NOTES

UNDERMINING CONGRESSIONAL OVERSIGHT OF COVERT INTELLIGENCE OPERATIONS: THE REAGAN ADMINISTRATION SECRETLY ARMS IRAN

INTRODUCTION

On January 17, 1986, President Ronald Reagan signed a secret finding[1] authorizing the covert sale of American arms to Iran: the Iran-contra affair had officially begun. In the ensuing months, the Reagan Administration pur-

1. *Text of Administration Documents Justifying Arms for Hostage Deal*, 45 CONG. Q.W. REP. 110, 110 (1987) [hereinafter *Text of Administration Documents*].

The Hughes-Ryan Amendment states:

> No funds ... may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, *unless and until the President finds that each such operation is important to the national security of the United States.* Each such operation shall be considered a significant anticipated intelligence activity for the purpose of [Title V of the National Security Act of 1947].

22 U.S.C. § 2422 (1982) (emphasis added). A finding, therefore, is the document which contains the presidential determination that an operation conducted by the CIA in a foreign country is important to the national security of the United States.

sued policies which would ultimately bring into question the integrity of the United States government. Pursuant to the secret finding, the government sold sophisticated missiles to Iran despite the President's prior denunciations of that country as a fountain of terrorism.[2] Members of the Reagan Administration negotiated the exchange of arms for hostages despite the President's assurances to the American people that such dealings would never be countenanced.[3] Finally, under the direction of Oliver North, a mid-level official in the National Security Agency, profits from the covert sale of arms to Iran were diverted into Swiss bank accounts and then secretly funneled to the counterrevolutionaries in Nicaragua (the "contras") to support their attempts to overthrow the recognized government of Nicaragua.[4]

While the Administration did not hesitate to give information about the covert arms sales to "an Iranian intermediary who failed several CIA lie detector tests, Iranian Government officials, Israeli Government officials, officials of the Government of a European country, private Israeli businessmen, and private U.S. citizens who did not have security clearances, such as [Albert] Hakim,"[5] it cloaked its actions from both Congress and the American

2. In a speech to the American Bar Association, for example, Reagan stated: "Now what do we know about the sources of those [terrorist] attacks and the whole pattern of terrorist assaults in recent years? In 1983 alone, the Central Intelligence Agency either confirmed or found strong evidence of Iranian involvement in 57 terrorist attacks." *Excerpts from the President's Address Accusing Nations of 'Acts of War,'* N.Y. Times, July 9, 1985, at A12, col. 1. Later in the same speech, Reagan asserted, "Now three other Governments [North Korea, Cuba and Nicaragua], along with Iran and Libya, are actively suporting a campaign of international terrorism against the United States, her allies and moderate third world states." *Id.*

3. In a news conference which took place while Americans were being held hostage on an airliner at the Beirut Airport, Reagan asserted: "Let me further make it plain to the assassins in Beirut and their accomplices wherever they may be that America will never make concessions to terrorists. To do so would invite more terrorism." *President's News Conference on Foreign and Domestic Issues*, N.Y. Times, June 19, 1985, at A18, col. 1.

4. *Key Sections of Document: The Making of a Political Crisis*, N.Y. Times, Nov. 19, 1987, at A12, col. 3 [hereinafter *Key Sections of Document*]. The majority report of the committee investigating the Iran-contra affair states:

> At the suggestion of Director Casey, North recruited Richard V. Secord . . . . Secord set up Swiss bank accounts and North steered future donations into these accounts. Using these funds, and funds later generated by the Iran arms sales, Secord and his associate, Albert Hakim, created what they called 'the Enterprise,' a private organization designed to engage in covert activities on behalf of the United States.
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> The Enterprise, functioning largely at North's direction, had its own airplanes, pilots, airfield, operatives, ship, secure communications devices, and secret Swiss bank accounts. For 16 months, it served as the secret arm of the N.S.C. [National Security Council] staff, carrying out with private and non-appropriated money, and without the accountability or restrictions imposed by law on the C.I.A., a covert contra aid program that Congress thought it had prohibited.

Id.

5. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR WITH SUPPLEMENTAL, MINORITY AND ADDITIONAL VIEWS, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 415 (1987) [hereinafter REPORT ON THE IRAN-CONTRA AFFAIR]. Albert Hakim coordinated the covert sale of American arms to Iran and the delivery of supplies to the contras. *From Abrams to Weinberger: The Cast of the Iran-Contra Drama*, N.Y. Times, Nov. 19, 1987, at A13, col. 2.

people. When the President signed the secret finding on January 17, 1986, he not only authorized the covert arms sales to Iran but also ordered the Director of Central Intelligence, William Casey, to withhold prior notification of the arms sales from Congress.[6] That order violated Title V of the National Security Act of 1947.[7]

Title V is the statute which governs congressional oversight of covert operations.[8] Drafted to limit the Executive Branch's ability to conduct covert operations in total secrecy and without accountability,[9] Title V requires the Director of Central Intelligence and the heads of any other agencies involved in intelligence activities to inform the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence ("the intelligence committees") of any covert operation prior to its initiation.[10] In extraordinary circumstances, the President may limit notification to eight members of Congress specified by title in the statute.[11]

Claiming that the President did not act improperly in directing Casey to withhold prior notification of the arms sales from Congress, the Reagan Administration has asserted three justifications for the President's violation of Title V. First, withholding notice was necessary because the covert arms sales were so sensitive that any unauthorized disclosure would threaten the lives of both the American hostages being held in Lebanon and the Iranians cooperating with the American government.[12] Second, the President has the authority

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6. *Text of Administration Documents, supra* note 1, at 110. (Text of Jan. 17 Intelligence Finding). In the finding, Reagan asserted:

> [D]ue to [the arms sales'] extreme sensitivity and security risks, I determine it is essential to limit prior notice, and direct the Director of Central Intelligence to refrain from reporting this Finding to the Congress as provided in Section 501 of the National Security Act of 1947, as amended, until I otherwise direct.

Id.

7. *See infra* text accompanying notes 128-211.

8. *See* Intelligence Authorization Act for Fiscal Year 1981, § 501, Pub. L. No. 96-450, 94 Stat. 1975, 1981 (1980) (adding "Title V - Accountability for Intelligence Activities" to the National Security Act of 1947), 50 U.S.C. § 413 (1982) [hereinafter Intelligence Authorization Act]. Covert operations are "activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions." 50 U.S.C. § 401 (1982).

9. S. REP. No. 730, 96th Cong., 2d Sess. 5 (1980) *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4192, 4195.

10. Intelligence Authorization Act, § 501, 50 U.S.C. § 413 (1982).

11. Section 501(a)(1)(B) of Title V states,

> [I]f the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

Id. at § 501(a)(1)(B), 50 U.S.C. § 413(a)(1)(B).

12. *See Opening Statement: 'Few Understood True Nature' of the Plan*, N.Y. Times, July 28, 1987, at A6, col. 1 (excerpts of testimony of Attorney General Edwin Meese III before the

under Title V to withhold notice of a covert operation until he believes that the disclosure will not interfere with the operation's success.[13] Third, the President may waive the requirements of Title V when he believes that national security will be served.[14]

This Note will argue that none of these justifications is valid. The Reagan Administration bases the first two justifications on its faulty construction of Title V. An analysis of the events leading up to the adoption of Title V, the legislative history of Title V, and the plain language of Title V will demonstrate that the Administration's construction of the statute is erroneous. The Administration's third justification is essentially a claim of executive privilege to withhold prior notice from Congress. Executive privilege is "the alleged authority of the executive to deny access to information in its possession, to Congress or the judiciary, even when those branches have affirmatively requested or commanded that the executive produce such information."[15] President Reagan's claim of executive privilege to withhold prior notice conflicts directly with the congressional demand for prior notification of covert operations embodied in Title V. To determine whether the President's claim of privilege is constitutional, this Note will analyze it within the framework for resolving separation-of-powers disputes which Justice Jackson applied in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[16] The Note will conclude that the President's claim of privilege is unconstitutional.

A complete analysis of the Reagan Administration's statutory and constitutional justifications requires an understanding of both the historical precedent for the claim of executive privilege and the development of congressional oversight of covert operations. Section I of this Note will, therefore, describe the historical precedent for claims of executive privilege. Section II will review the development of congressional oversight of covert operations. The third section of the Note will recount the President's decision to withhold

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joint congressional committee investigating the Iran-contra affair) [hereinafter *Opening Statement*]; Morgan and Pincus, *North, Panel Agree on Terms for Public-Private Testimony*, Washington Post, June 25, 1987, at A1, col. 4, A12, col. 1 (excerpts of testimony of former CIA General Counsel Stanley Sporkin before the joint congressional committee investigating the Iran-contra affair). *See infra* text accompanying notes 112, 115-18.

13. *See infra* text accompanying notes 119-20.

14. *Text of Reagan's Nov. 19 News Conference*, 44 CONG. Q.W. REP. 2947, 2948 (1987). *See also infra* text accompanying note 113.

15. Note, *The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General*, 11 PEPPERDINE L. REV. 331, 358 (1984). There are five areas in which the President has traditionally claimed executive privilege: (1) to protect advisory communications, (2) to protect secrets relating to national security, (3) to protect diplomatically sensitive data relating to international treaties, (4) to protect information relating to individuals who are subject to criminal or civil investigation, (5) where it would be administratively cumbersome to produce the information requested by Congress. P. KURLAND, WATERGATE AND THE CONSTITUTION 36 (1978), *cited in* Note, *supra*, at 358.

16. 343 U.S. 579, 635-38. This case resulted from President Truman's order during the Korean War that the Secretary of Commerce seize the nation's steel mills to prevent a strike. *Id.* at 582-83. *See infra* text accompanying notes 155-211.

prior notice of direct, covert American arms sales to Iran. Section IV will analyze the Administration's three justifications for noncompliance with the requirements of Title V which the Reagan Administration has forwarded. The final section will analyze legislation, presently being considered by Congress, which is designed to improve the current system of congressional oversight of covert operations.

I.
HISTORICAL PRECEDENT FOR THE CLAIM OF EXECUTIVE PRIVILEGE IN INTELLIGENCE MATTERS

President Reagan has claimed that he can assert executive privilege to withhold prior notice of covert operations from Congress.[17] As early as the Washington Administration, members of the Executive Branch have argued that the President can withhold from Congress information relating to the national security.[18] A review of both constitutional and historical precedents demonstrates that the President's power to withhold national security information from Congress is limited.

Presidents have based their assertions of privilege to withhold information from Congress on the executive powers clause[19] and the take care clause of the United States Constitution.[20] In the area of foreign affairs, Presidents have claimed that the assertion of executive privilege is justified if "disclosure would jeopardize national policies, offend some friendly nation, or otherwise embarass the United States in its relations with other nations."[21] When the claim involves national security information, the Executive Branch has claimed that the President's power to assert privilege also derives from the commander-in-chief clause.[22]

The Supreme Court has never adjudicated a challenge by a congressional committee to a presidential claim of executive privilege.[23] In *United States v.*

17. *Text of Reagan's Nov. 19 News Conference, supra* note 14, at 2948. *See also infra* text accompanying notes 155-56.

18. *Study Prepared by the Government and the General Research Division of the Library of Congress, reprinted from* CONG. REC. H2243-46 (daily ed. Mar. 28, 1973), *reprinted in* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 374 (1974). *See also infra* text accompanying notes 30-31.

19. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

20. *Id.* at § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . ."). *See* R. BERGER, *supra* note 18, at 375.

21. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 112 (1972).

22. *See, e.g.*, United States v. American Telephone & Telegraph, 567 F.2d 121, 128 (D.C. Cir. 1977) (the Ford Administration claimed that the commander-in-chief clause confers on the President absolute discretion in the area of national security). The commander-in-chief clause states: "The President shall be the Commander in Chief of the Army and Navy of the United States . . . ." U.S. CONST. art. II, § 2, cl. 1.

23. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims against Congress*, 71 MINN. L. REV. 461, 471 (1987). The United States Court of Appeals for the District of Columbia Circuit has addressed the issue in two cases: Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725

Nixon,[24] however, the Court indicated how it would approach such a dispute. In that case, then President Nixon claimed an absolute privilege of confidentiality of all presidential communications to resist a subpoena *duces tecum* issued on the motion of the Watergate Special Prosecutor.[25] Although the Court recognized that a privilege of presidential confidentiality is constitutionally based,[26] it held that the President's generalized interest in confidentiality was outweighed by "the fundamental demands of due process of law in the fair administration of criminal justice."[27] Although *Nixon* involved a separation of powers dispute between the Executive Branch and the judiciary, one could infer that the Court would apply the same approach in an executive privilege dispute with Congress.[28] Under such an approach, it is unlikely that the Court would uphold a claim of absolute executive privilege against a legitimate congressional demand for information.[29]

The history of disputes between the President and Congress over the disclosure of information possessed by the Executive Branch reflects the view of the Supreme Court that presidential power to withhold information from the other branches of government is not absolute. At a cabinet meeting in 1792, then-Secretary of State Thomas Jefferson first suggested that the President had the power to withhold from Congress those papers " 'the disclosure of which would injure the public.' "[30] George Washington had called the meeting to determine how to respond to a demand by the House of Representatives for

(D.C. Cir. 1974) and United States v. American Telephone & Telegraph, 567 F.2d 121 (D.C. Cir. 1977). For a discussion of *Senate Select Committee*, see *infra* note 28. For a discussion of *AT&T*, see *infra* text accompanying notes 192-96.

24. 418 U.S. 683 (1974).

25. *Id.* at 703.

26. *Id.* at 711.

27. *Id.* at 713.

28. Shane, *supra* note 23, at 472. In two cases after *Nixon*, Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), and United States v. American Telephone & Telegraph, 567 F.2d 121 (D.C. Cir. 1977), the United States Court of Appeals for the District of Columbia Circuit applied a balancing approach to resolve disputes between the President and congressional committees over claims of executive privilege.

