Congressional Control of Foreign Assistance

by Jeffrey A. Meyer†

If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.¹

As the United States in the 1980s seeks to reassert its influence abroad, foreign assistance is playing an increasingly important role in American foreign policy.² No longer primarily a subsidy for friendly foreign governments, foreign assistance has become a versatile instrument of intervention without the use of force. For example, the United States has used foreign aid to destabilize unfriendly regimes in Nicaragua, Afghanistan, and Angola; to quell international terrorism; and to secure the release of American hostages in the Middle East. Foreign aid serves an equally great symbolic role, as a barometer of American moral approval or disapproval of the outside world.³ Therefore, though the actual volume of foreign assistance channeled abroad may be small and sometimes of little impact, American foreign assistance policy functions as a broad index of U.S. foreign policy concerns. The annual foreign assistance budgeting process has become no less than a surrogate for a systematic reexamination of the progress, problems, and propriety of America's foreign policy.⁴

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3. Thus, for example, regarding assistance to the Nicaraguan "contra" rebels, philosophical divisions over the threat of communism outweigh tactical disagreements over whether the contras can effectively spend the funds. Similarly, once the sale of arms to Iran became public, the moral reprehensibility of sending arms to the Ayatollah Khomeini overshadowed assurances by the President that only a planeload of arms had been sent and that the policy had in fact succeeded in freeing a few hostages.

4. Senator J. William Fulbright observed:

[F]oreign aid provides the closest thing we have to an annual occasion for a general review of American foreign policy. It provides the opportunity for airing grievances.... It also
America, however, does not always speak with one voice in foreign policy and foreign assistance. Historically, the President has promoted an aggressive foreign policy, and has not hesitated to use the foreign assistance tool, while Congress has remained skeptical about international commitments and the effectiveness of assistance efforts abroad. The conflict between the White House and Congress on American policy toward Central America and the Persian Gulf is a current illustration of this disagreement. Whether it is the President or Congress that "calls the shots" in foreign assistance is vitally important to the shaping of all U.S. foreign policy.

This Comment looks at the struggle between the President and Congress over who determines American foreign assistance policy. In particular, it focuses on the "tools" that Congress uses to control executive discretion in this area. Part I discusses the meaning of "foreign assistance." Part II examines the separation of powers conflict in historical context, analyzing the evolution of congressional control over executive action in foreign assistance. It reveals a record of executive evasion of statutory controls and corresponding congressional constriction of executive discretion. Against this background, Part III evaluates the constitutional authority of Congress to control foreign assistance. Part IV examines the effectiveness of congressional controls within limits set by the Constitution. Finally, Part V considers new devices that Congress might use to control executive action, and proposes that Congress create

provides the occasion for a discussion of more fundamental questions, pertaining to America's role in the world, to the areas that fall within and those which exceed its proper responsibilities.


5. No recent research has examined in depth the historical and constitutional relationship of the President and Congress in the making of foreign assistance policy. The last article exclusively focusing on foreign assistance and separation of powers was Wallace, supra note 4, at 293-428, 453-94. The most recent article touching on congressional control of foreign assistance is Franck and Bob, The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case, 71 AM. J. INT'L L. 912 (1985), which provides an excellent overview of the types of statutory controls Congress uses to control executive discretion, although it does not focus on the foreign assistance context or its history apart from other areas of foreign relations. Finally, numerous authors have written on one thin slice of foreign assistance legislation: human rights restrictions. See, e.g., Cohen, Conditioning U.S. Security Assistance on Human Rights Practices, 76 AM. J. INT'L L. 246 (1982); Moeller, Human Rights and United States Security Assistance: El Salvador and the Case for Country-Specific Legislation, 24 HARV. INT'L L.J. 75 (1983); Albert, The Undermining of the Legal Standards for Human Rights Violations in United States Foreign Policy: The Case of Improvement in Guatemala, 14 COLUM. HUM. RTS. L. REV. 231 (1982); Broder and Lambe, Military Aid to Guatemala: The Failure of U.S. Human Rights Legislation, 13 YALE J. INT'L L. 111 (1988).
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a legislative-executive committee in order to assert more effective control over foreign assistance policy.

I. Defining Foreign Assistance

The popular meaning of “foreign assistance” is whatever the American government gives away for free. The United States, however, channels “assistance” to foreign countries and organizations in many forms other than gifts and donations. For purposes of this Comment, foreign assistance is defined as the transfer abroad, by the U.S. government, of money, materials, or services by gift, loan, sale, credit, guaranty, or subsidy, and of similar, regulated transfers by private parties.6

American foreign assistance falls into six subject-matter areas: two categories of aid (economic development/humanitarian and military) conveyed in three forms (grants and loans, sales, and regulated private commercial transfers). This results in six possible combinations of foreign aid: economic development and humanitarian loans and grants;7 military loans and grants;8 economic development and humanitarian sales;9 military sales;10 economic development and humanitarian

6. At least two statutory provisions, read together, recognize such a wide definition of foreign assistance. 22 U.S.C. § 2394(b) states:
(1) ‘foreign assistance’ means any tangible or intangible item provided by the United States Government to a foreign country or international organization under this chapter or any other Act, including but not limited to any training, service, or technical advice, any item of real, personal, or mixed property, any agricultural commodity, United States dollars, and any currencies of any foreign country which are owned by the United States Government; and
(2) ‘provided by the United States Government’ includes, but is not limited to, foreign assistance provided by means of gift, loan, sale, credit, or guaranty.

22 U.S.C. § 2304(d)(2) (1982 & Supp. III 1985) defines “security assistance” to include military grants, economic support funds, military education and training, peacekeeping operations, arms sales (including by credit or guaranty), and arms export licenses.


commercial regulation; and military commercial regulation. As discussed in Parts III and IV, the constitutionality and effectiveness of congressional control over executive action vary across this spectrum of foreign assistance. First, however, Part II develops a historical context for understanding how Congress can effectively and constitutionally control foreign assistance policy.

II. The Evolution Of Congress' Control Over Foreign Assistance

Congress has always granted the President wide discretion to manage foreign assistance. Authorizations are typically broad and sweeping, and appropriations are in lump sums. Regulations imposed by Congress on the foreign assistance process have been negative restrictions and prohibitions that bar the President from acting or spending funds in certain ways, rather than positive guidelines on how the money is to be spent. Congressional “control” of foreign assistance, then, denotes the ways in which Congress limits and confines the discretion it delegates to the President in this field.

Since 1961, when Congress passed the original template of the modern United States foreign assistance program, congressional regulation has

13. Thus, for example, in the area of economic development assistance, the President is instructed "to furnish assistance, on such terms and conditions as he may determine," for a variety of broad programs such as agriculture, rural development, and nutrition, 22 U.S.C. § 2151a(a)(1)(1982); voluntary population planning, 22 U.S.C. § 2151b(b) (1982); health programs, 22 U.S.C. § 2151b(e) (Supp. III 1985); education, public administration, and human resource development, 22 U.S.C. § 2151c(a) (Supp. III 1985); research and development of energy production and conservation, 22 U.S.C. § 2151d(b) (Supp. III 1985); and technical cooperation and development, 22 U.S.C. § 2151d(d) (Supp. III 1985).
14. In the area of military assistance, Congress has authorized the President “to furnish military assistance, on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise eligible to receive such assistance . . . .” 22 U.S.C. § 2311(a) (Supp. III 1985).
15. The Foreign Assistance Act of 1961 (FAA of 1961), Pub. L. No. 87-195, 75 Stat. 424, represented a watershed in U.S. assistance policy because it created a structure for an ongoing annual worldwide assistance program, both military and economic, in contrast to the ad hoc, crisis-oriented programs of the past. See J. White, The Politics of Foreign Aid 214-15 (1974). American foreign assistance policy reaches back at least to the 1930s, when the Ex-
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evolved in three distinct phases. During the "delegation phase," from 1961 until 1972, Congress extended to the President wide latitude to bypass statutory restrictions imposed on foreign assistance, reserving for itself few tools to control executive discretion. During the "investigation phase," from 1972 until 1983, Congress tightened its controls by instituting systematic and detailed reporting requirements and initiating expedited voting procedures to review executive action. Finally, during the "review phase," from 1983 until the present, Congress put itself into a position to review and participate more effectively in foreign assistance policy through devices such as objective definitional limits, expanded consultation requirements, independent fact-finding, shortened authorization periods, and expansion of expedited review procedures. The following sections examine these three phases in greater detail.

A. The Delegation Phase: 1961-1972

The early foreign aid restrictions gave wide powers to the President to avoid their application and left Congress with few tools to control executive action. Only scattered reporting requirements and the threat of a concurrent resolution legislative veto constrained executive action.16


16. See FAA of 1961, § 617, 75 Stat. at 444 (codified as amended at 22 U.S.C. § 2367 (1982)). A "legislative veto" occurs when Congress delegates power to the Executive, but retains the power to "veto," by a resolution of a committee or of one or both Houses, a particular use of that power. Such congressional action has legislative effect but does not satisfy the constitutional requirements of presentment, and, in the case of a committee or one-House legislative veto, bicameralism. See I.N.S. v. Chadha, 462 U.S. 919, 944-51 (1983) (striking down the legislative veto). An action has legislative effect if it has the "purpose and effect of altering the legal rights, duties, and relations of persons" outside of the Legislative Branch. Id. at 952.

Even before Chadha, moreover, the legislative veto in foreign aid legislation lacked power because it permitted a twelve month wind-up period for the continued obligation and expenditure of funds. Since foreign assistance funds are appropriated on a year-by-year basis, a year-long wind-up period allows expenditure of all remaining funds, and thus amounts only to a vague promise not to authorize and appropriate again next year. In 1973, the wind-up period was shortened to eight months. Foreign Assistance Act of 1973 (FAA of 1973), Pub. L. No. 93-189, § 14, 87 Stat. 722. Thus, in effect, the legislative veto provision was little more than a modified sunset provision.
Meanwhile, the President had broad discretionary power to waive prohibitions, to avoid applying restrictions because of vague definitional limits, and to invoke independent authorities to spend and re-direct foreign assistance for purposes unauthorized by Congress.

Almost all of the early restrictions on foreign assistance allowed the President an unlimited power of waiver. Typically, the President could make a finding that a restriction did not serve "national security interests" and waive it without informing Congress or explaining his rationale.\footnote{17} Where Congress did not allow a waiver, the President could still evade the effect of congressional restrictions because of their definitional vagueness.\footnote{18} The President was not required to consult with Congress or refer to any objective standard in complying with such definitional limits.

In addition to this broad authority to waive or to avoid legislative prohibitions, Congress also gave the President five independent spending powers: special funds authority, contingency fund authority, military drawdown authority, transfer authority, and reprogramming powers. The special funds authority permitted the President to authorize and use any foreign assistance funds up to $350 million "without regard to the requirements of the [Foreign Assistance Act]" whenever he determined it

\footnote{17} Thus, assistance to Cuba was prohibited "[e]xcept as may be deemed necessary by the President in the interest of the United States." Foreign Assistance Act of 1963 (FAA of 1963), Pub. L. No. 88-205, § 301(e)(1), 77 Stat. 379, 386 (codified at 22 U.S.C. § 2370(a)(2) (1982)). Assistance was prohibited to the government of any country failing to pay a debt to any U.S. citizen for goods or services furnished, provided that "the President does not find such action contrary to the national security." Foreign Assistance Act of 1962 (FAA of 1962), Pub. L. No. 87-565, § 301(d)(2), 76 Stat. 255, 260 (codified at 22 U.S.C. § 2370(c) (1982)). No development loans were permitted to foreign enterprises that might compete with U.S. business in the U.S. domestic market unless the President determined that a waiver is in the "national security interest." FAA of 1961, § 620(d), 75 Stat. at 445 (codified as amended at 22 U.S.C. § 2370(d) (1982)). Assistance to communist countries was prohibited unless the President found that "(1) such assistance is vital to the security of the United States; (2) the recipient country is not controlled by the international Communist conspiracy; and (3) such assistance will further promote the independence of the recipient country from international communism." FAA of 1962, § 301(f), 76 Stat. at 261 (codified as amended at 22 U.S.C. § 2370(f)(1) (1982 & Supp. III 1985)).

