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THE CONSTITUTIONALITY OF THE SOLICITATION OR CONTROL OF THIRD-COUNTRY FUNDS FOR FOREIGN POLICY PURPOSES BY UNITED STATES OFFICIALS WITHOUT CONGRESSIONAL APPROVAL

*George W. Van Cleve**

I. INTRODUCTION

I feel as though I am in a fortunate position today, as I appear before you to present my personal views on the constitutionality of the solicitation or control of third-country funds for foreign policy purposes by United States officials without congressional approval. The last time I was involved with this committee of the American Bar Association, it was as a speechwriter for someone else who had been invited to speak to the committee. I wrote what I thought was a pretty good speech, which had the added merits of addressing itself to the topic the committee wanted addressed, and coming to a conclusion which I had been led to believe would be a congenial one for the members. The only problem was that the person I wrote it for didn't agree with it, a fact he neglected to inform me about. So I arrived the day of the speech, full of anticipation, only to hear my employer stand up and present a point-by-point and, I might add, fairly convincing refutation of the arguments I had made in my speech draft. I hope to avoid a repetition of that problem today.

In the interest of time, I am going to limit my presentation today to the constitutional issue raised during the Iran-Contra Affair by the Reagan administration's decision to seek funding for the Contras from third countries. The legal ramifications of this decision were not fully addressed in the Iran-Contra Report. Yet, in my view, this is a legal issue where it would be wise to fill out the record so that future Administrations do not draw mistaken inferences about the views of persons such as

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myself who were asked to review the Iran-Contra Affair. Similar constitutional issues are also raised by the participation of federal officials in the activities of the Enterprise[1] and by the reported desire of then CIA Director William J. Casey to establish a privately funded covert action capability to conduct a number of covert action programs.

The constitutional questions raised by third-country funding are of particular interest because their resolution will determine the breadth of the policy choices available in situations where there is a political stalemate between the President and the Congress, as there was in the case of Nicaraguan policy for a considerable period during the 1980's. If, on the other hand, Congress either firmly supports or firmly opposes Presidential policy, it will likely have the political will to clearly acquiesce in, or to dictate, the manner in which the President and his officials deal with third countries.

As I shall explain in detail below, it is my view that the President and his staff could constitutionally solicit funds from third countries for use abroad to advance the President's conception of the foreign policy interests of the United States, even in the face of a congressional command to the contrary. However, I also take the view that neither the President, nor any other United States official, can constitutionally exercise control over the expenditure of such funds either directly, or through an indirect mechanism such as the Enterprise, without congressional approval. Between these two extremes there is a gray area comprised of cases where United States officials offer experience and advice which heavily influence the expenditure of funds which are nominally under the control of third parties. In this last situation, I believe the proper rule is that the President and his advisers may act to advance their conception of U.S. foreign policy interests absent a congressional prohibition on such action. But, any such congressional prohibition must be limited in scope to be constitutional, and explicit in its application to the President and his staff in order to be effective.

The Iran-Contra Affair is of particular interest because it presents all three of these situations. There are three key underlying facts which should be made clear for the purposes of analysis. First, third countries provided approximately ninety percent of the financing which supported the Contras during the period when U.S. assistance was cut off, while about ten percent came through the mechanism of the so-called

1. The phrase "the Enterprise" as used in this paper is the shorthand description of the network of shell corporations established to hold, manage, and disburse funds received from third countries and private individuals as contributions to the Contras or proceeds from arms sales by Richard Secord and Albert Hakim. *See* REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, 100th Cong., 1st Sess., Majority Chapter 22 (1987) [hereinafter Iran-Contra Report].

"diversion."[2]

Second, despite some denials on this point, U.S. officials, other than the President, solicited support from these third countries for the Contras, but without promising any *quid pro quo*[3] and, in some cases, made explicit that no *quid pro quo* would be forthcoming.[4] Certain of these solicitations were made at times when the law could be read to bar such solicitations.