In *Senate Select Committee*, the circuit court addressed the question whether the Committee's subpoena *duces tecum* requesting tapes of five conversations between President Nixon and John Dean could override the President's assertion of executive privilege to withhold the tapes. 498 F.2d at 727. The court found that "presidential conversations are 'presumptively privileged' " but that the presumption can be overcome "by an appropriate showing of public need by the party seeking access to the conversations." *Id.* at 730 (quoting Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973)). The court concluded that the Committee had not shown sufficient need to overcome the presumption of privilege. *Id.* at 731. It considered the Committee's need for the tapes to perform its investigative function to be "merely cumulative" since another congressional committee already possessed copies of the subpoenaed tapes. *Id.* at 732. The court also rejected the Committee's claim that the tapes were critical to the performance of its legislative function since the Committee had access to the publicly released transcripts of the tapes with partial deletions. *Id.*

For a discussion of *AT&T*, see *infra* text accompanying notes 192-96.

29. *See infra* text accompanying notes 155-211.

30. R. BERGER, *supra* note 18, at 375 (quoting 1 THOMAS JEFFERSON, WRITINGS 189-90 (1892-99)).

information relating to its investigation into the failure of General St. Clair's expedition against the Indians. Washington rejected Jefferson's suggestion, his cabinet having concluded that "there was not a paper which might not be properly produced."[31]

Other early disputes between the Executive Branch and Congress over the disclosure of information relating to national security reveal that historical precedent does not support an absolute executive privilege to withhold information from Congress. When the House of Representatives investigated the Burr conspiracy,[32] for example, it limited its demand for documents to those which the President believed could be released without public harm.[33] Nevertheless, Thomas Jefferson exceeded the House's request "because he was not content to exercise an outright discretion without full explanation of what he withheld and why he withheld it."[34] Although Andrew Jackson refused several congressional requests for information during his tenure as President, he complied on more than one hundred occassions, producing papers dealing with the negotiation of a treaty with Turkey, the seizure of American vessels by the Portuguese Navy and the conditions of political relations between the United States and Mexico.[35] Finally, when Congress demanded that President Tyler produce all documents relating to an Executive Branch investigation into alleged acts of fraud against the Cherokee Indian Nation, Tyler challenged Congress's power to demand the information but ultimately produced all the documents requested.[36] In these and most other confrontations between Congress and the Executive Branch over the disclosure of information prior to the Eisenhower Administration, Congress prevailed.[37]

Between 1954 and 1974, however, the balance between Congress and the Executive Branch regarding the disclosure of information shifted. On May 17, 1954, President Eisenhower wrote a letter to Secretary of Defense Wilson di-

31. *Id.* at 374-75. Abraham Sofaer claims that Washington's cabinet rejected Jefferson's recommendation not because it opposed the principle of withholding information from Congress, but rather because it believed that all of the information which the House of Representatives had requested could safely be disclosed to the public. Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1318 (1975).

32. The Burr Conspiracy involved Aaron Burr's plan to invade Mexico and establish an independent government there. He then intended to foment secession in the West and join it with Mexico to create a Napoleonic empire. Burr's co-conspirator, however, foiled Burr's plot by disclosing it to President Thomas Jefferson. Burr was subsequently tried for treason but acquitted because the plot was discovered before he had committed an overt act to further it. 2 ENCYCLOPEDIA BRITTANICA: MICROPAEDIA 391 (1974).

33. Wiggins, *Government Operations and the Public's Right to Know*, 19 FED. B.J. 62, 79 (1959). *See also* R. BERGER, *supra* note 18, at 179.

34. Wiggins, *supra* note 33, at 79. *See also* R. BERGER, *supra* note 18, at 179.

35. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J.L. & POL. 183, 210 (1986). *See also* Wiggins, *supra* note 33, at 80-81; R. BERGER, *supra* note 18, at 181-82.

36. Wiggins, *supra* note 33, at 82. *See also* R. BERGER, *supra* note 18, at 183-85; Stathis, *supra* note 35, at 210.

37. Wiggins, *supra* note 33, at 82. *See also* Sofaer, *Book Review*, 88 HARV. L. REV. 281, 289 (1974). *See generally*, R. BERGER, *supra* note 18; Stathis, *supra* note 35.

recting him to order his subordinates not to testify about advisory communications during an upcoming hearing before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations chaired by Senator McCarthy.[38] Although Eisenhower limited his claim of executive privilege to specific conversations among specified officials and to testimony before one committee, his Administration eventually extended its claim of privilege to include testimony by any executive employee before any congressional committee.[39] Congress bowed to Eisenhower's claim of privilege and continued to acquiesce to the Executive Branch's broad claims of privilege during the Kennedy, Johnson and Nixon Administrations.[40]

In 1974, after the resignation of Richard Nixon and revelations of major abuses by the intelligence community during his Administration, Congress reasserted its right of access to information in the Executive Branch's possession. During the Ford Administration, for example, the Executive Branch, despite some resistance, bowed to the aggressive demands of the House Select Committee on Intelligence for highly classified information relating to national security.[41] It also produced thousands of highly classified documents which the Senate Select Committee to Study Government Operations with

38. R. BERGER, *supra* note 18, at 373.

39. *Id.* at 376.

40. *Id.* at 377-78. The public supported Eisenhower's claim of privilege as an appropriate response to congressional excesses during the McCarthy era. *Id.* Congress's continued acquiescence in presidential claims of privilege until 1974 can best be understood as one aspect of the fundamental shift in power from Congress to the Executive Branch which occurred as a result of the fall of Senator McCarthy, the development of nuclear weapons and America's involvement in Viet Nam. *See generally* J. ROURKE, CONGRESS AND THE PRESIDENCY IN U.S. FOREIGN POLICYMAKING: A STUDY OF INTERACTION AND INFLUENCE 247-84 (1982); T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS (1979).

41. Stathis, *supra* note 35, at 262-66. During the Ford Administration, there were several confrontations between the President and the House Select Committee on Intelligence over Congress' access to documents held by the Executive Branch. The Executive Branch produced documents without challenging the authority of the Committee to request them until mid-September, 1975 when the Committee disclosed highly classified information about the failure of American intelligence during the 1973 Yom Kippur War. In response to the leak, President Ford cut off the Committee's access to additional classified material until it agreed to observe the Administration's controls on the release of such data. Although the Committee bowed to Ford's demands, it remained unclear whether the President would continue to withhold information. *Id.* at 262-63.

Shortly after this confrontation with the President, the Intelligence Committee subpeonaed then Secretary of State Henry Kissinger and ordered him to produce a secret memorandum on the 1974 Cyprus invasion which a mid-level State Department analyst had drafted. The Committee issued the subpoena to counter Kissinger's order prohibiting mid-level State Department analysts from testifying about their intelligence recommendations to senior government officials. Although Kissinger initially resisted the subpoena, he ultimately produced the document, though to protect secrecy, it was not in its original form. *Id.* at 263-64.

Soon after this episode, the Committee subjected Kissinger to three more subpoenas, all of which requested highly classified information. President Ford ordered Kissinger not to produce the documents because of their extreme sensitivity. Despite the President's pleas to the Committee's chairman, Otis Pike, to withdraw the requests, the Committee proceeded to issue contempt citations when Kissinger failed to comply with the subpoenas. Before the Committee voted on the citations, Kisssinger produced the documents. *Id.* at 264-65.

Respect to Intelligence Activities requested in the course of its broad investigation into earlier abuses by the intelligence agencies.[42]

The Carter Administration was even more cooperative than its predecessor in responding to congressional requests for documents relating to the activities of the intelligence agencies. In response to two of the most sensitive congressional investigations of the Carter Administration, the President allowed congressional committees to review a broad range of classified documents.[43] The two investigations included the House Select Committee on Assassinations' investigation into the deaths of President John F. Kennedy and Reverend Martin Luther King, Jr. and the congressional investigation into Billy Carter's association with Libya.[44]

In sum, a review of the constitutional and historical precedents demonstrates that the Executive Branch's power to withhold information from Congress is limited. After *United States v. Nixon*, the Supreme Court would most likely apply a balancing approach to an executive privilege claim against Congress, rather than accept a claim by the Executive Branch of absolute privilege. Moreover, Congress, except for a relatively brief hiatus between 1954 and 1974, has generally prevailed over the Executive Branch in its demands for disclosure of information. In light of these circumstances, the Reagan Administration's claim that the President can, in the interest of national security, withhold from Congress prior notice of covert intelligence operations, despite Title V's requirement of prior notice, lacks validity.

II.
CONGRESSIONAL OVERSIGHT OF INTELLIGENCE MATTERS

Although constitutional and historical precedent do not support executive claims of an absolute privilege to withhold information from Congress, they do support Congress's power to oversee and investigate the Executive Branch. Nevertheless, prior to 1974, Congress failed to legislate measures to ensure effective oversight of American intelligence agencies. In 1974, however, after the press revealed that during the Nixon Administration, the CIA and the FBI had flouted the law and violated the civil liberties of thousands of Americans,[45] Congress finally began to develop systematic oversight of the

42. *Id.* at 265. While relations between the Ford Administration and the Pike Committee were confrontational, those between the Executive Branch and the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, chaired by Senator Frank Church were far more cooperative. The Church Committee carried out a broad investigation of the intelligence community which required thousands of documents. Despite its avoidance of confrontation with the Executive Branch over production of classified information, the Church Committee reported that it had " 'good cooperation in obtaining information from the intelligence agencies and the Administration.' " *Id.* at 265 (quoting S. REP. No. 755, Book II, 94th Cong., 2d Sess. ix (1976)).

43. *Id.* at 267-68.

44. *Id.* at 266-71.

45. On December 22, 1974, the New York Times reported that "the Central Intelligence Agency, directly violating its charter, conducted a massive illegal domestic intelligence opera-

intelligence agencies. Title V of the National Security Act of 1947 represents the culmination of this effort.[46]

Although Congress's power to investigate is not specifically enumerated in the Constitution, the Supreme Court concluded over sixty years ago that it is "a necessary and appropriate attribute of the power to legislate."[47] The Court has based this conclusion on three grounds: first, Congress requires information to draft effective legislation;[48] second, congressional investigations gather the information which members of Congress need to inform the public of "the workings of its government";[49] third, congressional investigations act as a check against unbridled executive power.[50]

The scope of Congress's investigatory power is very broad. It "is as penetrating and far-reaching as the potential power to enact and appropriate under

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tion during the Nixon Administration against the antiwar movement and other dissident groups in the United States . . . . [I]ntelligence files on at least 10,000 American citizens were maintained by a special unit of the C.I.A. that was reporting directly to Richard Helms, then Director of Central Intelligence." Seymour, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. Times, Dec. 22, 1974, at A1, col. 8. William Colby, then Director of the CIA, confirmed this report on January 15, 1975, when he testified before the Senate Appropriations Committee that "officers of the CIA had spied on American journalists and political dissidents, placed informants with domestic protest groups, opened the mail of U.S. citizens, and assembled secret files on more than 10,000 Americans." S. REP. NO. 675, 94th Cong., 2d Sess. 4 (1976).

46. *See infra* text accompanying notes 61-92.

47. McGrain v. Daugherty, 273 U.S. 135, 175 (1926).

48. *Id.* Watkins v. United States, 354 U.S. 178, 187 (1956). Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1974).

49. *Watkins*, 354 U.S. at 200. The Supreme Court has generally supported its assertion that the informing function is an established aspect of Congress's powers with the following statement from Woodrow Wilson's CONGRESSIONAL GOVERNMENT 303 (1885):

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.

See, e.g., *Id.* at 200 n.33; Terry v. Brandhove, 341 U.S. 367, 377 n.6 (1950); United States v. Rumely, 345 U.S. 41, 43 (1952).

50. *McGrain*, 273 U.S. 135 (upholding the power of Congress to investigate corruption in the Executive Branch with respect to the Attorney General's failure to investigate certain violators of the Sherman Anti-Trust Act). In *Watkins*, the Court stated that the *McGrain* Court "recognized the danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered." 354 U.S. at 194-95. Similarly, in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), Justice Powell stated in his concurrence that by passing the Presidential Recordings and Materials Preservation Act, which, among other things, directed the Administrator of General Services to take custody of Richard Nixon's presidential papers and tape recordings, "Congress ha[d] unquestionably acted within the ambit of its broad authority to investigate, to inform the public, and, ultimately, to legislate against suspected corruption and abuse of power in the Executive Branch." *Id.* at 498 (Powell, J., concurring).

the Constitution."[51] It is not unlimited, however. Congress "cannot inquire into matters which are within the exclusive province of one of the other branches of Government."[52] In addition, it must seek information for a legitimate legislative purpose.[53] In doing so, Congress may not violate the Bill of Rights,[54] nor may it "expose for the sake of exposure."[55]

Despite the Court's early recognition of Congress's oversight and investigatory powers, Congress was slow to develop centralized oversight of national intelligence operations. One explanation is that the gathering of foreign intelligence was not centralized in one agency until 1947, when Congress passed the National Security Act of 1947 which created the CIA.[56] Since then, nearly two hundred bills have been introduced in both Houses of Congress to create either a joint committee or a special committee in each House to oversee the CIA.[57] Until the passage of Title V to the National Security Act of 1947, however, these attempts to centralize intelligence oversight of the CIA failed.

In the early 1950s, congressional oversight was carried out by separate subcommittees of the House and Senate Armed Services and Appropriations Committees.[58] By 1976, five Senate committees and three House committees shared oversight responsibility.[59] This decentralized oversight arrangement had several faults. First, because intelligence oversight was distributed over

51. Barenblatt v. United States, 360 U.S. 109, 111 (1958). "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad." *Watkins*, 354 U.S. at 187.

52. *Barenblatt*, 360 U.S. at 112. The Court stated in *Watkins*: "Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government." 354 U.S. at 187.

53. McGrain v. Daugherty, 273 U.S. 135, 178 (1926) (congressional inquiry into the Attorney General's failure to investigate certain violators of the Sherman Anti-Trust Act is for a legitimate legislative purpose). "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." Watkins v. United States, 354 U.S. 178 (1956).

54. *Watkins*, 354 U.S. at 198. In *Watkins*, the House Committee on Un-American Activities had asked petitioner certain questions which he refused to answer because he believed that the Committee did not have the authority to ask them. *Id.* at 182. The Court overturned petitioner's conviction for contempt of Congress on due process grounds because the Committee Chairman had failed to respond to petitioner's objection with sufficient information as to the relevance of the questions to allow him "a fair opportunity to determine whether he was within his rights in refusing to answer." *Id.* at 215.

55. *Id.* at 200. Doe v. McMillan, 412 U.S. 306, 330 (1972) (Douglas, J., concurring) (Congress's inclusion in a report on the public schools of the District of Columbia of documents relating to the disciplinary problems of specifically named students was unjustified "exposure for the sake of exposure.").