\footnote{18} The Foreign Assistance Act of 1966 (FAA of 1966) prohibited assistance to any country "engaging in or preparing for aggressive military efforts" directed against the United States or countries that receive U.S. assistance. Although the President was not permitted to waive this restriction by a contrary determination of the U.S. national security interest, he was explicitly given responsibility for determining which countries were preparing for aggressive military efforts and for rescinding the prohibition if he later determined and reported to Congress that the military efforts had ceased and that he had "received assurances satisfactory to him" that the military efforts would not be continued. FAA of 1966, Pub. L. No. 89-583, § 301(h)(1), 80 Stat. 795, 805-06, repealed by International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 734(a)(1), 95 Stat. 1519, 1560. Similarly, military assistance was to be terminated to any country in "substantial violation" of the regulation governing its use. FAA of 1962, § 201(a), 76 Stat. at 259 (codified as amended at 22 U.S.C. § 2314(d)(1) (1982)).
to be “important to the security of the United States.”19 Although there was a requirement that the President “promptly notify” certain committees and officers of Congress of any such determinations,20 he could use up to $50 million “pursuant to his certification that it is inadvisable to specify the nature of the use of such funds, which certification should be deemed to be a sufficient voucher for such amounts.”21 The contingency fund authority permitted the President to use up to $300 million for economic development and humanitarian purposes “when he determines such use to be important to the national interest.”22 The drawdown authority permitted the President to withdraw up to $300 million of materials and services from Defense Department stocks if he determined it to be “vital to the security of the United States.”23 The transfer authority permitted the President to transfer funds within one country between different accounts. For example, upon no more than a finding that it was “necessary for the purposes of this Act,” the President could transfer money from the economic support fund to the military grant account.24 Finally, there were no statutory limitations on the President’s reprogramming power. This power allowed the Executive to transfer funds within the same account between different countries.

The early legislation required four types of reports. First, the President had to submit, at the end of each fiscal year, one annual report “to make public all information concerning operations” of foreign assistance programs.25 Second, the President had to furnish, upon request of a congressional committee, any information specified by the committee.26

19. FAA of 1961, § 614(a), 75 Stat. at 444 (codified as amended at 22 U.S.C. § 2364(a) (1982 & Supp. III 1985)). Section 614(b) of the act permitted the President to furnish unlimited assistance from the Economic Support Fund account to “meet the responsibilities or objectives of the United States in Germany, including West Berlin, and without regard to such provisions of law as he determines should be disregarded to achieve this purpose.” Id. § 614(b), 75 Stat. at 444 (codified as amended at 22 U.S.C. § 2364 (1982)).
20. Id. § 634(d), 75 Stat. at 455.
21. Id. § 614(c), 75 Stat. at 444 (codified as amended at 22 U.S.C. § 2364(c) (1982)). In 1966, Congress required that the President “promptly and fully inform” the Speaker of the House and the chairman and the ranking minority member of the Senate Foreign Relations Committee of each use of funds under § 614(c), but did not require any explanation or justification for such use. FAA of 1966, § 301(g), 80 Stat. at 805.
23. Id. § 510(a), 75 Stat. at 437 (codified as amended at 22 U.S.C. § 2318 (1982)).
24. Id. § 610, 75 Stat. at 442. The transfer could not take away more than 10% of the source account nor augment the target account by more than 20%. Id. The President remained free to increase any account by more than 20% by employing his special funds or drawdown authority rather than his transfer authority. Id. § 510, 75 Stat. at 437 (drawdown authority); id. § 614, 75 Stat. at 444 (special funds authority).
25. Id. § 634(a), 75 Stat. at 455.
26. Id. § 634(b). Failure of the President to respond within 35 days would automatically suspend assistance under the provision about which information was requested. Id. § 634(c).
Third, the President had to notify Congress promptly after exercising his special funds, drawdown, or transfer authority (but not his contingency fund or reprogramming authority). Finally, Congress required the President to submit a report in January of each year on any assistance furnished for purposes “substantially different” in nature from, or in excess of 50% greater than, the proposed expenditures included in the amount justified to Congress prior to appropriation.

B. The Investigation Phase: 1972-1983

1. New Congressional Controls

In the wake of disclosures about military operations in Cambodia, Congress expanded its capacity to monitor and review the Executive’s management of foreign assistance. This subsection discusses the three principal congressional reforms and examines their application in two areas—arms sales and human rights.

Congress’ first step, contained in the Foreign Assistance Act of 1971, was to require the Executive to reduce to writing all “findings” or “determinations” mandated by statute in order to waive restrictions. By re-
requiring a prior written finding, Congress hoped to prevent the President from exercising his power to waive a restriction and only afterwards making a formal finding and notifying Congress. As part of this first reform, Congress required the President, when he invoked his independent authority over special funds, drawdowns, and account transfers, to give prior notice of the statutory source of his authority, his justification, and the extent to which he intended to exercise the authority.\textsuperscript{32} Congress also required presidential notification within thirty days of enactment of an appropriations bill of the receiving country's intended use of the U.S. funds and of the type of assistance.\textsuperscript{33} The President was also prohibited from subsequently exceeding the amount reported to Congress for military grants and economic support funds to one country by more than 10\%, unless he determined it to be "in the security interest" to waive this limit and provided Congress ten days' notice and a justification of his waiver.\textsuperscript{34} This had the effect of requiring both notice to Congress and a "security interest" finding before any substantial exercise of the President's independent authorities.\textsuperscript{35}

\textsuperscript{32} FAA of 1971, § 304(a)(1), 86 Stat. at 28 (codified as amended at 22 U.S.C. § 2411 (1982 & Supp. III 1985)). This section originated in the Special Foreign Assistance Act of 1971. It initially applied only to Cambodia and contained the additional requirement of a 30-day pre-notification. Pub. L. No. 91-652, § 8, 84 Stat. 1942, 1943 (1971). In the FAA of 1971, Congress generalized the pre-notification requirement but declined to set a specific waiting period: "It was the understanding of the Committee of Conference that, while not specifying the number of days, the advance notice should not just be immediately contemporaneous with the use of these authorities." S. CONF. REP. No. 590, 92d Cong., 1st Sess. 28, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 1937, 1946.


\textsuperscript{34} Id., 86 Stat. at 28-29 (codified as amended at 22 U.S.C. § 2413(b) (1982 & Supp. III 1985)). In 1974, Congress amended this section so that it would not apply if the amount of excess was less than $1 million. Foreign Assistance Act of 1974 (FAA of 1974), Pub. L. No. 93-559, § 21, 88 Stat. 1795, 1801. This restriction on the use of excess funds overlapped the rules regarding transfers between accounts. The prior statutory framework governing the President's authority to transfer funds between accounts allowed additions of up to 20\% to any single account whenever he determined it to be "necessary for the purposes of the Act." See supra note 24 and accompanying text. The combined effect of the new requirement with the old one was to permit transfers to military assistance and economic support fund accounts of up to 10\% of previously appropriated amounts on a finding that it was "necessary," while permitting transfers greater than 10\% only with 10 days' notice and a finding of a security interest. In 1974, Congress applied the 10-day advance notice requirement to economic development assistance and peacekeeping operations. FAA of 1974, § 21, 88 Stat. at 1801.

\textsuperscript{35} From 1972 to 1977, Congress continued to restrict the President's independent authorities. First, starting in 1973, the use of the contingency fund was to be "primarily for disaster relief purposes," in contrast to any use "important to the national interest" as allowed by the previous statute. FAA of 1973, Pub. L. No. 93-189, § 10, 87 Stat. 714, 719. In 1974 Congress restricted the fund to "emergency" purposes, and by the same year, the contingency fund pool had been reduced to only $5 million from a high of $300 million in 1961. FAA of 1974, § 28(c), 88 Stat. at 1803. Second, in 1974, Congress prohibited any augmentation of development assistance accounts through the use of special funds or transfer authorities. Id. § 19, 88.
The second reform created much more detailed substantive reporting requirements. In several pieces of legislation, Congress made clear that the President could no longer act upon unsupported findings or determinations; rather, he was now required to provide detailed statements of the facts involved and his justification for action.\textsuperscript{36} This promoted both internal accountability within the executive branch and external accountability to Congress and the public at large. Accountability within the executive branch was increased because a procedure for information gathering was imposed that involved more people and resources in policy evaluation and decision-making. Increased external accountability was introduced in the form of a requirement that the President consider the relevant findings of other persons or groups and certify that he had investigated and considered certain relevant facts in producing a finding or determination.\textsuperscript{37}

Congress' third reform was to initiate the use of expedited or "fast-track" legislative consideration procedures to review presidential findings. Typically, for any resolution eligible for such treatment, the number of days for committee consideration and the amount of time for floor debate were limited, and amendments were prohibited.\textsuperscript{38} This provision reinforced the Executive's external accountability by greatly increasing the probability that a congressional vote would actually take


\textsuperscript{36} \textit{See, e.g., AECA of 1976, 90 Stat. 729.}

\textsuperscript{37} \textit{See infra} notes 52-56 and accompanying-text.

\textsuperscript{38} The "fast-track" procedures had been used to expedite the consideration of other foreign policy resolutions, such as the War Powers Resolution of 1973, Pub. L. No. 93-148, § 7, 87 Stat. 555, 557-58 (1973), and agreements negotiated under the Trade Act of 1974, Pub. L. No. 93-618, §§ 151-154, 88 Stat. 1978, 2001-08. They were enacted not as statutory provisions but as part of the internal, parliamentary rules of each House. \textit{But see infra} note 140.
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place. The fast-track thus offered Congress an effective power of review and, as a result, indirectly encouraged the Executive to comply in good faith with reporting requirements.

2. Arms Sales

Statutory changes in the field of arms sales illustrate Congress' increasing supervision of executive policy decisions in the foreign aid arena. The 1968 Foreign Military Sales Act gave the President general authority to sell arms to friendly nations. Under this Act, the President was required to make a finding that a proposed sale would “strengthen the security of the United States and promote world peace,” but was not required to communicate or justify the finding to Congress. Although the law required the President to make two reports concerning each sale, neither report was due prior to the sale, when Congress would be in a position to object. In 1974, however, Congress imposed on the Executive a twenty-day report-and-wait period before he could issue a letter of offer to sell $25 million or more of defense articles or services, during which time Congress could disapprove with a concurrent resolution legislative veto. Then, in 1976, Congress lengthened the report-and-wait period to thirty days for arms sales of any size. As for sales of $25 million or more, Congress required a report-and-wait period before the President could issue a letter of offer to sell any defense articles or services. The President was required to “promptly submit” a report on the implementation of an agreement with the recipient country that prohibited subsequent transfers of the arms to other parties. The Secretary of State was required to submit semi-annual reports giving details on private transfers of U.S. arms abroad during the previous six months.

