess. 134-35 (1982), cited in Albert, *supra* note 55, at 251 n.134; see also L.A. Times, Dec. 7, 1982, at 9, col. 1 (according to a State Department official, there is "no question" that the previous government of General Lucas García was "more repressive and corrupt" than the then current regime of President Ríos Montt); L.A. Times, Mar. 12, 1983, at 10, col. 1 ("the Reagan administration late last year reviewed the civil rights situation here and decided . . . that there had been improvements under the Ríos Montt government.").

76. International Financial Institutions Act of 1977 § 701, 22 U.S.C. § 262d (1982 & Supp. III 1985). The act instructed U.S. representatives in multilateral development banks to oppose loans to countries with poor human rights records.

The Reagan Administration had sought the telephone system loan in 1981 as well as in 1982, but on different grounds. In 1981 the Administration maintained not that Guatemala was beyond the reach of the human rights legislation, but rather that the loan was justifiable under an express exception to the International Financial Institutions Act, namely, that the United States could vote for assistance to "programs which serve the basic human needs of the citizens" of the recipient country, other provisions of the act notwithstanding. 22 U.S.C. § 262d(f); see Albert, *supra* note 55, at 248. The 1981 application was withdrawn after objections were raised at committee hearings. *Id.* at 248 n.117. The 1982 loan, on the other hand, received a favorable U.S. vote in December 1982. N.Y. Times, Jan. 8, 1983, at D1, col. 1.

77. For an excellent analysis of this change in approach, see Albert, *supra* note 55.

78. The most notable are the "needy people" exception of section 116 of the Foreign Assistance Act of 1961, 22 U.S.C. § 2151n (1982 & Supp. III 1985) (regulating economic and development assistance), and the "basic human needs" exception of section 701 of the International Financial Institutions Act of 1977, 22 U.S.C. § 262d (1982 & Supp. III 1985) (regulating U.S. participation in regional development bank loans). According to Paul Albert, prior to December 1982, "[T]he Reagan administration did not vote in favor of nonbasic human needs loans [for Guatemala] at the Inter-American Development Bank, and its requests for economic

evidence that in 1982 the Guatemalan people continued to suffer grievous abuses of their human rights. As a November 1982 Americas Watch report summarized, "those who are with the government are fed; those who are not with the government are shot."⁷⁹

Nevertheless, President Reagan continued to press for security assistance to Guatemala. While Congress blocked some of the President's moves,⁸⁰ in other cases he was successful, leading one journalist to write that "[t]he Guatemalan army has suffered little more than political embarrassment from the curtailment of open U.S. military aid after 1977."⁸¹ Following the 1982 coup which installed General Ríos Montt, for example, the Reagan Administration approved a cash sale of more than \$6 million in spare parts, primarily for helicopters and other aircraft.⁸² At

development assistance were limited to aid which clearly fell within the basic human needs exception." Albert, *supra* note 55, at 249 (footnotes omitted).

The sole exception contained in section 502B is the exception for "extraordinary circumstances . . . which necessitate a continuation of security assistance, [when] on all the facts it is in the national interest of the United States to provide such assistance." 22 U.S.C. § 2304(c)(1)(C); *see supra* note 63. This exception was used liberally during the Carter years, saving many countries in Africa, the Middle East, and Asia from the § 502B prohibition. These countries either "supplied a critical resource, shared a border with the Soviets, or acted as a special surrogate to defend U.S. interests in [an] entire region." Cohen, *supra* note 55, at 270-71. The exception was not invoked, however, for countries in Latin America, including Guatemala.

In addition to these exceptions, two separate sections of the Foreign Assistance Act of 1961 independently authorize a waiver of human rights restrictions in special circumstances. Section 506 provides that if the President determines and reports to the Congress that "an unforeseen emergency exists which requires immediate military assistance to a foreign country" and that "cannot be met under the authority of . . . any other law," then "he may direct . . . the drawdown of defense articles . . . , defense services . . . , and military education and training, of an aggregate value not to exceed \$75,000,000 in any fiscal year." 22 U.S.C. § 2318 (1982 and Supp. III 1985). Section 614 provides that the President may authorize assistance, or may make sales, extend credit, and issue guarantees, up to specified limits, without regard to any other provision of law, if he determines and reports to the Congress "that to do so is important to the security interests of the United States," provided that he first "consult with, and . . . provide a written policy justification" to designated committees. 22 U.S.C. § 2364 (1982 & Supp. III 1985).

79. AMERICAS WATCH COMM., HUMAN RIGHTS IN GUATEMALA: NO NEUTRALS ALLOWED 2 (1982); *see also* AMNESTY INT'L, GUATEMALA: MASSIVE EXTRAJUDICIAL EXECUTIONS IN RURAL AREAS UNDER THE GOVERNMENT OF GENERAL EFRAIN RIOS MONTT (1982); J. HANDY, *supra* note 13, at 250-81. Even the Reagan Administration admitted as much when a new general, Mejía Víctores, took over the government in an August 8, 1983 coup. To shed the most favorable light on the new regime, Administration officials emphasized purported human rights improvements over the old regime of Ríos Montt. *See AMERICAS WATCH COMM., GUATEMALA REVISED: HOW THE REAGAN ADMINISTRATION FINDS "IMPROVEMENTS" IN HUMAN RIGHTS IN GUATEMALA* 14-16 (1985) [hereinafter *GUATEMALA REVISED*]. This pattern of finding improvements with each new general who took power has characterized the Reagan approach to Guatemala in general.

80. For example, the Administration requested \$10 million in Foreign Military Sales credits for Guatemala for fiscal years 1984 and 1985; both requests were turned down by Congress. GAO REPORT, *supra* note 11, at 7.

81. Nairn, *The Guatemala Connection*, THE PROGRESSIVE, May 1986, at 20, 22.

82. GAO REPORT, *supra* note 11, at 4.

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the time, the Guatemalan government lacked the funds for the purchase. The following year, however, the new government of Mejía Vítores asked to make a reduced purchase, which the Reagan Administration approved in January 1984.⁸³ Just prior to the sale, the Inter-American Commission on Human Rights of the Organization of American States (OAS) had presented a report to the OAS General Assembly, concluding that “there has been no significant improvement of the human rights situation in Guatemala; . . . disappearances, killings, torture, and the absence of [an] autonomous judicial system capable of insuring fair trials, render the rights in the American Convention on Human Rights illusory and are an affront to the conscience of the Americas.”⁸⁴

2. *Biased and Inaccurate Information*

A major problem with section 502B, and the foreign assistance appropriations process in general, is that although Congress often hears testimony from independent human rights groups, it relies in the first instance on information provided by the Executive.⁸⁵ The information is often not trustworthy. The Executive’s findings, contained in the annual State Department Country Reports on Human Rights, have been criticized by human rights groups for their inaccuracies and their tendency to reflect the ideological bias of the Administration.⁸⁶ Summarizing their evaluation of the 1985 Country Reports, the Lawyers Committee for Human Rights and the Watch Committees wrote:

As in the past, probably our strongest criticisms of the U.S. human rights performance in 1985 focus on El Salvador and Guatemala. Again, our quarrel with the Administration is in part because it insists that the advent of elected civilian governments signifies an end to human rights abuses, whereas we believe that they must also demonstrate that the rule of law prevails. In addition, we are critical because the Administration continues to deny widespread gross abuses that we consider to be well-substantiated.⁸⁷

83. *Id.* The Reagan Administration also succeeded in providing Guatemala with \$300,000 in International Military Education and Training (IMET) in 1985, for the first time since 1977, as well as \$10 million in Economic Support Funds (ESF) in 1983 and \$12.5 million in ESF in 1985. *Id.* at 29, 30.