56. Note, *The Extent of Independent Presidential Authority to Conduct Foreign Intelligence Activities*, 72 GEO. L.J. 1855, 1856-59 (1984). National Security Act of 1947, ch. 343, 61 Stat. 496 (codified as amended at 50 U.S.C. §§ 401-12 (1982)).

57. S. REP. NO. 675, *supra* note 45, at 3.

58. *Id.*

59. *Id.* at 6. The Senate committees included the Armed Services Committee, the Foreign Relations Committee, the Finance Committee, the Judiciary Committee and the Joint Committee on Atomic Energy. *Id.* at 6-7. The House Committees included the Armed Services Committee, the Appropriations Committee and the Foreign Affairs Committee. *Id.* at 3, 4.

several committees, it was not the primary focus of any one committee. Second, each of the committees which assumed some oversight jurisdiction could devote only limited resources to intelligence oversight because they had many other demands on their time and resources. Third, because each committee devoted only limited resources to intelligence oversight, none could develop the expertise necessary for effective oversight in this complex field. Last, when the Executive Branch wanted to brief Congress on its own initiative, it had to brief several committees, resulting in repetition and the waste of executive resources.[60]

In response to public revelations in 1974 of CIA abuses during the Nixon Administration, Congress acted to revamp the intelligence oversight system.[61] First, it passed the Hughes-Ryan Amendment of 1974.[62] The Amendment prohibited the expenditure of any appropriations on a covert operation conducted by the CIA, unless the President determined that the operation was important to American national security and informed the appropriate committees, in a timely fashion, of the operation and its scope.[63] The Amendment was historically significant "because it was the first statute to provide for congressional oversight of the United States intelligence community."[64]

In addition to the passage of the Hughes-Ryan Amendment, both Houses established temporary study committees to examine the matter of intelligence oversight.[65] These congressional committees and an executive commission, the Rockefeller Commission, all recommended the centralization of intelligence oversight in one committee from each House.[66] The committees concluded that centralization would result in more efficient and effective oversight, conserve executive resources and facilitate the prevention of unauthorized disclosures by limiting access to classified information.[67]

In response to these recommendations, the Senate established the Select Committee on Intelligence, and the House formed the Permanent Select Intelligence Committee.[68] The resolutions creating these committees sought to

60. *Id.* at 7.

61. *Id.* at 4. "Public allegations of CIA efforts to 'destabilize' the Allende regime in Chile" also spurred Congress to strengthen oversight of the intelligence agencies. REPORT ON THE IRAN-CONTRA AFFAIR, *supra* note 5, at 377. *See also supra* note 45.

62. 22 U.S.C. § 2422 (1982).

63. *Id.* The Hughes-Ryan Amendment was amended in 1980 by the same bill which added Title V to the National Security Act of 1947. *See* Intelligence Authorization Act, § 407 (codified at 22 U.S.C. § 2422 (1982)). The key change which the Intelligence Authorization Act made in the Hughes-Ryan Amendment was that it eliminated the reporting requirement in the Hughes-Ryan Amendment and subjected reporting of covert operations to the requirements of Title V. For the text of the amended version of the Hughes-Ryan Amendment, see *supra* note 1. *See also infra* text accompanying notes 83-84.

64. Note, *Policing Executive Adventurism: Congressional Oversight of Military and Paramilitary Operations*, 19 HARV. J. ON LEGIS. 326, 355 (1982).

65. S. REP. NO. 675, *supra* note 45, at 4-5.

66. *Id.* at 5-6.

67. *Id.* at 6-7.

68. *Id.* at 5-6. *See also* S. Res. 400, 94th Cong., 2d Sess., 122 CONG. REC. 14,673-75 (1976); H.R. Res. 591, 94th Cong., 1st Sess., 121 CONG. REC. 23,256 (1975).

toughen the reporting requirement of the Hughes-Ryan Amendment. The Senate resolution, for example, called on the heads of each intelligence agency to keep the Committee "fully and currently informed with respect to intelligence activities."[69] The Senate report on the resolution states that "the responsibility to keep the Committee 'fully and currently informed' . . . includes informing the new committee of significant anticipated activities, including covert and clandestine activities, *before* they are initiated so that there may be a meaningful exchange of views *before* any final decision is reached."[70]

The "fully and currently informed" language in the Senate resolution is particularly significant, because that resolution and the parallel resolution in the House, H.R. Res. 591, were passed in response to abuses by the intelligence agencies and with the intention of improving the then-prevailing oversight arrangement.[71] In its preamble, the Senate resolution explicitly states that one of its purposes is "to provide vigilant legislative oversight [of] the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and the laws of the United States."[72] The Senate Select Committee on Intelligence evidently believed that prior notification of covert operations was necessary to achieve this purpose.

In 1978, the Carter Administration issued Executive Order 12,036 to establish internal guidelines for informing Congress of covert operations.[73] The Order adopted the "fully and currently informed" notification requirement which had originated in the Senate resolution, reinforcing the understanding that Congress would receive notification of covert operations prior to their

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69. S. Res. 400, *supra* note 68, at 16.

70. S. REP. NO. 675, *supra* note 45, at 3 (emphasis added).

71. *See supra* text accompanying notes 61-67.

72. S. Res. 400, *supra* note 68, at 2.

73. Exec. Order 12,036, 43 Fed. Reg. 3674 (1978). The Executive Order states:

3-4. *Congressional Intelligence Committees.* Under such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods, the Director of Central Intelligence and heads of departments and agencies of the United States involved in intelligence activities shall:

3-401. Keep the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate fully and currently informed concerning intelligence activities, including any significant anticipated activities which are the responsibility of, or engaged in by, such department or agency. This requirement does not constitute a condition precedent to the implementation of such intelligence activities;

3-402. Provide any information or document in the possession, custody, or control of the department or agency or person paid by such department or agency, within the jurisdiction of the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate, upon the request of such committee; and

3-403. Report in a timely fashion to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate information relating to intelligence activities that are illegal or improper and corrective actions that are taken or planned.

Id.

initiation.[74]

In 1980, the Senate Select Committee on Intelligence held hearings on an intelligence charter which its Subcommittee on Charters and Guidelines had been drafting for the past three years.[75] One of the principal points of contention was the prior notification requirement in Title V of the charter.[76] Title V requires that the Director of the CIA and the heads of any other agencies or departments involved in a covert operation keep the committees "fully and currently informed" of all intelligence activities and of any "significant anticipated intelligence activity," which include covert operations conducted by the CIA and certain collection and counterintelligence activities.[77] It also requires them to supply the committees with any material which they request as necessary to carry out their oversight responsibilities.[78]

Although Title V incorporated the "fully and currently informed" language used in Carter's Executive Order 12,036, Admiral Stansfield Turner, Director of Central Intelligence and the Carter Administration's representative to the Committee, opposed Title V. Turner had several criticisms of the prior notification requirement. He believed that it was too intrusive on the powers of the President and reduced the President's flexibility with respect to operations posing grave dangers or requiring great speed and secrecy.[79] Turner also argued that under the system governed by Executive Order 12,036, the President could avoid prior notification under exceptional circumstances, but if the requirement were made into law, he could not.[80]

Turner's criticism of Title V went beyond its putative effect on the President. Turner also claimed that the prior notification requirement would make it very difficult for the Director of Central Intelligence to ask his subordinates to risk their lives when so many people would be informed of the operation.[81] He also argued that prior notification would inhibit foreign intelligence agencies and individuals from cooperating with American intelligence agencies.[82] Turner would have preferred to modify the oversight system governed by the Hughes-Ryan Amendment by maintaining the requirement that the President notify the Committees of covert operations "in a timely fashion," but reducing the number of committees receiving intelligence information from as many as eight under the Hughes-Ryan Amendment, to the two intelligence

74. *Id.* at § 3-401.

75. *National Intelligence Act of 1980: Hearings before the Senate Select Committee on Intelligence*, 96th Cong., 2d Sess. 325 (1980) [hereinafter *National Intelligence Hearings*].

76. Admiral Stansfield Turner, then Director of the CIA, testified that the prior notice requirement was one of the "most important remaining differences" between the Carter Administration and the intelligence committees over the proposed intelligence charter. *Id.* at 28. *See also* S. REP. NO. 730, *supra* note 9, at 3.

77. Intelligence Authorization Act, § 501(a)(1), 50 U.S.C. § 413(a)(1) (1982).

78. *Id.* at § 501(a)(2), 50 U.S.C. § 413(a)(2).

79. *National Intelligence Hearings, supra* note 75, at 17 (statement of Admiral Stansfield Turner, Director of Central Intelligence).

80. *Id.* at 41.

81. *Id.* at 17.

82. *Id.*

committees.[83]

Although the Senate Select Committee on Intelligence adopted the suggested modification of the Hughes-Ryan Amendment by eliminating the requirement that the President report covert operations to as many as eight committees and by limiting oversight of covert operations to the two congressional intelligence committees pursuant to Title V,[84] it rejected the suggestion that the Committee scuttle the prior notification requirement with respect to covert operations.[85] Senator Birch Bayh, then Chairman of the Committee, stated: "Without prior notice, oversight would be an empty fiction, because the most sensitive and significant activities are precisely those events which require advice, careful consideration and restraint."[86] Senator Joseph Biden presciently remarked with respect to the prior notice requirement:

> But I am not so worried about the intelligence community going off on its own and abusing their powers. I am worried about a President, this President, the last President or the next President deciding how they are going to use that agency. I am not prepared, as one Senator, to leave that to the good judgment of this President or the next President.[87]

Senator Bayh responded to Turner's criticism that the prior notification requirement would limit the President's flexibility by stating: "I fail to see how it is in any way inhibiting to report to two committees, carefully selected, carefully crafted, carefully staffed with maximum security and sensitivity."[88]

The legislative history of Title V further demonstrates that one of the principal purposes of the statute is to ensure that the Executive Branch gives Congress prior notification of covert intelligence operations. The legislative history states that "[t]he requirement to 'fully and currently inform' the oversight committees of 'any significant anticipated intelligence activity'[89] is in-

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83. *Id.* at 24.

84. *Id.* at 2 (statement of Senator Birch Bayh). *See also* Intelligence Authorization Act, § 407, 22 U.S.C. § 2422 (1982).

85. *See* Intelligence Authorization Act, § 501(a)(1), 50 U.S.C. § 413(a)(1) (1982).

86. *National Intelligence Hearings, supra* note 75, at 2 (statement of Senator Birch Bayh).

87. *Id.* at 8 (statement of Senator Joseph Biden).

88. *Id.* at 29 (statement of Senator Birch Bayh). The enactment of the prior notice provision further manifests its significance as an obstacle to unchecked presidential discretion. Despite the clear opposition of the Carter Administration, *id.* at 24-25, the prior notification requirement was the only section of the proposed intelligence charter which was made into law. S. REP. NO. 730, *supra* note 9, at 3. Ironically, the Carter Administration supported most of the other provisions of the proposed charter. *National Intelligence Hearings, supra* note 75, at 29.

89. The legislative history defines a "significant anticipated intelligence activity" as follows:

> An anticipated activity should be considered significant if it has policy implications. This would include, for example, activities which are particularly costly financially, as well as those which are not necessarily costly, but which have . . . [significant] potential for affecting this country's diplomatic, political, or military relations with other countries or groups . . . . It excludes day-to-day implementation of previously adopted policies or programs.

tended to mean that the committees shall be informed at the time of the Presidential finding that authorizes initiation of such activity. Arrangements for notice are to be made forthwith, without delay."[90] The legislative history adds that such intelligence operations carried out by agencies other than the CIA would also be subjected to the prior notification requirement.[91] The legislative history also explains that the purpose of prior notice is to "encourage[ ] consultation between the branches and offer[ ] the posssibility that better decisions might be made."[92]

From the inception of the CIA in 1947 until the passage of the Hughes-Ryan Amendment in 1974, congressional oversight of the intelligence community was ad hoc and decentralized. This situation was reflected in the broad claims of executive privilege made by the Eisenhower, Kennedy, Johnson and Nixon Administrations.[93] After Nixon's resignation and revelations of serious CIA abuses, Congress asserted its right to oversee the intelligence community, not only through aggressive investigations,[94] but more significantly, by creating a formal oversight structure through the establishment of the House and Senate Intelligence Committees, the passage of the Hughes-Ryan Amendment, and ultimately, through the passage of Title V of the National Security Act of 1947. Title V is particularly significant because it imposes on the Executive Branch, for the first time, a statutory duty to notify Congress of any covert intelligence operation prior to its initiation. Only six years after the passage of Title V, the Reagan Administration challenged its validity, seeking to bypass it through the assertion of executive privilege to withhold from Congress prior notice of the Iran initiative.

III.
THE IRAN-CONTRA AFFAIR: JUSTIFYING THE FAILURE TO GIVE PRIOR NOTICE

The Reagan Administration began a reappraisal of American policy towards Iran in late 1984.[95] In the summer of 1985, staff members of the National Security Council considered an Israeli proposal to provide Iran with Israeli-owned, but American-supplied, anti-tank missiles in exchange for the release of American hostages held in Beirut.[96] In August and September 1985, Israel, with the approval of President Reagan, shipped 504 anti-tank missiles to Iran.[97] This shipment resulted in the release of only one hostage.[98]

S. REP. NO. 730, *supra* note 9, at 8.

90. *Id.* at 9.

91. *Id.* at 8.

92. *Id.* at 9.

93. *See supra* text accompanying notes 38-40.

94. *See supra* text accompanying notes 41-44.

95. *Chronology of Events in the Iran-Contra Affair*, 45 CONG. Q.W. REP. 282 (1987) [hereinafter *Chronology*].

96. *Key Sections of Document*, *supra* note 4, at A13, col. 2.

97. *Id.*

98. *Id.* at col. 3.