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39. Half the battle in passing legislation is getting the full Congress to vote on a resolution. The fast-track mechanism increases the probability of obtaining a vote because, typically, any member of Congress can introduce an eligible joint resolution.

40. Even if Congress can only muster a simple majority, and not the two-thirds necessary to override a veto, the fast-track imposes a political constraint by putting the President in the uncomfortable position of having to veto the legislation.


43. The President was required to “promptly submit” a report on the implementation of an agreement with the recipient country that prohibited subsequent transfers of the arms to other parties. Id. § 3(a), 82 Stat. at 1322. The Secretary of State was required to submit semi-annual reports giving details on private transfers of U.S. arms abroad during the previous six months. Id. § 36(a), 82 Stat. at 1326.

44. FAA of 1974, § 45(a)(5), 88 Stat. at 1814-15. If the President certified that an “emergency” existed, then he would not have to wait the 20 days for possible congressional disapproval. But he would still have to notify Congress prior to issuing a letter of offer. Id.

45. AECA of 1976, § 204(a), 90 Stat. at 735-36. Congress accomplished this by requiring the President to withhold consent to the nontransfer agreement for 30 days, which itself was a prerequisite for the foreign country's eligibility to buy arms. No legislative veto was included for arms sales of less than $25 million.

million or more.\textsuperscript{46} Congress required the President to consider and report on thirteen different factors and justifications.\textsuperscript{47} Finally, for such large sales, Congress strengthened its legislative veto power with a provision for fast-track consideration of any concurrent resolution.\textsuperscript{48}

3. Human Rights

Human rights legislation also illustrates Congress' approach to foreign assistance during the "investigation" phase. In 1975, Congress passed the first piece of binding legislation tying foreign assistance to the human rights conduct of foreign governments.\textsuperscript{49} In 1976, it widened the human rights prohibition from economic development and humanitarian assistance to military assistance, providing that "no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."\textsuperscript{50} From the start, Congress was at a severe disadvantage in trying to define

\textsuperscript{46} The coverage was expanded to include not only sales of any defense articles or services in amounts of $25 million or more but also sales of $7 million or more of "major defense equipment," defined as articles on the U.S. Munitions List with research and development costs greater than $50 million or production costs greater than $200 million. AECA of 1976, §§ 211(a), 215, 90 Stat. at 741-42, 747.

\textsuperscript{47} Id. § 211(a), 90 Stat. at 742-43. These included the reasons why the proposed sale was in the national interest, the name of each contractor expected to provide the defense article or service, the availability of comparable articles or services from other countries, the effect on regional stability, the effect on U.S. relations with neighboring countries, and the impact on arms control.

\textsuperscript{48} Id., 90 Stat. at 743 (referring to § 601(b)). The fast-track procedures in the Senate provided for committee discharge after 10 days upon motion (privileged for consideration) approved by the entire Senate; for a 10 hour limit on debate; and for no amendments. Id. § 601(b), 90 Stat. at 765-66. The House procedures were more limited than those of the Senate: "For the purpose of expediting the consideration and adoption of concurrent resolutions under this subsection, a motion to proceed to the consideration of any such resolution after it has been reported by the appropriate committee shall be treated as highly privileged in the House of Representatives." Id. § 211(a), 90 Stat. at 743. This would presumably allow for rapid floor action but may not prevent a committee from "bottling up" the resolution until after the 30-day lapse.

\textsuperscript{49} In 1974, Congress passed a "sense of the Congress" resolution barring aid to countries that violate human rights. FAA of 1974, § 46, 88 Stat. at 1815-16. In 1975, the prohibition became mandatory for development assistance. However, if the Executive determined that the assistance would "directly benefit the needy people" in such a country, the aid would still be granted. International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 310, 89 Stat. 860 (codified as amended at 22 U.S.C. § 2151n (1982 & Supp. III 1985)). The Administrator of the Agency for International Development was required to submit a report with a detailed explanation of the assistance to be provided and how it would directly benefit needy people. If Congress disagreed with the Administrator's justification, it reserved the right to terminate assistance by concurrent resolution. Id.

\textsuperscript{50} AECA of 1976, § 301(a), 90 Stat. at 748 (codified as amended at 22 U.S.C. § 2304 (1982 & Supp. III 1985)). "Security assistance" was defined to include military grants, military sales, military education and training, peacekeeping operations, economic support funds, arms credits, guarantees, and export licenses. Id., 90 Stat. at 750. Human rights was a growing policy concern of Congress in the mid-1970s which the Executive Branch did not share until the election of President Carter. See generally Cohen, supra note 5, at 249-50.
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"human rights" and to determine the extent of violations necessary to trigger the prohibitions.\textsuperscript{51} To compensate, Congress instituted the most substantively detailed reporting requirements yet enacted. One requirement was an annual report by the Secretary of State on the human rights practices of all countries proposed as recipients of security assistance.\textsuperscript{52} This reporting requirement was distinctive because it instructed the Secretary to rely on specified sources of information. Congress created the new position of Assistant Secretary of State for Human Rights and Humanitarian Affairs, and required that this officer assist in preparing the report.\textsuperscript{53} The creation of this position was meant not only to increase the Executive's information gathering capacity,\textsuperscript{54} but also to inject a more independent viewpoint into the information flow from the foreign service bureaus abroad.\textsuperscript{55} In addition, the Secretary was required to give "due consideration" both to the reports of "appropriate international organizations" such as the Red Cross and to the extent to which foreign governments allowed unimpeded investigations.\textsuperscript{56}

Another reporting requirement, triggered at the request of Congress, concerned the human rights practices in specific countries. With respect to each such country, it required the Secretary of State to perform a detailed balancing test to justify U.S. policy. The Secretary had to present

\textsuperscript{51} For example, it is difficult to define a "consistent pattern." Likewise, it is difficult to determine if it is "the government" or forces outside of the government's control that are responsible for violations. Finally, even though "gross violations" are defined in a list for purposes of the statute, the list is not exhaustive. See, e.g., Cohen, supra note 5, at 252; Moeller, supra note 5, at 78-79; Albert, supra note 5, at 249-51 (noting problems of defining "military advisor," "basic human needs," and "improvement").

\textsuperscript{52} AECA of 1976, § 301(a), 90 Stat. at 748-49.


\textsuperscript{54} The Assistant Secretary was to "maintain continuous observation and review of all matters pertaining to human rights" by "gathering detailed information," "preparing the statements and reports to Congress," and "making recommendations to the Secretary of State and the Administrator of the Agency for International Development." AECA of 1976, § 301(b), 90 Stat. at 750.

\textsuperscript{55} If the Secretary of State had been left to prepare reports on his own, he would have had to rely on the facts and information presented to him by the career foreign service officers in each country, who often view their primary role as maintaining smooth relations with their host country and thus promote a "clientist" perspective. See Cohen, supra note 5, at 256-60. The Assistant Secretary, according to one observer, functioned with vigor as a counterweight to the regional bureaus during the first few years. Id. at 261-62. During the Reagan Administration, the first nominee for the Assistant Secretary position, Ernest Lefever, believed that the United States "had no right to promote human rights in sovereign states" and was eventually forced to withdraw. The post was filled by Elliot Abrams, who also opposed a vigorous human rights policy. When Abrams was promoted, Richard Schifter was appointed. He has established a strong rapport with Congress and human rights groups. N.Y. Times, May 12, 1987, at B6, col. 5.

\textsuperscript{56} AECA of 1976, § 301(a), 90 Stat. at 749.
“all the available information” regarding the country’s human rights practices and the steps the United States had taken to promote and to call attention to respect for human rights in that country. In addition, he was required to describe any “extraordinary circumstances” that “necessitate[d]” a continuation of assistance, and to decide whether “on all the facts” it was in the “national interest” of the United States to continue such assistance. After such a report was requested, any joint resolution to restrict assistance to the country in consideration would be considered with fast-track procedures.

Finally, Congress developed a related breed of reporting requirements in country-specific human rights legislation. Country-specific prohibitions were not new to foreign assistance legislation, but became increasingly common as an alternative to the general human rights-based prohibition because the legislation could employ more specific language when applied to particular countries. Some of these country-specific prohibitions employed highly specific and detailed certification requirements and at least one provided for fast-track review.

57. Id. Failure to submit the report within 30 days automatically terminated delivery of further assistance, except when specifically authorized by law for such country, unless and until such statement was transmitted. Id.

58. Id. § 601(b), 90 Stat. at 765-66. The President vetoed the original version of AECA, which contained seven legislative vetoes, including one for termination of assistance for human rights violations upon concurrent resolution of Congress. After the veto, Congress passed a new version of the AECA that provided for review through joint resolution, but with expedited consideration procedures (in the Senate only). H. R. REP. No. 1144, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 1378, 1380-81.


59. For example, assistance has been prohibited to Cuba since 1961. FAA of 1961, § 620(a), 75 Stat. at 444-45 (codified as amended at 22 U.S.C. § 2370(a) (1982)). Assistance has also been prohibited to a number of other communist countries since 1962. FAA of 1962, § 301(d)(3), 76 Stat. at 261 (codified as amended at 22 U.S.C. § 2370(f)(1) (Supp. III 1985)).

60. See generally Moeller, supra note 5. Since 1975 Congress has restricted aid on human rights grounds at various times to Chile, South Korea, Argentina, Brazil, El Salvador, Guatemala, Paraguay, Uruguay, the Philippines, and Zaire. Cohen, supra note 5, at 255-56.

61. The 1981 prohibition on assistance to El Salvador, for example, allowed the President to waive the prohibition only upon certifying that the Salvadoran government:

(1) is making a concerted and significant effort to comply with internationally recognized human rights; (2) is achieving substantial control over all elements of its own armed forces, so as to bring to an end the indiscriminate torture and murder of Salvadoran citizens by these forces; (3) is making continued progress in implementing essential economic and political reforms, including the land reform program; (4) is committed to the holding of free elections at an early date and to that end has demonstrated its good faith efforts to begin discussions with all major political factions in El Salvador which have declared their willingness to find and implement an equitable political solution to the conflict, with such solution to involve a commitment to—(A) a renunciation of further military or paramilitary activity; and (B) the electoral process with internationally recognized observers.

1. New Congressional Controls

The final phase of congressional control began in 1983 with the invalidation of the legislative veto in *I.N.S. v. Chadha*. Critics of *Chadha* argue that it forced Congress to choose between the long leash of unlimited presidential discretion and the short leash of requiring prior congressional approval of every executive action. In the foreign assistance context, while Congress may have loosened its controls in some areas, in others it tightened its controls after *Chadha* with innovative tools designed to narrow executive discretion. Congress' new control devices include objective definitional standards, in-person consultation requirements, shortened authorization periods, and independent or "shadow" fact-finding bodies appointed by Congress. This section first analyzes these controls and then examines their application in the context of America's war on drugs and assistance to Nicaraguan contras.

The first control, numerical definitional standards, narrows loopholes by setting an objective standard as a reference point for invoking foreign assistance restrictions. The disadvantage of employing numerical standards is that Congress must not only specify what actions are sanctionable, but also determine what level of such actions will trigger sanctions. Because these restrictions often apply to many different countries, setting...
precise boundaries is not an easy task. Nevertheless, by using a numerical standard, Congress can reduce the subjectivity of standards employed in human rights legislation. A numerical standard for evaluating information sets more certain fact-finding targets and strengthens the value of other controls such as detailed reporting requirements.