Finally, although the Contras nominally controlled most of the third-country funds, U.S. officials were heavily involved in determining how the funds were spent.[5] U.S. officials also arranged critical foreign governmental approvals to allow the weapon purchases, which were a principal use of those funds, to go forward.[6] In addition, some believe that U.S. officials controlled, through the mechanism of the Enterprise, the expenditure of several million dollars of private and third-country funds on behalf of the Contras.[7]

The legal treatment of the issue of third-country funding by the Iran-Contra majority is of particular interest. The majority asserted that all of these actions by the Administration were unconstitutional, but presented no persuasive authority for their position,[8] and used incorrect reasoning to support it. Since I agree with their position in part,[9] I hope to remedy these defects in my presentation. I present their views now as background for this discussion.

The majority said:

> When members of the executive branch raised money from third countries and private citizens, took control over that

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2. The total contributions from third countries were approximately $34 million. *Id.* at Majority Executive Summary, 4. Even the majority places the funds which flowed to the Contras from the so-called "diversion" at about $3.8 million. *Id.* at Majority Ch. 15.

3. *Id.* at 504, Minority Ch. 7.

4. *5 Joint Hearings of the Committees on the Iran-Contra Investigation*, 100th Cong., 1st Sess. at 34, 126-31 (1987) [hereinafter *Hearings*] (Testimony of Elliot Abrams).

5. *See generally*, Iran-Contra Report, *supra* note 1, Majority Report, Chs. 2 and 3.

6. Iran-Contra Report, *supra* note 1, at 46, Majority Ch. 2.

7. *See generally*, Iran-Contra Report, *supra* note 1, Majority Ch. 22.

8. The authority cited consists of general quotations from *The Federalist* and the convention debates which do not resolve the issue, together with statutes and Comptroller General's opinions. Neither the statutes nor the Comptroller General opinions speak to the basic question whether the Appropriations clause reaches third-country funds.

9. Actually, in their Executive Summary of the Iran-Contra Report, the majority appear to concede that solicitation of third-country funds by the President would be constitutionally permissible. Iran-Contra Report, *supra* note 1, at 16. Yet, in the preceding paragraph, the majority states: "[t]he solicitation of foreign funds by an Administration to pursue foreign policy goals rejected by Congress is dangerous and improper." *Id.* One is left uncertain whether the use of the word "improper" in this context is purely hortatory, or represents the majority's view that Congress can constitutionally prohibit such solicitation. It is perhaps not too much to suggest that the majority was uncertain of its position on this point.

> money through the Enterprise, and used it to support the Contras' war in Nicaragua, they bypassed this crucial safeguard [the Appropriations clause] in the Constitution. As Secretary of State George Shultz testified at the public hearings: "You cannot spend funds that the Congress doesn't either authorize you to obtain or appropriate. That is what the Constitution says, and we have to stick to it."[10]

The majority continued:

> Congress' exclusive control over the expenditure of funds cannot legally be evaded through use of gifts or donations made to the executive branch. Were it otherwise, a President whose appropriation requests were rejected by Congress could raise money from private sources or third countries for armies, military actions, arms systems, or even domestic programs.[11]

The legality of the solicitation of third-country funds was apparently a matter of debate within the Administration itself in 1984, the time when the major third-country donations began. Secretary of the Treasury Baker is reported to have been of the opinion that if the U.S. Government acted as conduit for third-country funding to the Contras, that would be an "impeachable offense."[12] Then CIA Director Casey was of the opinion that such fund-raising was permissible if the third-country contributions were made directly to the Contras.[13]

The constitutional position of the Iran-Contra majority was that unless the President has congressional approval for his actions, he cannot raise funds from, or participate in the expenditure of the funds of, third countries even though those expenditures may occur entirely outside the United States. The majority's constitutional position on solicitation is mistaken. Its position on control of funds is correct in part, but is too broadly drawn and is based on faulty reasoning.