84. INSTITUTE FOR POLICY STUDIES, IN CONTEMPT OF CONGRESS: THE REAGAN RECORD OF DECEIT AND ILLEGALITY ON CENTRAL AMERICA 58 (1985) [hereinafter CONTEMPT OF CONGRESS].

85. Section 502B directs the Secretary of State to submit reports on human rights conditions in prospective recipient countries. 22 U.S.C. § 2304(b).

86. *See, e.g.*, LAWYERS COMM. FOR HUMAN RIGHTS & THE WATCH COMMS., THE REAGAN ADMINISTRATION’S RECORD ON HUMAN RIGHTS IN 1985, at 1-7 (1986) [hereinafter HUMAN RIGHTS IN 1985].

87. *Id.* at 6.

In stronger language, George McGovern has decried "the constant fudging, withholding, distorting and downright lying about the facts in Central America."⁸⁸

The self-serving character of the Reagan Administration's human rights reports is especially evident when the reports on Guatemala from successive years are read in sequence. An Americas Watch Report from September 1985 concluded:

Reviewing the record, we find that the Reagan Administration failed to condemn gross violations by Presidents Lucas, Ríos, and Mejía while each in turn held office. Indeed, at times, it praised their performance on human rights. As soon as a Guatemalan military dictator was deposed, however, the State Department condemned his human rights record for the purpose of favorably comparing his successor to what went before.⁸⁹

The assessment of a regime's human rights performance fluctuated, depending on whether the Reagan Administration wanted to assist that regime or its successor. Any objectivity in the reports was undermined by ulterior foreign policy goals,⁹⁰ thereby subverting the goals of the human rights statutes.

88. McGovern, *Preface* to CONTEMPT OF CONGRESS, *supra* note 84, at 2.

89. GUATEMALA REVISED, *supra* note 79, at 1.

90. Last year, for example, the Administration pressured Cerezo to renounce his policy of "active neutrality" toward the U.S.-backed *contras* in Nicaragua. See AMERICAS WATCH, HUMAN RIGHTS IN GUATEMALA DURING PRESIDENT CEREZO'S FIRST YEAR 81 (1987) [hereinafter CEREZO'S FIRST YEAR]. The Watch Committees and the Lawyers Committee for Human Rights wrote in early 1987:

It was plain . . . during 1986 that concern with human rights [in Central America] was subsidiary to the Administration's main goal—ousting the Sandinista government from Nicaragua. The preoccupation with this goal by the Administration led it to countenance many abuses that it might otherwise have opposed effectively: . . . [for example,] the subversion of civilian authority in El Salvador, Guatemala and Honduras in the effort by the Administration to enlist the armed forces in those countries in support of its war against the Sandinistas.

LAWYERS COMM. FOR HUMAN RIGHTS & THE WATCH COMMS., THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1986, at 4 (1987) [hereinafter HUMAN RIGHTS IN 1986].

More broadly, the Administration tends, in Central America as elsewhere, to view regional and civil conflicts as manifestations of the ideological battle between Communism and the "Free World." See 2 M. MCCLINTOCK, *supra* note 13, at 285. At a House Committee on Foreign Affairs hearing on the ISDCA, Secretary of State George Shultz testified:

While we are promoting democratic reform throughout Central America, the Soviet Union and Cuba are abetting the establishment of a Communist dictatorship in Nicaragua. If the forces of dictatorship continue to feel free to aid and abet insurgencies in the name of 'proletarian internationalism,' it would be absurd if the democracies felt inhibited about promoting the cause of democracy.

Foreign Assistance Legislation for Fiscal Years 1986-1987 (Part I): Hearings before the Comm. on Foreign Affairs, 99th Cong., 1st Sess. 21 (1985); see also Chomsky & Herman, supra note 2, at 30-31 ("U.S. economic interests in the Third World have dictated a policy of containing revolution, preserving an open door for U.S. investment, and assuring favorable conditions of investment.").

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3. *Evasions of Section 502B's Proscription of Military Sales*

Congress' intent in section 502B was not merely to ban grants of military aid, but also to prohibit government and corporate sales of defense articles or services.⁹¹ The Reagan Administration evaded these provisions by removing items from lists of materials forbidden for sale to Guatemala, even though the items were clearly used for military purposes,⁹² and by permitting the shipment of arms to Guatemala by independent corporate suppliers.⁹³ Section 502B prohibits "the export of defense articles or defense services to or for the armed forces, police, intelligence, or other internal security forces of a foreign country under section 38 of the Arms Export Control Act."⁹⁴ The Arms Export Control Act, in turn, defines "defense articles" and "defense services" broadly to include support equipment and related services, as well as weapons themselves.⁹⁵ Specific equipment covered by the act is listed by the Office of Munitions Control⁹⁶ in its "Munitions List."⁹⁷

A second list, the Commerce Department's "Crime Control and Detection List,"⁹⁸ was brought under the 502B prohibition by the 1978 amendment:⁹⁹ "Security assistance may not be provided to the police, domestic intelligence, or similar law enforcement forces of a country, and licenses may not be issued under the Export Administration Act of 1979 for the export of crime control and detection instruments and equipment."¹⁰⁰

Yet, commercial sales made by private U.S. companies were "[t]he primary means Guatemala used during the period 1978 through 1982 to obtain military and dual-use equipment and technology from the United States."¹⁰¹ In certain cases, items shipped to Guatemala for military use did not appear on either of the prohibited lists. In 1980 and 1981, for example, 23 Bell Helicopters worth almost \$25 million were sold to Guatemala, but escaped review because the helicopters were classified as ci-

91. 22 U.S.C. § 2304(d)(2)(B), (C).

92. See *infra* text accompanying notes 101-106.

93. See *infra* text accompanying notes 107-110.

94. 22 U.S.C. § 2304(d)(2)(C).

95. 22 U.S.C. § 2794 (1982 & Supp. III 1985).

96. The Office of Munitions Control is under joint direction of the Departments of State and Defense.

97. 22 C.F.R. § 121.01 (1987).

98. 15 C.F.R. § 376.14 (1987).

99. See *supra* note 62.

100. 22 U.S.C. § 2304(a)(2). For a description of the procedures for administrative review of license applications, see GAO REPORT, *supra* note 11, at 4-5. For lists of items for Guatemala either approved, disapproved, or "returned without action" by the Office of Munitions Control, see *id.* at 18-23. For similar tables with respect to Department of Commerce action on license applications, see *id.* at 24-27.

101. GAO REPORT, *supra* note 11, at 4.

villian by the Commerce Department.¹⁰² These helicopters were used by the Guatemalan Air Force, with twenty pilots receiving training at Bell's headquarters in Fort Worth, Texas.¹⁰³ According to one journalist, the "Guatemalan air force pilots . . . spoke highly of their hands-on U.S. training and said they left Texas early to rush immediately into rural operations."¹⁰⁴ By labeling the helicopter transaction "civilian," the Executive evaded the restrictions of 502B.