The second control, in-person consultation requirements, institutes a formalized executive-legislative consultation process. Even when Congress requires the President to report-and-wait prior to taking action, it faces political pressure to acquiesce in an already announced policy. Consultation, as distinguished from notification, involves Congress at the planning stages prior to executive implementation of its findings. Previous consultation requirements were worded as vague admonitions to consult with Congress and had proved largely ineffective. Therefore Congress has created formal statutory requirements that specific executive branch members meet with members of appropriate congressional committees, and that the substance of such conversations appear in the Congressional Record. Although cumbersome, the specificity of these requirements makes it far more difficult for the Executive to ignore them or treat them as notification requirements.

Pursuant to the third control, shortened authorization periods, Congress appropriates funds for an entire year but authorizes their release in prorated amounts on a quarterly, trimesterly, or semiannual basis. To trigger the funds' release, the Executive must comply with certain reporting requirements, and Congress must fail to pass a fast-track joint resolution of disapproval. This approach encourages good faith compliance with reporting requirements because such reports serve as foundations for subsequent fast-track review. It fosters the Executive's external ac-

67. *See supra* note 51 and accompanying text.
68. Such precise standards also give foreign countries fair warning of impending restrictions, potentially deterring sanctionable behavior.
69. *See infra* text accompanying notes 80-82.
71. The experience with the War Powers Resolution is instructive. This legislation required the President to consult with Congress "in every possible instance" before introducing U.S. forces into situations of imminent hostilities. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1982)). Because the requirement was so vague it was not controversial; despite vetoing the Resolution, President Nixon praised the consultation provision. Subsequent Presidents did not in fact consult "in every possible instance." In the Mayaguez incident and the Iran hostage rescue attempt, for example, consultations did not take place until after action was taken. In the invasion of Grenada, consultation took place only three hours prior to the attack. *See Franck & Bob, supra* note 5, at 940-41.
72. *See infra* text accompanying notes 80-82.
73. See, e.g., *infra* notes 91-92 and accompanying text.
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countability in an environment of ongoing rather than annual congressional oversight.

Finally, the fourth control, shadow fact-finding, involves creating an independent fact-finding body appointed by congressional leadership to investigate and report on foreign country conduct relevant to certain foreign assistance restrictions. This system enhances earlier measures designed to widen the number of sources of information for Congress. Although Congress cannot force the Executive to adopt such findings as its own because of the Executive's constitutional role as interpreter of the laws, shadow fact-finding nevertheless keeps Congress better informed and keeps the Executive "honest" in its own fact-finding efforts.

2. Anti-Drug Policy

In the wake of Chadha, Congress established aggressive control devices in legislation conditioning foreign aid on the steps taken by drug-producing countries to reduce production, processing, and trade in illicit drugs. Most significantly, it included the new control devices of numerical definitional standards and in-person consultation requirements. Since 1972, Congress had conditioned foreign assistance on anti-drug policies of drug-producing countries, but had left to presidential discretion the determination of whether a country was complying with U.S. requirements. Late in 1983, Congress expanded the annual reporting requirement, setting numerical targets and forecasts on reductions in drug

74. See, e.g., infra notes 93-95 and accompanying text.

75. The human rights legislation directed the Executive to coordinate its fact-finding under the Assistant Secretary of State for Human Rights and Humanitarian Affairs and to give "due consideration" to human rights findings of outside groups. See supra notes 52-56 and accompanying text.

76. Although Congress may require the President to consider the factual findings of outside persons or organizations, it cannot require the President to accept them. This would intrude upon the executive power to interpret the law. In Bowsher v. Synar, the Court defined the executive function:

Appellants suggest that the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical so that their performance does not constitute "execution of the law" in a meaningful sense. On the contrary, we view these functions as plainly entailing execution of the law in Constitutional terms. Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law.


77. The Foreign Relations Authorization Act of 1972, Pub. L. No. 92-352, § 503, 86 Stat. 489, 496, provided that the President may fund anti-drug operations and that the President shall suspend all assistance under the Foreign Assistance Act, the Foreign Military Sales Act (now the AECA), and PL 480 "with respect to any country when the President determines that the government of such country has failed to take adequate steps to prevent narcotic drugs" from being produced and transported into the U.S. "Such suspension shall continue until the President determines that the government of such country has taken adequate steps" to curtail production. Id.
production.\textsuperscript{78} It mandated that the President, in deciding whether to waive the prohibition on assistance, give "foremost consideration" to whether the country had met the maximum expected reductions in drug production determined to be achievable in the annual report.\textsuperscript{79}

Congress also created a formal process for executive-legislative consultation in anti-drug policy. After the report was submitted, "in-person" discussions were required between designated representatives of the President and members of the appropriate congressional committees.\textsuperscript{80} The substance of each consultation was to be published in the Congressional Record,\textsuperscript{81} after which the Committee on Foreign Relations and the Committee on Foreign Affairs were directed to hold public hearings.\textsuperscript{82} Finally, in 1986, the Anti-Drug Abuse Act cut off assistance to any "major illicit drug producing country,\textsuperscript{83}" defined objectively as any country producing more than five metric tons of opium or five hundred metric tons of marijuana or cocaine in a fiscal year.\textsuperscript{84} Although Congress permitted the President to waive the restrictions, the President had to make extensive certifications, and his determinations were subject to fast-track reversal.\textsuperscript{85}

\textsuperscript{78} The Department of State Authorization Act (Dept. of State Authorization Act), Fiscal Years 1984 and 1985, Pub. L. No. 98-164, § 1003(b), 97 Stat. 1017, 1053-57 (codified as amended at 22 U.S.C. § 2291(e) (1982 & Supp. III 1985)), converted the existing requirement that the President submit a general annual report on U.S. international anti-drug policy into a particularized demand for: information about the "policies adopted, agreements concluded, and programs implemented," 97 Stat. at 1053; a "detailed status report" on the production in suspected drug countries, \textit{id.} at 1054; a description of all U.S. assistance to these countries, a description of the "plans, programs, and timetables" each country had adopted for the elimination of drugs, "a discussion of the adequacy of the legal and law enforcement measures taken and the accomplishments achieved in accord with these plans," "a determination by the President of the maximum reductions in illicit drug production which are achievable during the next fiscal year," and the actual reduction in drug production achieved. \textit{id.}

\textsuperscript{79} \textit{id.} at 1056. The President is also instructed to consider whether the country has taken law enforcement measures "to the maximum extent possible" as evidenced by the "arrest and prosecution of violators." \textit{id.}

\textsuperscript{80} \textit{id.} at 1055.

\textsuperscript{81} \textit{id.}

\textsuperscript{82} \textit{id.}


\textsuperscript{84} Dept. of State Authorization Act, § 1003(b), 97 Stat. at 1056. These numerical limits do not, of course, guarantee ready enforcement of the assistance prohibition. Congress could not expect, for example, accurate determinations of the quantity of cocaine grown in the jungles of Bolivia. Nevertheless, the attempt to define "major drug producing countries" in numerical production terms represented a shift from a subjective to an objective standard.

\textsuperscript{85} To waive the prohibition on assistance, the President must determine that the country has either cooperated fully with U.S. efforts or taken adequate steps on its own, or that the "vital national interests" of the United States require providing assistance. Anti-Drug Abuse Act of 1986, § 2005, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) at 3207-62. The President must make a "full and complete description of the vital national interests placed at risk" and weigh these risks against the risks to the "vital national interests" of failing to pre-
3. Assistance to the Nicaraguan Contras

In the area of assistance to the Nicaraguan contras, Congress has cast a net of complex reporting procedures, presidential certifications, and congressional review requirements. Most significantly, it has employed the control devices of shortened authorizations subject to fast-track review and shadow fact-finding commissions. In 1984, although Congress prohibited military funds to the contras,\(^8\) it created a procedure by which the President, after certifying at any time with detailed information that the Nicaraguan government was destabilizing other Central American nations with materiel or monetary support,\(^7\) could gain access to a fast-track joint resolution appropriating up to $14 million of military assistance.\(^8\) In 1985, Congress enacted a similar ban on military funds,\(^9\) but again promised fast-track consideration of a request from the President "at any time" for military assistance.\(^8\) It appropriated $27 million in "humanitarian" aid, but scheduled the release of funds one-
third at a time, conditioned on the submission of reports by the President every ninety days.\textsuperscript{91} Then, in 1986, Congress appropriated $100 million, permitting $30 million for military assistance. Again, it required that the funds be disbursed in three stages, conditioned not only upon the submission of reports by the President, but also upon the failure of a subsequent joint resolution of disapproval considered under fast-track procedures.\textsuperscript{92}

In addition, the 1986 measure created an independent five-person commission, appointed by congressional leadership, to serve as an alternative and competing source of information on events in Nicaragua.\textsuperscript{93} The Commission was instructed to "monitor and report" on the internal reform efforts of the contras and the status of peace negotiations,\textsuperscript{94} as well as to prepare and submit reports nearly identical to those required of the President.\textsuperscript{95}

that amendments were permitted to the joint resolution in the Senate. \textit{Id.} § 722(o)(2), (t)(2), 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) at 257, 259.

\textsuperscript{91} \textit{Id.} §§ 722(g)(3), (j), 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) at 254, 255. These reports had to provide a "detailed statement" of progress in reaching a negotiated settlement, a "detailed accounting" of the funds already disbursed, and a "discussion" of the alleged human rights violations by both the Nicaraguan government and rebels. \textit{Id.}

\textsuperscript{92} Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-500, §§ 206-216, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1783, 1783-299 to -308. Forty percent of the funds were made available for immediate expenditure, 20% could be disbursed no earlier than October 15, 1986, upon submission of a presidential report, and 40% could be disbursed no earlier than February 15, 1987, subject to the receipt by Congress of a detailed presidential report and a 15-day waiting period during which Congress could enact a joint resolution of disapproval. Congress also added fast-track reviews of any joint resolution to restrict the use of the funds to "humanitarian assistance," "logistics advice and assistance," and "support for democratic political and diplomatic activities," \textit{Id.} § 211(f)(1)(B), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) at 1783-304 to -305, and of any joint resolution to consider additional requests for aid. \textit{Id.} § 215, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) at 1783-307. More recently, the President, anxious to secure funding for the contras, has proposed making disbursements conditioned not on his own reports but upon a "sense of Congress" resolution. \textit{N.Y. Times}, Feb. 3, 1988, at A1, col. 6.

\textsuperscript{93} One member each was appointed by the House Speaker, the House Minority Leader, and the Senate Majority and Minority Leaders; one other member, the chairman, was appointed by majority vote of the four appointed members. No member could be a government officer or employee. The Commission members received per diem salaries and could appoint seven paid staff members. \textit{Id.} § 213, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) at 1783-305 to 1783-306.

\textsuperscript{94} \textit{Id.} § 213(b), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) at 1783-305.

\textsuperscript{95} \textit{Id.} § 213(e), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) at 1783-306. Thus, the Commission was to provide, \textit{inter alia}, a detailed statement on the status of negotiations towards a peace settlement; a discussion of alleged human rights violations; and an evaluation of the progress by the contras in broadening their political base and defining a program for achieving representative democracy. \textit{Id.} § 214(1), (3), (4), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) at 1783-307.
Even though Congress possesses the bulk of textual foreign affairs powers, the Executive has asserted authority to direct foreign assistance policy based both on the text of the Constitution and on Supreme Court precedent. Most notably, the Executive relies on Justice Sutherland's dictum in United States v. Curtiss-Wright Export Corp., proclaiming the President to be the "sole organ of the nation in its external relations." Even though the courts have refrained from adjudicating separation of powers challenges in foreign assistance, this section argues that Congress retains ample constitutional authority to control foreign assistance.