In November 1985, the President authorized a second shipment of missiles by Israel to Iran on an aircraft supplied by the CIA. No hostages, however, were released after this shipment.[99] Two months later, the President raised the level of American involvement in the covert sale of arms to Iran by authorizing the direct shipment of American-owned arms to Iran in exchange for the release of more hostages.[100]

Before the President could legally proceed with the shipment, however, he had to fulfill the requirement of the Hughes-Ryan Amendment of "finding" that the operation was important to the national security of the United States.[101] Stanley Sporkin, then-General Counsel of the CIA, was responsible for drafting the finding.[102] According to Sporkin, his assistants originally drafted the finding with a provision for notifying Congress.[103] Sporkin subsequently added to the draft finding an additional provision which would allow the President to forego prior notification.[104] Sporkin believed that the President had to make the decision whether or not to give notice.[105]

The President ultimately chose the option which Sporkin had added, to forego prior notification of Congress. The finding which Reagan signed on January 17, 1986, not only authorized direct, covert American arms sales to Iran, but also directed William Casey, the Director of the CIA, to withhold prior notice from Congress.[106] The finding states:

> [I] hereby find that the following operation in a foreign country . . . is important to the national security of the United States, and due to its extreme sensitivity and security risks, I determine it is essential to limit prior notice, and direct the Director of Central Intelligence to refrain from reporting this Finding to the Congress as provided in Section 501 of the National Security Act of 1947 . . . .[107]

According to the finding, the objective of the covert arms sales to Iran was to assist Iranian elements who were sympathetic to the United States in establishing a more moderate government in Iran, to obtain significant intelligence about the Iranian government's intentions with respect to its neighbors and to

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99. *Id.*

100. *Id.* at col. 5.

101. 22 U.S.C. § 2422 (1982). For the text of the Hughes-Ryan Amendment, see, *supra* note 1.

102. *Joint Hearings on the Iran-Contra Investigation Before the House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition: Testimony of Stanley Sporkin*, 100th Cong., 1st Sess. 39-40 (1987) [hereinafter *Sporkin Testimony*].

103. *Id.* at 44-45.

104. *Id.* at 44-45. Sporkin testified that the January 17, 1986, finding was the only one in which he included a provision to withhold prior notice from Congress. *Id.* at 191.

105. *Id.* at 45.

106. *Texts of Administration Documents, supra* note 1, at 110 (text of Jan. 17 intelligence finding).

107. *Id.*

further the release of American hostages held in Beirut.[108]

Pursuant to the finding, Casey did not inform congressional leaders of the covert arms sales to Iran. Almost eleven months after the President signed the finding, however, a weekly magazine in Beirut disclosed the Administration's covert activities.[109] Nine days later, on November 12, 1987, the President briefed congressional leaders about the covert arms sales to Iran for the first time since he had signed the finding.[110] On the next day, the President made the first public acknowledgement of the direct arms sales to Iran in a nationally televised address. During this address, the President attempted to justify withholding prior notice from Congress as follows:

> There is ample precedent in our history for this kind of secret diplomacy. In 1971, then-President Nixon sent his national security adviser on a secret mission to China. In this case, as today, there was a basic requirement for discretion and for sensitivity to the situation in the nation we were attempting to engage.[111]

Reagan again addressed the question of his failure to give Congress prior notice of the Iran arms sales during a televised news conference on November 19, 1986. The President asserted that it was necessary to withhold prior notification because "this undertaking involved great risks, especially for our people and for the Iranian officials with whom we dealt."[112] Later in the same news conference, the President offered another justification for his withholding prior notice, stating, "[A]s I said, the President, believe it or not, does have the power, if, in his belief, national security can be served, to waive the provision of that law [Title V] as well as to defer notification of the Congress . . . ."[113]

Subsequent testimony before the different congressional committees investigating the Iran-contra affair revealed that both Sporkin and Casey advised the President that he could withhold prior notice of direct, covert

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108. The finding states in part:

Description: Assist selected friendly foreign liaison services, third countries and third parties which have established relationships with Iranian elements, groups and individuals sympathetic to U.S. Government interests and which do not conduct or support terrorist actions directed against U.S. persons, property or interests, for the purpose of: (1) establishing a more moderate government in Iran, (2) obtaining from them significant intelligence not otherwise obtainable, to determine the current Iranian government's intentions with respect to its neighbors and with respect to terrorist acts, and (3) furthering the release of the American hostages held in Beirut and preventing additional terrorist acts by these groups. Provide funds, intelligence, counter-intelligence, training, guidance and communications and other necessary assistance to these elements, groups, individuals, liaison services and third countries in support of these activities.

Id.

109. *Chronology, supra* note 95, at 283-84.

110. Felton, *Reagan Tries to Put Out Fire on Iran Dealing*, 44 CONG. Q.W. REP. 2883 (1986).

111. *Text of Reagan's Address on Arms Shipments to Iran*, 44 CONG. Q.W. REP. 2916, 2918 (1987).

112. *Text of Reagan's Nov. 19 News Conference, supra* note 14, at 2947.

113. *Id.*

American arms sales to Iran from Congress without violating Title V of the National Security Act of 1947. According to Sporkin, both the preambular language of Title V and the Constitution authorize the President to withhold prior notice of covert operations from Congress.[114] Casey testified that Sporkin advised the Reagan Administration that the sensitive nature of the covert arms sales to Iran also justified the President's withholding prior notification from Congress.[115] Attorney General Edwin Meese III confirmed Casey's statement. Meese explained that the covert arms sales were extremely sensitive because "human lives were at stake: the lives of the American hostages and the lives of the more pragmatic Iranian elements. . . ."[116] Meese testified that Casey and Sporkin had advised the President that "it would be appropriate to delay the notification of Congress."[117] According to Sporkin, "there would be notification as soon as the hostages . . . were out."[118] Meese concurred in the CIA's advice that notification in the circumstances be deferred until the hostages were released.[119]

The Justice Department attempted to support the President's position with a legal memorandum that it prepared in December 1986. The memorandum concluded that the President was " 'within his authority in maintaining the secrecy of this sensitive diplomatic initiative from Congress until such time as he believed that disclosure to Congress would not interfere with the success of the operation.' "[120]

The Reagan Administration's justifications did not convince many members of Congress of the legality of the President's actions. One commentator reported that "[e]ven the President's strongest supporters on Capitol Hill have said he bent the law."[121] Senator Sam Nunn criticized the President's withholding of prior notice by stating: "The President seems to think that he can notify Congress any time he chooses to. That is simply contrary to the letter

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114. *Sporkin Testimony, supra* note 102, at 163, 201. Sporkin testified as follows:

> MR. CHENEY: Do you now, with the benefit of hindsight have any second thoughts about the decision to go for non-recognition or non-notification of Congress?
>
> MR. SPORKIN: Congressman, if this is what this has caused, obviously, that's an easy decision . . . . But I do think whether this is the case or there may be some other case, I do think there are instances where you could have non-notification. I think it is built into the statute itself. It is built into the Constitution.

Id. at 162-63.

115. *Text of Summary of Senate Report on the Iran-Contra Inquiry*, N.Y. Times, Jan. 19, 1987, at A6, col. 1.

116. *Opening Statement, supra* note 12, at A6, col. 4.

117. *The Testimony: Notifying Congress and the Threat to Go Public*, N.Y. Times, July 29, 1987, at A6, col. 1 (excerpts from the testimony of Attorney General Edwin Meese III).

118. *Sporkin Testimony, supra* note 102, at 89.

119. *Opening Statement, supra* note 12, at A6, col. 1.

120. Pressman, *House Members Try to Tighten Strings on Covert Operations*, 45 CONG. Q.W. REP. 720, 721 (1987).

121. Felton, *Beyond the Welter of Facts, More Questions*, 45 CONG. Q.W. REP. 275, 281 (1987).

and spirit of the law."[122]

The majority report of the congressional committee investigating the Iran-contra affair comes to the same conclusion.[123] It states that the President was wrong in claiming that he could indefinitely defer notifying Congress of especially sensitive operations for fear that public disclosure would endanger the lives of the American hostages in Beirut.[124] It adds that according to the legislative history of Title V, the President can justifiably withhold prior notice only if there is insufficient time to notify Congress.[125] The minority report of the congressional committee investigating the Iran-contra affair disputes this conclusion.[126] It claims that "the decision not to notify must of necessity rest on presidential discretion" and that this discretion is both recognized in the preambular language of section 501 of Title V and in the Constitution.[127] A detailed analysis of the language and legislative history of Title V and of the constitutional principles supporting the concept of executive privilege will reveal that the majority report's conclusions are correct and that none of the Reagan Administration's justifications for withholding prior notice of the Iran initiative from Congress are valid.

IV.
THE INVALIDITY OF THE REAGAN ADMINISTRATION'S JUSTIFICATIONS FOR WITHHOLDING FROM CONGRESS PRIOR NOTIFICATION OF COVERT ARMS SALES TO IRAN

As previously noted, the Reagan Administration asserted three justifications for its failure to give Congress prior notice of its covert arms sales to Iran. The validity of two of these justifications — that withholding notice was necessary to protect the lives of the American hostages and cooperating Iranians[128] and that notice was justifiably deferred until the hostages were released so as not to jeopardize the success of the operation[129] — depends on the Reagan Administration's interpretation of Title V. The third justification — that the President may waive the requirements of Title V when he believes that national security will be served[130] — depends on the Reagan Administration's interpretation of the President's powers under the Constitution. A thorough examination of the Reagan Administration's statutory and constitutional interpretations demonstrates that they are erroneous and that the Administra-

122. Felton, *Reagan's Iran Deal: The Skepticism Builds*, 44 CONG. Q.W. REP. 2927, 2928 (1986).
123. REPORT ON THE IRAN-CONTRA AFFAIR, *supra* note 5, at 415-16.
124. *Id.* at 415.
125. *Id.*
126. *Id.* at 544.
127. *Id.*
128. *See supra* text accompanying notes 112, 115-18.
129. *See supra* text accompanying notes 119-20.
130. *See supra* text accompanying note 113.

tion's failure to give Congress prior notification of the covert arms sales to Iran violated Title V of the National Security Act of 1947.

A. The Reagan Administration's Proffered Statutory Justification: The Alleged "Third Track"

When Congress enacted Title V, it anticipated the possibility that certain covert operations would require such great secrecy that it would be impractical for the President to notify both congressional intelligence committees.[131] To satisfy the conflicting needs of secrecy and oversight, Congress included section 501(a)(1)(B) as an alternative to section 501(a)(1)'s requirement of notice to both intelligence committees.[132] Section 501(a)(1)(B) expressly provides that

> if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interest of the United States, such notice shall be limited to the Chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.[133]

According to the legislative history of Title V:

> [t]he purpose of this limited prior notice in extraordinary circumstances is to preserve the secrecy necessary for very sensitive cases while providing the President with advance consultation with the leaders in Congress and the Chairmen and ranking minority members who have special expertise and responsibility in intelligence matters. Such consultation will ensure strong oversight, and at the same time, share the President's burden on difficult decisions concerning significant activities. This limited prior notice calls only for prior consultation, and in no way suggests prior approval.[134]

Congress designed this limited notice provision for situations like the covert sale of arms to Iran where a press leak would jeopardize the lives of the American hostages and of the Iranians cooperating in the operation, yet the Reagan Administration never seriously considered invoking it.[135] When asked during the joint hearings on the Iran-contra affair why he did not recommend that the President take advantage of section 501(a)(1)(B), Sporkin replied, "I can't recall whether that even crossed my scope at the time."[136] In response to a similar question at the joint hearings, Meese stated, "I don't recall anyone

131. S. REP. NO. 730, *supra* note 9, at 10.
132. *Id.*
133. Intelligence Authorization Act, § 501(a)(1)(B), 50 U.S.C. § 413(a)(1)(B) (1982).
134. S. REP. NO. 730, *supra* note 9, at 10.
135. Felton and Pressman, *Reagan Pressed to Apologize for Iran Affair*, 45 CONG. Q.W. REP. 109 (1987). *Reagan's Senior Cabinet Members Testify*, 45 CONG. Q.W. REP. 1746, 1753 (1987) (statement of Edwin Meese III). *Sporkin Testimony*, *supra* note 102, at 161.
136. *Sporkin Testimony*, *supra* note 102, at 161-62.

pointing out the advantage of consultation with Congress or notification of Congress."[137]

According to Sporkin, the Reagan Administration's failure to comply with either section 501(a)(1) or section 501(a)(1)(B) did not violate Title V because Title V has a "third track" which allows the President to defer notification of Congress until after the initiation of a covert operation.[138] Sporkin claims that the President's right to defer notification is built into Title V's preamble[139] which states that the prior notification requirements shall be carried out "[t]o the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches . . . ."[140] According to Sporkin, this language "recognizes that there are constitutional prerogatives which are not going to be dealt with by the notification. . . . [T]he statute must mean that there are times when there will be non-notification."[141]

Sporkin also argues that if Congress did not intend to give the President the right to withhold prior notification in certain circumstances, then it would not have included section 501(b) in Title V.[142] That section requires notifica-

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137. John W. Nields, Jr., the House's Chief Counsel at the joint hearings, asked Meese, "At any of the meetings [on the Iran initiative] in January of 1986 did anyone point out the advantage of consultation notice to Congress?" *Reagan's Senior Cabinet Members Testify*, 45 CONG. Q.W. REP. 1746, 1753 (1987) (excerpts of testimony of Attorney General Edwin Meese III).

138. Sporkin stated: "[L]ook there is a three track system under this statute [Title V]. There's the no notice, there's the notice to the group of eight, and then there is the notice to the intelligence bodies." *Sporkin Testimony*, *supra* note 102, at 201.

Sporkin also testified as follows:

> MR. MITCHELL: You have said that there are three, you said a three track approach.
>
> MR. SPORKIN: Right.
>
> MR. MITCHELL: All right. One of them is no notice. That means he doesn't tell Congress.
>
> MR. SPORKIN: That comes from the statute. You are saying that it doesn't come from the statute.

Id. at 202-03. *See also id.* at 163, 198.

139. Sporkin stated, "The no notice track comes right under the first three or four words where it says subject to or consistent with the President's and the legislature's constitutional authorities." *Id.* at 201. *See also id.* at 163, 198-99, 200-01.

140. Intelligence Authorization Act, § 501(a), 50 U.S.C. § 413(a) (1982).

141. *Sporkin Testimony*, *supra* note 102, at 199.

142. *Id.* at 199-200. Sporkin testified as follows:

> Because I'm telling you that the statute recognizes there will be times when the—there will be non-notification. If you read the statute it's there. . . . What does 501(b) say? It says in instances where the President doesn't give notification he shall make timely—I forget, he should in a timely fashion give notice—so the statute itself, and I think there is another provision, there is a third provision that recognizes that point.