II. ANALYSIS

Despite the majority's statements to the contrary, the analysis of this issue is not controlled by the text of the Constitution. The relevant constitutional provisions, the Appropriations clause,[14] and the Gift clause,[15] do not clearly resolve this problem, however much we might

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10. *Id.* at 412, Majority Ch. 27.
11. *Id.*
12. *Id.* at 39, Majority Ch. 2.
13. *Id.*
14. "No Money shall be drawn from the Treasury, but in consequence of appropriations made by law: and a regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.
15. "And no Person holding any Office of Profit or Trust under them, shall, without the

wish that they did.[16] I will begin by demonstrating that the prehistory of the Constitution does shed significant light on these issues. I will then show that the underlying structure of the Constitution itself can provide additional insight with respect to these matters.

A. The Prehistory of the Appropriations Clause: The Constitutional Struggle Over the War Power in England

The question of control over sources of revenue and appropriations has been an issue between executives and legislatures at least since the time of the second Stuart King, Charles I, who was beheaded in 1649 for having been on the losing side of this issue.[17] The Parliament which beheaded Charles ultimately insisted that it should have control of both the purse and the sword.[18] It is worth remembering, however, that the dispute between Charles and Parliament began over the question whether the King could collect revenue from subjects without the approval of Parliament, an approval which Parliament intended to condition on the King's acceptance of Parliamentary policy with respect to intervention in war in Europe, which Parliament favored.[19]

It seems entirely likely that the constitutional division of authority between Congress and the President which enforces the separation of the purse and the sword resulted in significant part from the experience of the English Civil War which ensued.[20] It is true that as this struggle escalated Charles' equivalent of the Secretary of Defense and National Security Adviser, the Earl of Strafford, was himself executed by Act of Parliament, after having been placed under suspicion of proposing to employ foreign troops against England on behalf of the King on the basis of purloined notes of the Privy Council. But, it is equally true that the partisans of Parliament themselves were in league with the Scottish army

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consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State." U.S. CONST. art. I, § 9, cl. 8.

16. The scope of the Gift clause is analyzed in note 25, *infra*. The Appropriations clause, on its face, applies only to money "drawn from the Treasury," which funds provided by a third country manifestly are not.

17. *See* W. CHURCHILL, HISTORY OF THE ENGLISH SPEAKING PEOPLES (1956). This book provides a fine general account of the political concerns of this period.

18. "On June 1, 1642, Parliament presented nineteen Propositions to the King. This ultimatum demanded that . . . Parliament should be given complete control over the militia, and over the army required for the reconquest of Ireland—that is to say, 'the power of the sword'. . . In brief, the King was invited to surrender his whole effective sovereignty over Church and State." On this, Civil War broke out, only to be ended by Charles' death by regicide in 1649. 2 W. CHURCHILL, HISTORY OF THE ENGLISH SPEAKING PEOPLES 231 (1956) [hereinafter CHURCHILL].

19. *Id.* at 178-79, 181.

20. It is no coincidence that this sèminal dispute between Charles and Parliament over taxation also implicated fundamental questions of political and legal freedom which resulted in the firm establishment, in its full modern reach, of the Great Writ of habeas corpus. *Id.* at 178-230.

which had invaded England in rebellion, an act which would have been "plain treason if the King's writ ran."[21] Parliament's excesses in the trial of Strafford, of which Churchill gives a fascinating account,[22] and which has certain remarkable parallels with present day events, contributed to the constitutional prohibition on bills of attainder, which sharply limits Congress' power to punish.[23]

I believe this historical experience made the Founders equally skeptical of the Congress and the Executive when it came to the exercise of the war power. As Madison said in *Federalist* No. 38:

> (I)s it not manifest that most of the capital objections urged against the new system (the Constitution) lie with tenfold weight against the existing Confederation? . . . Is it improper and unsafe to intermix the different powers of government in the same body of men? Congress, a single body of men, are the sole depository of all the foederal (sic) powers. Is it particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands? The Confederation places them both in the hands of Congress.[24]

The general lesson from this history is that the Founders were no more willing to establish a constitution which gave control of the sword to those who had control of the purse, than they were to establish a constitution where those who controlled the sword controlled the purse. We must, accordingly, be wary of an interpretation of the Constitution which would give to either Congress or the President clear and limitless supremacy over the other in this respect, although the Constitution may clearly allocate certain aspects of these powers. It does seem fair, however, to conclude that Parliament won its original argument with Charles over control of revenues, successfully asserting with respect to all succeeding Kings a complete authority to authorize all revenues coming to the crown from any source of taxation. And it is not difficult to imagine that the Parliament which confronted Charles would have included all revenues from any other source as well.

B. *The Appropriations Clause*[25]

This aspect of the Parliamentary victory, the right to control revenues, seems to have been carried over into our Constitution by the Appropriations clause. The Appropriations clause of the Constitution

21. *Id.* at 213.
22. *Id.* at 216-23.
23. U.S. CONST. art. I, § 9.
24. THE FEDERALIST No. 38, at 246-47 (J. Madison) (J. Cooke ed. 1961).
25. The Gift clause of the U.S. Constitution, art. I, § 9, cl. 8, provides in part: "And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the

provides that: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time."[26] A search of the debates of the constitutional convention and related materials sheds little light on the meaning of this provision. During the convention, the focus of debate was on the part of the language which dealt with the process by which appropriations were to be made. This was because two other questions—in which House of Congress appropriations and revenue measures should originate, and whether such measures could be amended by the other House—became substantial points of contention between the large and small states in their bargaining over the powers of the Houses of Congress.[27] But the source material does seem to show that the Founders considered that the "money" which would be drawn from the Treasury would be "public money."[28]

The commentaries on this clause of the Constitution also seem to imply that Congress would be in control of all revenues of the government through this provision. St. George Tucker, the well-known commentator on Blackstone, had this to say about the meaning of the Appropriations clause:

> All the expenses of government being paid by the people, it is the right of the people, not only, not to be taxed without their own consent, or that of their representatives freely chosen, but also to be actually consulted upon the disposal of the money which they have brought into the treasury . . . In those governments where the people are taxed by the executive, no such check can be interposed. The prince . . . would deem it sedition if any account were required of him . . . . Such is the difference between governments, where there is responsibility, and where there is none.[29]

Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." There is no indication whatsoever that the Gift clause was intended to apply to the funds of third countries which were donated for purposes other than the private benefit of the donee. In fact, the historical record is that this clause originated in a personal gift to an ambassador, Benjamin Franklin, by Louis XVI of France. 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION app. A at 327 (1966) [hereinafter M. FARRAND]. For this reason, the Gift clause and related statutes are irrelevant to this analysis and will not be discussed further.

26. U.S. CONST. art. I, § 9, cl. 1.

27. Comment, *The Origination Clause, the Tax Equity and Fiscal Reform Act of 1982, and the Role of the Judiciary*, 78 NW. U.L. REV. 419 (1983). The large States tended to be partisans of the House because they expected to be most fully represented there, and their effort was to force appropriations bills to originate in the House. *Id.*

28. M. FARRAND, *supra* note 25, app. A at 149. ("The Public Money" is "lodged in its Treasury").

29. 1 ST. GEORGE TUCKER, NOTES ON BLACKSTONE app. at 362 (1803 & photo reprint 1969).

Joseph Story, in his *Commentaries on the Constitution of the United States* stated:

> As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses . . . of the government, it is highly proper that Congress should possess the power to decide, how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure . . . . It is wise to interpose, in a republic, every restraint, by which the public treasure, the common fund of all, should be applied, with unshrinking honesty to such objects, as legitimately belong to the common defence, and the general welfare. Congress is made the guardian of this treasure . . . . [30]

These quotations from Tucker and Story make clear that the intention of the constitutional provision was to give Congress the exclusive power to control the expenditure of all funds raised by the United States Government through "taxes" or revenues from "other sources." There is no way to definitely ascertain from the text of this provision, or from the commentary on it, whether the provision was intended to be limited to revenues resulting from direct or indirect taxes (*i.e.*, user fees such as customs revenues), or alternatively, was intended to cover any revenue from any source. The political justifications offered for the provision by the commentators can be read to suggest that the types of revenues covered by the provision are limited to tax revenues: the commentators argue that since the tax revenues come from the people they should have a right to control their expenditure.