Because foreign aid slips between the cracks of textually enumerated constitutional grants of power, the separation of powers debate over foreign assistance funding hinges on relating the textual foreign affairs powers to the purposes served by foreign assistance. Congress argues that because all foreign assistance involves either an appropriation of money...
or a trade of goods, its constitutional appropriation and foreign commerce powers confer upon Congress plenary control over foreign assistance. The Executive has four responses. First, even if Congress’ power over appropriations and foreign commerce is plenary, Congress can only exercise its authority through the legislative process, which grants the President veto power.101 Second, the President enjoys his own plenary power to interpret and administer the law, giving him, in practice, discretion to modify controversial policies.102 Third, the President possesses substantive plenary powers as the commander-in-chief,103 the treaty-maker,104 and the appointer and receiver of ambassadors.105 Finally,
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Congress' general power over appropriations does not permit it to achieve ends beyond those that it could otherwise legislate under the scope of its specific and enumerated powers.106 Congress has four counterarguments. First, it may override any veto by a two-thirds vote. Second, the President may not execute laws as he chooses but is constitutionally bound to "take Care that the Laws be faithfully executed."107 Third, the President's various functions, such as that of commander-in-chief, do not positivistically create a policy-making power akin to the legislative powers of Congress.108 Finally, neither the Constitution's text nor Congress' structural constitutional role as legislative policy-maker implies a truncated appropriations power, one limited to specifying "how much" but not "how" funds shall be spent.

The judiciary has refrained from resolving this separation of powers dispute, relying upon the political question and equitable discretion doctrines to avoid reaching the merits of challenges by members of Congress to the Executive's management of foreign assistance.109 In Crockett v. Reagan,110 for example, twenty-nine members of Congress brought suit against executive officials for failure to terminate assistance to El Salvador in accordance with human rights legislation.111

106. In United States v. Lovett, 328 U.S. 303, 313-15 (1946), the Supreme Court decided that an appropriations bill that withheld funds to three particular government employees, who were feared to be subversives, was no "mere appropriations measure," id. at 313, but was an unconstitutional bill of attainder. "It seems clear that the availability of appropriations cannot be conditioned on compliance with directions and prohibitions that Congress could not legislate directly." Wallace, supra note 4, at 324. The appropriations power is a blunt instrument, which Congress may use by either appropriating or not, but not by attaching substantive restrictions and conditions that it could not otherwise legislate. Arguing that the "nuances" of executive and legislative power are not informed by theories of separation of powers but by the "continuing development of accommodations" between the two branches, Wallace concludes that the President has exclusive "core" powers that "embrace the power both to conduct foreign affairs and make policy," id. at 309, 320, while Congress retains power at the peripheries of foreign relations to regulate less important, miscellaneous areas such as immigration and passports or to give up-or-down decisions on major questions of war and appropriations. Id. at 321.


108. In the framework of the "Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his function in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." Youngstown, 343 U.S. at 587.


dismissed the claim, holding that even if presidential certifications of human rights conditions were untruthful, the doctrine of equitable discretion counseled that relief be withheld when “the plaintiffs' dispute is primarily with their fellow legislators” who had failed to vote for a resolution to terminate aid. In 1983, in Sanchez-Espinoza v. Reagan, a group of Congressmen challenged U.S. activity in Nicaragua as a violation of the Boland Amendment. The District Court dismissed the claim on the basis of the equitable discretion and the political question doctrines. The Court of Appeals for the District of Colombia dismissed the Boland Amendment claim as moot, since the appropriations bill of which it had been a part had expired by the time of the appellate hearing. Although clouded by the debate over who has absolute control over foreign assistance, relative peaks of congressional power can be discerned within the landscape of foreign aid. Congressional power over foreign

& Supp. III 1985), see supra note 61, as well as the President's continued provision of assistance without certification of “exceptional circumstances” permitting him to waive the provision, under the general prohibition of assistance to human rights violating countries, 22 U.S.C. § 2304(a)(2) (1982 & Supp. III 1985), see supra notes 49-50 and accompanying text.

112. The District Court justified the equitable discretion doctrine, reasoning that when a member of Congress is a plaintiff in a lawsuit, concern about separation of powers counsels judicial restraint even where a private plaintiff may be entitled to relief. Where the plaintiff’s dispute appears to be primarily with his fellow legislators, “[j]udges are presented not with a chance to mediate between two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking.” 558 F. Supp. at 902 (citation omitted). The Court of Appeals affirmed on the same grounds. It also affirmed the District Court’s finding that the issue of whether the President must file a report pursuant to the War Powers Resolution was a nonjusticiable political question.


115. 568 F. Supp. at 600.

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assistance is greater than the President's in four of the six types of foreign assistance discussed above: all three forms of economic development and humanitarian assistance (loans or grants, governmental sales, private commercial transfers), and private commercial regulation of military transfers. This conclusion stems from a comparison of the President's and Congress' enumerated powers. The President's strongest foreign affairs power, as commander-in-chief, does not extend uniformly over the entire spectrum of foreign assistance. It has less force in economic development assistance than in military assistance. Even for military assistance, the President is the "Commander in Chief of the Army and Navy" and not of the makers and merchants of military arms. Congress' authority rests not only on foreign commerce and appropriations powers, but also on lesser known textually enumerated foreign affairs powers. For example, Congress may restrict aid to nations seizing U.S. fishing vessels, by virtue of its power "to define and punish Piracies committed on the high Seas;" to terrorist nations or human rights violators, by virtue of its power "to define and punish . . . Offenses against the Law of Nations;" and to countries that permit mob destruction of U.S. government property, by virtue of its power "to make all needful

117. See supra text accompanying notes 7-12.
118. In the other two types of foreign assistance—military loans or grants, and military sales—the President and Congress share power equally.
119. "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." Youngstown, 343 U.S. at 587. Thus, while the President's role as chief of the armed forces may permit him to sell or give away U.S.-owned military equipment, it does not logically extend to regulating private commercial sales. "There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants." 343 U.S. at 643-44 (Jackson, J., concurring) (emphasis in original).
120. 22 U.S.C. § 2370(o) (1982). This would also empower Congress in the area of terrorist acts committed in international waters or airspace.
121. U.S. Const. art I, § 8, cl. 10.
Rules and Regulations respecting the Territory or other Property belonging to the United States." 126

In light of the above, Congress appears to be underexercising its powers over foreign assistance, delegating to the Executive much of what it constitutionally could control. With the courts continuing to step aside, however, this struggle will remain largely political and not legal. The challenge before Congress, then, is to draw on the political legitimacy of its constitutional role in order to expand its institutional capacity to compete with and control executive action.

IV. Effectiveness of Current Congressional Controls

Congress has no way to quantify the effect of the controls it has imposed upon executive discretion. This section nevertheless offers a theoretical framework for Congress to gauge how effective a given control will be. It reviews the different controls that Congress has developed and shows how they serve the twin procedural goals of slowing executive action and quickening congressional reaction. It argues that Congress ultimately "controls" executive action only to the extent that it retains a reactive ability to reverse, or to threaten to reverse, actions with which it disagrees. In this light, fast-track review procedures emerge as the most effective form of congressional control. The effectiveness of all other controls largely depends on the efficacy of the fast-track. Fast-track procedures, moreover, stand out as more effective than the legislative veto. Chadha, ironically, may have increased congressional control of foreign assistance by prompting a conversion to and reliance on fast-track control devices.

A. Review of Congressional Controls

The current state of the art statutory control device employed by Congress restricts executive discretion in two ways. First, it imposes a procedure upon executive action. Prior to taking discretionary action, the Executive must: adhere to increasingly complex and objective definitional standards; report all available information and provide highly detailed policy justifications; consider certain outside standards and factors; 127 and initiate in-person consultations with members of Congress. Second, it lowers procedural barriers to congressional review. Congress' power to review an action benefits from: shortened authorization periods that encourage more frequent congressional attention to ex-

126. U.S. CONST. art. IV, § 3, cl. 2.
127. See supra note 76 and accompanying text.
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eecutive action; report-and-wait requirements that prevent the Executive from presenting Congress with *faits accomplis*; independent fact-finding sources that compete with executive sources of information; and fast-track procedures that ensure an up-or-down vote on any executive action.\(^\text{128}\)

B. The Meaning of “Control”

Whether Congress has strengthened its control through these devices depends largely on how “control” is defined. To control does not mean “to manage.” Congress is not an executive enforcement body; it has the power to prescribe processes, not to carry them out. Congress lacks not only the institutional competence to micro-manage foreign assistance, but also the constitutional authority to participate in day-to-day decision-making except through actions taken bicamerally and presented to the President.\(^\text{129}\)

Neither can “control” mean ensuring that the President carries out the precise will and intent of Congress. Often the goals of Congress’ foreign aid restrictions are only vaguely expressed in a legislative preamble. Sometimes legislation reveals logically inconsistent intent or conflicting policy goals.\(^\text{130}\) Finally, many foreign aid restrictions, in the interests of

\(^{128}\) In *Chadha*, Chief Justice Burger mentioned some of these controls, noting that even in the absence of the legislative veto Congress has “abundant means to oversee and control its administrative creatures.” 462 U.S. at 955 n.19. The control devices mentioned at various points in the opinion include formal reporting requirements, report-and-wait (or pre-notification) requirements, durational limits on authorizations, definitional limits of authorizing legislation, and judicial review. *Id.* at 953 n.16, 955 n.19.

\(^{129}\) For these reasons, the Iran-Contra affair was not a failure of Congress to “control” foreign assistance. The majority report of the committees on the Iran-Contra affair declared, “It is the conclusion of these Committees that the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance. . . . Congress cannot legislate good judgment, honesty, or fidelity to law.” U.S. HOUSE OF REPRESENTATIVES SELECT COMMITTEE TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND U.S. SENATE SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H. REP. NO. 433 and S. REP. NO. 216, 100th Cong., 1st Sess. 423 (1987). The shipment of arms to Iran and the diversion of funds to the *contras* violated the substantive prohibitions on arms sales to terrorist nations and assistance for military activities in Nicaragua. Even if the sales and assistance were somehow to fall outside of the definitional limits of the statutory prohibitions, the Executive was, at the very least, required to notify and report on such transfers. The legal structure was there; it was clearly flouted. See Scheffer, *U.S. Law and the Iran-Contra Affair*, 81 AM. J. INT’L L. 696 (1987). Ironically, the increase in congressional controls may well account for the “off-the-books” nature of the National Security Council operation.

\(^{130}\) The policy on assistance to Pakistan, for example, has been torn between the goals of withholding assistance to discourage the acquisition or development of nuclear weapons and providing assistance to promote political stability and Pakistani efforts to assist the Afghan rebels. In 1985, Congress prohibited assistance to Pakistan unless the President certified that “the assistance program will reduce significantly the risk that Pakistan will possess a nuclear
permitting flexibility, leave Congress' intent open-ended, by, for example, granting the President broad waiver authority on the basis of his individual and unchecked findings of a "national security interest." The difficulty of determining congressional intent is compounded by the varying and undefined language used to describe the national security interest: "vital to the security of the United States," "national interests," and "in the security interests." A meaningful definition of "control," then, is not the power to manage foreign aid distribution or to compel the President to divine the intent of Congress. Rather, the power to control presidential discretion is ultimately the power to review: both to set general policy guidelines and to disapprove particular presidential actions as inconsistent with those guidelines. A congressional control device is effective to the extent that it strengthens and streamlines Congress' institutional power of review.