Id.

Sporkin also testified as follows:

> The no notice track comes right under the first three or four words where it says subject to or consistent with the President's and the legislature's constitutional authorities. Now when you take the second provision that says that in those instances where no notice is given he shall give notice in a timely fashion. What does that provision

tion "in a timely fashion" in cases where the President fails to give prior notification.[143] Indeed, Sporkin can find support for this argument in the legislative history of Title V which states:

> The Senate Select Committee and the Executive Branch and the intelligence agencies have come to an understanding that in rare extraordinary circumstances if the President withholds prior notice of covert operations, he is obliged to inform the two oversight committees in a timely fashion of the action and the reasons for withholding of such prior notice.[144]

Sporkin might have concluded that the Iran initiative involved those rare extraordinary circumstances which allow the President to withhold prior notice by invoking section 501(b) and the preamble to section 501(a).

Although Sporkin's argument is superficially plausible, a closer analysis of the preambular language indicates that the covert arms sales to Iran did not comprise the "rare extraordinary circumstances" that would permit the President to withhold prior notice. The preambular language was included in Title V for a very limited purpose. In drafting Title V, the intelligence subcommittee recognized the realities of conducting foreign relations in a volatile international environment. Senator Huddleston, the Chairman of the subcommittee that drafted Title V, explained that the preambular language is intended to give the President the prerogative, in an emergency, "to move very quickly if he determined the situation required it."[145] The legislative history further explains that "[t]he preambular clause referring to authorities under the Constitution is an indication that a broad understanding of these matters concerning intelligence activities can be worked out in a practical manner, even if the particular exercise of the constitutional authorities of the two branches cannot be predicted in advance."[146] The Senate Intelligence Committee clearly recognized the possible occurence of a "rare emergency situation, when the President might be required to act to defend the vital interests of the nation and there might not be time to provide notice until the plan had begun."[147] In such a situation, it would be inexpedient, and perhaps unconstitutional, to prevent the President from acting where the intelligence committees did not

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mean? It doesn't mean—it has to mean the third track. It can mean nothing else, Senator.

Id. at 201.

143. Section 501(b) states:

The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) and shall provide a statement of the reasons for not giving prior notice.

Intelligence Authorization Act, § 501(b), 50 U.S.C. § 413(b) (1982).

144. S. REP. NO. 730, *supra* note 9, at 12.

145. *National Intelligence Hearings, supra* note 75, at 135.

146. S. REP. NO. 730, *supra* note 9, at 9.

147. *Id.*

receive prior notice.[148]

By including the preambular language in section 501(a) of Title V, the intelligence subcommittee surely did not intend to authorize the President to withhold prior notice based on his belief that a covert operation is too sensitive to be disclosed or on his determination that it has been successfully completed. Instead, only where the actual circumstances of the situation are such that it would be impossible for the President to notify the intelligence committees before acting may the President withhold prior notification. In an attempt to clarify this distinction, the legislative history provides a hypothetical example of a "rare extraordinary emergency situation" in which the President receives a cable in the middle of the night concerning an opportunity of extreme importance to American security interests. The President must respond within a few hours or else lose the opportunity.[149] In such circumstances the President would be justified in first invoking the constitutional prerogative established in the preamble to section 501(a) and then notifying Congress in a timely fashion in accordance with section 501(b).

Consistent with his flawed reading of the preambular language, Sporkin's claim that section 501(b) further supports the "third track" erroneously interprets the congressional intent behind that provision. As previously mentioned, section 501(b) requires the President to notify Congress "in a timely fashion" of any covert operations "for which prior notice was not given" and to "provide a statement of the reasons for not giving prior notice."[150] The purpose of section 501(b) is not, as Sporkin has asserted, to give the President the option either to notify Congress prior to the initiation of a covert operation or to notify Congress in a timely fashion whenever the President believes that withholding prior notice is justified.[151] Instead, Congress included section 501(b) in Title V to ensure that the President notifies Congress in a timely fashion of any covert operation initiated as the result of a "rare extraordinary emergency situation" which precludes prior notice.

The legislative history of Title V supports this interpretation of the purpose of section 501(b) by its explicit statement that "[t]he provisions of subsection (b) are expressly not conditioned upon the preambular clauses that apply to subsection (a)."[152] By limiting the application of the preambular language

148. *Id.*

149. *Id.* The legislative history quotes the following example given by William Colby, former Director of the CIA:

> I can conceive of a cable arriving in the wee hours of the night which says that you have an opportunity to do somethink [sic] of vast importance. It makes a great deal of sense but . . . the return cable has to go out in a matter of three hours. It will be a little hard in that situation to be able to go through the procedure [of notifying Congress] . . . but to hold it because you couldn't get to the Committee at that point I think would be a mistake.

Id.

150. Intelligence Authorization Act, § 501(b), 50 U.S.C. § 413(b) (1982).

151. *See supra* text accompanying notes 142-48.

152. S. REP. NO. 730, *supra* note 9, at 12.

to section 501(a), Congress expressed its understanding that in a "rare extraordinary situation" it might be impossible for the President to give the intelligence committees prior notice of a covert operation but that under no circumstances would it be impossible for him to notify Congress in a timely fashion of a covert operation which had been initiated without prior notice.

The covert American arms sales to Iran which the President approved in the finding of January 17, 1986, clearly do not fit within the description of a "rare extraordinary emergency situation" for which section 501(b) and the preambular language to section 501(a) provide. No time limit existed on the covert arms sales such that the President, as a practical matter, could not have informed Congress of his decision to proceed with the covert operation. In fact, the sale of arms to Iran had been under discussion within the Administration for at least seven months prior to the President's signing the finding on January 17, 1986.[153] The covert operation then continued for an additional ten months before Congress was informed of it through public disclosure.[154] These facts in no way conform to the type of situation which the congressional intelligence committees envisioned when they drafted the preambular language. Sporkin's claim that the Reagan Administration was statutorily justified in withholding prior notification from Congress because the President believed that disclosure might threaten human lives or the successful release of the American hostages, therefore, clearly violates the letter and spirit of Title V.

B. The Reagan Administration's Proferred Constitutional Justification: The Claim of Executive Privilege

The Reagan Administration's third justification for withholding prior notice from Congress exceeds the bounds of Title V. In a televised news conference which aired on November 19, 1986, President Reagan claimed that "the President, believe it or not, does have the power, if, in his belief, national security can be served, to waive the provisions of that law [Title V] as well as to defer notification of the Congress."[155] The President's assertion of an executive privilege to withhold from Congress prior notice of covert operations constituted a direct challenge to the power of Congress to oversee the actions of the intelligence agencies. If the President's claim were held to be constitutional, it would completely destroy the intelligence committees' ability to exercise oversight with respect to the Executive Branch's covert operations.

Although the President's claim will probably never be litigated,[156] it is

153. *Chronology*, *supra* note 95, at 282.

154. *Id.* at 284. *See also supra* text accompanying notes 109-10.

155. *Text of Reagan's Nov. 19 News Conference*, *supra* note 14, at 2948.

156. Once the Iran-contra affair became public, any claim which the intelligence committees could have made under Title V became moot. This fact illustrates the improbability of obtaining a judicial resolution of the validity of the President's claim of executive privilege to avoid compliance with Title V's prior notification requirement. Since the Executive Branch carries out covert operations in complete secrecy, the intelligence committees will not know that

nevertheless instructive to consider whether his assertion of executive privilege would be upheld. Neither the Constitution nor the Supreme Court provides a decisive answer to the question whether the President, based on his implied powers, can disregard a federal statute requiring him to inform Congress of covert intelligence operations. "[T]he Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security."[157] The Supreme Court, moreover, has had relatively few opportunities to establish governing constitutional principles for separation-of-powers disputes.[158]

Perhaps the most instructive Supreme Court opinion addressing disputes between the Executive and Legislative Branches is Justice Jackson's seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[159] Although Justice Jackson did not propose a formula by which all separation-of-powers disputes can be resolved, he did establish a framework for analyzing disputes between the President and Congress which the Supreme Court has subsequently applied.[160] According to Jackson, the powers of the President fluctuate "depending upon their disjunction or conjunction with those of Congress."[161] Consequently, Presidential authority falls into one of three zones. First, when the President acts with implied or express congressional authorization, his power is at its maximum, and "the strongest of presumptions and the widest latitude of judicial interpretation" support his acts.[162] Second, when the President acts and Congress has neither granted nor denied him power to do so because of inertia, indifference or acquiescence, then the President operates in a "zone of twilight" where the distribution of power is uncertain.[163] Third, when the President acts against the express or implied will of Congress, his

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a covert operation has been initiated unless the Executive Branch complies with Title V. If the Executive Branch fails to do so, however, the intelligence committees will most likely not discover its noncompliance until well after the covert operation has commenced. At that point, as in the case of the covert sale of arms to Iran, the question of notification will be moot. If, on the other hand, the intelligence committees discover, at a point in time where notification has not become moot, that the Executive Branch has initiated a covert operation without giving them prior notice, the committees could either seek to enjoin the President from not complying with Title V or issue a subpoena requesting the information being withheld. In either case, the dispute between the Executive Branch and Congress would then be very similar to the dispute resolved in United States v. American Telephone & Telegraph, 567 F.2d 121 (D.C. Cir. 1977). For a discussion of that case, see *infra* text accompanying notes 192-96.

157. United States v. American Telephone & Telegraph Co., 567 F.2d 121, 128 (D.C. Cir. 1977).

158. G. STONE, L. SEIDMAN, C. SUNSTEIN, M. TUSHNET, CONSTITUTIONAL LAW 346 (1986). "[T]he decisions of the Court in this area [separation of powers] have been rare, episodic, and afford little precedential value for subsequent cases." Dames & Moore v. Regan, 453 U.S. 654, 661 (1981).

159. 343 U.S. 579 (1952).

160. *See, e.g.*, Haig v. Agee, 453 U.S. 280 (1981); Dames & Moore v. Regan, 453 U.S. at 654.

161. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

162. *Id.* at 635-37.

163. *Id.* at 637.

power is at a minimum.[164]

Then Associate Justice Rehnquist, writing for the majority in *Dames & Moore v. Regan*,[165] recently noted that these three zones form a continuous spectrum within which any separation-of-powers dispute must fall. Rehnquist wrote: "Justice Jackson himself recognized that his three categories represented 'a somewhat over-simplified grouping,' and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."[166] This section will demonstrate that Reagan's claim of executive privilege to withhold prior notice from Congress falls within that part of the Jacksonian spectrum where the President's power is at a minimum and that the President's claim of privilege would not be upheld.

The dispute between Reagan and Congress clearly does not fall within the maximum power end of the Jacksonian spectrum, where Congress has implicitly or explicitly authorized the President's action. Title V, as previously argued, authorizes the President to withhold prior notification only in "rare extraordinary emergency situations" where prior notice as a practical matter, is impossible.[167] American covert arms sales to Iran do not meet the requirements for such a situation.[168]

Nor does this dispute fall within the middle range of the Jacksonian spectrum, the "zone of twilight." In his assertion of the power to withhold prior notice in the interest of national security, President Reagan acknowldedged the existence of Title V but claimed that he had the power to waive its provisions.[169] Reagan, therefore, was not stating that Congress had acquiesced in his assertion of privilege but rather that his executive privilege trumps the notification requirement which Congress established in Title V.

Even if Reagan claimed that Congress had acquiesced in his open assertion of privilege, neither the case law defining the limits of the zone of twilight nor the history surrounding the passage of Title V would support his claim. The Supreme Court recently addressed the issue of the limits on the middle region of the Jacksonian spectrum in *Haig v. Agee*.[170] That case involved a challenge by Philip Agee — a former CIA agent who had publicly committed himself to a campaign to damage the CIA — to the Secretary of State's revocation of his passport under a State Department regulation which authorized passport revocation when a person's " 'activities abroad [were] causing or [were] likely to cause serious damage to the national security or the foreign

164. *Id.* at 637-38.
165. 453 U.S. 654 (1981).
166. *Id.* at 669 (citations omitted).
167. *See supra* text accompanying notes 145-49.
168. *See supra* text accompanying notes 153-54.
169. *See supra* text accompanying notes 155-56.
170. 453 U.S. 280 (1981).

policy of the United States.' "[171] One of Agee's challenges to the revocation was that "the regulation invoked by the Secretary . . . ha[d] not been authorized by Congress."[172]

The Supreme Court had dealt with challenges to passport revocations under the Passport Act of 1926 on two occassions prior to reviewing the statute in *Haig v. Agee*. In *Zemel v. Rusk*,[173] the Court applied the analysis which it had earlier established in *Kent v. Dulles*,[174] holding that the Passport Act authorized only those executive actions " 'which it could fairly be argued were adopted by Congress in light of the prior administrative *practice*.' "[175] In *Haig*, however, the Court asserted that "a consistent administrative *construction* of that statute [the Passport Act of 1926] must be followed by the courts, 'unless there are compelling indications that it is wrong.' "[176] Based on this assertion, the Court later concluded that "[a]lthough a pattern of actual enforcement is one indicator of Executive policy, it suffices that the Executive has 'openly asserted' the power at issue."[177] The Court ultimately upheld the revocation of Agee's passport because "the *policy* announced in the challenged regulation is 'sufficiently substantial and consistent' to compel the conclusion that Congress has approved it."[178]

Before *Haig*, the Court presumed that Congress had acquiesced in an administrative practice if the Executive Branch had pursued the practice in a manner "sufficiently substantial and consistent" to put Congress on notice and Congress failed to deny the Executive Branch the claimed authority. *Haig*

171. *Id.* at 286 (quoting an explanatory notice from the Secretary of State to Agee).

172. *Id.* at 287. Agee also argued that the revocation of his passport violated the first, fifth and fourteenth amendments. *Id.* at 28. The Court concluded that Agee's constitutional claims were meritless because the express language of the regulation upon which the revocation was based limited its application to cases in which " 'serious damage' " to national security or foreign policy were likely. *Id.* at 306.

173. 381 U.S. 1 (1965). *Zemel* involved a challenge to the State Department's refusal to endorse the plaintiff's passport for travel to Cuba. *Id.* at 3. The Court upheld the validity of the Secretary of State's action. *Id.* at 7. The Court concluded that Congress had granted the Secretary of State the power to restrict travel to Cuba because the State Department had imposed area restrictions on passports both before and after the enactment of the Passport Act of 1926, *id.* at 8-11, and because Congress had not limited that power when it enacted legislation in 1952 relating to passports. *Id.* at 11-12. The Court distinguished *Kent v. Dulles*, by stating that in *Kent*, the Court could not find "an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved [the passport refusal]." *Id.* at 12.