An even more blatant example was the June 10, 1981 approval of the sale of \$3.1 million worth of military cargo trucks and jeeps to Guatemala. The same items had been deleted from the Crime Control and Detection List *one week* earlier.¹⁰⁵ According to Representative Don Bonker, former Chairman of the Subcommittee on Human Rights and International Organizations,

[R]efugees reported that the Guatemalan soldiers arrived in helicopters, trucks, and jeeps, and tortured and murdered innocent unarmed civilians, including an 80 year-old-man [sic] and a 7 year-old girl. . . . By selling or giving the Lucas regime helicopter parts, training packages, or jeeps and trucks; [sic] we are literally aiding the indiscriminate attacks on innocent peasant villages and households.¹⁰⁶

Some shipments of military equipment to Guatemala by private companies evaded the government review process altogether. Leon Kopyt, the president of Mass Transit Systems Corporation of Philadelphia, told journalist Allan Nairn that his company had been supplying the Guatemalan government with laser-aimed rifle sights for several years, in spite of the fact that an application for the sale of these devices with the Office of Munitions Control had been "returned without action."¹⁰⁷ According

102. Albert, *supra* note 55, at 249-50; Nairn, *supra* note 81, at 22.

103. Nairn, *supra* note 81, at 22.

104. Nairn, Letter to the Editor, *THE PROGRESSIVE*, Sept. 1986, at 6, 7 (author's reply) [hereinafter Nairn Letter].

105. CONTEMPT OF CONGRESS, *supra* note 84, at 54-56; see also Albert, *supra* note 55, at 247 n.105 (items were removed from this list by Commerce Department at suggestion of State Department after receipt of applications from two companies to export the items to Guatemala).

106. *Human Rights in Guatemala: Hearing Before the Subcomms. on Int'l Organizations and on InterAmerican Affairs of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess 3 (1981) (prepared statement of Don Bonker, Chairman, Subcomm. on Human Rights and Int'l Organizations). But cf. *Implementation of Congressionally Mandated Human Rights Provisions (Vol. 1): Hearings Before the Subcomm. on Human Rights and Int'l Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 11 (1981) (prepared statement of Walter J. Stoessel, Jr., Under Secretary of State for Political Affairs):

We currently have pending a number of license applications seeking authorization to export abroad police equipment. I wish to assure the Committee that human rights factors will be considered in reaching a decision on the ultimate disposition of these licenses and that these decisions will be in full compliance with the law.

107. Nairn, *supra* note 81, at 20.

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to Nairn, "Kopyt says Mass Transit obtains the sights overseas . . . and therefore does not need a State Department license."¹⁰⁸ Richard H. Melton, former Director of the Office of Central American and Panamanian Affairs of the State Department, denied the existence of this illicit supply line: "There are no laser-aimed rifle sights in the Guatemalan army."¹⁰⁹ Nairn, however, maintains that he confirmed Leon Kopyt's assertions "with Guatemalan officers, Mass Transit company documents, and Western intelligence officials."¹¹⁰ The number of other such illicit transfers of military equipment is impossible to determine.

Another means of evading review has involved the use of third countries. In 1982, ten U.S. M-41 tanks, worth approximately \$34 million, were shipped to Guatemala by a Belgian company by way of the Dominican Republic.¹¹¹ While the State Department denied prior knowledge of the illegal transfer,¹¹² Nairn contends that "[a]ccording to U.S. officials, the Pentagon and the CIA had arranged for the tanks to arrive from Belgium by way of the Dominican Republic."¹¹³ In any case, three years later, even after the State Department concededly knew of the deal, no report had been filed with Congress as required by the Arms Export Control Act. The GAO Report on Guatemala states:

Evidence indicates that although the need to submit a . . . report on the Guatemala transfer was discussed within State, the report was delayed until all investigations could be completed. Apparently, either the investigations were not completed, were not reported to the State Department, or the Department decided not to prepare the report to Congress. In any event, we found no evidence of any report ever being submitted to the Congress.¹¹⁴

Section 502B promoted a norm—no aid to human rights violators—that remained distant from and largely irrelevant to the gritty politics of arms sales. Because of executive evasion of the legislative restrictions, the "mandatory prohibition" was hardly more effective than the initial "sense of Congress" resolution.

108. *Id.*

109. Melton, Letter to the Editor, *THE PROGRESSIVE*, Sept. 1986, at 6.

110. Nairn Letter, *supra* note 104, at 8.

111. GAO REPORT, *supra* note 11, at 7.

112. *See id.*, Appendix XI: *Advance Comments from the Department of State*, at 38.

113. Nairn, *supra* note 81, at 21.

114. GAO REPORT, *supra* note 11, at 7. More generally, the Reagan Administration, like others before it, has sought the aid of other countries in the service of U.S. foreign policy goals. Since the curtailment of U.S. military sales, Israel in particular has continued to supply the Guatemalan military with equipment. Nairn, *supra* note 81, at 22; Jamail & Gutierrez, *Israel in Central America*, REPORT ON GUATEMALA, July-Aug. 1987, at 5.

III. Country-Specific Legislation and the Certification Process

A. *Congressional Intent*

In addition to enacting general human rights legislation, Congress began in the 1970s to condition military assistance to specified countries on human rights considerations. Some of the enactments were outright prohibitions; others required that a certification be filed prior to the disbursement of funds.¹¹⁵ Altogether approximately twenty countries have been denied aid through country-specific legislation.¹¹⁶

Country-specific legislation has been viewed as a censure both of the foreign government and of the U.S. executive branch, inasmuch as the legislation reflects congressional sentiment that the Executive has not properly enforced the general human rights statutes with respect to that particular country.¹¹⁷ Furthermore,

[t]he repeated willingness of Congress to legislate on specific countries placed the Executive on notice: unless it began to apply section 502B, Congress might legislate again. While this prospect did not move the Ford and Nixon administrations to alter their practice, it appears to have had significant influence on the Carter administration.¹¹⁸

115. See e.g., Pub. L. No. 99-83, § 703, 99 Stat. 190, 239-41 (1985) (country-specific legislation on Guatemala).

116. For a compilation of these statutes, see U.S. LEGISLATION RELATING HUMAN RIGHTS TO U.S. FOREIGN POLICY (1982) (available from Int'l Human Rights Law Group, Washington, D.C.).

117. See Comment, *supra* note 55, at 170 ("[C]ountry-specific legislation represents Congress' attempt to implement its own laws when the Executive has failed to observe them."). An examination of the context in which certain country-specific statutes were passed, however, suggests that this interpretation is not universally correct. For example, in 1977 the State Department published reports critical of human rights conditions in Argentina, Brazil, El Salvador and Guatemala. The countries responded by branding "the American efforts as interference in their domestic affairs." L.A. Times, Mar. 18, 1977, at 20, col. 1. The Guatemalan Foreign Ministry, for example, stated that it "declines in advance whatever aid or sale of military equipment conditioned on judgments made by whatever foreign government on affairs that are exclusively of its internal competence." While protection of human rights was a "laudable desire of the illustrious government of the United States," Guatemala could not accept "a doctrine in which one government unilaterally takes the right to judge another government with which it has friendly relations" *Id.*

Only at this point did Congress react, imposing a one-year prohibition on military sales credits. Foreign Assistance and Related Programs Appropriations Act of 1978, Pub. L. No. 95-148, § 503B, 91 Stat. 1230, 1239 (1977). The Senate Report which discusses the bill states: "Brazil, El Salvador and Guatemala have informed the United States that they were not interested in receiving any credits extended by the United States. Therefore, the Committee recommends a reduction in this program reflecting the amounts that would have been available to those countries under the Administration's request." S. REP. NO. 352, 95th Cong., 1st Sess. 108 (1977). Thus, in this case, Congress was not censuring the Executive but was merely reacting to the rejection of U.S. assistance by the four developing countries. Concern for human rights simply was not the major impetus behind Congress' decision.