The cornerstone of congressional "control" over foreign assistance is the fast-track procedure. Other control devices, by themselves, do not permit Congress to review and reverse an act of presidential discretion. Reporting requirements are less likely to be observed without the threat that Congress will vote to disapprove the Executive's policy. Consultation requirements degenerate into de facto notification requirements if Congress is unable to review. Shortened authorization periods mean little if Congress is unable at each juncture to change the policy and the boundaries of executive discretion. These controls, standing alone, fail to constrain an Executive pursuing goals contrary to those of Congress.

explosive device." ISDCA of 1985, § 902(e), 99 Stat. at 267-68 (codified at 22 U.S.C. § 2375(e) (Supp. III 1985)). The purpose of prohibiting aid was to limit the flow of military technology and foreign exchange with which to purchase critical nuclear materials. Requiring the President to certify that aid would "reduce significantly" Pakistani efforts to acquire or develop a nuclear device invited the President to stretch the truth in order to promote the alternative short-term goal of regional political stability. See infra note 148.

131. See supra note 17.

132. The vagueness and seeming interchangeability of these terms may make their use constitutionally questionable under the nondelegation doctrine. This doctrine embodies the notion that "[f]ormulation of policy is a legislature's primary responsibility entrusted to it by the electorate." U.S. v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring). However, an attack on nondelegation grounds is not likely to succeed under the wide delegation standards allowed by the Supreme Court, especially in the context of foreign affairs. See Goldwater v. Carter, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring); Curtiss-Wright, 299 U.S. 304 (upholding delegation to President of power to ban arms sales to certain countries if he felt it would serve cause of regional peace); Note, Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto, 94 YALE L.J. 1493, 1500 (1985).

133. In the human rights context, for example, the Executive has twisted the meaning of the definitional limits. See Cohen, supra note 5. Reporting requirements have been frustrated by inaccurate and biased reporting. See Albert, supra note 5, at 244. And executive certifications, required in order for the Executive to waive prohibitions, have not always been truthful. See infra note 148.
C. The Legislative Veto and the Fast-Track

The various legislative vetoes in foreign assistance legislation had limited value in controlling executive discretion over foreign assistance. Notwithstanding the broad legislative veto in place since 1961, as well as numerous other vetoes enacted later, few resolutions of disapproval were introduced and none ever passed. Failure to exercise the legislative veto demonstrates that the central obstacle to Congress asserting control over foreign assistance has not been the President, but Congress itself. The barrier is not, as presumed by proponents of the legislative veto, Congress' inability to muster a two-thirds supermajority on a floor vote to disapprove presidential action, but its inability to muster the political will to vote on a controversial measure at all. Only twice since 1978 has Congress passed a regular foreign aid authorization and appropriations bill (in 1981 and 1985). By contrast, between 1961 and 1978, only once—in 1972—did Congress fail to do so. Congress has resorted to legislating foreign assistance through continuing resolutions and supplemental appropriations.

134. See supra note 16 and accompanying text.

135. HOUSE COMMITTEE ON FOREIGN AFFAIRS, 98TH CONG., 2D SESS., CONGRESS AND FOREIGN POLICY 1983, at 141 (Comm. Print 1984). The concurrent resolution legislative veto also had "threat" value. Concurrent resolutions were introduced in 1976 against the sale of Hawk and Vulcan air defense system to Jordan; in 1977 against AWACs to Iran; in 1978 against aircraft sales to Egypt, Israel and Saudi Arabia; and in 1981 against AWACs and F-15 parts to Saudi Arabia. The introduction of these measures and their near success did persuade the President to modify the terms and content of the deals.

The legislative veto may have been as much a political instrument as a binding legal instrument. Congress passed legislative veto provisions even after Chadha. In 1985, for example, § 514 of the Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 1837, 1898, enacted the pariah of legislative vetoes—the committee veto—prohibiting transfers between foreign assistance appropriation accounts without prior written approval of both appropriations committees. More recently, the President has revived the concurrent resolution legislative veto by proposing, as an incentive for Congress to vote funds for the contras, that disbursements of assistance be conditioned upon a "sense of Congress" resolution. N.Y. Times, Feb. 3, 1988, at A1, col. 6. This may permit an unconstitutional intrusion by Congress into the Executive's interpretation of the law, according to the principles of Bowsher.

136. Even on those occasions when Congress had the political will to terminate assistance to a country, it sidestepped the option of a concurrent resolution in favor of a joint resolution country-specific prohibition. One reason for the rejection of the concurrent resolution process might have been its lack of political legitimacy in light of questions about its constitutionality. Another might have been that the country-specific prohibitions that were enacted, unlike blanket "vetoes," could be tailored to each situation.

137. HOUSE COMMITTEE ON FOREIGN AFFAIRS, 98TH CONG., 2D SESS., CONGRESS AND FOREIGN POLICY 1984, at 70, 73 (Comm. Print 1985).

138. Id. at 70. This practice has infected all of Congress' legislation; an example is the $600 billion appropriations package passed in December 1987. See A Crazy Way to Govern, N.Y. Times, Dec. 19, 1987, at A26 (editorial). The continuing resolution and supplemental appropriations processes are, due to their sheer size and diversity, a means of promoting semi-expedited legislative consideration. For example, in 1981, when a regular foreign aid appropri-
In contrast to the legislative veto, fast-track procedures virtually compel congressional review of presidential discretion. For an institutionally clumsy Congress that cannot reach decisions on foreign assistance, fast-track review procedures offer an effective way to rein in a decisive Executive Branch. Fast-track procedures are particularly suited for the review of executive action which requires an up-or-down, yes-or-no type of decision.\textsuperscript{139}

Critics of the fast-track procedures point out that they do not bind Congress. Because fast-track procedures are formulated outside the statutory process, as a part of the internal rules of each House, they offer the advantage of being instituted easily without presentment to the President, but they can also be readily changed through the parliamentary procedures of each House.\textsuperscript{140} The House of Representatives has already eroded the fast-track procedures in considering aid for the contras in the

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139. The initiation and enactment of new legislation, on the other hand, demands greater opportunities for amendments, consideration, and debate, and may thus be hampered by expedited procedures. The effectiveness of fast-track procedures can be seen in the trade area, where Congress has used the fast-track to enhance notification and consultation procedures. The “modified fast-track” procedures employed in the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 401(a), 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 2948, 3013-14, require that the President, upon a request from another country for free trade negotiations, consult with the House Ways and Means Committees and with the Senate Finance Committee for 60 days before giving an additional 90-day notice of his intent to sign an agreement. If either committee disapproves of the negotiations during the 60-day consultation period, or if the President fails to notify Congress 90 days prior to concluding an agreement, then the agreement can be bumped from the “fast track” onto the “slow track”—the regular legislative process—where there is little assurance that it will survive intact. Thus, the guarantee of fast-track consideration is a major incentive for foreign countries to negotiate seriously with U.S. presidents.

The foreign assistance process is, of course, quite different. Our “negotiating partners” require no incentives to discuss the aid they need.

140. The House Rules Committee has expressed concern that, notwithstanding Congress’ constitutional power to regulate its internal proceedings, U.S. CONST. art. I, § 5, cl. 2, the inclusion of internal House rules within the text of a statute waives the House’s unilateral right to change them.

To the extent that the House chooses to enact any rule into law, it places itself in the constitutionally unacceptable position of requiring the consent of the other body and of the President to directly modify or repeal that rule. . . . [T]he committee believes that unnecessary doubts are invited by proposing rules in statutory form.”

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last two years.\textsuperscript{141} Yet, other forms of congressional review, such as the legislative veto, are also subject to abuse by parliamentary procedures. The fast-track procedures offer a way to prevent resolutions from being side-tracked by other forms of parliamentary maneuvering.\textsuperscript{142} They remain Congress' most viable option for strengthening its power to control executive discretion.

V. Strengthening Congressional Controls

As the two preceding sections illustrate, the challenge before Congress is to control executive discretion in ways that are not only constitutional but effective. This section suggests three ways to strengthen existing control devices. It then proposes the creation of a legislative-executive committee to improve Congress' own institutional competence to fashion foreign assistance policy, thus eliminating the necessity of entrusting the Executive with wide-ranging discretion.

\textsuperscript{141} On April 16, 1986, the House met to consider a resolution to approve additional assistance to the contras under the statutorily declared expedited process. \textit{See supra} note 90 and accompanying text. Representative Trent Lott rose to object to consideration of the resolution because it had not been introduced as required within three days of the President's request for more aid. In response, House Speaker "Tip" O'Neill declared that the resolution was not being brought up under the statute at all, but under a separate House rule newly reported from the Rules Committee providing fast-track consideration. O'Neill stated, "The House is not operating under that statute, and that statute does acknowledge that the House has the constitutional right to change the procedure at any time under its rulemaking authority. The Committee on Rules and the House have changed the procedure..." 132 CONG. REC. H1848 (daily ed. Apr. 16, 1986). In this case, the President received fast-track consideration, but the statute had been circumvented.

The fast-track was derailed again in March 1987. As the House was about to vote on the resolution of disapproval for the third installment of contra aid, \textit{see supra} note 92 and accompanying text, House Speaker James Wright recognized a member of the Rules Committee seeking to introduce a measure changing the resolution from one of up-or-down approval to one proposing a moratorium on further aid pending an accounting of previous contra aid. Representatives Robert Michel and Lott, seeking to introduce the simple statutory resolution of disapproval, protested the Speaker's recognition of anyone else in light of the "highly privileged" nature of their resolution. Speaker Wright responded that a resolution reported by the Rules Committee was equally privileged, and that he was authorized as Speaker to exercise his discretion in choosing between consideration of two highly privileged motions. 133 CONG. REC. H1189-90 (daily ed. Mar. 11, 1987). Representative Lott responded:

Mr. Speaker, what in heaven's name is going on around this House that we can't abide by our own rules and process we established, by law, just 5 months ago, for dealing with this issue? ... The only way prescribed by that law that the aid could not be released would be by the enactment of a joint resolution of disapproval. But now the Democratic leadership wants to change the rules in the middle of the game, change the funding terms in the middle of the fiscal year, and impose more conditions, terms and delays in the funds' release.

\textit{Id.} at H1191.

\textsuperscript{142} \textit{See supra} notes 38-39 and accompanying text.
A. Proposed New Control Devices

There are at least three ways that Congress can enhance its current controls over executive discretion. The first is to match objective definitional standards in statutory language with congressionally appointed shadow fact-finding commissions. No existing control combines these two innovations. This two-pronged approach corners executive discretion by simultaneously closing off the two avenues that the Executive has to escape a statutory limit: its internal interpretation of the limit and its external findings of conformity with that limit. Explicitly combining these two types of control would allow Congress to rely upon two fact-finding bodies making competing evaluations against one fixed, objective standard, rather than depending upon one official fact-finder trying to mold its facts to a floating, subjective standard.

Although it would not be feasible for Congress to define all statutory restrictions in objective terms or to demand independent fact-finding verification in all cases, some restrictions could be greatly strengthened.

143. Objective standards can be created by reference to either numerical quantities or specifically enumerated instances. Examples of the former include drug production measures in the Anti-Drug Abuse Act, 22 U.S.C. §2291 (Supp. III 1985), or precise food-aid quotas to countries meeting statistical poverty criteria set by the International Development Association, 7 U.S.C.A. § 1711 (West Supp. 1987). The prohibition on assistance to countries that, through their voting practices at the United Nations, evince a "consistent pattern of opposition to the foreign policy of the United States," 22 U.S.C. § 2414a(b) (Supp. III 1985), lends itself to a numerical standard based on how often a foreign country votes in opposition to the United States. Similarly, the prohibition on assistance to countries that have repudiated a debt owed to a U.S. citizen, 22 U.S.C. § 2370(c) (1982), could be given teeth by setting a dollar amount that would trigger the aid cut-off.