174. 357 U.S. 116 (1958). The plaintiffs challenged the State Department's refusal to issue them a passport because they had failed to submit affidavits "as to whether [either of them were] then or ever had been a Communist." *Id.* at 118. The Court found no administrative practice of denying passports to Communists. *Id.* at 128. The Court then held that since Congress had never explicitly authorized the Secretary of State to withhold passports from citizens because of their political associations or beliefs, he could not in the instant case "employ that standard to restrict the citizens' right of free movement." *Id.* at 130.

175. *Zemel*, 381 U.S. at 12 (quoting Kent v. Dulles, 357 U.S. at 128) (emphasis added).

176. 453 U.S. 280, 291 (1981) (quoting E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 55 (1977)) (emphasis added).

177. *Id.* at 303 (quoting *Zemel*, 381 U.S. at 9).

178. *Id.* at 306 (quoting *Zemel*, 381 U.S. at 12 (1965)) (emphasis added).

lowered the standard of Executive action and Congressional knowledge necessary to prove acquiescence. Under *Haig*, the Court will find acquiescence where the Executive Branch has asserted, but not necessarily enforced, a policy in a "sufficiently consistent and substantial" manner and Congress has not expressly legislated against the particular assertion of power by the Executive Branch.[179]

Even under *Haig*'s broader view of acquiescence, Reagan's open assertion of executive privilege to withhold prior notice of covert operations would not fall within the zone of twilight. The Reagan Administration might argue that from the inception of the CIA until 1974, Congress acquiesced in the Executive Branch's assertion of executive privilege with respect to covert operations because, during that period, Congress exercised lackluster oversight and failed to legislate any oversight requirements despite broad assertions of executive privilege by Presidents Eisenhower, Kennedy, Johnson and Nixon.[180] That acquiescence, however, clearly ended in 1974 when public allegations of abuses by the CIA mobilized Congress, leading it to adopt the Hughes-Ryan Amendment, to establish the House and Senate Intelligence Committees, to legislate oversight with prior notification through Title V, and to take a more aggressive stand with respect to the production of national security information by the Executive Branch.[181] With respect to the specific assertion of privilege to withhold prior notice, the Reagan Administration did not openly assert this claim until after the public revelations of the Iran-contra affair. Congress, therefore, could not possibly have acquiesced.

Since Congress has generally not remained silent in the face of Executive Branch assertions of privilege, the question as to whether the President can claim executive privilege to withhold from Congress prior notice of covert operations falls toward the minimum power end of the Jacksonian spectrum. Justice Jackson described the consequences of a dispute falling in this region of the spectrum as follows:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with

179. *See* Comment, *Illumination or Elimination of the "Zone of Twilight"?: Congressional Acquiescence and Presidential Authority in Foreign Affairs*, 51 U. CIN. L. REV. 95, 116 (1982). It is possible that the Court will limit the holding in *Haig* to cases involving the right to travel. One commentator has stated, however, that *Haig* may represent the Court's movement toward an acceptance of "executive authority to act without explicit congressional authorization on domestic national security secrecy problems." Edgar and Schmidt, *Curtiss-Wright Comes Home*, 21 HARV. C.R.-C.L. L. REV. 349, 377 (1986).

180. *See supra* text accompanying notes 38-40, 56-60.

181. *See supra* text accompanying notes 61-92.

> caution, for what is at stake is the equilibrium established by our constitutional system.[182]

Thus, according to Justice Jackson's analysis, President Reagan's assertion of executive privilege to withhold prior notice from Congress can be based only on his inherent constitutional powers, and his assertion that based on these powers alone he can override the requirements of a valid statute must be "scrutinized with caution."

Presidents have traditionally based their claims of privilege on the executive power clause,[183] the commander-in-chief clause,[184] and the take care clause.[185] Because covert operations are pursued to further national security, the Reagan Administration's strongest claim would be that the President's power to assert executive privilege to withhold from Congress prior notice of covert operations is implicit in his duties as commander in chief. Indeed, the Reagan Administration could find support for such a claim in *United States v. Nixon*,[186] the most significant Supreme Court opinion to address the issue of the limits on the President's power to assert executive privilege against demands for information made by another branch of government.

In *Nixon*, then President Nixon asserted an absolute privilege of confidentiality for all presidential communications to resist a subpoena *duces tecum* issued on the motion of the Watergate Special Prosecutor.[187] The Court balanced the President's generalized interest in confidentiality against the "demands of due process of law in the fair administration of criminal justice"[188] and held that the demands of due process outweighed the President's interest in confidentiality.[189]

Although the President's claim of privilege was defeated in *Nixon*, the Court expressly noted that the communications for which the President claimed confidentiality did not include military and diplomatic secrets — the types of secrets which were involved in the covert sale of arms to Iran — and that "[a]s to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities."[190]

Initially, this dictum suggests that the Court would be extremely deferen-

182. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

183. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

184. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be the Commander in Chief of the Army and Navy of the United States . . . .").

185. U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . ."). R. BERGER, *supra* note 18, at 375.

186. 418 U.S. 683 (1973).

187. *Id.* at 703. The subpoena directed the President to produce tape recordings of specified conversations between him and his advisers. The Special Prosecutor required the tapes for use in a criminal prosecution. *Id.* at 687-88.

188. *Id.* at 713.

189. *Id.* at 712-13.

190. *Id.* at 710.

tial to Reagan's assertion of privilege to withhold prior notice from Congress. The force of this dictum with respect to the issue being considered here, however, is limited for several reasons. First, the Court expressly stated that its opinion did not concern "the balance between the President's generalized interest in confidentiality and congressional demands for information."[191] Second, by applying a balancing test to Nixon's claim of absolute privilege of confidentiality against the judiciary, the Court established a model which can also be used to analyze executive privilege claims against Congress. Indeed, the United States Court of Appeals for the District of Columbia Circuit applied a balancing approach in *United States v. American Telephone & Telegraph Co.*,[192] a case involving facts very similar to those of the issue presently being discussed, and concluded that the President cannot assert an absolute claim of executive privilege under his powers as commander in chief to prevent congressional access to information related to the national security.[193]

American Telephone & Telegraph was an outgrowth of an investigation by the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce into warrantless, domestic wiretapping for asserted national security purposes. The Subcommittee subpoenaed from AT&T "request letters" which the FBI had sent to AT&T to obtain permission to use its lines. Attempting to limit the disclosure of these letters to the Subcommittee, the Department of Justice first negotiated with the Subcommittee and then, after negotiations had broken down, sought to enjoin AT&T from complying with the subpoena. The district court granted the injunction. On appeal, the circuit court remanded the case, suggesting that the parties attempt to negotiate a settlement.[194] After the second round of negotiations failed, the case was resubmitted to the circuit court for resolution.

Upon resubmission, the Executive Branch argued that it could withhold the subpoenaed documents from the Subcommittee because the commander-in-chief clause of the Constitution conferred upon it an absolute discretion in the area of national security.[195] Since the Subcommittee's document request had been made through a subpoena, the Executive Branch's assertion of absolute privilege created a direct conflict between the inherent powers of the Executive and Legislative Branches. The court summarily rejected the Executive Branch's claim, stating: "This [argument] does not stand up. While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief . . . it confers upon Congress other powers equally inseparable from the national security."[196] Given that the court rejected the Executive Branch's claim of an absolute privilege to withhold national security information in the face of a request based

191. *Id.* at 712 n.19.
192. 567 F.2d 121 (D.C. Cir. 1977).
193. *Id.* at 128.
194. *Id.* at 123-24.
195. *Id.* at 128.
196. *Id.*

on Congress's inherent subpoena power, it follows that a court would likewise reject President Reagan's claim of an absolute privilege to withhold from Congress prior notification of a covert operation since the requirement of prior notice derives from a federal statute which was signed by the President and has the force of law.

Although the court in *American Telephone & Telegraph* rejected the Executive Branch's claim of absolute privilege, it did acknowledge that "the degree to which the executive may exercise its discretion [to protect against public disclosure] is unclear when it conflicts with an equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative function."[197] The court then proceeded to formulate a compromise to resolve the dispute over the production of the request letters based on the theory that "each branch should take cognizance of an implicit constitutional mandate to seek optimal accomodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[198]

In drafting Title V, the Senate Intelligence Committee made every effort to achieve "optimal accomodations" of the needs of each of the branches by limiting the statute's restraints on the President's power as commander in chief while guaranteeing effective congressional oversight. In the preamble to

197. *Id.*

198. *Id.* at 127. In drafting a compromise, the circuit court first considered the positions of the two parties. The Justice Department was willing to submit for the Subcommittee's inspection, in exchange for the Subcommittee's withdrawal of the subpoena, "expurgated copies of backup memoranda upon which the Attorney General had based his decisions to authorize the warrantless taps." *Id.* at 124. According to the court, these memoranda would probably be more useful to the Subcommittee than the request letters because the memoranda provided information about the "purpose and nature of the tap." *Id.* The Justice Department's offer included all backup memoranda, with the identity of the target of the tap expurgated, for the two sample years, 1972 and 1975, as well as ten randomly selected unexpurgated memoranda from the same years so that the Subcommittee could verify that the Justice Department had not improperly classified domestic surveillance material as foreign. *Id.* at 131. In addition, the Justice Department insisted on reserving the right of the Attorney General to withdraw any of the ten randomly selected memoranda and replace it with another if he believed that disclosure of any of the randomly selected memoranda could cause "grave damage to the national security or possibly result in physical harm to any person it disclosed." *Id.* The district court, after an in camera inspection of the substituted memoranda, would have to approve the Attorney General's decision. *Id.*

The Subcommittee rejected the sample size as to small and the substitution procedure as undermining the validity of the random selection process. The Subcommittee also objected to the Justice Department's refusal to allow the subcommittee's staff members who would examine the unexpurgated documents to carry their notes back to the Subcommittee. *Id.* at 131.

In forwarding its compromise solution, the circuit court reserved the right to modify it if the verification procedure revealed that the Justice Department was deceiving the Subcommittee. *Id.* at 133. The court concluded that the sample size was sufficient but that it could be enlarged if upon in camera inspection of the original and expurgated memoranda, the district court found significant inaccuracies. *Id.* at 132. The court supported the Executive Branch's use of the substitution procedure but only if it made an in camera showing of "the accuracy and fairness of the edited memorandum, and the extraordinary sensitivity of the contents of the original memorandum to the national security." *Id.* Finally, the Subcommittee staff members could take notes on their inspection, but they had to leave the notes under seal with the FBI and then could give only an oral report to the Subcommittee. *Id.*

section 501(a), the Committee gave the President the option to act without giving prior notice in those rare extraordinary emergency situations which preclude prior notice as a practical matter.[199] Although Title V generally requires prior notification, it expressly states that prior approval of the intelligence committees is not a condition precedent to the Executive Branch's initiation of a covert operation.[200] In section 501(a)(1)(B), Title V provides for limited prior notice in cases where the President determines that limited notice is necessary to prevent public disclosure.[201] Section 501(d) further bolsters the protections against unauthorized disclosures by requiring both Houses of Congress to consult with the Director of Central Intelligence "to establish . . . procedures to protect from unauthorized disclosure all classified information."[202] In light of these accomodations of the needs of the Executive Branch in conducting covert operations, Title V represents reasonable restrictions on the President's implicit powers as commander in chief. The President's assertion of an absolute privilege to withhold prior notice from the intelligence committees, however, represents an unconstitutional intrusion into Congress's statutorily mandated investigatory authority.

Even if Title V does not represent "optimal accomodation," it is certainly a more legitimate attempt to accomodate the duties and responsibilities of the Executive and Legislative Branches than President Reagan's claim of absolute privilege to withhold prior notice of covert operations from Congress. In the realm of covert activities, presidential discretion to withhold prior notice is tantamount to unlimited executive power because of the nature of these activities. The Executive Branch initiates and manages all covert operations, the success of which depends on secrecy. To maintain secrecy, the Executive Branch must withhold information about these operations from the public. If the President could claim privilege to withhold from Congress prior notice of covert operations, he would be able to conduct them in an unrestrained manner without being held accountable to the electorate. The ability to exercise such unfettered discretion vitiates the system of checks and balances mandated by the Constitution.

In *Youngstown*, Justice Jackson rejected President Truman's claim of unlimited executive power under the Executive Power Clause for similar rea-

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199. *See supra* text accompanying notes 145-49.

200. Section 501(a)(1)(A) states that "the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity." Intelligence Authorization Act, § 501(a)(1)(A), 50 U.S.C. 413(a)(1)(A) (1982).

201. Section 501(a)(1)(B) states:

> [I]f the President determines it is essential to limit notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the minority and majority leaders of the Senate.

Id. at § 501(a)(1)(B), 50 U.S.C. 413(a)(1)(B).

202. *Id.* at § 501(d), 50 U.S.C. § 413(d).

sons.[203] In that case, Truman had ordered the Secretary of Commerce to seize and operate the nation's steel mills to avert a strike which threatened to stop all steel production during the Korean War.[204] The owners of the seized mills sought a declaratory judgment that the President's order was invalid and a preliminary injunction against the order's enforcement.[205] Having found that Congress had neither authorized nor acquiesced in the President's action[206] and that the seizure could not be sustained under the President's implied constitutional powers,[207] the Supreme Court invalidated the President's order.[208] In his concurrence, Justice Jackson rejected the argument that the executive power clause gave the President unlimited powers, reasoning that "[t]he example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."[209]

Justice Jackson also rejected the government's argument in *Youngstown* that President Truman's seizure powers could be founded on the take care clause, stating that "ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."[210] In other words, the President is not above the law. Supporting President Reagan's claim that he can assert, at his discretion, executive privilege to withhold prior notice of covert operations would permit him to choose whether to comply with the requirements of Title V. The Constitution, however, mandates that the President "shall take Care that the Laws be faithfully executed,"[211] and no provision accords the President the power to use discretion in performing this function.