118. Cohen, *supra* note 55, at 256.

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In 1985, Congress sought through country-specific legislation to ensure that human rights considerations would play a prominent role in the Reagan Administration's policy toward post-election Guatemala.¹¹⁹ Section 703 of the ISDCA¹²⁰ prohibited military aid unless (1) "an elected civilian government [was] in power in Guatemala," and (2) the "government made demonstrated" progress in alleviating human rights abuses.¹²¹ The first of these conditions did not by itself undermine the general 502B prohibition. Indeed, it raised the standard for military aid by adding the explicit goal of civilian control.

The second condition, on the other hand, significantly weakened the standard imposed by section 502B. Section 502B contained a blanket prohibition: It required not just progress, but an actual end to the consistent pattern of gross violations of human rights.¹²² Under section 703, however, the President could legally disburse military assistance to a country that demonstrated a consistent pattern of human rights abuses, so long as the pattern was less egregious than in the preceding year.¹²³

119. Senator Kennedy, proposing an early version of section 703, argued that the United States should not provide "military aid to the armed forces of [Guatemala] while they continue to engage in brutal human rights abuses." 131 CONG. REC. S6211 (daily ed. May 15, 1985). Kennedy believed that the Reagan "administration [had] failed to give adequate consideration either to human rights in Guatemala or to democracy in Guatemala." *Id.* While the Senate rejected Kennedy's proposal, *id.* at S6212, a virtually identical provision passed the House, was adopted by conference committee, and was enacted into law. H.R. REP. NO. 237, 99th Cong., 1st Sess. 137 (1985) (Joint Explanatory Statement of the Committee of Conference); see also CEREZO'S FIRST YEAR, *supra* note 90, at 89-90 ("Anticipating the Reagan Administration's eagerness to re-establish a military relationship with the Guatemalan armed forces after the election of a civilian government, Congress attached a series of conditions to legislation authorizing military aid for Guatemala.").

120. Pub. L. No. 99-83, § 703, 99 Stat. at 239-41. Section 703's conditions remained in force only during the provision's two-year authorization period, which expired on September 30, 1987. During this period, section 703 superseded section 502B with respect to military assistance to Guatemala. Section 502B's prohibitions, however, are not similarly time-bound; hence, absent supervening law, section 502B controls. Congress is currently considering an authorization bill for fiscal years 1988 and 1989. See *supra* note 21.

121. *Id.* § 703(a).

122. 22 U.S.C. § 2304 (1982 & Supp. III 1985).

123. In marked contrast, Congress had, only two years prior to enacting Section 703, amended related human rights legislation to ensure that the criteria for aid would not be diluted. Section 701(a)(1) of the International Financial Institutions Act, 22 U.S.C. § 262d (1982), prohibits U.S. support for multilateral loans to countries that engage in "a pattern of gross violations of internationally recognized human rights." This provision initially included the word "consistent" before "pattern," but the word was deleted by amendment. Supplemental Appropriations Act of 1984, Pub. L. No. 98-181, § 1004, 97 Stat. 1153, 1286 (1983). The purpose of the deletion clearly was to ensure enforcement of the statute according to congressional intent. The House Committee on Banking, Finance and Urban Affairs "remind[ed] those charged with executing this law that the law does not make reference to 'improvement' and that it is not enough to change the requirement that the United States oppose loans to particular countries because the kind and scope of violations in such countries have changed if a pattern of gross violations continues." H.R. REP. NO. 175, 98th Cong., 1st Sess. 59-60, reprinted in 1983 U.S. CODE CONG. & ADMIN. NEWS 1942-43.

While promotion of human rights remained the goal, section 703 was a step backward.¹²⁴

B. *The Problem of Delegation*

Section 703 requires that the President issue a certification to Congress justifying, under the terms of the statute, the delivery of military assistance to Guatemala.¹²⁵ This procedural mechanism guarantees that the President's findings will be public. Although the provision was designed to reinforce Congress' ability to ensure that its intent is respected, it has not succeeded. In fact, section 703 has actually increased congressional reliance on the Executive's findings.

Like section 502B, section 703 charges the Executive with fact-finding. The two provisions operate very differently, however. Under 502B, the State Department is directed to transmit to Congress a "full and complete report" on the human rights practices in prospective recipient countries "as part of the presentation materials for security assistance programs proposed for each fiscal year."¹²⁶ When Congress subsequently authorizes money for security assistance, it may use the Country Reports as it wishes—relying fully on their authority, supplementing them with its own findings, or even ignoring them. Its degree of reliance on the reports is a result of political accommodation, and is in no way constrained by the Executive's conclusions.

Congress' role vis-à-vis the section 703 certification is different. Unlike the reporting requirement of section 502B, section 703's certification provision is self-executing; that is, once the President complies, the authorization of military assistance to Guatemala is a *fait accompli*.¹²⁷ Under section 703, Congress has already acted—to authorize security assistance

124. Cf. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555-56, 22 U.S.C. § 2370 note (1982), which required the President to certify that the government of El Salvador was taking steps toward alleviating human rights abuses in that country. The intent of the legislation was to tighten congressional control over the Reagan Administration's policy in El Salvador, which had been conducted in violation of general human rights statutes. See generally Nash, *supra* note 55, at 280. Yet by replacing the broader 502B prohibition with the requirement that the Salvadoran government make "progress" in a few areas, section 728 achieved the opposite result: It authorized the disbursement of U.S. military aid to a government that engaged in gross violations of human rights. "Congress' focused attempt to address the Salvadoran problem, therefore, ironically resulted in exempting El Salvador from the stricter human rights legislation already in force." Comment, *supra* note 55, at 175.

125. Pub. L. No. 99-83, § 703(a), 99 Stat. at 239-40.

126. 22 U.S.C. § 2304(b).

127. Section 703 is part of the International Security and Development Cooperation Act of 1985, enacted "[t]o authorize international development and security assistance programs . . . for fiscal years 1986 and 1987" Pub. L. No. 99-83, § 703, 99 Stat. at 190 (prefatory language).

on the condition that it receive a timely Presidential certification—and that authorization is effective unless Congress repeals it by further legislation. Under *I.N.S. v. Chadha*, Congress may not retain the power to veto the authorization if it disagrees with the President's decision.¹²⁸

Even when the President does issue a section 703 certification, however, Congress' choice is not irrevocable. Congress must still appropriate funds to the programs it has authorized, and it could include a country-specific prohibition in its appropriations bill. To accomplish this, however, would require a rare degree of political mobilization. Such a measure would require those who initially supported section 703 to concede, in effect, that the provision had failed in its purpose. Members of Congress who fought to constrain the President through section 703 would need to convince their colleagues that even *stronger* constraints were necessary.

In section 703, therefore, Congress not only weakened the substantive standard in the human rights statutes, but also created a procedural mechanism under which its delegation of power to the President is difficult to check. The Executive exploited these flaws in the certification that followed, basing its justification for military assistance on a distorted version of the facts.

C. *The June 6, 1986 Certification*

On June 6, 1986, pursuant to section 703, Secretary of State George Shultz transmitted to the Chairman of the House Committee on Foreign Affairs a "Certification to Authorize Military Assistance and Sales for Guatemala."¹²⁹ The certification asserts that all the conditions specified in section 703 have been satisfied. A four-page "Justification" for such assistance accompanied the certification.¹³⁰ The image of Guatemala described in these documents—an established civilian government enforcing the rule of law, a subservient military, a sharp decline in political violence, minimal pressure on citizens to join civil defense patrols, and full support for the domestic human rights group—differs greatly from the facts documented by independent human rights groups.

128. 462 U.S. 919 (1983).

129. Certification to Authorize Military Assistance and Sales for Guatemala, 51 Fed. Reg. 24,467 (1986).

130. Department of State, Justification for Certification to Authorize Military Assistance and Sales for Guatemala (June 6, 1986) (unpublished, but transmitted to House Comm. on Foreign Affairs along with Certification to Authorize Military Assistance and Sales for Guatemala, *supra* note 129) [hereinafter Justification] (copy on file with the *Yale Journal of International Law*).

1. *Civilian Control*

Central to section 703 was the requirement that an elected civilian government attain power in Guatemala. Secretary Shultz stated in the Justification that the civilian government "took office without interference from the military establishment . . ."¹³¹ Despite the inauguration of a civilian president in January 1986, however, there was little doubt that the military actually controlled Guatemala.

Even the new president of Guatemala acknowledged that the elections "were not a gracious concession on the part of the military."¹³² In fact, the elections were the culmination of a three-stage strategy conceived by the Army after the Ríos Montt coup of March 1982.¹³³ The Army's strategic retreat from the forefront of the political arena was designed to improve the regime's image, ensuring needed foreign assistance, loans, and investment.¹³⁴ Although the Guatemalan military retreated from formal office, it did not relinquish its power. After the elections, Cerezo admitted that his ability to control the Army would be "dependent on [his] ability to play by the rules."¹³⁵

Under section 703, no military assistance could be provided absent a formal written request from Cerezo. When he took office, Cerezo announced that he would delay his request for military assistance for a

131. *Id.* at 1. Although a civilian government was elected in 1985, some human rights groups questioned the fairness of the elections. See GUATEMALAN ELECTIONS, *supra* note 14, at 62 (concluding that intimidation and threats of violence against parties and voters made a wholly free and fair election impossible); see also TODAY'S GUATEMALA, *supra* note 14. Guatemalans interviewed cited fear of reprisal by the Army as a prominent reason for voting. According to TODAY'S GUATEMALA, voting is "mandatory" in Guatemala. The Army paid for advertisements which declared that abstaining or casting blank ballots was treasonous.

132. Black, *Cerezo, Guatemala's New Leader, Sees Duarte as an Object Lesson*, L.A. Times, Jan. 12, 1986, § 5, at 2, col. 3.

133. *Id.* The Army detailed its plan in a document called the "National Plan of Security and Development," which was approved by Ríos Montt in April, 1982. The three stages consisted of: a war to rid Guatemala of "communist subversion"; the creation of a network of agencies, the rural resettlement program, and civil defense patrols that would secure the Army's control in the countryside; and "elections with a massive turnout" that would ensure the foreign aid "which might help Guatemala to defeat subversion." *Id.*; see also T. BARRY, *supra* note 11, at 40; Black, *supra* note 8, at 11 (describing the four-year master plan as one that would progress "from scorched earth to clean elections").

134. See Kinzer, *Walking the Tightrope in Guatemala*, N.Y. Times, Nov. 9, 1986, § 6 (Magazine), at 38: "Badly in need of foreign aid and realizing they could no longer avoid the inevitable, the officers allowed a free election—and a historic adversary of the military assumed the presidency." Kinzer quotes a top Guatemalan Army officer who boasted, "Vinicio is a project of ours—not Vinicio himself, but the return of civilian institutions. . . . This civilian project is really a military project. We can defend the country better this way. That's why we were the first to press for elections, and that's why we want this project to succeed." *Id.*

135. Central American Historical Institute, UPDATE, Mar. 31, 1986, at 5 (citation omitted). In October 1985, Cerezo admitted, "In the first six months I'll have 30% of the power. In the first two years I'll have 50%, and I'll never have more than 70% of the power during my five-year term." *The 70% Solution*, TIME, Nov. 18, 1985, at 60.

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year.¹³⁶ In response to pressure from the Guatemalan military, however, Cerezo submitted a request for U.S. assistance in May 1986, only four months later.¹³⁷

As evidence that the Guatemalan government is achieving control over the military, the State Department points to Cerezo's abolition of the Department of Technical Investigations (DIT).¹³⁸ The DIT was a civilian group that abducted and killed Guatemalan citizens on orders from the Army.¹³⁹ Unfortunately, the dissolution of the DIT proves little about Cerezo's gain of control over the military. Indeed, this was the third time during the past six Guatemalan regimes that the DIT had been purged.¹⁴⁰ More important, the government left intact the army intelligence unit that directed the DIT.¹⁴¹

Cerezo's lack of power is further demonstrated by his inability to pursue those responsible for political violence. Under the decree issued by General Mejía Vítores four days before Cerezo took office, the president was forbidden to prosecute military or police personnel for political crimes committed in the four years preceding that date.¹⁴² Although

136. *Guatemala Leader: Don't Start Military Aid Yet*, Miami Herald, Dec. 18, 1985, at A20, col.1. At that time Cerezo acknowledged that he could not refuse altogether to request aid "because the Guatemalan military only agreed to give us the office and not full control." *Id.*

137. Cerezo's original request was for less than one million dollars. *Guatemala President Requests U.S. Funds*, Miami Herald, May 22, 1986, at A28, col. 3. The Reagan Administration assured Congress that Cerezo requested \$5 million, and announced that the U.S. would provide the larger amount. However, because of U.S. budget cuts, Guatemala actually received a little more than \$2 million in military aid. CEREZO'S FIRST YEAR, *supra* note 90, at 90. The Reagan Administration may have urged the Guatemalan military to push Cerezo to request larger amounts, in spite of his desire to receive aid in small increments in response to human rights improvements. HUMAN RIGHTS IN 1986, *supra* note 90, at 66.

138. Justification, *supra* note 130, at 2.

139. TODAY'S GUATEMALA, *supra* note 14.

140. Nairn & Simon, *Bureaucracy of Death*, THE NEW REPUBLIC, June 30, 1986, at 14. General Mejía Vítores, the military leader whom Cerezo replaced, stated that he had no objection to the DIT's abolition. In fact, he helped to enforce the disbanding of the DIT with another government security force, the Special Operations Brigade (BROE), also notorious for political terror. The BROE detained 600 DIT agents for 24 hours. As a result of Cerezo's action, 115 agents were fired, and the rest were given an opportunity to join the uniformed police. UPDATE, *supra* note 135, at 2. After the DIT was "abolished," a new detective branch, the Policía de Investigación Criminal (PIC) was established. *Id.* In Guatemala, the Group for Mutual Support pointed to the dissolution of the DIT as a "mockery of the people" and a "mask used to ameliorate Guatemala's deteriorated image caused by governments with their disappearances, assassinations, massacres . . ." Americas Watch Committee, GUATEMALA NEWS IN BRIEF, July 1986, at 5 (citation omitted).