An example of a standard cast in terms of enumerated instances can be found in the human rights-based restrictions on foreign assistance. That legislation defines "gross violations of internationally recognized human rights" to include "torture," "prolonged detention without charges and trial," and "causing the disappearance of persons by the abduction and clandestine detention of those persons." 22 U.S.C. § 2304(d)(1) (1982). Instances could be enumerated for the prohibition of aid to countries in "substantial violation" of arms transfer agreements, 22 U.S.C. § 2314(d)(1) (1982), to include specific examples of violations.

These two types of objective standards are not flawless. Choosing a numerical standard is inevitably arbitrary. Enumerated-instance standards present the joint problems of trying to define the "instances" provided (e.g. "prolonged detention") and attempting to list all possible instances in which the prohibition would apply.

144. These shadow fact-finding bodies could take the form either of ad hoc appointed committees or of a permanent Congressional Office of Foreign Assistance. This office would be similar in function to the Congressional Budget Office, which monitors and checks the Executive's budget calculations. See T. Franck & E. Weisband, Foreign Policy By Congress 244-45 (1979).

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along these two lines. A statute imposing human rights restrictions on foreign aid, for example, could specify a minimum number of people or percentage of the population victimized by physical violence or political imprisonment as constituting a sanctionable violation. The Executive and the shadow fact-finding commission could devote their efforts to investigating ascertainable figures rather than speculating about the meaning of a “consistent pattern” or “gross violations.” Although the shadow commission could not compel the Executive to accept its findings, its official status would act as a constraining political influence on executive fact-finding. The combination of objective standards and shadow fact-finding would help refocus the policy debate. A President who opposed restrictions would not be able to achieve his objective through reinterpretation of standards or questionable fact-finding, but instead would be forced to exercise his waiver power. Thus, the policy debate would no longer turn upon whether certain barbarous governments fall outside of the definitional application of the prohibitions, but upon the broader policy question of whether it is in the national interest to provide foreign assistance despite the foreign government’s conduct.

A second way for Congress to strengthen its control is to reactivate its advice-and-consent power to promote increased consultation by executive officers. Congress currently relies on statutorily prescribed procedures for in-person consultation. These procedures are, however, an inappropriate instrument for promoting meaningful communication between the Executive and Congress. Effective consultation is an ongoing informal give-and-take process, the need for which arises independent of statutory timetables. In addition, because Congress cannot constitutionally compel the Executive to accept the advice of individual members, inserting detailed consultation provisions within every assistance

146. A numerical standard would be more easily and accurately set in country-specific legislation than in general legislation applying to all countries. Existing country-specific legislation has, however, failed to adopt objective standards.

147. See supra note 76 and accompanying text.

148. For example, with aid to El Salvador in the early 1980s, Congress put the President in the position of reconciling inconsistent policies of anti-communism and human rights by making him certify as a condition of providing assistance that the Salvadoran government had made progress in promoting human rights. Representative Lee Hamilton noted, “In the El Salvador situation, we were asking the President to certify the uncertifiable... knowing that the President would do so. It distorted the whole debate.” N.Y. Times, July 5, 1983, at A12, col. 3.

149. Article II, Section 2, Clause 2 of the U.S. Constitution gives Congress the power to advise and consent on the appointment of officers of the United States. Congress retains this power over all officers except those “inferior” officers whom it allows the other branches to appoint without congressional approval.

150. The in-person consultation provisions in 22 U.S.C. § 2291(f) (Supp. III 1985), for example, are triggered only upon submission of the President’s periodic reports.
restriction may impose an unnecessarily cumbersome process without providing Congress much benefit. Congress therefore should not demand consultation, but rather entice it, by conditioning consent to the appointment of executive officers involved in foreign assistance on those officers' agreement to participate in a cooperative, information-sharing relationship with appropriate committees of Congress.\textsuperscript{151} Even though Congress would have no way of ensuring that confirmed officers fulfill their promises to establish a continuing relationship, this would be an improvement over current statutory consultation procedures, which mandate little more than that meetings and discussions take place.\textsuperscript{152}

Finally, Congress can improve its fast-track procedures by raising the cost to itself of not adhering to them. Current fast-track procedures are too easily circumvented to provide adequate guarantees that Congress will review executive action. If the President were permitted to invoke his special funds authority to continue assistance should Congress not give prompt consideration to a resolution of approval, Congress would have a strong incentive to adhere to fast-track procedures and make a decision. In the context of assistance to the Nicaraguan contras, for example, Congress could require a fast-track resolution of approval at ninety-day intervals to permit the next disbursement of funds. In the event that opponents of renewed assistance derailed the fast track, preventing consideration within ten calendar days, the President would be entitled to invoke his special funds authority,\textsuperscript{153} in an amount no more than that which would have been permitted, to continue assistance.\textsuperscript{154}

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151. Because Congress has the power to decide which officers are subject to its advice and consent and which officers are not, it can also increase the number of officers subject to its consent.

152. Each committee already retains, through the subpoena power, independent authority to mandate that meetings and discussions take place.

153. This is analogous to one of the recurring debates over the War Powers Resolution. Congress in effect “authorizes” the President to commit U.S. forces for 60 days by mandating withdrawal after 60 days (or 90 days if the President requests an extension) if Congress does not give affirmative approval. 50 U.S.C. § 1544(b) (1982).

154. A problem would arise for this approach if the prospective authorization was larger than the amount in the pools of the President's independent authorities. The President cur-
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Thus Congress, though not absolutely binding itself to take action, would, in effect, guarantee the President either an up-or-down vote or continuance of his assistance program.\textsuperscript{155} Perhaps the major disadvantage to this new control is that the required congressional action would occupy a great deal of time, to the detriment of other legislative matters. This type of control, therefore, should be reserved for only the most sensitive and contentious areas of foreign assistance funding.

B. \textit{Eliminating Executive Discretion: A Proposal for a Legislative-Executive Committee on Foreign Assistance}

As discussed earlier,\textsuperscript{156} Congress has significant, though not unfettered, constitutional authority to make foreign assistance policy. Ideally, then, Congress should exert its authority over important “policy” decisions in this field and leave less important “administrative details” to the Executive.\textsuperscript{157} Yet, with few exceptions, Congress does not currently decide even such basic policy issues as how much and what type of assistance to give each recipient country.\textsuperscript{158} Congress has, because of its inefficient decision-making process, allowed the President to fill the policy vacuum and make many important decisions on foreign assistance.\textsuperscript{159} In this light, congressional control devices have been part of a reactive strategy to slow the actions of a decisive Executive, and have not served as an appropriate substitute for congressional policy-making. To become

\textsuperscript{155} This system would be similar to subjecting executive action to a vote of disapproval, as provided in the Nicaraguan contra aid legislation, because congressional inaction would result in continued aid. However, there are two critical differences. Under the proposed control device, Congress would have created the political expectation that it would vote on whether to approve. And further, the President would face the politically less desirable alternative of relying on his independent authorities.

\textsuperscript{156} See supra notes 96-126 and accompanying text.

\textsuperscript{157} See supra note 132. “Formulation of policy is a legislature’s primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people.” United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring).

\textsuperscript{158} Congress generally appropriates in non-country-specific lump-sums by category of assistance. See supra notes 13-14 and accompanying text. Many restrictions Congress imposes are rendered “toothless” because the Executive is granted broad waiver authority. See supra note 17 and accompanying text.

\textsuperscript{159} See supra notes 134-38 and accompanying text. A sense that Congress was not competent in foreign affairs may also have accounted at one time for wide delegations of authority to the Executive Branch. The days have long passed, however, when Congress relied entirely on the Executive Branch for information. With the increase in personal staffs and the expansion of centralized congressional information agencies, many members of Congress have become experts on a par with their Executive Branch counterparts. T. Franck & E. Weisband, supra note 144, at 227, 242-43.
a policy-maker, Congress need not invent more clever statutory controls, but must reform its own decision-making process.\textsuperscript{160}

One way for Congress to exert primary decision-making power is to create a joint legislative-executive committee charged with formulating and proposing foreign assistance policy. The remainder of this section argues that such a committee would be politically feasible and constitutionally permissible, and would assert Congress' constitutional role in the foreign assistance policy-making process. The Committee could respond to two major impediments to congressional control of foreign assistance: (1) the lack of efficient decision-making procedures; and (2) the lack of incentives for executive consultation.

1. The Effectiveness of a Legislative-Executive Committee

The composition of the Committee should reflect a careful political balance between members of different parties and branches of the government. The Committee would have fifteen members: four from the majority and two from the minority in each House and an Assistant Secretary from each of the Departments of State, Commerce, and Defense.\textsuperscript{161} Of the six members from each House, the chairpersons of the committees on Foreign Affairs/Foreign Relations and Appropriations would automatically be members and the remaining four members would be chosen, two each, by the majority and minority leadership. The Committee members from Congress would reflect the views of the leadership so that their actions would have greater weight among other members of Congress. The Committee's party balance would be determined by that of Congress, even if the President was from the other party.\textsuperscript{162} Members

\textsuperscript{160} As Senator Charles Mathias observed:
If Congress is to be constructive in its foreign policy interventions in the future, not only attitudes but institutions will have to change. Perhaps the single most effective action that could be taken would be to establish some sort of coordinating mechanism to bring together the work of several committees with jurisdiction into a unified foreign policy framework.


\textsuperscript{162} For example, if the President were Republican and both Houses of Congress were controlled by the Democrats, then the Democrats would still retain an 8-7 majority. If one House of Congress and the President were of the same party, then that party would have a 9-6 majority. If the President and both Houses were from the same party, that party would have an 11-4 majority.
of Congress would retain an overwhelming twelve-to-three majority over representatives of the Executive.

The Committee would serve as the linchpin for a new foreign assistance policy-making process to replace the traditional decentralized authorizations-appropriations process and the newer continuing resolution-supplemental appropriations process. Traditionally, foreign aid legislation was controlled directly by the committees on authorizations, appropriations, and the budget, as well as indirectly by a total of twelve committees in each House that dealt in one way or another with foreign aid issues. The result of involving so many actors in the process was the proliferation of amendments that impeded legislative passage. Under the newer continuing resolution-supplemental appropriations process, Congress has reduced the number of controversial amendments, but at the cost of depriving foreign aid legislation of a careful, well-structured committee consideration process. Foreign assistance provisions appear directly in large spending bills, not only without examination in committee but also without deliberation on the floor of Congress because many members approve or disapprove such large package measures for reasons unrelated to their foreign assistance content. The result of either the traditional or more recent legislative consideration process is that the Executive dominates the early stages of recommending action and reconciling executive and congressional views, because only the Executive has a unified vision and program for foreign assistance.

The proposed Committee would strengthen Congress' voice by generating competing recommendations and a coherent, unified response to programs proposed by the President. The Committee would function as a standing committee of Congress, possessing full and exclusive oversight and reporting powers over foreign assistance legislation. It would exceed the scope of other standing committees because it would consider appropriations as well as authorizations of foreign assistance. This would guard against the frequent practice of including authorization language within appropriations bills. Its bills would be reported simultaneously to both Houses of Congress. Reported legislation would receive privileged calendar status for consideration before both Houses. Members of Congress could propose amendments, but strict limits on time for debate would, in effect, limit the number of amendments that could be offered, making any measure less likely to sink under its own amended weight.

163. EXECUTIVE-LEGISLATIVE CONSULTATION, supra note 160, at 18.
164. "The growing tendency of Congress to encumber foreign aid bills with all sorts of restrictions and provisos has caused the legislation to stall in recent years." Roberts, Congress Has Its Ways of Influencing Foreign Aid, N.Y. Times, Apr. 7, 1985, § 4, at p. 4, col. 3.
Once a measure passed both Houses, the Committee would serve as its own conference committee. All measures passing both Houses would be submitted to the President for signature.

This process would strike a balance between effective decision-making and constitutional procedure. It would consolidate and expedite internal congressional decision-making, endowing Congress with the institutional agility and flexibility to formulate rapid changes in policy. Yet, the process would remain within constitutional guidelines for legislative action. The Committee would not usurp executive functions of interpreting or administering the law. Furthermore, the entire process would satisfy, through bicameral passage and presentment to the President, the constitutional requirement, reiterated in Chadha, of a “single, finely wrought and exhaustively considered, procedure.”

Besides enhancing Congress’ internal decision-making powers, the Committee could increase Congress’ external leverage over the Executive in formulating foreign assistance policy. The Committee would provide a single, deliberative fact-finding forum whose recommendations would carry substantial political weight with the public by virtue of its diverse and high-level membership. The presence of executive branch members on the same side of the table with their legislative counterparts would promote a cooperative legislative-executive environment to replace the current atmosphere of confrontation. Although the presence of three executive branch members would cede some power to the Executive, on balance Congress would gain far more than it lost by eliminating executive discretion to waive restrictions or invoke independent authorities. In the absence of these unilateral discretionary powers, the Executive would be accountable to, and encouraged to cooperate with, the Committee in the promotion of its foreign policy initiatives. Executive branch committee members would therefore have great incentive to participate actively in the Committee by exercising their voting power. In addition, executive branch members would actively consult and openly exchange information with other members in the hope of influencing votes.

2. The Political Feasibility of Creating a Legislative-Executive Committee

At first glance, the creation of a legislative-executive committee on foreign assistance appears politically unrealistic, if not outright impossible.

166. The Committee would not necessarily hinder the President’s ability to respond to sudden emergencies. The President would still retain such independent powers as the drawdown authority under 22 U.S.C. § 2318 (1982) and the “special” fund authority under 22 U.S.C. § 2364 (1982 & Supp. III 1985).

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In a Congress where members jealously guard their "turf" and where the traditional committee process runs strong, few would appear likely to agree to such an overwhelming centralization of power in such a novel form. Yet closer examination reveals that many members of Congress have already lost their influence in foreign assistance policy, and that Congress has often and successfully innovated new committee structures in response to unusual policy needs.

With the breakdown of the traditional authorizations-appropriations process, most members of Congress have already been left out of the process by which foreign aid is legislated. Because foreign aid measures have been wrapped up in large-package appropriations bills, and considered under expedited procedures and great time pressure, most members have had little opportunity to introduce floor amendments. Even members of the foreign affairs authorizations committees have had little influence in the process since foreign aid restrictions are often tagged onto appropriations bills.

As for adherence to conventional committee structures, Congress has created committees that resemble the proposed legislative-executive committee. Although it has never established a legislative-executive committee endowed with the power to report legislation to each House for consideration, it has created a joint congressional committee with such reporting powers and a legislative-executive committee with powers limited to oversight and investigation. For more than thirty years, from 1946 to 1977, the Joint Committee on Atomic Energy, composed of members from both Houses, held exclusive congressional power over atomic energy legislation.

Vested with full jurisdiction over atomic energy legislation, the Atomic Committee enjoyed unusual power as the only joint legislative committee ever created with the authority to report legislation. The Atomic Committee was abolished in 1977, in part because of a growing feeling that nuclear energy questions were no longer

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168. See supra notes 137-38 and accompanying text.
169. The omnibus authorization and appropriations bills permit little time for debate and consideration of each item. Furthermore, a conference committee to consider foreign assistance provisions in an omnibus bill typically consists of only four people. See supra note 138.
171. See 1977 CONG. Q. ALM. 660. Since 1947, there have been at least 26 joint congressional committees formed, all with powers limited to investigation and oversight. FIRST STAFF REPORT TO THE TEMPORARY SELECT COMMITTEES TO STUDY THE SENATE COMMITTEE SYSTEM, 94TH CONG., 2D SESS., THE SENATE COMMITTEE SYSTEMS 25 (Comm. Print 1976). Senator Henry M. Jackson, a long-time committee member, asserted that "the committee made the decisions, with the advice and consent of the executive branch," instead of the reverse, as was commonly the case. 1977 CONG. Q. ALM. 660. "The Joint Committee on Atomic Energy is, in terms of its sustained influence with the Congress, its impact and influence on the Executive, and its accomplishments, probably the most powerful congressional committee in the history of the nation." H. GREEN & A. ROSENTHAL, THE JOINT COMMITTEE ON ATOMIC ENERGY: A STUDY IN FUSION OF GOVERNMENTAL POWER 288 (1960).
deserving of the unique attention and secrecy accorded by a joint com-
mittee.\textsuperscript{172} Congress has not forgotten this structure, however: in 1984,
the Temporary Select Committee to Study the Senate Committee System
recommended establishing another joint committee with the same pow-
ers and structure as the Atomic Committee to govern intelligence
activities.\textsuperscript{173}

Joint legislative-executive committees have been considered, and in
one case enacted, by Congress. For example, a 1975 survey by the Com-
mmission on the Organization of the Government for the Conduct of For-
eign Policy (the Murphy Commission) found 65\% support among
members of Congress for a legislative-executive committee on foreign
policy with informal powers to exchange information, keep track of re-
ports to Congress, and arbitrate differences over security classifica-
tions.\textsuperscript{174} In addition, in 1976, Congress created the legislative-executive
Commission on Security and Cooperation in Europe (the Helsinki Com-
mission) because of its dissatisfaction with the Executive’s monitoring of
human rights after the Helsinki Accords. The Commission, consisting of
twelve congressional members and three executive members, had powers
of oversight and investigation, but did not have the power to report legis-
lation.\textsuperscript{175} In sum, the proven record of the Joint Committee on Atomic
Energy and the Helsinki Commission, as well as the serious proposals for
similar joint and legislative-executive committees, demonstrate that the
creation of the proposed committee on foreign assistance would rest on
ample institutional precedent.

3. The Constitutionality of the Legislative-Executive Committee

Participation of executive officers on a congressional committee would
not violate the constitutionally mandated separation of powers. The ex-
ecutive officers would neither become “members” of Congress nor exer-
cise “legislative Powers.”

\begin{itemize}
\item \textsuperscript{172} A growing number of opponents of nuclear power in the mid 1970s lobbied to repeal
the special status of nuclear energy, primarily to gain access to nuclear power issues at the
subcommittee stage. (The joint committee had no subcommittees.) The Atomic Committee
was also weakened by the retirement or electoral defeat of one-third of its 18 members in the
\item \textsuperscript{173} TEMPORARY SELECT COMMITTEE TO STUDY THE SENATE COMMITTEE SYSTEM,
REPORT TOGETHER WITH PROPOSED RESOLUTION, 98th Cong., 2d Sess. 1314 (Comm. Print
1984).
\item \textsuperscript{174} 22 U.S.C. §§ 3002-3003 (1982 & Supp. III 1985). In 1985, the Commission expanded
its congressional membership to eighteen. Commission on Security and Cooperation in Eu-
\item \textsuperscript{175} EXECUTIVE-LEGISLATIVE CONSULTATION, supra note 160, at 32. The Murphy
Commission also proposed a joint legislative committee on national security to exercise general
oversight powers and referral powers over reports submitted under the War Powers Resolu-
tion. Id. at 26.
\end{itemize}
Congressional Control of Foreign Assistance

The Constitution states, "no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office."\textsuperscript{176} Membership in Congress is strictly defined: a person becomes a member only by popular election.\textsuperscript{177} Thus, an executive branch officer who becomes a member of a congressional committee does not by implication become a member of Congress.

Moreover, an executive officer on a legislative committee does not exercise legislative power. In \textit{Chadha}, the Supreme Court defined legislative actions as those "altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch."\textsuperscript{178} The actions of a legislative committee do not, by themselves, alter the rights or duties of persons outside of Congress. Committee actions have no binding force even within Congress; both Houses are free to accept or reject legislation recommended by a committee.

The committee process is not a constitutionally required component of legislative decision-making.\textsuperscript{179} Therefore, executive branch members may serve on congressional committees without running afoul of constitutional prohibitions against executive participation in the legislative process. In \textit{Buckley v.Valeo},\textsuperscript{180} the Supreme Court, considering the constitutionality of a legislative-executive federal elections commission, noted, "Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission presently

\textsuperscript{176.} U.S. CONST. art. I, § 6.

\textsuperscript{177.} "The House of Representatives shall be composed of Members chosen every second year by the People of the several States." \textit{Id.} art. I, § 2, cl. 1; "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years." \textit{Id.} amend. XVII, cl. 1. In Powell \textit{v.} McCormack, 395 U.S. 486, 523 (1969), the Supreme Court held that "[t]he Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." (Emphasis in original.) If the House does not have authority to exclude from membership a person elected to that body by constitutionally prescribed procedure, it follows that neither can it include those not so elected.

\textsuperscript{178.} 462 U.S. at 952.

\textsuperscript{179.} The Constitution does not mention the committee system within its description of the legislative process; it leaves each House free to regulate its own internal proceedings. U.S. CONST. art. I, § 5, cl. 2. When it convened for the first time, the House of Representatives had only one standing committee—the committee on "elections." Similarly, by 1816, the Senate had only three committees—the committees on "enrolled bills" (1789), on "engrossed bills" (1806), and on "contingent expenses" (1807). T. FRANCK & E. WEISBAND, supra note 144, at 217-18. Since the committee system has evolved not from a constitutional prescription of legislative process, but from Congress' own internal ordering, a committee vote is not a legislative act. An action taken under the internal rules of either House does not constitute an exercise of legislative power.

\textsuperscript{180.} 424 U.S. 1 (1975).
This case thus supports the notion that a legislative-executive committee can exercise powers normally delegated to a congressional committee. While it is true that the proposed legislative-executive committee on foreign assistance would enjoy not only investigative but also reporting powers, both powers are of the type that Congress can permissibly delegate to its own committees as part of its internal rulemaking.

VI. Conclusion

The struggle between the President and Congress over control of foreign assistance policy has provoked as much trench warfare over the procedural weapons of combat as open warfare over substantive policymaking. This Comment has traced the rise in congressional controls over executive action in foreign assistance over the last quarter century. Congress gradually turned from a casual bystander during the “delegation phase” in the 1960s, to an informed spectator during the “investigation phase” in the 1970s, and to an active participant during the “review phase” in the 1980s. In restraining executive action, Congress has trod a fine line between constitutional propriety and practical effectiveness, choosing controls that genuinely curb executive discretion without intruding upon the executive function. The challenge before Congress now is to streamline its decision-making processes so that it can keep pace with the Executive's foreign policy initiatives. Congress can prevent power from slipping through its fingers. It has the tools to do so. It must choose to use them.

181. Id. at 137. The Federal Election Commission in Buckley consisted of two members appointed by the President (with the advice and consent of the Senate) and four by the President pro tempore of the Senate and the Speaker of the House. Id. at 113. The Commission was ruled unconstitutional not because of the participation of executive branch members in the legislative process, but because of the participation of legislative branch members in administration and enforcement functions.