In sum, President Reagan has claimed that he can waive the prior notification requirement of Title V whenever he determines that withholding prior notice will serve national security. Congress has not authorized this action, nor has it acquiesced in this assertion of Executive power. Since the Constitution does not expressly empower the President to assert executive privilege to withhold information from Congress, he can rely only on his implied constitutional powers to support his claim of privilege. In this particular instance, the President's position is further weakened because his claim of privilege to withhold prior notice of covert operations is tantamount to a claim of unlimited executive power to conduct covert operations. Neither the commander-in-chief clause, nor the executive power clause, nor the take care clause support such a broad claim of executive power.

203. Youngstown Sheet & Tube Co. v. Sawyer, 348 U.S. 579, 641 (1952) (Jackson, J., concurring).
204. *Id.* at 582-83.
205. *Id.* at 583.
206. *Id.* at 585-86.
207. *Id.* at 587-88.
208. *Id.* at 589.
209. *Id.* at 641.
210. *Id.* at 646.
211. U.S. CONST. art. II, § 3.

V.
PROPOSED LEGISLATION TO IMPROVE CONGRESSIONAL OVERSIGHT OF COVERT OPERATIONS

The Reagan Administration's violation of Title V is just one example of the "pervasive dishonesty and inordinate secrecy" which characterized the Iran-contra affair.[212] The violation is particularly significant, however, because it was the first step in hiding the Iran-contra affair from Congress and from the nation. Some members of Congress believe that had the President notified the intelligence committees or the "gang of eight"[213] in accordance with Title V, the Iran-contra affair would never have occurred.[214] The Reagan Administration's violation of Title V was also particularly significant because it undermined the current oversight system so seriously that several members of the joint congressional committee investigating the Iran-contra affair concluded that Title V needs to be completely rewritten.[215] On September 25, 1987, Senators William S. Cohen and David L. Boren introduced a bill, S. 1721, to fill that need.[216] The bill constitutes "the single legislative recommendation to emerge from congressional investigations of the Iran-contra affair."[217] It passed the Senate by a vote of seventy-three to eighteen on March 15, 1988.[218] A parallel bill introduced in the House, H.R. 3822,[219] was reported from the House Intelligence Committee on May 11, 1988.[220] It probably will not reach the floor of the House, however, until after Congress con-

212. *Key Sections of Document*, *supra* note 4, at A14, col. 3. The majority report of the congressional committee investigating the Iran-contra affair also cited repeated lying by Oliver North and other officials in the Reagan Administration to Congress and the American people and the NSC staff's clandestine aid to the "contras" while the Boland Amendment was in effect. *Id.*

213. The "gang of eight" refers to the eight members of Congress whom the President would notify under the limited notice provision of section 501(a)(1)(B) of the Intelligence Authorization Act, 50 U.S.C. § 413(a)(1)(B) (1982). The "gang of eight" includes the chairpersons and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. *Id.*

214. *Key Sections of Document*, *supra* note 4, at A14, col. 1. *See also* H. REP. NO. 705, 100th Cong., 2d Sess. 5 (1988).

215. After hearing Stanley Sporkin's claim that Title V creates a third track which allows the President to defer notifying Congress of a covert operation, Representative George J. Mitchell responded as follows:

> I think this testimony of yours makes clear that one of the things we have to do is completely revisit this act. If you as the General Cousel to the Central Intelligence Agency read this to mean that the President in his discretion can in circumstances when he considers it appropriate not notify Congress of covert activities, then this statute doesn't mean anything.

Sporkin Testimony, *supra* note 102, at 201-02.

216. S. 1721, 100th Cong., 1st Sess. (1987).

217. Rasky, *Walking a Tightrope on Intelligence Issues*, N.Y. Times, Oct. 11, 1988, at A26, col. 1.

218. 134 CONG. REC. S2210 (1988).

219. H.R. 3822, 100th Cong., 2d Sess. (1988), *reprinted in* H. REP. NO. 705, *supra* note 214, at 1-4.

220. H. REP. NO. 705, *supra* note 214, at 3. The bill passed the House Intelligence Committee by a vote of eleven to six. *Id.*

venes in 1989.[221]

This section will analyze S. 1721 and H. R. 3822, the two bills which Congress is currently considering in an effort to reform congressional oversight of covert intelligence operations. It will explain the significant changes which these bills would make to Title V and will clarify the important differences between the two bills. Finally, where the bills inadequately remedy Title V's shortcomings, this section proposes more effective changes to improve the system of congressional oversight of covert operations.

A. Section-by-Section Analysis of the Proposed Legislation

The first section of the House bill, section 501(a), is significant in several respects. First, it expressly places the ultimate responsibility of informing the intelligence committees of all intelligence activities directly on the President.[222] In its current form, Title V places express responsibility for informing the intelligence committees on the Director of the CIA and the heads of all departments or agencies involved in intelligence activities; any ultimate Presidential responsibility is merely implicit.[223] Second, the revised bill maintains the requirement in Title V that the Executive Branch notify the congressional intelligence committees prior to the initiation of a covert operation by adopting the "fully and currently informed" language which was used in Title V and which is accepted to mean that the committees will receive notice of significant intelligence activities, including covert and clandestine activities, before they occur.[224]

The second sentence of section 501(a) of the House bill,[225] like Title V, leaves the decision to initiate any intelligence activity to the Executive Branch.[226] This sentence is significant because it demonstrates that Congress does not intend to interfere with the functioning of the Executive Branch and

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221. Rasky, *supra* note 217, at A26, col. 2.

222. Section 501 of H.R. 3822 states:

> The President shall ensure that the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activities, as required by this title.

H. REP. NO. 705, *supra* note 214, at 1.

223. Section 501(a) of Title V reads in part that "the Director of Central Intelligence and the heads of all departments, agencies and other entities of the United States involved in intelligence activities shall — (1) keep . . . the [intelligence committees] fully and currently informed of all intelligence activities . . . including any significant anticipated intelligence activity." Intelligence Authorization Act, § 501(a), 50 U.S.C. 413(a) (1982).

224. *See supra* text accompanying notes 69-90.

225. The second sentence of section 501(a) of H.R. 3822 states, "*Provided*, That nothing contained in this title shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities." H.R. REP. NO. 705, *supra* note 214, at 1.

226. Section 501(a)(1)(A) of Title V states that the statute "shall not require approval of [the intelligence committees] as a condition precedent of the initiation of any such anticipated intelligence activity." Intelligence Authorization Act, § 501(a)(1)(A), 50 U.S.C. § 413(a)(1)(A) (1982).

that Congress's role is only advisory. The Senate bill uses language similar to the House bill but transcends both the House bill and Title V by explicitly stating that the overriding policy of the oversight system is to encourage consultation between Congress and the Executive Branch.[227] Although encouraging such consultations is one of the main objectives of Title V,[228] this objective is not expressly stated in the statute. By expressly requiring that intelligence activities "ordinarily be conducted pursuant to consultations," the Senate bill makes it clear that Congress should have an advisory role to help warn the Executive Branch of the unseen pitfalls of its policies and to share with the President the responsibility for policy failures.

In both the House and Senate bills, the proposed revision of section 501 includes five other subsections which do not deal directly with the conveying of notice to the intelligence committees.[229] These subsections should be moved to form a new section 504 to ensure that the notification of Congress is the central focus of the statute.

Section 502 of the House bill makes it clear that the responsibility to notify Congress rests not only with the President but also with the Director of Central Intelligence and the heads of all departments and agencies involved in intelligence activities.[230] This section is drawn largely from sections 501(a)(1) and 501(a)(2) of Title V but makes a significant change in Title V's preambular language[231] by eliminating the first clause of the preamble to section 501(a)

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227. Section 501(a) of the Senate bill states:

Such [covert] activities shall ordinarily be conducted pursuant to consultations between the President, or his representatives, and the intelligence committees, prior to the implementation of such activities although nothing contained herein shall be construed as requiring the approval of the intelligence committees as a condition precedent to the initiation of such activities.

S. 1721, *supra* note 216, at 2.

228. S. REP. NO. 730, *supra* note 9, at 8.

229. *See* H.R. REP. NO. 705, *supra* note 214, at 1-2; S. 1721, *supra* note 216, at 2-3.

230. Section 502 of the House bill states:

To the extent consistent with due regard for the protection of classified information relating to sensitive intelligence sources and methods or other exceptionally senstive matters, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall (1) keep the intelligence committees fully and currently informed of all intelligence activities, other than a covert action as defined in section 503(e), which are the responsibility of, are engaged in by, or carried out for or on behalf of, any department, or entity of the United States Government, including any significant anticipated intelligence activity and any significant intelligence failure; and (2) furnish the intelligence committees any information or material concerning intelligence activities, other than covert actions, which is within their custody or control, and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.

H.R. REP. NO. 705, *supra* note 214, at 2.

231. The preamble to section 501(a) of Title V states:

To the extent consistent with all applicable autorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelli-

of Title V.[232] This language was the basis for the Reagan Administration's erroneous claim that Title V implicitly permits the President to withhold from Congress prior notification of covert operations.[233] Like the House bill, section 502 of the Senate bill eliminates the first clause of the preamble to section 501(a) of Title V.[234] In addition, the Senate bill improves upon the House bill by eliminating the italicized words which appear in the preamble to Title V as well as in the first clause of the House bill: "*To the extent consistent* with due regard for the protection *from unauthorized disclosure* of classified information relating to sensitive intelligence sources and methods . . . ."[235] According to the legislative history of Title V, the quoted language was included in the preamble because Congress "recognized that in extremely rare circumstances" the Executive Branch might withhold "certain sensitive aspects of operations or collection programs . . . to protect extremely sensitive intelligence sources and methods."[236]

The problem with the underlined language is that it permits the Executive Branch to use its discretion to withhold information relating to intelligence sources or methods to protect that information from "unauthorized disclosure," or leaks. As demonstrated previously, President Reagan used his fear of leaks to justify withholding from Congress not only information relating to intelligence sources and methods but also prior notice of the entire Iran initiative.[237] Although it is incumbent on Congress to respect the Executive Branch's rightful frustration over the damaging effects of leaks, it is equally important that the Executive Branch be forewarned that the fear of leaks is not a sufficient justification for withholding any information from Congress. To destroy the Executive Branch's notion that leaks are more likely to pour forth from the intelligence committees than they are from the Executive Branch itself, both Houses of Congress must take appropriate measures under section 501(d) of the Senate bill or section 501(d) of the House bill to toughen access to classified information and to increase the penalties for those who

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gence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall . . . .

Intelligence Authorization Act, § 501(a), 50 U.S.C. 413(a) (1982).

232. The House bill eliminates the following language: "To the extent consistent with all applicable authorities and duties including those conferred by the Constitution upon the executive and legislative branches of the Government, and." H. REP. NO. 705, *supra* note 214, at 2.

233. *See supra* text accompanying notes 138-41.

234. Section 502 of the Senate bill states in part:

The Director of Central Intelligence and the heads of all departments, agencies and other entities of the United States Government involved in intelligence activities shall keep the intelligence committees fully and currently informed of all intelligence activities . . . . *Provided*, That such obligation shall be carried out with due regard for the protection of classified information relating to sensitive intelligence sources and methods.

S. 1721 *supra* note 216, at 3-4.

235. *Id.*

236. S. REP. NO. 730, *supra* note 9, at 6.

237. *See supra* text accompanying note 111.

disclose classified information without authorization.[238]

Section 503 of the House bill creates several significant changes in the current laws governing congressional oversight of intelligence activities. These changes reflect some of the shortcomings, highlighted by the Iran-contra affair, both in the Hughes-Ryan Amendment itself and in the relationship between the amendment and Title V.[239] First, the Hughes-Ryan Amendment applies only to covert operations conducted by the CIA.[240] Second, it does not prescribe any requirements for the form of a presidential finding.[241] Third, under the current system of congressional oversight, the requirement that the President issue a finding prior to each covert operation conducted by the CIA falls under the Hughes-Ryan Amendment[242] rather than Title V. Although Title V requires that the President inform the congressional intelligence committees or the "gang of eight" prior to the initiation of a covert operation, it does not designate the form which this notice must take. As a result, President Reagan was able to satisfy the finding requirement of the Hughes-Ryan Amendment by determining, prior to the initiation of the covert American arms sales to Iran, that the sales were important to American national security yet simultaneously withhold that finding from Congress without violating Title V.

The House bill takes several steps to rectify these shortcomings. First, it

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238. Subsections 501(d) of the Senate and House bills are identical. Both state:

> The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of Congress under this section. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

H.R. REP. NO. 705, *supra* note 214; S. 1721 *supra* note 216, at 2-3.

239. Section 503(a) of the House bill states:

> The President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government unless he determines such an action is necessary to the national security of the United States, which determination shall be set forth in a finding that shall meet each of the following conditions: . . . .

H.R. REP. NO. 705, *supra* note 214, at 2.

240. Although the National Security Council ("NSC") was one of the primary government organizations responsible for the planning and execution of the covert arms sales to Iran and for funneling profits from those sales to aid the contras in Nicaragua, the President did not have to find that any of the NSC's actions were important to the national security of the United States because the Hughes-Ryan Amendment applies only to the CIA's expenditures for covert operations. *See generally Key Sections of Document, supra* note 4, at A12-13.

241. There was no written finding to authorize the first shipment to Iran of 504 American-supplied, Israeli-owned anti-tank missiles. Robert McFarlane, Reagan's National Security Adviser at the time of the shipment, testified that the President had authorized this covert operation in an oral finding. *Testimony by Ex-NSC Adviser McFarlane Before House Foreign Affairs Committee*, 44 CONG. Q.W. REP. 3084, 3085 (1986).

242. For the text of the Hughes-Ryan Amendment, see *supra* note 1.

repeals the Hughes-Ryan Amendment[243] and incorporates its previous requirement into sections 503(a) and 503(d) of the bill.[244] Second, it extends the finding requirement to covert operations carried out by "any department, agency, or entity of the United States Government."[245] Third, it prescribes precise requirements for the content of the presidential finding.[246] And last, it expressly requires the President to ensure that the finding is conveyed to the intelligence committees or the "gang of eight" prior to the initiation of a covert operation.[247]

Although these changes vastly improve upon the current oversight system, the House bill should include one other change in the current system of oversight to ensure that the reformed system operates more effectively. Section 503(d) of the House bill prohibits the expenditure of any funds on a covert operation unless the President issues a finding.[248] Congressional approval of the expenditure of funds for covert operations should be linked, however, not only to the President's issuance of a finding but also to the conveyance of that finding to the intelligence committees or the "gang of eight" pursuant to the prior notification requirements of the House bill.