141. Known as the "G-2," this unit is primarily responsible for urban terror. See TODAY'S GUATEMALA, *supra* note 14; see also Nairn & Simon, *supra* note 140, at 15 (describing the G-2 units on military bases as offices whose function is "the elimination of individuals"). The G-2 officers both approve killings and make recommendations on potential targets of assassination to the G-2 control center at the National Palace. *Id.*

142. Mejía Vítores had declared "general amnesty for every person responsible for or accused of having committed political crimes and related common crimes" from March 23, 1982, the date of the coup that brought Ríos Montt to power, to January 14, 1986. All govern-

Cerezo initially stated that an amnesty would be a matter for the courts,¹⁴³ on January 24, 1986, Cerezo announced that the amnesty would be respected.¹⁴⁴

Cerezo's action angered members of the only human rights organization in Guatemala, the Group for Mutual Support (GAM).¹⁴⁵ With almost 1500 members, GAM has documented 959 cases of "disappearances" from 1980 to 1985 along with the names of approximately 100 military and police officials who were allegedly involved.¹⁴⁶ The State Department implies that Cerezo has been fully supportive of GAM.¹⁴⁷ GAM members, however, frustrated in their demands that Cerezo investigate the disappearances of their relatives and prosecute those responsible for their deaths, have expressed extreme disappointment with Cerezo's response.¹⁴⁸

2. *Progress in Eliminating Abuses by the Military*

As evidence that the government has made progress in eliminating kidnappings and disappearances, the certification declares that the level of political violence declined during the previous year, and has dropped

ment officials were included in the amnesty. UPDATE, *supra* note 135, at 2. An earlier amnesty decreed by the Ríos Montt government gave the Army protection from prosecution for earlier crimes. CEREZO'S FIRST YEAR, *supra* note 90, at 14.

143. CEREZO'S FIRST YEAR, *supra* note 90, at 15.

144. UPDATE, *supra* note 135, at 2. In an interview, Cerezo stated, "Alfonsin-style trials would be very difficult here, because the Guatemalan Army is not an army in defeat like in Argentina. The Guatemalan Army feels that it is victorious and it's right—no matter what the cost. . . . [I]f we want to bring about peace in Guatemala, we can't have an amnesty for the guerillas and put the officers on trial. If I did that I'd be committing suicide." Black, *supra* note 8, at 25.

145. Grupo de Apoyo Mutuo por Aparecimiento con Vida de Nuestros Familiares (Group for Mutual Support for the Appearance Alive of our Families).

146. UPDATE, *supra* note 135, at 3.

147. "President Cerezo has met several times with relatives of several hundred disappeared persons, ordering the creation of an independent commission" Justification, *supra* note 130, at 3.

148. Cerezo offered to declare missing persons "deceased" so that widows could collect social security and so that children could leave the country with the signature of only one parent on their passports. This action, which would not affect most Guatemalans, who neither receive social security nor use passports, was rejected as "insulting" by GAM director, Nineth de García. UPDATE, *supra* note 135, at 3. Cerezo also promised to set up an investigative commission to discover the fate of persons "disappeared" under past administrations. In June 1986, Cerezo cancelled his search for an Investigatory Commission; in late December, however, he promised that such a Commission would be formed in 1987. Americas Watch Committee, GUATEMALA NEWS IN BRIEF, Dec. 1986-Jan. 1987, at 7. Although a Commission was formed on April 7, 1987, as of October 1987, only two of the four planned members had been appointed. REPORT ON GUATEMALA, Sept.-Oct. 1987, at 11. In November 1986, when the Guatemalan Congress provided for the creation of a human rights procurator, Cerezo attempted unsuccessfully to veto the bill. CEREZO'S FIRST YEAR, *supra* note 90, at 9. In August 1987, a procurator was finally appointed. REPORT ON GUATEMALA, Sept.-Oct. 1987, at 13.

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sharply since 1982, the government's "peak year for violence."¹⁴⁹ Although the number of murders cited in the 1986 certification—"collected from all available credible sources by the American Embassy in Guatemala"¹⁵⁰—differ markedly from those documented by human rights groups and professional journalists, even the Reagan Administration admits that political murders, abductions, and disappearances continue to occur.¹⁵¹ Cerezo himself reported an upsurge in political killings, noting that 69 cadavers, many showing signs of torture, had appeared during his first three weeks in office.¹⁵²

Even if the statistics relied on by the Executive were accurate, the use of "progress" as a basis for the provision of assistance guts the law of its humanitarian objectives. Levels of violence have always fluctuated, under even the most brutal military regimes in Guatemala.¹⁵³ A relative decline in murders or disappearances in any year, when the underlying system remains unchanged, should not by itself justify U.S. assistance.

The Administration's statistics, moreover, are in dispute.¹⁵⁴ An Americas Watch publication declared that "[d]espite improvements that have taken place during President Cerezo's first year, the human rights situation in Guatemala remains terrible."¹⁵⁵ Nevertheless, the State Department persists in finding "noticeable changes" and "dramatic improvements" in the human rights situation in Guatemala.¹⁵⁶ Both the

149. Justification, *supra* note 130, at 2-3.

150. *Id.* at 3.

151. The State Department claims there was an average of 10-12 politically-motivated killings per month since the inauguration. *Id.*; cf. Nairn & Simon, *supra* note 140, at 13 (estimating for the first half of 1986 more than 60 killings per month not attributable to combat or common crime); CERZO'S FIRST YEAR, *supra* note 90 at 30-31 (reporting that after midyear, the average number of deaths and abductions cited in newspapers rose from 100 to 160 per month, while the National Police estimated 180 per month).

152. Nairn & Simon, *supra* note 140, at 13.

153. See generally J. HANDY, *supra* note 13.

154. See *supra* note 151.

155. CERZO'S FIRST YEAR, *supra* note 90, at 2. The decline in the level of violence may be explained in part by the Army's decimation of the guerilla forces, as well as by its success in engendering fear in rural Guatemala. Recent reports have confirmed that there has been no significant improvement in human rights conditions in Guatemala since the certification was issued. See, e.g., Americas Watch Committee, GUATEMALA NEWS IN BRIEF, June 1987, at 2 (noting that the Army's presence and counterinsurgency operations in the countryside have not diminished since President Cerezo took office); Farnsworth, *Guatemala: Who Calls the Shots?*, MOTHER JONES, Oct. 1987, at 16 (describing continued fear of retribution by death squads).

156. Telephone interview with James Cason, former Guatemala Desk Officer at the State Dep't (Nov. 5, 1986). Cason stated that "things have improved dramatically this year," and declared that it is safe for Indians to go home now, because "the violence levels are way down." This optimism is not shared by Guatemalan refugees. On August 10, 1986, we interviewed a Guatemalan family living in "sanctuary" in New England. They had fled from Guatemala during the Mejia Victores regime, after receiving anonymous threats for refusing to participate in the civil defense patrols. Despite the change in government, they continue to fear they will be murdered if they return to Guatemala.

State Department and President Cerezo have tried to explain the level of violence in Guatemala as resulting from a rise in "common crime" rather than from political terror.¹⁵⁷ Bodies found last year, however, bore signs of torture.¹⁵⁸

Military-sponsored violence included intimidation and attacks against members of the Group for Mutual Support.¹⁵⁹ In 1985, two of the Group's six steering committee members were kidnapped, tortured, and assassinated by security agents. In response to this episode, Congress added a "sense of the Congress" provision to the ISDCA, requesting protection for GAM members.¹⁶⁰ The State Department mirrors the language of this provision, asserting that GAM "was able to carry out its work with the full cooperation, protection and support of the Guatemalan government."¹⁶¹ The truth was less appealing: The Army persisted in intimidating GAM members, who received little support from the civilian government.¹⁶²

157. In fact, the former Guatemalan Desk Officer claimed that under Cerezo there has not been one "hard case of political violence"! Telephone interview with James Cason, former Guatemala Desk Officer at the State Dep't (Nov. 5, 1986); *see also* DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1986: REPORT SUBMITTED TO THE SENATE COMM. ON FOREIGN RELATIONS AND THE HOUSE COMM. ON FOREIGN AFFAIRS, 100th Cong., 1st Sess. 510 (Joint Comm. Print 1987) (minimizing the number of political killings attributable to the security forces).

158. CEREZO'S FIRST YEAR, *supra* note 90, at 29-38; Central American Historical Institute, UPDATE, Sept. 30, 1986, at 1.

159. AMERICAS WATCH COMM., GUATEMALA: THE GROUP FOR MUTUAL SUPPORT 2 (1985). The organization and its members have been threatened numerous times since its formation in 1984. Until recently, it has been too dangerous for any human rights monitoring group to operate within the country. Even the International Red Cross (IRC), which limits itself to humanitarian work and declines to disclose information on human rights abuses, has been barred from Guatemala. *Id.* at 4. The Justification states that Cerezo has met with the IRC to discuss "possible humanitarian work" in Guatemala. Justification, *supra* note 130, at 3. As of February 1987, this goal had not been realized. CEREZO'S FIRST YEAR, *supra* note 90, at 27.

160. Pub. L. No. 99-83, § 703(h)(2), 99 Stat. at 241:

It is the sense of the Congress that—(A) human rights groups in Guatemala, particularly the Group for Mutual Support, should be allowed to carry out their work against human rights abuses with the full cooperation, protection, and support of the Government of Guatemala; and (B) whether the Government of Guatemala allows human rights groups, including the Group for Mutual Support, to carry out their work should be taken into account by the United States in determining whether there is human rights progress in Guatemala.

See also 131 CONG. REC. H5403 (daily ed. July 10, 1985) (statement of Rep. Levine) (praising the "dignified and important efforts of the group for mutual support in the face of intolerable government abuses").

161. Justification, *supra* note 130, at 3.

162. On September 18, 1986, for example, the Guatemalan Army's television channel showed a photo of Nineth de García, the director of the GAM, with a caption entitled "terrorist person." The last time the Army had used this label was in March 1985, when two GAM leaders were murdered. UPDATE, *supra* note 158, at 1. Cerezo expressed "surprise" at GAM's claim that the Army is threatening its members. He promised to investigate its claims

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Under section 703, the government must also make progress toward eliminating forced recruitment into the civil defense patrols. The State Department claims that “[t]here is no evidence that the Guatemalan government is forcibly conscripting persons into the patrols or holding them there against their will.”¹⁶³ In truth, however, the civil patrol system is based entirely on coercion. A centerpiece of the Army’s counterinsurgency strategy, the system is designed to secure control over citizens, not to grant them autonomy.

Over 900,000 primarily rural citizens currently participate in the patrols.¹⁶⁴ Under the civil patrol system, civilians must stand guard over their own neighbors, defend the country from “insurgents,” and turn in “suspicious” friends. In this way, the Army divides the population, depriving the insurgents of civilian support.¹⁶⁵ Forced labor and daily assemblies in which villagers pledge allegiance to the military authorities have become central features of village life. In addition, a “Food for

and to give García a “report.” Americas Watch Committee, GUATEMALA NEWS IN BRIEF, Aug. 1986, at 7.

163. Justification, *supra* note 130, at 4.

164. TODAY’S GUATEMALA, *supra* note 14, at 3. The Army has also resettled more than 60,000 civilians into approximately 56 Army-run “model villages” grouped into several “development poles” in areas of high conflict. *Id.* There is no sign that Cerezo is dismantling this element of Army control. In fact, new “development poles” continue to be established under Cerezo. UPDATE, *supra* note 135, at 4. Congressional sentiment against the “model village” program was so strong that section 703 expressly prohibited development aid and economic support funds for use in Guatemala’s rural resettlement program. Pub. L. No. 99-83, § 703(e), 99 Stat. at 240. A State Department official denied that funds disbursed pursuant to Section 703 have been used in this way. Telephone interview with James Cason, former Guatemala Desk Officer at the State Dep’t (May 28, 1987). In a more recent appropriations bill, Congress passed a provision allowing funds to be used in Guatemala’s resettlement program only if the Appropriations Committees of both Houses of Congress are notified fifteen days in advance. Pub. L. No. 99-591, § 101(f), 100 Stat. 3341, 3341-232 (1986). Although funds may now be legally disbursed for use in the rural resettlement program, Agency for International Development (A.I.D.) Desk Officer for Guatemala and Panama, Tom Cornell, insisted that the agency has so far chosen not to channel U.S. assistance to villages in the development poles. Telephone interview with Tom Cornell (Nov. 13, 1987). In the past, however, after similar denials, A.I.D. has been forced to admit that funds have in fact gone directly to the model villages. *See* T. BARRY, *supra* note 11, at 43. Barry describes a series of A.I.D. communications from 1982 to 1985 which vigorously denied that funds were going to development poles or model villages. He then reprints a segment of a 1985 letter from A.I.D. to Senator Patrick Leahy, admitting that the funds may in fact have gone to such projects, and proposing a program to fund the local Inter-Institutional Coordination Councils within the development poles.

165. This system disproportionately affects the indigenous Indian population, who reside in the areas of heaviest conflict. Civil patrols are used by the Army to divide the Indian highland communities, pitting Indians against their neighbors and even forcing them to kill their own family members. *See* 2 M. MCCLINTOCK, *supra* note 13, at 255. As a result of the Army’s counterinsurgency campaign, their lives have been uprooted and their traditions destroyed. Congress expressed concern for the plight of the Indians in Section 703, requiring the certification of progress in respecting the internationally recognized human rights of the indigenous Indian population. Pub. L. No. 99-83, § 703(a)(2)(C), 99 Stat. at 240.

Work" program reinforces the notion that the Army provides for villagers, while the "subversives" threaten them.¹⁶⁶

As stated in the certification, the 1984 Guatemalan Constitution makes participation in civil patrols voluntary.¹⁶⁷ Although Cerezo promised to let each village decide whether to participate in civil patrols, the scenario is highly unrealistic. The two previous regimes of Mejía Víctores and Ríos Montt also insisted on the "voluntary nature" of the patrols,¹⁶⁸ but the intimidation inherent in the civil patrol system gives villagers little freedom to oppose it.¹⁶⁹ To recruit patrollers, the Army goes from house to house, rounding up men for duty.¹⁷⁰ Anyone who refuses to join is labeled "delinquent"; many are tortured or killed, and fathers are sometimes threatened with the rape of their daughters if they choose not to join the patrols.¹⁷¹

Despite overwhelming evidence to the contrary, the State Department asserts that the civil defense patrols are voluntary. The Justification describes a case where a village voted to stop participating, but then petitioned the government to reinstate the patrols.¹⁷² It does not explain why the villagers chose this route, but adds that "undoubtedly many patrol members believe it *prudent* to participate in village patrols because of *peer pressure*."¹⁷³ This euphemistic language makes a mockery of the deadly threats faced by the Guatemalan people.

In sum, the Administration found "substantial improvement"¹⁷⁴ in a country still torn by military-sponsored violence. While some progress could be documented, human rights conditions in Guatemala remained abysmal. The certification overstated the power of the civilian government, applauded cosmetic shifts in policy, and characterized as "voluntary" one of the most coercive institutions maintained by the

166. Black, *supra* note 8, at 22. Violence against civilians is often followed by community assistance—designed by the Army to pacify the resistance. In 1982, the Army conducted such a pacification campaign, known as "Fusiles y Frijoles" ("Bullets and Beans"). *Id.* at 11-12.

167. Justification, *supra* note 130, at 3. However, Cerezo admitted to Americas Watch in February 1985 that less than one-third of the civil patrollers served voluntarily. CIVIL PATROLS IN GUATEMALA, *supra* note 8, at 33.

168. In its 1982 and 1983 Country Reports the State Department echoed the claim that the civil patrols were voluntary. CIVIL PATROLS IN GUATEMALA, *supra* note 8, at 33. However in its 1985 report, the State Department acknowledged that they were compulsory in many rural areas. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985: REPORT SUBMITTED TO THE SENATE COMM. ON FOREIGN RELATIONS AND THE HOUSE COMM. ON FOREIGN AFFAIRS, 99th Cong., 2d Sess. 547 (Joint Comm. Print 1986).

169. CIVIL PATROLS IN GUATEMALA, *supra* note 8, at 33.

170. *Id.* at 39.

171. *Id.* at 35-40. The Army has also been known to create incidents to convince villagers that they need a civil patrol. CEREZO'S FIRST YEAR, *supra* note 90, at 48.

172. Justification, *supra* note 130, at 4.

173. *Id.* (emphasis added).

174. *Id.* at 2.

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Guatemalan military. The Executive thereby frustrated Congress' primary goals, and facilitated the flow of U.S. military assistance into the hands of human rights violators.¹⁷⁵

Conclusion

Neither the general statute prohibiting security assistance to serious human rights violators nor the country-specific statute have prevented the flow of U.S. aid to abusive regimes in Guatemala. The Reagan Administration evaded the proscription of section 502B by urging that "improvement" in the human rights record of successive Guatemalan regimes would suffice as a condition for aid; by deceptive, inaccurate and ideologically-motivated reporting; by removing, at opportune moments, certain items from lists of goods forbidden for sale to Guatemala; and by refusing to report sales by U.S. allies of U.S.-made weapons to Guatemala.

The Reagan Administration continued to push for military assistance to Guatemala after the election of Vinicio Cerezo. While satisfying the procedural requirement of the 1985 act, the Executive Branch undermined congressional intent by submitting a certification that falsely portrayed Guatemala as a civilian democracy. But Congress too is responsible for this outcome. It enacted section 703 with two critical flaws: The legislation weakened the substantive requirement for the disbursement of security assistance to Guatemala, and it made congressional control over executive policy more difficult.

A serious human rights policy should not accord great weight to "progress" or "improvements" when gross violations of human rights continue to dominate the life of a nation. Tailoring aid to progress may in theory be desirable, but to be successful such a program must be sensitive to actual conditions in Guatemala and free from underlying institutional pressure to increase aid. Neither condition is satisfied today. Given President Reagan's demonstrated willingness to disregard human rights laws¹⁷⁶ and his overriding anti-Communism,¹⁷⁷ he cannot be trusted to

175. In addition, the United States has *directly* intervened in the Guatemalan Army's counterinsurgency war on at least one occasion. According to a Pentagon release issued on May 5, 1987, U.S. pilots flying U.S. Army helicopters transported 300 Guatemalan counterinsurgency troops to an area of guerilla activity in early May, 1987. See Stix, *U.S. Helicopters Airlift Guatemalan Combat Troops*, REPORT ON GUATEMALA, May-June 1987, at 4; Americas Watch Committee, GUATEMALA NEWS IN BRIEF, Apr.-May 1987, at 9. The Pentagon stated that Cerezo had made a request for the helicopters, while other sources report that Defense Minister General Gramajo initiated this request. An official Guatemalan Army statement on May 8 declared that the helicopters were "solicited by the Guatemalan *army* to transport troop replacements to zones with difficult land access." *Id.* (emphasis added).

176. See *supra* Part II.

report objectively. The concept of progress is too manipulable to serve Congress' goal.

In addition, by allowing the President to designate authorized funds for Guatemala provided that he submit a certification, section 703 delegated a power to the President that is difficult to insulate from abuse. Nevertheless, Congress is not powerless. While unlikely to persuade the judiciary to hear a challenge to executive authority,¹⁷⁸ Congress has the power, both constitutional and political, to govern the appropriations process in foreign affairs. Most important, it can enact new legislation cutting off military appropriations to Guatemala. Members of Congress can also apply political pressure short of legislation. Congressional opposition—expressed in committee, in floor debate, in sense of Congress resolutions, even in private communications—can be effective in blocking the Executive's agenda.¹⁷⁹

To overcome the problem of delegation, Congress should enact legislation that includes procedures more likely to preserve congressional control. For example, Congress could require that executive certifications of human rights conditions in Guatemala be approved by joint resolution. While potentially cumbersome, a promise of expedited, or "fast-track," review of the certification would assure a relatively quick congressional response to executive policy.¹⁸⁰ Moreover, Congress should base its response on an independent investigation as well as on the executive certification. It could, for example, create a fact-finding commission that would issue an alternate report.¹⁸¹ Under such a statute, Congress' *failure* to pass a joint resolution within a specified waiting period would negate the certification—in effect, it would constitute a country-specific prohibition.

Congress has yet to demonstrate the political will to take any of these actions. It has failed to voice opposition to the State Department certi-

177. See *supra* note 90.

178. See *supra* notes 53-54 and accompanying text.

179. See, e.g., HUMAN RIGHTS IN 1985, *supra* note 86, at 64 (Reagan's request for reprogramming of A.I.D. funds to support Guatemalan model village program withdrawn because of congressional opposition).

180. Cf. Continuing Appropriations Act of 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1936 (1984) (conditioning assistance to Nicaraguan *contras* upon executive reports and congressional approval by joint resolution). See generally Franck & Bob, *supra* note 42 (assessing congressional control devices in the post-*Chadha* era).

181. Cf. Int'l Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 99-500, § 101(k), 100 Stat. 1783-305, 1783-306 (1987) (creating independent five-person commission appointed by congressional leadership to generate alternative source of information on events in Nicaragua).

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cation for aid to Guatemala.¹⁸² Perhaps because the inauguration of a civilian president in a country long ruled by military leaders held such promise, Congress was willing to tolerate the abuses which continued to oppress the people of Guatemala. In our view, this represents both the success of the Guatemalan Army's 1982 plan,¹⁸³ and a retreat from Congress' concern for human rights articulated a decade ago.

182. According to staff members of the House Western Hemisphere Subcommittee, strong bipartisan support for the Cerezo government made significant political challenge to the 1986 certification impossible. Telephone interviews with staff members (Aug. 21 & Nov. 3, 1986).

183. See *supra* note 133.