Both of the commentators also rely on the concept of executive accountability for expenditures as a justification. Story's commentary, in particular, suggests that it is wise republican government to limit the executive's ability to spend funds which are part of the "public treasure" to those objects approved by the people. If executive accountability is the determinative consideration, then this provision could apply to funds received from a foreign government as well; but, Story's discussion could simply refer to the constitutional requirement for periodic accountings.

Thus, it is not possible to determine whether the Founders intended the direct language of the provision to cover the circumstance where funds were provided by a foreign government or not. However, it does appear that the drafters intended to comprehensively cover all "public"

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30. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 213-14 (1833).

monies. It appears also that Congress was asserting a right to completely control the expenditure of such monies.

Looked at from another perspective, the basic question remains: Can a President, or any executive branch official, manage or spend private funds (including third-country funds) without their becoming "public" funds which appear to have been intended to be covered comprehensively by the drafters of the Appropriations clause? Does it make any difference if the funds are spent entirely abroad on functions which clearly are not direct activities of the U.S. Government? In analyzing this question, it is worth looking at two related issues: (1) the President's power to deal with foreign governments; and (2) the President's power to control property.

The President's ability to solicit funds from third countries (by solicit, I mean to ask for funds which would be directly donated to the cause involved) for the support of foreign causes in which he believes is protected by the Constitution. This argument is made in detail in the Minority Report of the Iran-Contra committees.[31] Suffice it to say that the President's ability to express his views on issues of foreign policy to other governments, and to solicit their support for his policies, seems so intimately bound up with the President's powers over the foreign policy of the United States that, at a minimum, any statute which could be read to interfere with this power should be read to avoid this issue. If Congress insists on confronting this issue directly, I believe such a statute should be held unconstitutional as a trespass on executive prerogative. What is said here of the solicitation of funds should apply equally, it seems to me, to seeking foreign government permit approvals on behalf of a third country or foreign cause.[32]

This does not mean, as the majority argues, that the President could apply funds so solicited to expenditures for domestic programs or the army. There are two distinct reasons for this. The first is that the power to appropriate funds for these objects is reserved to Congress by the Constitution.[33] The second, as I shall discuss below, is that the President does not have the power to apply funds to any object, except to execute a constitutionally protected authority, without the approval of the Congress. I caution the reader at this point, however, that the implications of

31. Iran-Contra Report, *supra* note 1, Minority Ch. 3, 463-66, 472-73.

32. We have also argued in the Minority Report, I think correctly, that an inherent foreign affairs power which belongs to the President can properly be delegated to, and exercised by, the President's personal staff or by his Cabinet without congressional interference. Iran-Contra Report, *supra* note 1, at 474, Minority Ch. 4.

33. U.S. CONST. art. I, § 8. "The Congress shall have Power To Lay and collect Taxes . . . and provide for the common defence and general welfare of the United States . . . ." *Id.*

the Minority Report's position on the issue of solicitation, though powerful, are narrow. The fact of inherent Presidential authority over certain aspects of foreign affairs does not form the basis for the sweeping assertions of Presidential power sometimes made using similar arguments. The Minority Report's argument is narrowly drawn, and should be narrowly applied.

Having said that the President does have power to solicit funds from third countries for foreign purposes, how are we to analyze the other two cases: influence by the President and his staff over the expenditure of such funds, and control by United States officials over the expenditure of such funds? I have already shown that neither the text nor the history of the Constitution provide much legal guidance in this respect. However, there are important structural considerations on which the Constitution rests which point the way to a conclusion.

C. The Control of Third-Country Funds by the President or Other United States Officials

We can begin an analysis of control over third-country funds by analyzing the juridical character of the President as compared to that of the British King. The British monarch not only held vast property in his own right, which he acquired by virtue of hereditary accession to the monarchy, he also acquired the property of others through feudal property rules, and all of this property could be applied to his personal benefit or to state projects of the Crown.[34] In addition, the British monarch was considered the owner of all property in Britain which otherwise would have been without an owner.[35] Finally, the King received revenues through Acts of Parliament which could be either temporary or perpetual (and thus hereditary) in duration (referred to as the "extraordinary revenues" of the Crown).[36] In analyzing the King's revenues as an aspect of the royal prerogative, Blackstone properly drew a distinction between "the King's revenue in his own distinct capacity" (as King) which supports the entire civil government, including the armed forces during some reigns, and "the revenue of the public."[37] In short, the British sovereign had a dual legal character, as first lord among feudal lords, and as the juridical sovereign.[38]

34. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND chs. 7 and 8 (1765 ed.).

35. *Id.*

36. *Id.*

37. *Id.* at 321.

38. *Id.* In writing about a century after the English Civil War, and in discussing the balance of constitutional power between the King and Parliament, Blackstone makes the point that Parliament's decision to supplement the hereditary revenues of the Crown for the life of a King at the beginning of a reign "restores to him that constitutional independence, which at

The President of the United States, of course, does not directly hold any property by virtue of his accession to office in the manner in which the British King held hereditary property and revenues. Property is entrusted to his use during his term in office, and he serves as the trustee or legal representative for the property of the United States during that term according to rules established by statute or common law. He does not hold property in the second mode in which the British monarch would have held property, for private benefit by virtue of his office. As Gouverneur Morris told the Constitutional Convention: "Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office . . . . This Magistrate is not the King but the prime Minister. The people are the King."[39]

It has been persuasively argued that the Founders relied heavily on Locke's theory of government in establishing the Constitution.[40] As Rogers and Young said:

> Because common law concepts of fiduciary obligations made it possible to divorce private interest from the exercise of public power, Locke turned to the notion of government as a trust. Like a trustee of private property, an officeholder has no right to assert private 'dominion' over the power he holds; his use of the property must be limited to such acts as will benefit those who gave him his power. To prevent private interest from diverting public power from its narrow course, Whig theorists necessarily had to strip public office of the attributes of dominion [which it had had under British practice] by turning it into a public trust.[41]

It follows from what has been said about the transformation in the general property concept of public office from one of private or feudal property to one of public trust, and with respect to the specific change in the legal character of the Office of the President brought about by the Constitution, that the President cannot "privately" hold property in his capacity as President, but always holds the property of the United States as its representative. The President's property must either belong to him as an individual, in which case he must have acquired it privately (except for his compensation), or it must belong to the United States.

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his first accession seems, it must be owned to be wanting" because of the relative decline of hereditary revenues as a portion of total Crown revenues. As Blackstone points out, if Parliament makes such a grant, the King then "has never any occasion to apply to Parliament for supplies, but upon some public necessity of the whole realm." *Id.* at 323.

39. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 68-69 (1966).

40. Rogers and Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025 (1975); *see also* B. BAILYN,THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 58-59 (1967).

41. Rogers and Young, *supra* note 40, at 1027-28.

Therefore, assets acquired by the President, or over which he exercises control, by virtue of his office, must be considered to be the property of the United States, since the President cannot hold them in any other character. This same rule must apply to the rest of the executive branch since its members cannot have any greater rights in property than the President would have by virtue of office. It follows from this that funds acquired, or over which control is exercised, by virtue of office, are public moneys and therefore covered by the Appropriations clause.

D. Advice and Influence Over the Expenditure of Third-Country Funds by the President and Other United States Officials

The analysis of the third case, where U.S. officials do not control third-country funds which are in the possession of a third party, but do give advice and thereby exercise influence over their expenditure, is the most difficult. It is apparent that this type of advice and influence can vary substantially from case to case. For example, the advice given could relate to general strategic or policy matters, such as the military position of the United States in the event that a third country was attacked; intelligence information concerning the disposition of United States forces or the forces of a foreign country; or advice concerning the best means of combatting a foreign military threat. Or the advice given could be considerably more specific, such as the proper tactics for a particular battle or campaign, or the proper means for training a particular army, or for equipping that army. It seems fair to say that at one point or another during the Iran-Contra Affair, many of these general and specific kinds of advice and assistance were given by the staff of the National Security Council (NSC) to officials of different third countries and forces.[42]

It seems apparent that certain of these kinds of advice would be closely allied with, and a very important adjunct to, traditional diplomatic communication. A diplomacy which is not closely connected to a clear and coherent military position is not a powerful diplomacy. It therefore follows that the types of general communication described above, of strategy, intentions, and military intelligence, would be protected constitutionally as part of the President's diplomacy powers.

A considerably closer question is presented by the provision of tactical military advice and planning assistance, and the intelligence related to such advice and assistance. In providing this type of operational assistance, the United States is moving much closer to direct involvement by its officials in foreign military operations. The constitutional status of this type of activity is of particular importance in view of the role which

42. *See generally* Iran-Contra Report, *supra* note 1, Majority Chs. 2 and 3, 12-14.

can be assumed by the staff of the National Security Council at the direction of the President under current law.[43] While one can argue about the boundaries of the war-making power under the Constitution, it clearly reserves to Congress the power to declare war. And although one can argue about the boundaries of the Appropriations clause, one cannot reasonably argue that it was not intended to apply to every penny of military expenditures by the United States. In fact, the *Federalist papers* extensively discuss the fact that the congressional power to appropriate funds for military purposes is intentionally limited by the Constitution in a manner designed to limit the amount of discretion which can be given to the Executive, even by a willing Congress.[44] In the case of tactical military advice and intelligence, then, there is a conflict between a central congressional authority, the control over military appropriations, and an extension of the President's authority over foreign affairs and defense.[45] In my view, if Congress makes its will to prevent executive action in the area of such tactical advice unmistakably clear, except in the context of a declared war, Congress should prevail. However, if Congress does not act, or does not act clearly, then the President should be allowed to advance his conception of foreign policy even by providing this type of military and intelligence advice and assistance to third countries and forces.

III. CONCLUSIONS

Applying these considerations to hypothetical circumstances similar to those of the Iran-Contra Affair, but without passing judgment on any of the issues of the Iran-Contra Affair itself, produces the following results. First, it is constitutional for the President to solicit the political and financial support of other countries for a foreign faction such as the Contras, without the permission of the Congress, or even against its will. Nor, absent an express statutory command, is it unlawful for him to fail to notify the Congress of such solicitations.

Secondly, it is constitutional for U.S. officials to advise those in possession of third-country funds as to the expenditure of such funds absent an express congressional command to the contrary. This situation calls into play the principle that certain actions are constitutionally protected

43. While there is currently in force a National Security Decision Directive barring NSC staff involvement in operations, it is clear from the history of the National Security Act that there is no statutory bar to such involvement. *See* Iran-Contra Report, *supra* note 1, at Minority Ch. 6. Thus, a future President could allow the NSC staff to reassume this role.

44. *See, e.g.*, THE FEDERALIST No. 26 (A. Hamilton) (J. Cooke ed. 1961).

45. Whatever the scope of the President's authority as Commander in Chief, I do not see how the President's authority to provide military advice and assistance could be greater in constitutional terms than his ability to commit U.S. troops. It follows that if Congress could prevent the President from committing troops in a particular situation, it could prevent this type of tactical military advice and intelligence from being provided.

because they are intimately connected to the President's foreign affairs and defense powers. However, Congress' power over appropriated funds for military purposes is complete, and should be respected unless it conflicts directly with a core executive function. If Congress asserts its power to appropriate explicitly to control the actions of the President and his staff, which constitute the provision of tactical military advice or information where there is no declared war, Congress should prevail. But, if Congress does not act, or does not act in a properly limited manner, or do so explicitly, then the President and his staff are constitutionally permitted to offer such advice in pursuance of the President's policy.

Finally, it is not constitutional for U.S. officials to exercise control over the expenditure of such funds whether they are in the hands of a foreign faction such as the Contras, or of an entity such as the Enterprise, without the approval of the Congress.