As previously noted,[249] the Iran-contra affair proved that this second requirement is necessary. In authorizing covert arms sales to Iran, President Reagan complied with the Hughes-Ryan Amendment by issuing a finding

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243. H.R. REP. NO. 705, *supra* note 214, at 1.

244. Section 503(d) of the House bill states:

> No funds appropriated for, or otherwise available to, any department, agency, or entity of the United States Government, may be expended, or may be directed to be expended, for any covert action, as defined in section 503(e), unless and until a Presidential finding required by section 503(a) has been signed or otherwise issued in accordance with that subsection.

H. REP. NO. 705, *supra* note 214, at 3-4. *See also*, *supra* note 239, for the text of section 503(a) of the House bill.

245. H. REP. NO. 705, *supra* note 214, at 3.

246. Each finding must be memorialized in writing within forty-eight hours of the President's decision to initiate a covert operation; a finding may not be retroactive; it must identify all government entities, third parties and foreign countries involved in the covert operation; and it may not authorize any illegal activity. *Id.* at 2.

247. Section 503(c)(1) of the House bill states:

> The President shall ensure that any finding approved pursuant to subsection (a) shall be reported to the intelligence committees as soon as possible after such approval and prior to the initiation of the covert action authorized by the finding. Provided, That if the President determines it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, such finding may be reported to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. In either case, a copy of the finding, signed by the President, shall be provided to the chairman of each intelligence committee. Where access to a finding is limited to the members of Congress identified above, a statement of the reasons for limiting such access shall also be provided.

Id. at 3.

248. *See supra* note 244.

249. *See supra* text accompanying notes 242-43.

before proceeding with the operation.[250] In the finding, however, he directed William Casey not to report the operation to Congress.[251] President Reagan, therefore, was able legally to expend appropriated funds on a covert operation while keeping it secret from Congress. The proposed change in the House bill would eliminate this loophole by expressly stating that the expenditure of appropriated funds on covert operations violates the law, unless the President not only issues a finding but also conveys it to the intelligence committees or the "gang of eight" pursuant to the requirements in the House bill. This proposed change would improve the House bill by putting teeth into the prior notification requirement.

Section 503 of the House bill transcends both the Senate bill and Title V by expressly using the term "covert action." Neither Title V nor S. 1721 uses this term. Title V uses the term "significant anticipated intelligence activity,"[252] and S. 1721 uses "special activity."[253] Both terms are simply euphemisms for the commonly used and understood term "covert action."

Of greater significance are the definitional shortcomings of the terms "significant anticipated intelligence activity" and "special activity." Title V does not expressly define the term "significant anticipated intelligence activity." The legislative history does, however, explain that the term includes "CIA covert operations" and "certain collection and counterintelligence activities" but then leaves it to the intelligence committees to inform the Executive Branch of "those activities for which it expects advance information . . . ."[254] The problem with this formulation is that the Executive Branch can avoid notifying Congress of activities which the intelligence committees do not foresee and, therefore, do not include as activities for which they expect prior notice.

The Senate bill improves upon Title V by expressly defining "special activity" within the statute. The Senate bill states:

> [T]he term 'special activity' means any activity conducted in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, but which is not intended to influence United States political processes, public opinion, policies or media . . . .[255]

The primary flaw in this definition is that it depends on determining the intent behind the Executive Branch's policy and consequently would be difficult to enforce and easy to circumvent. Future administrations could claim, for example, that a covert operation did not fall within the prior notification require-

250. *Text of Administration Documents*, *supra* note 1, at 110.
251. *Id.*
252. *See* Intelligence Authorization Act, § 501(a)(1), 50 U.S.C. § 413(a)(1) (1982).
253. S. 1721, *supra* note 216, at 4.
254. S. REP. NO. 730, *supra* note 9, at 9.
255. S. 1721, *supra* note 216, at 7-8.

ment because it was "not intended to influence United States political processes, public opinion, policies or media,"[256] despite the fact that the policy had that effect.

Although the direct reference to the term in the House bill may be praiseworthy, the definition of "covert action" in H.R. 3822 suffers from a shortcoming similar to that of the Senate bill's definition of "special activity." The House bill states that " 'covert action' means an activity or activities conducted by an element of the United States Government to influence political, economic, or military conditions abroad so that the role of the United States Government is not intended to be apparent or acknowledged publicly . . . ."[257] This definition, while simpler than that in the Senate bill, also depends on determining the intent of the Executive Branch.

A superior definition might be that a covert operation includes any activity conducted outside of the United States by any agency of the United States Government in support of national foreign policy objectives, which operation is planned and executed so that the United States Government's role is not apparent or acknowledged publicly, yet functions in support of such activity.[258] This definition would replace the House and Senate bills' reference to intent.

The House bill further improves upon the current system of intelligence oversight by eliminating any statutory basis upon which the President could use discretion in claiming the right to withhold prior notice from Congress. First, it deletes the preambular language of Title V which the Reagan Administration claims implicitly supports its right to withhold prior notice.[259] In addition, the House bill, unlike Title V, expressly states the conditions under which the President may defer prior notice and expressly prescribes that the deferral period not exceed forty-eight hours.[260]

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256. *See supra* text accompanying note 255.

257. H. REP. NO. 705, *supra* note 214, at 3.

258. Similar to the definitions in the House and Senate bills, this definition would not include the following:

> activities to collect necessary intelligence, military operations conducted by the armed forces of the United States and subject to the War Powers Resolution (50 U.S.C. 1541-1548), diplomatic activities carried out by the Department of State or persons otherwise acting pursuant to the authority of the President, or activities of the Department of Justice or Federal law enforcement agencies solely to provide assistance to the law enforcement authorities of foreign governments.

S. 1721, *supra* note 216, at 8. *See also* H. REP. NO. 705, *supra* note 214, at 3.

259. *See supra* text accompanying notes 138-41, 233.

260. Section 503(c)(2) of the House bill states, "[i]n circumstances where time is of the essence and the President determines that it is important to the national security interests of the United States to initiate a covert action before the notice required by paragraph (1) can be given, such action may be initiatied without such notice."

Section 503(c)(3) states:

> The President shall ensure that notice of a covert action undertaken pursuant to paragraph [(c)](2) is provided to the intelligence committees, or to the Members of Congress identified in paragraph (1) [the "gang of eight"], as soon as possible, but in no event later than forty-eight hours after the covert action has been authorized pursuant

This change is a crucial addition to the current system of congressional oversight of intelligence activities. Title V neither prescribes the circumstances which the President may invoke to defer prior notice nor states that the President is responsible for the decision to withhold prior notice. The most significant weakness of Title V is that it uses inexact language — "in a timely fashion" — to define the period of time within which the Executive Branch must inform Congress of a covert operation for which prior notice was not given.[261] The Reagan Administration abused this language by withholding notice of the covert sales of American arms to Iran for ten months.[262] The House bill expressly proscribes such a lengthy deferral.[263]

The Senate bill, unlike the House bill, does not expressly address the issue of deferred notice. Instead, it requires that the President's finding be conveyed to the intelligence committees "as soon as possible, but in no event later than forty-eight hours after it has been signed."[264] This language has three weaknesses. First, it does not express the notion that the President is required to convey notice to the intelligence committees *prior* to the initiation of a covert operation, except in extraordinary circumstances. Second, it does not prescribe the circumstances which would allow the President to defer prior notice for up to forty-eight hours. Third, it does not provide for the situation in which a covert operation has been initiated without a signed finding. In such a scenario, the Senate bill allows the President forty-eight hours to sign a finding,[265] and an additional forty-eight hours after the finding has been signed to report it to the committees.[266] This flaw in the Senate bill must be rectified because certain covert operations, such as an attempt to rescue American hostages in a foreign country, may be completed in less than ninety-six hours. Under the Senate bill, the President could comply with the law in such cir-

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to subsection (a). Such notice shall be accompanied by a statement of the President setting forth why time was of the essence and why proceeding pursuant to paragraph (2) [which allows the President to defer prior notice] is important to the national security interests of the United States.

H. REP. NO. 705, *supra* note 214, at 3.

261. Section 501(b) of Title V states:

The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) and shall provide a statement of the reasons for not giving prior notice.

Intelligence Authorization Act, § 501(b), 50 U.S.C. § 413(b) (1982).

262. *See supra* text accompanying notes 109-10.

263. *See supra* text accompanying note 260.

264. S. 1721, *supra* note 216, at 7.

265. Section 503(a)(1) of the Senate bill states:

Each finding shall be in writing, unless immmediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision is made.

Id. at 5.

266. *See supra* text accompanying note 260.

cumstances, even though he did not convey notice to the intelligence committees until after the operation had been completed.

The House bill shuts the "ninety-six hour loophole" which the Senate bill creates. Like the Senate bill, the House bill gives the President forty-eight hours to reduce to a finding a contemporaneous written record of a covert operation which required immediate action.[267] It then requires that this finding be conveyed to either the intelligence committes or the "gang of eight" "as soon as possible, but in no event later than forty-eight hours after the covert action has been authorized."[268] The House bill, therefore, eliminates the additional forty-eight hour period which the Senate bill gives the President to report a finding in cases where the authorization of a covert operation cannot be immediately reduced to a signed finding.

B. Conclusion

Both the House and Senate bills improve upon the current system of congressional oversight of covert intelligence operations. Both bills, for instance, place the ultimate responsibility of giving Congress prior notice of covert operations directly on the President.[269] They also eliminate the preambular language in Title V which provided the basis for the Reagan Adiministration's erroneous claim that it was justified under that statute in deferring prior notice of covert American arms sales to Iran.[270] Although both bills improve on Title V, the House bill represents a more effective reform of the current system of congressional oversight because it explicitly deals with the problem of deferred notice in rare emergency situations[271] and because it eliminates the "ninety-six hour loophole" which the Senate bill creates.[272] The House bill, however, would greatly benefit from two of the changes proposed in this section. First, funding for covert operations conducted by any agency of the United States Government should be linked not only to the President's issuance of a finding but also to the conveyance of that finding to the intelligence committees pursuant to the prior notice requirement of the House bill.[273] Second, the proposed definition of "covert action" should replace that used in the

267. Section 503(a)(1) of the House bill states:

> Each finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision is made.

H. REP. NO. 705, *supra* note 214, at 2.

268. *Id.* at 3.

269. *See supra* text accompanying note 222. Section 501(a) of the Senate bill states: "The President shall ensure that the [intelligence committees] are kept fully and currently informed of the intelligence activities of the United States as required by this title." S. 1721, *supra* note 216, at 2.

270. *See supra* text accompanying notes 232-34.

271. *See supra* note 260 and accompanying text.

272. *See supra* text accompanying notes 265-68.

273. *See supra* text accompanying notes 248-51.

House bill, thereby eliminating the dependence of the prior notification requirement on a determination of the Executive Branch's intent in initiating a covert operation.[274]

CONCLUSION

Title V of the National Security Act of 1947 represents the culmination of Congress's attempt over a period of six years, beginning with the passage of the Hughes-Ryan Amendment in 1974, to legislate effective oversight of covert intelligence operations. Effective congressional oversight of the intelligence agencies is crucial to the proper functioning of the American democratic system because these agencies, by necessity, operate in complete secrecy from the public, leaving Congress as the only check on unbridled Executive power. Indeed, the CIA's abuses during the Nixon Administration demonstrated the damage which the intelligence agencies can wreak when they operate with complete independence from congressional oversight.

The Reagan Administration, nevertheless, disregarded this lesson of history from the outset of its involvement in the Iran-contra affair. Rather than complying with the requirements of Title V and notifying Congress prior to the covert sale of arms to Iran, President Reagan directed William Casey, the Director of the Central Intelligence Agency, not to inform Congress of this covert operation. As a result, the Reagan Administration was able to pursue misguided policies, such as the trading of arms for hostages, without a realistic evaluation of the opposition which these policies would face in Congress and from the American people. When these policies ultimately became public, they undermined the credibility of the United States Government both at home and abroad.

Ironically, Title V was designed to avoid exactly the type of situation which resulted from the Reagan Administration's failure to give Congress prior notification of the covert arms sales to Iran. The purpose of prior notification, in addition to effective congressional oversight, is to encourage consultation between the branches, improve decision-making in the area of foreign policy and "enable[ ] the Executive to get a sense of congressional reaction and avoid the rather clamorous repudiation which has occurred in certain cases."[275] Congress, moreover, designed Title V to encourage prior notification even in the most sensitive cases. The Reagan Administration, however, would not take Congress into its confidence.

After the covert arms sales to Iran became public, the Reagan Administration claimed that its violation of the prior notification requirement contained in Title V was justified. Neither Title V nor the Constitution supports this claim. Although Title V does allow the President to defer notifying the intelligence committees of a covert operation if prior notice is impossible as a

274. *See supra* text accompanying notes 257-58.
275. S. REP. NO. 730, *supra* note 9, at 8.

practical matter, it does not, as the Reagan Administration claimed, allow the President to defer prior notice because he fears that it will result in a leak which may threaten the lives of those involved or the success of the operation itself. Similarly, the Constitution does not empower the President to claim executive privilege to withhold prior notice from Congress when he believes that national security may thus be served. If any of these justifications were valid, the Executive Branch would be able to bypass congressional oversight of covert operations with "talismanic incantations" of either its fear of leaks or the necessities of national security.

Congress has recognized the need to prevent this result as well as the need to prevent the recurrence of abuses in the area of covert operations. To achieve these goals, both the Senate and the House have introduced bills which redraft Title V. These bills improve upon Title V in its current form by eliminating the language upon which the Reagan Administration based its justifications for withholding prior notice. It is imperative that Congress adopt these changes to demonstrate to the Executive Branch its continued commitment to effective oversight of covert operations.

PHILIP L. GORDON

APPENDIX

TITLE V — ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES

Congressional Oversight

"Sec. 501.(a) To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall—

"(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the 'intelligence committees') fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;

"(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is required by either of the intelligence committees in order to carry out its authorized responsibilities; and

"(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

"(b) The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) and shall provide a statement of the reasons for not giving prior notice.

"(c) The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b).

"(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under this section. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

"(e) Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.".

(2) The table of contents at the beginning of such Act is amended by adding at the end thereof the following: